

FOLEY'S | LIST

Defacto Relationships

The Threshold Issues

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Date: 22 August, 2013

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There is no end to the complexity of human relationships, and nowhere is this seen more than when trying to establish whether or not people are in a de facto relationship for the purposes of Family Law.

Partner relationships are often a slippery slope of commitment with both parties slipping and stumbling at different times. It is therefore hard to determine when a relationship changes into something with the characteristics required for a de facto relationship.

The commencement of the operation of Part VIIIAB of the Family Law Act on 1 March 2009 was somewhat akin to a “Moonies Wedding”. Many couples went to bed on 28 February 2009 as usual and woke up on 1 March 2009 with the rights and responsibilities of married couples; many being completely unaware of their change in status. This raised, and continues to raise, questions about who is actually “in” and who is “out” of the de facto regime.

The purpose of this paper is to review the cases about threshold issues in 2012 and 2013 and see what principles can be distilled from them to help us identify when a de facto relationship commences.

It also aims to demystify the position in Western Australia, as this State has not referred powers to the Commonwealth and has separate legislation. Western Australia’s similar State legislation came into operation 7 years prior to the Commonwealth legislation. It is a useful source of jurisprudence.

Legislation

The relevant legislation is Part VIIIAB Family Law Act 1975 (Cth) (“FLA”) and Division 5A Family Court Act 1977 (WA), the latter which is read together with the Interpretation Act 1984 (WA).

<u>Family Law Act 1975</u>	<u>Interpretation Act 1984 (WA) & Family Court Act</u>
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<u>Family Law Act 1975</u>	<u>Interpretation Act 1984 (WA) & Family Court Act</u>
Meaning of de facto relationship	
s.4AA(1) a person is in a de facto relationship with another person if:	13A(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
(a) the persons are not legally married to each other; and	s.13A(1) not legally married
(b) the persons are not related by family; and	
(c) having regard to all the circumstances of their relationship, they have a relationship <i>as a couple living together on a genuine domestic basis</i> . Paragraph (c) has effect subject to paragraph 5.	2 persons who live together in a <i>marriage-like relationship</i> : s.13A(1)
Working out if persons have a relationship as a couple living together on a genuine domestic basis	Indicators of a de facto relationship
4AA(2) Those circumstances may include any or all of the following:	13(2) - The following factors are <i>indicators</i> of whether or not a de facto relationship exists between 2 persons, but are <i>not essential</i> :
(a) the duration of the relationship	(a) the length of the relationship between them;
	(b) whether the 2 persons have resided together
(b) the nature and extent of their common residence;	(c) the nature and extent of common residence;
(c) whether a sexual relationship exists;	(d) whether there is, or has been, a sexual relationship between them;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;	(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(e) the ownership, use and acquisition of their property;	(f) the ownership, use and acquisition of their property (including property they own individually);
(f) the degree of mutual commitment to a shared life;	(g) the degree of mutual commitment by them to a shared life;
(g) whether the relationship is or was	

<u>Family Law Act 1975</u>	<u>Interpretation Act 1984 (WA) & Family Court Act</u>
registered under a prescribed law of a State or Territory as a prescribed kind of relationship	
(h) the care and support of children	(h) whether they care for and support children;
(i) the public aspects of the relationship	
	s.205Z(3) matters for consideration not limited.
No particular finding	
4AA(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.	13A(2) - The factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential.
Matters and weight	
4AA(4) 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.	
No gender requirement	
4AA(5) For the purposes of this Act: (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex;	s.13A(3)(a) it does not matter whether the persons are different sexes or the same sex.
More than one relationship	
4AA(5) For the purposes of this Act: (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.	13A(3)(b) It does not matter whether either of the persons is legally married to someone else or in another de facto relationship.
Requirements for jurisdiction	
s.90SB(a) - The period or total period of the de facto relationship must be at least 2 years; OR	s.205Z(1)(a) - De facto relationship of at least 2 years; OR
s.90SB(b) - There is a child of the de facto relationship; OR	s.205Z(1)(b) - there is a child of the de facto relationship who is not 18

<p><u>Family Law Act 1975</u></p>	<p><u>Interpretation Act 1984 (WA) & Family Court Act</u></p>
	<p>years and failure to make an order would result in a serious injustice to the partner caring or responsible for the child; OR</p>
<p>s.90SB(c) – the applicant has made substantial contributions of the kind mentioned in paragraph 90SM(4)(a), (b) or (c); and a failure to make a declaration would result in serious injustice to the relationship; OR</p>	<p>s.205Z(1)(c) - De facto partner who applies for the order made substantial contributions of the kind mentioned in s.205ZG(4)(a),(b) and (c) and failure to make the order would result in a serious injustice to the partner.</p>
<p>s.90SB(d) the relationship is or was registered under a prescribed law of a State or Territory;</p>	
<p>Geographical connection</p>	
<p>s. 90RG One of the parties must be ordinarily residence a participating jurisdiction when the proceedings commenced.</p>	<p>s.205X (a) that one or both of the parties to the application were resident in WA on the day the application was made; AND</p>
<p>s.90SK(1) in order for the Court to make a declaration in relation to property or an order for division of property the Court must be satisfied of: (a) either or both parties were ordinarily resident in a participating jurisdiction when the application was made; (b) that either: (i) both parties were ordinarily resident during at least 1/3rd of the de facto relationship; or (ii) the applicant made substantial contributions in the de facto relationship in one or more States or Territories that are participating jurisdictions at the application time.</p>	<p>s.205X(b)(i) both parties have resided in WA for at least 1/3rd of the duration of their relationship; OR</p>
	<p>s.205X(b)(ii) substantial contributions of the kind referred to in s.205ZG(4)(a),(b) or (c) have been made in the State by the applicant.</p>
	<p>205Y Where a court is satisfied as to the matters specified in section 205X(a) and (b), it may make an order under this Division by reason of facts and circumstances even if those facts</p>

