Proving the Existence of De Facto Relationships in Family Matters: Finding Certainty in Murky Waters

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Introduction

Since 1 March 2009 the Family Court and the Federal Circuit Court have been able to deal with property and maintenance disputes under the *Family Law Act 1975* between de facto couples in all states and territories except Western Australia (and South Australia since 1 July 2010).

The first part of this paper sets out the background legislative provisions for jurisdiction, although they are not the main focus of this paper. The second part of the paper deals with defining whether a de facto relationship exists.

This paper deals with:

1. Comparative provisions
2. Jurisdictional aspects - geography, time limits, de facto financial cause, declarations etc
3. What are the key elements governing the existence of a de facto relationship?
4. Do the parties have to live together?
5. Is a sexual relationship necessary?
6. Public aspects of the relationship
7. To what extent do financial affairs need to be mingled?
8. Later stage relationships – when are they de facto relationships?
9. Relationships over the internet
10. Determining the existence and the start and end of the relationship – evidence
11. Can more than one de facto relationship co-exist?
12. Consequences of threshold issue on availability of interim or interlocutory relief
13. Case law update.

1. Comparative provisions - de facto and married

While it may have been simpler for users of the FLA for Pt VIII FLA to be amended and power be given to the Family Law Courts to make maintenance and property orders for de facto couples under that Part, for constitutional reasons a new Pt VIIIAB was introduced instead. The ability of the Federal Government to legislate for de facto couples is not the same as for married couples.

Part VIIIAB largely duplicates Pts VIII and VIIIA. It deals with property and spousal maintenance but also with financial agreements so Part VIIIAB largely duplicates both Pts VIII and VIIIA. Parts VIIIAA and VIIIB apply to de facto relationships and are not duplicated in Pt VIIIAB. The complexity and length of the Act increased with these changes. There are 40 more pages to the Act in the Wolters Kluwer/CCH version and 48 more section 90s.

This paper was researched and written with considerable assistance from Laura Villemagne-Sánchez, Hayley Chester, Isabel Britten-Jones and Laura Woodbridge

Schedules of the relevant sections (based on schedules appearing in the Wolters-Kluwer/CCH *Australian Master Family Law Guide* and the Wolters-Kluwer/CCH *Australian Family Law and Practice*) are set out below:

Property

Part VIII	Description	Part VIIIAB
s 77A	Specification of maintenance elements in lump sum orders	s 90H
s 78	Declarations of interests in property	s 90SL
s 79	Alteration of property interests	s 90SM
s 75(2)	Maintenance factors or third step of property adjustment	s 90SF(3)
s 79A	Setting aside property adjustment orders	s 90SN
s 79B-79E	Proceeds of crime provisions	s 90VA-90VD
s 79F	Notifying third parties	s 90SO
s 79G	Notifying bankruptcy trustee	s 90SP
s 79H	Notifying court about bankruptcy	s 90SQ
s 79J	Notifying non-bankrupt spouse of bankruptcy	s 90SR
s 80	General powers of court	s 90SS
s 81	Duty to end financial relations	s 90ST
s 85A	Ante-nuptial and post-nuptial settlements	N/A
s 90	Certain instruments not liable to duty	s 90WA

Financial Agreements

Part VIIIA	Description	Part VIIIAB
s 90A	Definitions	None
None	Geographical requirement	s 90UA
s 90B	Pre-relationship agreement	s 90UB
s 90C	During relationship but prior to separation	s 90UC
s 90C	During marriage but after separation	None
None	After separation of de facto relationship	s 90UD
s 90D	After divorce	None
None	How state agreements become financial agreements	s 90UE
s 90DA	Separation declarations	s 90UF
s 90DB	When certain clauses come into effect	s 90UG
s 90E	Requirements for maintenance provision	s 90UH
s 90F	Income tested benefit exception	s 90UI
s 90G(1)	What makes agreements binding	s 90UJ(1)
s 90H	Effect of death	s 90UK
s 90J	Termination of agreements	s 90UL
s 90K	Setting aside agreements	s 90UM
s 90KA	Validity and enforceability	s 90UN