<u>Family Law Act 1975</u>	<u>Interpretation Act 1984 (WA) & Family Court Act</u>
	and circumstances, or some of them, took place before the day on which the application was made or outside the State
Commencement of jurisdiction	
1 March 2009 (QLD, NSW, Vic, Tas)	1 December 2002
1 July 2010 South Australia	
Can aggregate periods?	
<ul style="list-style-type: none"> • Yes 	<ul style="list-style-type: none"> • Yes <p>s.205Z(2) In deciding whether there has been a de facto relationship between the partners for at least 2 years, the court must consider whether there was any break in the continuity of the relationship and, if so, the length of the break and the extent of the breakdown in the relationship.</p> <p>s.205Z(3) Subsection (2) does not limit the matters the court may consider.</p>
Can include periods prior to commencement of jurisdiction	
<ul style="list-style-type: none"> • Yes. • Section 90SB FLA allows an aggregation of periods so that the qualifying period of 2 years can be met, notwithstanding that one or more of the periods occurred before the commencement of the legislation, and some after (<u>Dahl & Hamblin</u> (2011) FLC93-480 and <u>Fenton & Marvel</u> [2012] FamCAFC 150) 	<ul style="list-style-type: none"> • Yes: see s.205Y • Does not include a de facto relationship that ended prior to the commencement of jurisdiction: s.205U(2)

Jurisdictional fact

The finding of the threshold issue is in the nature of a jurisdictional fact. That is, its finding enlivens the power of the decision maker to exercise a discretion.

Murphy J in Jonah and White [2011] FamCA 221¹ at 39 citing the High Court in Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135 at 148.

This means that there is a limit to the orders that the Court can make pending a finding of jurisdiction. This also means that it is vital that the evidence lead in support of or against any finding of jurisdiction is in an admissible form. The rules of evidence apply and what is at stake is a finding of jurisdiction; a potentially knock out punch. Lawyers need to be aware of who bears the onus of proof and the standard of proof. Consideration needs to be given to the probative value of the evidence. The factors are broad and the discretion is wide and the case law reveals how widely the discretion is applied. There is much resulting uncertainty in this area.

The grey areas

The areas that appear to cause the most difficulty are:

1. The nature and extent of a common residence;
2. The commitment to a shared life; and
3. The public aspects of the relationship.

This is not surprising as His Honour Justice Cronin in Vaughan & Bele [2011] FamCA 436 at [11]-[13] stated that it is the parties who define the nature of their relationship. It may evolve and alter dramatically over time.

Selected cases from 2012 and 2013:

Full Court of the Family Court of Australia

Jonah and White [2012] FamCAFC 200 May, Strickland, Ainslie-Wallace JJ

Family Court of Australia

Esdale and Schenk [2012] FamCA111 Murphy J

Wall and Mitchell [2012] FamCA 114 Johnston J

Taisha & Peng and anor [2012] FamCA 385 Cronin J

Allenby and Kimble [2012] FamCA 614 Murphy J

¹ Which was upheld by the Full Court in Jonah & White [2012] FamCAFC 200

Malcher and Seares [2012] FamCA 643 Stevenson J

Kazama and Britton [2013] FamCA 4 Watts J

Volen and Backstrom [2013] FamCA 40 O'Reilly J

Ting and Fingal [2013] FamCA 29 Cronin J

Jacob and Lawrence [2013] FamCA 188 Macmillan J

Asprey & Delamarre [2013] FamCA 214 Cleary J

Family Court of Western Australia

Shelley and Markhov [2012] FWCA 68 Crisford J

Federal Circuit Court

Houli and Laidler [2012] FMCAfam 636 Demack FM

Dandridge and Barren [2012] FMCAfam 141 McGuire FM

Betts and Sheriff [2012] FMCAfam 617 Baumann FM

Miller and Trent [2011] FMCAfam 324 Coates FM

Bourke and Golby [2013] FMCAfam 228 Roberts FM

Gissing and Sheffield [2012] FMCAfam 1111 O'Sullivan FM

Full Court of the Family Court of Australia

Jonah and White [2012] FamCAFC 200, (2012) FLC 93-522 May, Strickland, Ainslie-Wallace JJ

Ms. Jonah began working in Mr. White's business in 1992 and they began a sexual relationship that continued until early 2009. Mr. White was married throughout the period of the parties' relationship and living with his wife and children. The parties kept their relationship secret, maintaining separate homes and households. Ms. Jonah sought a declaration that the parties were in a de facto relationship from August 1996 until June 2009. Mr. White asserted that the relationship was an affair and not a de facto relationship. What was interesting was that not surprisingly, the parties did not spend significant time together:

sometimes 2-3 days every 2nd or 3rd week, travelling overseas together once for about 2 ½ weeks and other occasions of about 2 weeks.

His Honour Justice Murphy, the trial judge, set out the enquiry that the Court is to make when determining whether or not a de facto relationship exists:

60. In my opinion, the key to that definition [de facto relationship] 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 involved the merger of two lives as just described, that is the core of the de facto relationship as defined and to which, each of the statutory factors (and others that might apply to a particular relationship) are directed.”

Murphy J confirmed, what could be assumed from the legislation, that exclusivity is not a necessary requirement of a de facto relationship, as Mr. White had maintained his marriage. [para 62 of trial judgment]

As to the question of the extent to which parties needed to live together, His Honour said relevantly at paragraphs 65-66 of the judgment, the fact that the parties lived in the same residence for “*only a small part of each week*” does not exclude the possibility that they were living together on a genuine domestic basis. The maintenance of separate residences is not necessarily inconsistent with the parties having a de facto relationship. For His Honour the issue was one of the nature of the union, rather than how it manifests itself in quantities of time. The merger of two individual lives into a couple that is important.

His Honour found that there was no de facto relationship and put significant weight on the lack of reputation as a couple, the lack of social involvement in each other’s lives and lack of public aspect of their relationship. His Honour appeared to not be concerned about the limited time that the parties had spent together.