Maintenance

Part VIII	Description - maintenance	Part VIIIAB
s 72	Right to maintenance	s 90SF(1)
s 74	Power to order maintenance	s 90SE
s 75(2)	Factors to be taken into account	s 90SF(3)
s 77	Urgent maintenance	s 90SG
s 77A	Specification of lump sum in orders	s 90SH
s 82	Cessation of orders	s 90SJ
s 83	Modification of orders	s 90SI

Section 90SF(3)/ s 75(2) factors

Factor	s 75(2) - PtVIII	s 90SF(3) - PtVIIIAB
Age and state of health	(a)	(a)
Income, property, earning capacity, etc	(b)	(b)

Care of child of relationship under 18(c)		(c)
Commitment to support self and those the party has a duty to maintain	(d)	(d)
Responsibility to support others	(e)	(e)
Eligibility for pension, allowance, superannuation, etc	(f)	(f)
Standard of living	(g)	(g)
Education or training	(h)	(h)
Effect on creditor	(ha)	(i)
Contribution to financial position of the other	(j)	(j)
Duration of relationship and effect on earning capacity	(k)	(k)
Need to protect parent role	(l)	(l)
Financial circumstances of cohabitation with another	(m)	(m)
Terms of order proposed or made	(n), s 79	(n), s 90SM
Child support	(ha)	(q)
Terms of order or declaration made or proposed under Pt VIIIAB	(naa)	(o)
Any other fact or circumstance which justice requires to be taken into account	(o)	(r)
Terms of any Pt VIIIA financial agreement	(p)	(t)
Terms of order or declaration made or proposed to be made under Pt VIII	–	(p)
Terms of Pt VIIIAB financial agreement	(q)	(s)

What are the differences?

At first glance the provisions dealing with de facto couples appear similar to the provisions for legally married couples, but there are differences. In summary these are:

1. Date of separation - a de facto couple must have separated after 1 March 2009 (or 1 July 2010 in South Australia) to be under the FLA. It doesn't matter when married couples separated for them to be under the FLA.
2. The "financial causes" which the Family Law Courts can deal with.
3. Time limits for the institution of proceedings and the grounds on which leave can be sought.
4. Length of relationship and other qualifying factors.
5. Geographic pre-conditions.
6. Interim or procedural orders and injunctions.
7. Financial agreements.

Part VIIIB (superannuation) was not replicated for de facto couples. Instead, s 90MS(1) was amended to provide that in "proceedings under s 79 or 90SM with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses". For the making of splitting orders under s 90MT(1), reference is made back to s 90MS. The flagging and flag-lifting provisions in Pt VIIIB refer to Pt VIIIAB. A superannuation interest is treated as property of the de facto couple for the purposes of para (c) of the definition of "de facto financial cause" in s 4.

Part VIIIB does not apply in Western Australia for de facto couples.

Third parties and de facto relationships are dealt with in Pt VIIIAA, but in a separate Division, Division 3. Sections 90TA(2) and (3) set out the changes to be made to Divisions 1 and 2 when applied to de facto relationships.

This paper does not comprehensively deal with Pt VIIIAB financial agreements. The comparative provisions are listed above. It is important, however, to be aware that there are significant differences between Pt VIIIA and Pt VIIIAB agreements and different advice is required to be given. Different advice must be given with respect to agreements under Pt VIIIA compared to those under Pt VIIIAB. In summary, these differences are:

1. The matters which can be covered (s 90UB(3) and 90B(2))
2. Wording for the ousting of jurisdiction (s 71A(1) and 90SA(1))
3. There may be a distinction as to whether they can be relied upon in the event of death rather than the breakdown of a marriage (s 90H and 90UK)
4. Pt VIIIAB does not apply to intact relationships (compare “matrimonial causes” and “de facto financial causes” in s 4(1))
5. Grounds for setting them aside (s 90K(1) and 90UM(1))
6. Effect of marriage (s 90UJ(3))
7. Grounds for setting aside orders. There is no equivalent s 44(3) for de facto couples which means parties cannot consent to orders being set aside.
8. Consequences of setting aside (s 44(3B)(c)(ii) and 44(5). If orders are set aside and the parties are not in the standard application period, leave will need to be sought from the court, to proceed with a property settlement or maintenance application.