His Honour pointed to a number of indicia, which he identified as pointing to the conclusion that there was no de facto relationship. The Full Court referred to these findings at para 25 of their judgment:

- a. Each of the parties kept and maintained a household distinct from the other;
- b. In the respondent's case, that household involved the maintenance of family relationships including the support of children;
- c. There was no relationship or intended relationship between the applicant and the respondent's children;
- d. The relationship was clandestine, time was not spent socializing as a couple;
- e. The respondent continued to emphasise the limits of the relationship with the applicant, and told her that if he had to make a choice, he would choose his wife;
- f. Despite regular monthly payments and a payment of \$24,000 there was no joint bank account and no joint investments;
- g. The parties rarely mixed with each other's friends;
- h. The parties did not mix with the respondent's business associates;
- i. There was virtually no involvement by the respondent in the applicant's life;
- j. The respondent spent very little time with the applicant's family; and
- k. There were very few public aspects to their relationship.

The Full Court emphasized that the touchstone of the de facto relationship is the parties being a "*couple living together on a genuine domestic basis.*" [para 32]

The Full Court agreed that parties could fulfill the requirements of a de facto relationship where they 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. [para 40]

The applicant argued that the parties were living together "*through their emotional communion which occurred not only in each other's physical presence, but by telephone and otherwise.*" The Full Court rejected this argument and held that they were "*not persuaded that "emotional communion" is sufficient to fall within the definition of "living together".*" [at paras 41-42]

The Full Court held that His Honour's conclusion that the proper focus of the enquiry is on the nature and quality of the asserted relationship rather than a quantification of time spent together was entirely correct. [para 44]

The Full Court held that His Honour's findings about the lack of public aspects of the relationship was also open to His Honour on the evidence. The appeal was dismissed.

This is the most significant decision of 2012. Its importance is to clearly define the nature of the enquiry to be undertaken by the Court, that is to examine the nature and quality of the relationship rather than a quantification of time spent. The Full Court's confirmation that a relationship in which the parties live together for limited periods does not disqualify them from a finding of being in a de facto relationship is very important; particularly in the factual context of this case where the parties did not spend a great deal of time together.

This case has opened up the definition of de facto relationships.

Family Court of Australia

Esdale and Schenk [2012] FamCA111 Murphy J [interim costs]

This was an interim hearing some weeks prior to a final hearing to determine the question of jurisdiction. The applicant asserted that the parties were in a de facto relationship from 2006. The respondent denies any such relationships, asserting that the applicant was his full-time carer for which she was paid a wage.

The applicant sought an order for \$65,000 either as interim costs (s.117) or partial property settlement (s.90SM).

His Honour held that the jurisdiction of the Court "carries with it the power to determine the existence or otherwise of facts upon which its jurisdiction depends." [para 11]

However, His Honour quoted Justices Wilson and Dawson in R v Ross-Jones & Marinovich; Ex parte Greene (1984) 156 CLR 185 at 213:

The power to determine the existence of jurisdictional facts is not a power which in any way extends the jurisdiction of Court. If a matter is beyond the jurisdiction of a Court, it cannot be brought within jurisdiction for the

purpose of granting interlocutory relief. That proposition appears to us, with all respect, to be self-evident and decisive.

His Honour held that the Court did not have jurisdiction to make an order under s.90SM saying in paragraphs 16 to 18:

16. Proceedings of the type which will be tried in about eight weeks are proceedings determining jurisdictional facts. In my view, the Court has jurisdiction to grant interlocutory relief in respect of those proceedings. That is, the Court has jurisdiction to grant interlocutory relief in respect of the primary proceedings which are proceedings for the determination of the requisite jurisdictional facts.

17. The circumstances in which a court may grant interlocutory relief upon satisfaction of a prima facie case that jurisdiction exists are limited and essentially confined to urgent cases where, “... the circumstances point compellingly to a need to preserve the status quo as an interim measure pending a hearing to determine whether interlocutory relief should be granted.” (Ross-Jones at 213 per Wilson and Dawson JJ).

18. In my view, the Court’s jurisdiction and power to make interlocutory orders in the circumstances under consideration is confined to powers ancillary to the jurisdiction and power to make orders determining whether the Court has jurisdiction. This Court does not have jurisdiction or power to make interlocutory orders with respect to sections 90SM or 90SS, pending a determination of whether there is a de facto financial cause.

His Honour held that the Court had jurisdiction to make an order for interim costs under s.117 at paragraph 22:

Where the Court has inherent jurisdiction, such as the jurisdiction to decide the facts upon which the existence of jurisdiction are based, the Court has all of the powers necessary or ancillary to the determination of that issue.

His Honour found that “proceedings under [the] Act” in s.117 includes proceedings brought to determine if there is jurisdiction in respect of the proceedings. [para 23]

His Honour ultimately declined to make a costs order. His Honour said that the exercise of the costs power does not just mean considering the matters in s.117(2A); the Court should have “proper regard” to s.117(1) which prescribes

that each party should bear their own costs. He held that even in proceedings where there is no issue of jurisdiction and the applicant receiving an award it is not certain that the costs power will be exercised as “*Section 117(1) remains..an obstacle that must be overcome.*” This is even more the case when jurisdiction is in issue.

In summary, it seems that while there is the power, it is unlikely to be exercised.

Wall and Mitchell [2012] FamCA 114 Johnston J (*substantial contributions*)

Ms. Wall asserted that the parties were in a de facto relationship for 2 years. Mr. Mitchell denied that the parties were ever in a de facto relationship, but rather were in an on/off boyfriend/girlfriend relationship for 4 discrete periods. The parties did live together. The issues were the existence or not of the de facto relationship and whether Ms. Wall made substantial contributions contemplated by the FLA. His Honour considered the question of the existence of the relationship in two distinct periods.

His Honour accepted Mr. Mitchell’s evidence that Ms. Wall stayed with Mr. Mitchell two nights per week and he occasionally with her. They did not establish a shared residence. While Mr. Mitchell paid for most things when they went out, there was no evidence of any shared financial relationship between them. They had no mutual property. His Honour found that there was “some level of commitment to a shared life” but also behaviour that was inconsistent with this; such as going out with other people. Once His Honour found that there was no de facto relationship during the first period, there could not have been a 2-year relationship. The case is not particularly helpful as it turned on the particular facts and Ms. Wall’s case was not strong.