The Federal Government has proposed amendments to the FLA which will fix the last of these differences as it is a serious anomaly.

In *Piper & Mueller* (2015) FLC 93-686 a combined s 90UC and s 90B agreement was upheld. The Full Court noted that only one of the financial agreements could have operative effect at any one time although both may be binding on the parties from the time of execution. In relation to the argument that different advice is required for Pt VIIIA agreements to Pt VIIIAB agreements, the majority said (at [37]):

> “As to the submission that different types of advice would need to be given so as to ensure the validity of the agreements, it is not readily apparent to us that this would be so. Even if it were so, there is no reason why both types of advice could not be given to a party prior to signing a document containing both agreements.”

The Full Court did not need to decide the validity of the s 90UC agreement as the parties had not married and only the s 90UC agreement was in issue. The majority noted (at [38]) “there is no statutory imperative which requires that these agreements must be contained in separate documents”.

The general view of practitioners is, however, that it is more practical and easier to ensure that the agreement is binding under both sections of the FLA, if separate agreements are drafted and separate verbal and written advice given in relation to each agreement.

2. Jurisdictional aspects

De facto financial causes

For the courts to be able to exercise power under the FLA with respect to property of the parties to the marriage, the relationship must be within the definition of a "matrimonial cause" in s 4(1). Property disputes which constitute a "matrimonial cause" are:

> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings -
> (i) arising out of the marital relationship;
> (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
> (iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under s 104.

For de facto relationships, proceedings with respect to property of the parties to a de facto relationship are covered if it is within a "de facto financial cause":

> (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them.

For de facto relationships, proceedings with respect to maintenance are covered by the "de facto financial cause":

> (a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship.

There are separate clauses relating to proceedings regarding vested bankruptcy property, proceedings with respect to financial agreements and third parties.

In summary, orders for maintenance or property division cannot be made in an intact de facto relationship. They can however, be made where a married couple is not separated. This was confirmed by the High Court in *Stanford and Stanford* (2012) FLC 93-512.

Geographic conditions

A declaration of the existence of a de facto relationship can be made, "only if the court is satisfied that one or both of the parties were ordinarily resident in a participating jurisdiction when the primary proceedings were commenced" (s 90RG). They cannot be resident in Western Australia or overseas.

A maintenance order can only be made if the court is satisfied that the geographical requirements of s 90SD(1) are met:

(a) either or both parties were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made, and
(b) either:
    (i) both parties were ordinarily resident in participating jurisdictions during at least a third of the relationship; or
    (ii) the applicant made substantial contributions in relation to the de facto relationship under s 90SM(4)(a) to (c) in a participating jurisdiction.

An alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the de facto relationship broke down (s 90SD(1A)).

A property order or declaration can only be made if the court is satisfied that the geographical requirements of s 90SK(1) are met:

(a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the ***application time***); and
(b) that either:
    (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
    (ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

in one or more States or Territories that are participating jurisdictions at the application time;

An alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down (s 90SK(1A)).

Declaration about existence of de facto relationships

A court can make a declaration about whether or not a de facto relationship existed or not under s 90RD(1). A declaration under s 90RD(1) may also declare any or all of the following:

(a) the period, or periods, of the de facto relationship for the purposes of s 90SB(a);
(b) whether there is a child of the de facto relationship;
(c) whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in s 90SM(4)(a), (b) or (c);
(d) when the de facto relationship ended;
(e) where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

If the jurisdictional hurdles about time and geography are met for the de facto relationship, there are still further hurdles.

Length of relationship

One of the following four criteria must be met under s 90SB before the court can make a maintenance or property order, or declaration about property interests:

(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 (and for the purposes of Part VIIIAB, a child is a child of a de facto relationship if the child is the child of both of the parties to 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 a certain kind; 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.

In *Dahl & Hamblin* (2011) FLC 93-480 the trial Judge determined that a shorter period could be aggregated with a longer period to establish the requisite two-year period. The two periods were between 1994 and 1998, and between April 2008 and October 2009. They were, therefore, almost 10 years apart. For a two year period between May 2006 and April 2008 the respondent was in a de facto relationship with a third party. The Full Court said (at paras 21, 24):

> "By the use of the word “periods” in s 90RD(2)(a) and s 90SB(a), Parliament must clearly have envisaged that a de facto relationship can breakdown and resume with the result that the original earlier period of the relationship and any resumed period (or periods) after other breakdowns are capable of aggregation to establish the total time of the relationship for jurisdictional purposes. If this was not the intention, why was the word “periods” introduced into the legislation? ...
>
> Accordingly, we think that the better view must be that the introduction into Pt VIIIAB of the concept of “periods” and thus the possibility of the aggregation of periods must mean that for the purposes of Pt VIIIAB there can only be one relationship, albeit in some cases broken into periods.”

The Full Court also concluded that a period prior to the commencement of Pt VIIIAB can be included in the aggregated two year period because the FLA does not state otherwise. The Full Court noted (at para 47):

> "If it was intended that periods of a relationship, which occurred prior to the commencement date for Pt VIIIAB, were not to be taken into account in aggregating the required two year period, it would have been an easy matter for the legislature to make this position clear particularly given that it was made clear that a relationship that had broken down prior to the commencement date was not covered by Pt VIIIAB."

Time limits

For the FLA to apply, the de facto relationship must have broken down after 1 March 2009 in all States and Territories except Western Australia (which has not referred its powers) and after 1 July 2010 in South Australia.

Proceedings must be issued within 2 years of the date of separation. In *Madin & Palis* [2015] FamCAFC 65 the Full Court determined that the 2-year limitation period commenced on the day after final separation. The parties separated on 9 January 2011. The trial judge held the limitation date was 8 January 2013 and dismissed the application filed 9 January 2013 as being out of time. The Full Court found that the trial judge was in error and that the limitation period commenced on 10 January 2011 and ended at midnight on 9 January 2013. The application was therefore filed in time.

An extension of time can be granted under s 44(6), which is similar to the provisions which apply to married couples. However under s 44(3) which only applies to married couples, proceedings can also be instituted out of time with the consent of both parties.

An example of a case where leave was sought to apply to issue property settlement proceedings out of time in a de facto relationship was *Worth & Riley* [2017] FamCA 393. Benjamin J applied the same principles as for married couples and followed the case law under s 44(3). The delay was 26 months from the end of the standard application period. Leave was not granted due to the hardship granting leave would cause to the respondent husband. The husband made his decision to retire without consultation with the wife, although he informed her of the decision. The wife did not warn him then of her potential claim for property and maintenance. His evidence was that he would not have decided to retire if he knew of the potential claim. Benjamin J found that the wife had a modest claim to the husband's superannuation and he was unlikely to be able to make up any lost superannuation and consequent income given the failure of the wife to commence the proceedings in the standard application period.

3. Elements governing existence of a de facto relationship

Section 4(1) of the FLA defines a "de facto relationship" as having the meaning set out in s 4AA(1). A de facto relationship is defined in s 4AA(1) as when:

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

The circumstances considered under s 4AA(1)(c) may include any or all of the factors referred to in s 4AA(2). The general practice of courts is to consider all of the factors and examine if and how each one applies.

The factors are:

(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;
(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 aspect of the relationship.

These are the key elements governing the existence of a de facto relationship. No particular finding of any circumstance is necessary in deciding the existence of a de facto relationship (s 4AA(3)). In determining whether a de facto relationship exists, a Court can have regard to, and attach weight to, any matters that seem appropriate to the Court in the circumstances of the case (s 4AA(4)).

A de facto relationship can exist between two persons of different sexes or between two persons of the same sex. It need not be an exclusive relationship, and can exist even if one person is legally married to someone else or in a concurrent de facto relationship (s 4AA(5)). The extent to which cohabitation is a necessary pre-requisite is discussed later in this paper.