The case is more useful for adding to a line of authority about “substantial contributions”. His Honour followed the decisions of Coates FM in Miller and Trent [2011] FMCAfam 324 which had followed the decision of Holden CJ in V and K [2005] FCWA 80 where at para 21 Chief Judge Holden held:

“Notwithstanding I am of the view that a contribution to domestic duties in circumstances such as exist in this case where there were no dependent

children over a short period of time ought not to be seen to be substantial. In my view, substantial means something more than usual or ordinary. In my view, [the section] is aimed at more exceptional circumstances where serious injustice may be caused by the application [of the relevant provision].”

His Honour did not find that Ms. Wall made substantial contributions. Her financial contributions were extremely limited and not as required under the FLA.

Taisha & Peng & anor [2012] FamCA 385 Cronin J (burden & standard of proof)

The parties were in dispute about the existence of a 17 year alleged de facto relationship. His Honour found that the applicant bore the onus of proof and that the standard of proof to be applied was the balance of probabilities.

Allenby and Kimble [2012] FamCA 614 Murphy J

The parties were in dispute as to whether there was a de facto relationship of 10 years. The parties did live together initially and Mr. Kimble sought that Ms. Allenby sign a de facto property agreement under Queensland law at the time. Ms. Allenby moved out after about 3 years. She then moved back in with Mr. Kimble. All in all the parties lived together for about 5 years. Ms. Allenby had claimed Centrelink benefits and denied to Centrelink that she was in a de facto relationship for much of the parties' relationship. Ms Allenby's representations to Centrelink did not determine the matter for His Honour; he found it likely that her statements were completely false and that she made them with a view to obtaining a benefit to which she was not entitled.

Evidence upon which His Honour placed importance in finding a de facto relationship was:

1. He found that the relationship moved from a phase in which the parties maintained their separateness, to cohabitation;
2. The fact that they shared the master bedroom;

3. Emails passing between Mr. Kimble's daughter and Ms. Allenby while Mr. Kimble and his daughter were overseas, keeping Ms. Allenby up to date with their activities and linking to photos. This showed an intermingling of families. [paras 81-82]
4. Mr. Kimble renovating his home to allow Ms. Allenby to work there without her providing him with any compensation; [para 91]
5. The involvement of each other with their respective children and families including visiting the other party's family members;
6. The drawing of a cohabitation agreement and it being pursued 18 months after being raised and after cohabitation commenced;
7. Emails passing between the parties about domestic and family issues; "focusing upon the minutiae redolent of domestic life." [para 82] and
8. The finding that the reason for Mr. Kimble failing to call his solicitors solicitors was that their evidence would not have assisted his case.

The last finding acts as an important reminder the rules of evidence in this and other cases. In the draft de facto agreement, which was drawn by Mr. Kimble's solicitors, he stated that the de facto relationship started in 2004. He said in evidence that he was under a misapprehension when giving instructions to his solicitors as he thought that the date the parties began sharing a common residence while having a sexual relationship was considered to be the commencement of a de facto relationship. Mr. Kimble did not call his solicitor at the time to give evidence in the proceedings and corroborate his explanation. Not surprisingly Mr. Kimble was found to have waived privilege on this issue.

Mr. Kimble's counsel argued that it was up to Ms. Allenby's counsel to call Mr. Kimble's former solicitor if she wanted to challenge Mr. Kimble's evidence on this issue. His Honour found that this was not correct and the evidentiary burden lay with Mr. Kimble. His Honour found that it was significant that Mr Kimble failed to call this evidence and explain the absence of the evidence [paras 69-71]. His Honour made a finding under Jones and Dunkel (1959) 101 CLR 298, that the reason why Mr Kimble had not called the evidence from his previous solicitor is because the evidence would not have assisted Mr. Kimble's case.

Malcher and Seares [2012] FamCA 643 Stevenson J

The issue for determination in this matter was the length of the parties' de facto relationship. The applicant asserted it was 4 ½ years from June 2007 until November 2011. The respondent said that the relationship was a "social/sexual" relationship only and that the parties had only lived together for 11 months. It was common ground that the parties did not live together on a full-time basis. The parties spent time with the applicant's children and the respondent allowed the applicant, together with his children, to use a property and ski lodge for regular weekends and holidays over about a four-year period. She accompanied the applicant and his children on about 7 occasions.

Her Honour had difficulty with the concept that a "social/sexual" relationship *"includes mutual care of and enjoyment of activities with one party's children over that period of time."* (about a 4 year period)[para 45]

Her Honour found that there was a de facto relationship from June 2007 until November 2011. She also relied upon the respondent making provision for the applicant in her Will and relied upon the social aspects of the parties' relationship.

Kazama & Britton [2013] FamCA 4 Watts J

The applicant asserted that she and the respondent were in a de facto relationship from November 2002 to September 2009. The respondent asserted that the de facto relationship was only between 2006 and 2009. The parties had never established a common residence; the applicant's case was that the parties spent significant time together at the respondent's home in north QLD. The parties also spent significant time together on holidays. His Honour followed the reasoning of Murphy J in Jonah & White in holding that this did not preclude a finding of a de facto relationship.

The respondent sponsored the applicant to move to Australia on a spouse visa. The respondent made representations to the Department of Immigration that

the parties commenced a de facto relationship in 2002. At trial the respondent said that he told the Department this information to secure the applicant's immigration status and it was false. His Honour declined to accept evidence from the respondent that contradicted the evidence that he gave to the Department of Immigration. He considered that the respondent, if telling the truth, had committed an illegal act and that the sanction against the respondent was to allow the applicant to pursue her claim under s.90SM FLA. His Honour considered that this sanction was not disproportionate to the seriousness of the illegality in which the respondent asserted that he was involved. [para 87]

Despite the parties maintaining separate residences, His Honour found that the de facto relationship existed from 2002 to 2009. His Honour placed emphasis on the respondent providing significant financial support to the applicant and her children totaling \$135,000. The expenses were rent, other expenses for the applicant, the applicant's daughter's university fees, her rent and a car. The parties were also publicly open about their relationship and he referred to the matters above regarding the respondent's representations.

Volen and Backstrom [2013] FamCA 40 O'Reilly J

Ms. Volen asserted that the parties were in a de facto relationship from 2005 to 2010. Ms. Backstrom denied this; however she acknowledged a de facto relationship from Easter 2006 to November 2007. The important issue was whether there was a de facto relationship in existence at the time of the commencement of the legislation: 1 March 2009. A feature of the relationship was that the respondent was involved in on-line "intimate conversations and liaisons" with other women during the latter part of the asserted relationship and with the applicant's knowledge. The applicant acknowledged sleeping in a separate bedroom or leaving the property for days at a time at different times to give the respondent space. The respondent asserted that she tried to remove the applicant for about 2 ½ years with the applicant refusing to accept that the respondent didn't want a relationship.

Her Honour had to consider when the relationship terminated. A significant issue for her Honour was whether there is at law a necessity for one party to *communicate* to the other an intention to end a de facto relationship.

Her Honour had regard to a decision of Stevenson J in Clisbey and Vigés [2011] FamCA 611. Stevenson J referred to a line of authority from Pavey (1976) FLC 90-051, Todd & Todd (No. 2) (1976) FLC 90-008 which was applied by McGuire FM in Aitken & Deacon FMCAfam 35.

McGuire FM² summarized the requirements for separation as follows:

- i. There are three elements required for separation:
 - i. The development of an **intention** to separate; which need not be mutual;
 - ii. The **communication** of that intention to the other party; which should be unambiguous and unconditional and should be viewed objectively; and
 - iii. Some form of **action** upon the determination to separate.

In Clisbey Stevenson J referred to Watson J in Todd and Todd (No.2) who also considered communication of the intention to be an absolute requirement (at 75,079). However, Stevenson J also referred to decisions such as Hibberson and George 12 FamLR 725 in which communication of the intention was not required.³

O'Reilly J found that it was not appropriate to apply decisions which relate to the end of a marriage to de facto relationships. [para 31]

Her Honour followed the decision of Cronin J in Vaughan & Bele [2011] FamCA 436 at [11]-[13] in which Cronin J said:

[13] *"...there is a distinction between actions which connote unhappiness in a relationship and the termination of it. Termination has a distinct finality about it but it must be such that both parties acknowledge but not*

² As His Honour then was.

³ Hibberson and George was followed by the Queensland Court of Appeal in S & B [2004] QCA 449 (26 November 2004)

necessarily accept, that at least one of them has decided to permanently end the relationship.”

Her Honour found that the parties had commenced a de facto relationship between December 2005 and Easter 2006 on the basis that:

1. They had a common residence; the applicant had moved her clothes and a large number of her personal and farm possessions into the farm; they prepared and ate meals together; they shared the farm and other chores; they had commenced to make “mutual decisions” about farm matters;
2. They shared a bed and had a sexual relationship which existed for the whole of the period;
3. There was no financial dependence or interdependence, but the parties agreed that the applicant would give up her employment and live at the farm;
4. They had formed a life plan, with mutual commitment to a shared life and commenced to execute it;
5. They attended to public aspects of life as life partners.

The matters that Her Honour found important in determining when the relationship ended were:

1. The applicant having executed an Enduring Power of Attorney in favour of the respondent in February 2008, which the respondent accepted. Her Honour finding it unlikely that the respondent would have accepted the power after the relationship was over;
2. The respondent not changing her Will to remove the applicant until April 2010; and
3. The respondent, a former public servant in the Justice Department, not taking action to remove the applicant from her home for 2 ½ years; despite her assertions that she wanted the applicant gone.

Her Honour found that the parties were in a de facto relationship between November 2007 and 22 April 2010 on the basis that:

1. They had a continuous common residence despite holidays and other visits away, and short times spent away to give the respondent “space”. Both shared domestic and farm chores.
2. A sexual relationship during that period;
3. Financial interdependence;
4. The use of the farm and another property for their mutual purposes;
5. A mutual commitment to a shared life:
 - a. Despite the respondent telling the applicant to leave; which was on occasions and not a continuous pattern;
 - b. The respondent not taking steps to evict the applicant was not as a result of the applicant’s bullying or intimidation but as a result of the respondent’s commitment to the relationship and dependence upon it, particularly in light of her physical and health difficulties;
 - c. Emails passing from the respondent to the applicant expressing genuine emotion and intent; and
6. The public aspects of their relationship were limited to local life and stock sales.

Ting and Fingal [2013] FamCA 29 Cronin J [Interim orders]

Ms. Ting alleged an 8-year de facto relationship. Mr. Fingal denied the existence of a de facto relationship, stating that they lived in the same house but were never intimate. Ms. Ting looked after Mr. Fingal’s house and his animals while he travelled to Indonesia to be with his wife and children. Ms. Ting sought interim and final orders for property settlement and spousal maintenance.

The question for His Honour was whether he could make interim orders for spousal maintenance when the existence of the de facto relationship had not been determined.

His Honour held that the Court has jurisdiction to determine whether or not there are sufficient facts upon which jurisdiction depends, (para 11 following the decision of Re Ross-Jones; ex parte Green (1984) 156 CLR 185. Wilson and

Dawson held that this power did not extend the jurisdiction of the Court: *"If a matter is beyond the jurisdiction of a court, it cannot be brought within jurisdiction for the purposes of granting interlocutory relief."* At paragraph 13, His Honour said that there must be a prima facie case that jurisdiction exists and in order for the court to exercise jurisdiction for interlocutory relief, there had to be compelling circumstances showing a need to preserve the status quo.

The Court does not have the power to make orders in Part VIIIAB on an interim basis unless the court is satisfied that there is a de facto relationship. Therefore there is no power to make orders for interim maintenance or interim property settlement.

His Honour expressed concern about such orders being able to be reversed due to the applicant being impecunious.

His Honour also held that in such circumstances injunctions should only be made *"where there is a serious prospect that the respondent would take action to thwart the applicant having the benefit of any judgment."* (para 41). This follows the line of authority from Waugh and Waugh.

Mr. Fingal did however have the obligations of any other party in a financial matter to provide discovery.

Jacob and Lawrence [2013] FamCA 188 Macmillan J

It was common ground that the parties met on an internet dating site in August 2009, moved in together in September 2010 and separated under the one roof on 14 October 2011. The issue for determination was whether the parties were in a de facto relationship as at 14 October 2009 and if not, had the applicant made substantial contributions to the relationship and that the failure to make orders sought by her would result in serious injustice to her.

Her Honour found that some emails passing between the parties and one between the respondent and his family were telling about the nature of their relationship at the time. Her Honour found that there was not a commitment to a shared life in the early stages of the relationship and that in fact it was the applicant who demonstrated the lack of commitment.

The applicant said that she made substantial contributions in the form of meeting all of the parties' joint household expenses including most of the grocery expenses and food supplies, all office expenses relating to the respondent's business and paid for much of their entertainment. She also deposed to undertaking some work in the respondent's business, maintaining the household by doing the vast majority of cooking, most of the cleaning, feeding and grooming the dogs, maintaining the garden and researching and sourcing items to improve the property.

Her Honour found that even if she accepted the applicant's evidence at its highest, her contributions were not "substantial." Her contributions to the household and the parties' lifestyle were not anything exceptional and had to be viewed in the context of contributions made by the respondent.

The applicant argued that her substantial contributions were the sale of her property and her forgone opportunity of full-time employment. She asserted that the respondent forced her to sell her home and that he was adamant that she not obtain full-time work.

Her Honour held that to contribute is to "play a part in the achievement of a result." Meaning that even if the applicant had sold her home or given up employment, it is what follows from the act that counts, not the act itself. In this case it would be the contribution of the sale proceeds to a property purchase or her subsequently working in the respondent's business that would be a contribution. Forgoing employment opportunities and selling a house are not contributions of the kind referred to in s.90SM(4)(a), (b) or (c).

Her Honour found that the applicant had not established her case.

Asprey & Delamarre [2013] FamCA 214 Cleary J

The parties were in dispute about an alleged 9 year de facto relationship that the applicant said was from May 2002 to January 2011. They had two children aged 5 and 2 years. The parties did not live together in the same house for any period longer than 7 weeks and this was only after the birth of each child. The applicant spent most weekends together and other special times. They had a "passionate" disagreement about how to live together, which Her Honour considered

significant. Her Honour found that they wanted to spend all their time together as a family, each on their own terms. They disagreed about where to live: Sydney or the Central Coast and whether the applicant could continue to work from home if they lived in the respondent's home. This ongoing argument about how they would live together as a family reflected a mutual commitment to a shared life.

Her Honour found that there was no financial dependency and they maintained separate bank accounts. Her Honour considered that this was not uncommon in modern relationships. They each purchased a property in their own name and did not purchase property together.

The respondent failed to call his family to give evidence. Her Honour accepted that he was close to his family and inferred that they had not been called as their evidence would not have assisted his case. Her Honour notes that the parties gave an engraved clock to the respondent's parents on their 50th wedding anniversary. Her Honour found that the respondent would not have included a casual girlfriend on the engraving in that way. Again the respondent took the applicant to a family function after their separation as he hadn't told his family that they had separated and didn't want to worry them. Her Honour considered that this evidenced the "positive placement the applicant had in the respondent's family."

She found that there was a close affectionate bond between the applicant and at least two of the respondent's children from his marriage.

Her Honour found that there was a de facto relationship. She placed the greatest significance on the fact that the parties have two children together to whom they have been committed parents.⁴

⁴ Interesting to note that a telling piece of evidence was that in 2006 the respondent completed an application to change his health insurance to include the applicant.

Family Court of Western Australia**Shelley and Markhov [2012] FWCA 68 Crisford J**

Ms. Shelley asserted that the parties had been in a 14-year de facto relationship. Dr Markhov denied any de facto relationship. Ms. Shelley and Dr Markhov spent substantial amount of time living in the same household from 1995 to October 2008. The households were in properties owned by each of them. They also had lengthy periods when they lived apart, up to 8 months. They paid rent to each other religiously, which was not a commercial rent. They had sexual intercourse over that period but did not always share a bedroom. Her Honour found that Ms. Shelley used another bedroom. They socialized together sometimes. There was no financial intermingling, dependence or support; they maintained their own finances. Dr Markhov looked for potential partners on the internet and Ms. Shelley was aware of this. He travelled to Russia and Bulgaria, ostensibly looking for a wife. They never identified each other as their spouse or de facto in any tax documents. In immigration documents, Ms. Shelley only nominated Dr Markhov as an emergency contact on 2 out of 6 occasions. She also told immigration that she did not intend to remain living in Australia for the next 12 months on one occasion. Ms. Shelley was not involved in the care and support of Dr Markov's children. She never attended any work function, nor was she invited and did not meet his boss of 10 years. It appears that they potentially behaved quite differently when in each other's social circles. When in Dr Markhov's circle, people did not know that they were in a relationship. Yet Ms. Shelley's friends believed them to be a couple. They generally holidayed separately each travelling to their country of origin but did have some holidays together.

What is also of interest is the evidence that Her Honour found equivocal:

1. Women's toiletries in the second bathroom (not the one used by Dr Markhov);
2. Women's clothes in the second (not main bedroom); and
3. Photographs of the parties together or with other people. In the main they were happy snaps taken on social occasions or holidays and were staged.

Her Honour found the evidence of each party troubling [para 12]. However, the matters that Her Honour identified as important in determining that there was not a marriage-like relationship were:

1. A “striking feature” of the relationship being that over an extended period of time Dr Markhov was actively seeking another partner and this was not covert; (contrast with Volen & Backstrom)
2. Ms. Shelley’s acceptance of this behavior;
3. Neither treated the other of prime importance:
 - a) They came and went;
 - b) Holidays as they pleased;
 - c) Did not intermingle finances;
 - d) Maintained strong cultural links which excluded the other; and
 - e) Played little part in the family life of each other.
 - f) They simply lived together.

They were found not to be in a de facto relationship; but rather were “friends with benefits”, with Dr Markhov effectively biding his time. [para 222].

Federal Circuit Court

Houli and Laidler [2012] FMCAfam 636

Ms Houli argued that the parties were in a de facto relationship from late 2001 to 27 July 2009. Mr Laidler denied the existence of a de facto relationship, saying that it didn’t reach that stage.

Her Honour found that each party was an honest and thoughtful witness and they were both intelligent and good people.

The parties lived in separate properties in separate towns, some 150kms apart. Ms Houli sold her home to purchase a property closer to Mr Laidler. In the end Mr Laidler purchased an investment property in his sole name, in which Ms Houli and her children lived. He said that this provided him with an investment, her with a home and freed up her capital. There was no formal lease. Ms Houli paid money to Mr Laidler, which he classified as rent in his taxation records. Ms Houli did some painting and decorating of the investment property, described by

Her Honour as investing her own time and energy in the improvement of the property. Her Honour found that there was a significant degree of financial relationship between them primarily arising because of the purchase of the property, Ms Houli treating the house in a manner which exceeded the rights of any usual tenant and responsibilities of any usual landlord.

The parties had different levels of commitment to a shared life. Her Honour accepted that Mr Laidler did not want a de facto relationship.

The parties saw their own children as their responsibility; however, Mr Laidler spent about half of the week at Ms Houli's home where her children lived and was "engaged in all household activities as one would expect from the children's mother's partner."

The parties presented as a couple.

Her Honour found that the parties were in a de facto relationship, despite Mr Laidler's accepted view of their relationship.

Dandridge and Barren (2012) FMCAfam 141 McGuire FM

The applicant asserted that the parties were in a de facto relationship and the respondent asserted that the relationship did not get beyond "boyfriend and girlfriend." The parties had a sexual relationship over 10 years and two children. It was common ground that the respondent provided regular and significant degree of financial support over the 10 years and the parties presented themselves publicly as a couple and a family unit.

The applicant stated that the parties lived together for periods, at either party's home.

The respondent asserted that they maintained separate premises throughout the relationship. The applicant was in receipt of Centrelink benefits and child support and maintained that she was not in a de facto relationship or was supported by the respondent. She held out through social media that she was single and open to other sexual relationships. There was no mutual financial commitment such as joint bank accounts or commonly owned property.

The respondent bought and sold a number of residences during the relationship, each being in his own name. There was no suggestion that the applicant made any direct financial contribution to the purchase of any real estate.

The applicant admitted in cross-examination to maintaining a separate rented residence for 6 years. This important fact was not mentioned in the affidavit. His Honour was very troubled by the applicant's failure to disclose this and found the applicant's evidence misleading. The respondent gave evidence about the applicant being in receipt of Centrelink benefits throughout the relationship and receiving child support; again the applicant did not mention this in her trial affidavit. Again His Honour was most concerned about the applicant's lack of candor. His Honour did not apply the Elias principle in relation to the Centrelink documents, but said that he took into account the inherent contradictions in the applicant's behaviour and representations.

His Honour accepted that the respondent was financially and emotionally controlling. There was evidence that the applicant "did not go as far as commitment" to the respondent [para 49]:

1. the applicant retained her financial independence;
2. she retained her own residence;
3. there were aspects of her being socially independent; and
4. she held herself out to Government Departments as being financially and emotionally independent.

His Honour found that there was not a de facto relationship. The applicant's failure to disclose her separate residence, her Centrelink claim and her affidavit having been drafted in a way to hold herself out as financially dependent upon and living with the respondent, all weighed heavily against her credibility.

Miller and Trent [2011] FMCAfam 324 Coates FM

The parties lived together for 17 months. Mr. Miller asserted that he made substantial contributions to the relationship, mostly non-financial contributions by adding value to Ms. Trent's business and by improving the properties in which they lived and that he would suffer a serious injustice if an order for property settlement were not made.

His Honour found that the word substantial has the same or similar meaning under the Family Court Act and the Family Law Act. He followed Chief Judge Holden's decision in V and K [2005] FCWA 80, and said that the enquiry was whether Mr. Miller's contributions were

“more than usual or ordinary or were contributions having real worth, value or importance and that a serious injustice may result.” [at para 62]

His Honour held that a “serious injustice” is one that is “weighty” or “important” and shows a marked degree of difference from a mere injustice. [at para 63] His Honour required a causal connection between the substantial contributions and an increase in the value of Ms. Trent's business: he *“had to show that the contributions were directly related to what is required in s.90SM(4)(a),(b) and (c) FLA.”* [para 77]

The applicant was not able to show the base value of the assets. The question of a substantial contribution cannot be viewed in a vacuum; pre-relationship ownership of assets and entities and their values must be taken into account. [para 87]

Significantly, the respondent brought in the majority of assets and they remain in her possession.

80. “In my view, the applicant's evidence does not disclose a single outstanding asset which he contributed or that the respondent retained assets which did not belong to her to begin with, apart from the horse [S]. Nor does his evidence indicate that the respondent make use of any of his assets as in the taking or receiving of a substantial contribution, nor did his schedule disclose any joint ownership of assets through shared investment.”

The applicant's contributions to cooking and driving the respondent's children to school were not out of the ordinary. [para 73]

He was unable to demonstrate that he had any knowledge or expertise to show that his contributions added some form of exception or out of the ordinary value to the business interests: [para 67]

The case confirms that 3 elements must be established:

1. The applicant bears the onus of proving that s/he made substantial contributions;
2. There must be a causal connection between those contributions and the increase in value of the assets; thereby making substantial contributions; and
3. There must be a resulting serious injustice if orders were not made.

His Honour was not satisfied that the relationship met the requirements for a de facto relationship under the Act.

Betts and Sheriff [2012] FMCAfam 617 Baumann FM

Mr Betts asserted that the parties were in a de facto relationship from 1995 until April 2010. Ms Sheriff denied the existence of a de facto relationship, stating that she was interested in a no strings attached casual relationship.

The case turned on its facts. It was common ground that the parties had a sexual relationship and did live together for a time. His Honour found that the relationship had deteriorated by 2007; with the applicant not providing any care to the respondent's children; there was no financial dependence between the parties, no mingling of financial resources of the parties at any time to any significant degree; the applicant claimed Centrelink Benefits throughout the period. There didn't appear to be any joint property other than possibly some items of furniture. His Honour found that the reputation and public aspects of the relationship had ceased in at least 2007.

His Honour found that there was no de facto relationship for the purpose of the *Family Law Act*.

Bourke and Golby [2013] FMCAfam 228 Roberts FM

The question was whether the parties were in a de facto relationship on 1 March 2009, having been living together from 2004 and ceased living together in July 2007. The applicant contending that after that date their de facto relationship

continued and the respondent stating that their relationship continued but as boyfriend girlfriend.

His Honor found that the parties were in a de facto relationship up until March 2011, despite them not living together. His Honour relied upon

- The parties lived a short distance apart, worked in the same business and spent time socializing with family, friends and business acquaintances;
- The parties' maintenance of a joint bank account;
- The respondent purchasing expensive gifts which went beyond boyfriend girlfriend and his purchase of gifts for her which he portrayed as being from his children;
- The parties being equal shareholders in the respondent's business and her appointment as a director after they ceased living together and she did not cease in that role until December 2010;
- The use of equity in the applicant's home to purchase assets for the business;
- The fact of the parties engagement, which needs to be assessed on a case by case basis;
- Mutual support for each other's children, through children accompanying the parties on holidays and the payment of expenses for the other party's child;

Gissing and Sheffield [2012] FMCAfam 1111 O'Sullivan FM

The applicant alleged that the parties were in a de facto relationship from 1995 to 2010. The respondent denied that they were in a de facto relationship. The parties lived together at different times during this period, not all of the time. The parties purchased a number of properties in the respondent's name, using joint funds. His Honour ultimately did not accept the respondent's evidence, largely due to the evidence that she gave and the way she behaved in the witness box: her story lacked credulity, she was evasive, at times refusing to answer questions.

His Honour found that the parties were in a de facto relationship relying upon:

- The mutual involvement in the businesses and the length of their association: purchased 3 properties, cars, beach boxes and had run a business together in 4 locations;
- Carrying on a mutual enterprise and the sharing of income from it and the shared payment of expenses for their mutual support and their homes;
- Intermingling of finances and joint bank account;
- The interdependence between the parties and the almost complete reliance by the respondent on the applicant for financial and other advice and administration;
- The perception of others;
- The common residence(s) for significant periods of time.

What am I actually looking for?⁵

What is clear from the cases is that they turn on their facts. It is important therefore for solicitors to take detailed instructions about a wide variety of matters. This will assist when determining whether the parties have the requisite level of coupledness to allow a court to find a de facto relationship and also to be able to avoid any surprises.

In the current overly connected world, we should not underestimate the importance of unguarded communications such as emails, cards and letters as evidence. This is not limited to declarations of love and commitment but also to the degree of minutiae of daily living; mundane matters that would interest a partner and not a friend. Also ensure that you consider social media, such as Facebook and dating sites.

The duration of the relationship

- The longer the relationship is, is not determinative or necessarily of assistance in establishing it as a de facto relationship;
- The legislation requires a 2-year minimum subject to exceptions.

⁵ Thanks to Jim Mellas for his great ideas for this section.

The nature and extent of their common residence;

- The parties do not have to live together on a full-time basis, nor do they have to live together for the entirety of their relationship. Having more limited time together does not exclude the possibility of a de facto relationship;
- The quality and nature of the common residence is important rather than the quantity of time: Jonah and White
- How much time do they spend together;
- Are there reasons why they do not live together on a full-time basis? Is it out of their control, such as for work reasons?
- What is the nature of their common residence? Is there one property or are they moving between each other's principal homes? Do they rent the common residence separately or together?
- Have they changed common residences together? Moving together as properties are bought and sold?
- What address does each party give for receiving correspondence or where required? Doctors? Schools? University? Employment? Centrelink or Government agencies?

Whether a sexual relationship exists;

- Its frequency; and
- Its exclusivity.

The degree of financial dependence or interdependence, and all

- Do the parties have joint bank accounts?
- How did the parties meet their expenses? Loans, utilities, mortgages, other household expenses, general living expenses?
- Did one party support the other financially and if so, to what extent?
- Did one party perform unpaid work or household duties?

The ownership, use and acquisition of their property;

- Did the parties acquire property during the relationship? Who acquired it? How was it paid for? How is it owned? How did they use it?
- How significant was the property?
- Did the parties allow each other to use their respective property?

The degree of mutual commitment to a shared life

- Did they live together in one home;
- Did they spend regular time together? If so, how much?
- What conversations / statements did they make to each other about their commitment: verbal or in writing;
- What representations did they make to others about their commitment? Family, friends, Government agencies?
- Did they have projects together? Renovations? Work?
- Were they involved together in each other's family life? Attending functions together?
- If they gave gifts together, were they significant, how were they given, signed or engraved?

Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

The care and support of children

- This is potentially a significant factor, so take detailed instructions.
- Did they assist with the care of each other's children?
- If not, why not?

- If they were not during the relationship, was there an intention to do so in the future?
- What time did they spend with each other's children?
- What were their respective levels of involvement?
- Did one party support the other party's children financially?
- Did one party provide physical care to the other party's children?

The public aspects of the relationship

- Did the parties socialize together;
- Were they known as a couple, if not why not?
- In what circles were they known as a couple: family, extended family, friends, and work?
- Did they attend important functions for each party?
- Did they make provision for each other in Wills, health and other insurance and superannuation?
- Were they the emergency contacts for each other: Passports, immigration;
- Were they each other's next of kin: medical, hospitals and Powers of Attorney; and
- Were they each other's emergency contact for the other party's child(ren): school, doctor.

After reviewing the cases, it is clear that the nature of the enquiry is broad and the outcomes often uncertain due to the changing nature of commitment and relationships and the discretionary nature of the legislation. The Full Court following Justice Murphy in Jonah and White has opened the door to include a much broader definition of what constitutes a de facto relationship.

Many of these cases are expensive to run due to the number of witnesses required to give evidence about different aspects of the relationship.

Consideration needs to be given to ensure that the evidence of the witnesses is relevant and that they are not equivocal as in many of the cases. It is also particularly important that the affidavits are drafted carefully to comply with the rules of evidence and that matters such as the failure to call evidence are considered well before trial.