One of the difficulties in defining a de facto relationship is that every de facto relationship and, indeed, every married relationship, is very different. As Thackray J said in *Truman & Clifton* [2010] FCWA 91 (at paras 335-336, 338), when dealing with the Western Australian legislation, which is different to the FLA:

> "We live in a pluralist society in which concepts of even the most fundamental institutions, such as marriage, are highly value laden …
>
> In the case of legal marriage we have the certainty associated with the certificate of marriage … those who have complied with the formal requirements of the *Marriage Act 1961* (Cth), or its overseas equivalents, are without doubt married. However, the moment a construct such as *"marriage-like"* is introduced, value judgments will come flooding …
>
> How then is a judge expected to decide whether a relationship between a man and a woman (or indeed under this legislation same-sex couples) is "marriage-like" in circumstances where married couples straddle the spectrum from the deliriously happy to the homicidally estranged?"

The problem under the FLA is similar - what value judgements are there in interpreting the phrase - a "couple living together on a genuine domestic basis"?

4. Do the parties have to live together?

The definition of a de facto relationship under the FLA, among other things, includes that parties "have a relationship as a couple living together on a genuine domestic basis". Case law shows that

parties can be in a de facto relationship even if they are not cohabiting. They may live separately for various reasons, such as for employment. By contrast, the mere fact that parties are living together does not necessarily lead to the finding that a de facto relationship existed. Whether the couple lived together is only one of the factors and it is a consideration of the whole picture which will lead to the finding of a de facto relationship. When considering if the parties lived together for the purpose of establishing the existence of a de facto relationship, the following should be considered:

- Whether the parties live together, and if not, what are the reasons for this?
- How much time the parties spent together?
- What was the nature of their common residence? Is there one property or do the parties move between each other's home?
- What address did each party give for receiving correspondence?

The following cases are useful in understanding the extent to which the parties live together affects the existence of a de facto relationship.

Moby & Schulter (2010) FLC 93-447 involved a 4-day hearing in which the parties sought a declaration as to whether a de facto relationship existed and if so for what period or periods. The applicant asserted that a de facto relationship existed between 2002 and approximately October 2009. The respondent denied that there was ever a de facto relationship, but that if there was one, it ended no later than February 2008. Mushin J said (at para 185) that in determining whether the de facto relationship continued for a total period of at least two years, “that period must include the time commencing on 1 March 2009 on which date the legislation came into effect”.

Mushin J also said (at para 140):

> "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."

Mushin J declared that a de facto relationship existed between the parties in Victoria in 7 separate periods over 7 years:

- May 2002 to May 2004;
- August 2004 to December 2004;
- January 2005 to mid June 2005;
- Late June 2005 to mid December 2005;
- Late December 2005 to April 2007;
- Late June 2007 to mid February 2008; and
- Mid March 2008 to October 2009.

<u>Jonah & White (2012) FLC 93-522</u>

Ms Jonah and Mr White commenced a 17-year relationship when Ms Jonah began working in Mr White’s company. Mr White was married throughout his entire relationship with Ms Jonah and

continued to live with his wife and children. He provided significant financial support to Ms Jonah. The parties did not spend significant time together - seeing each other for approximately 2 to 3 days every second or third week. They travelled overseas together on one occasion for 2 ½ weeks, and on a couple of other occasions spent 2 weeks together. Ms Jonah argued that the parties "also lived together through their emotional communion which occurred not only in each other's physical presence, but by telephone and otherwise". The Full Court was not persuaded that "emotional communion" fell within the definition of "living together".

The Full Court held that the fact that the parties each kept and maintained households which were distinct from the other pointed to the conclusion that the parties were not in a de facto relationship. However, the trial judge, Murphy J, was of the view that although the parties lived in the same residence for only a small part of each week this did not exclude the possibility that they were "living together as a couple on a genuine domestic basis". The Full Court agreed. Murphy J looked at whether there was a merger of their lives into "coupledom". The decision that there was no de facto relationship was significantly impacted upon by the lack of public aspects to their relationship, not the limited time that the parties spent living together.

Murphy J said (at paras 65-66) of *Jonah & White* [2013] FamCA 221:

> "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 residences is necessarily inconsistent with parties having 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".

This case demonstrated that the court will examine the nature and quality of the relationship - the merger of two lives - rather than the quantity of the time together, when determining whether there is a de facto relationship.

Nghiem & Truong [2012] FamCA 210

There was no dispute that the parties lived together until at least 2003. The date of commencement of the de facto relationship was disputed, but was not relevant to the outcome. The wife said the de facto relationship ended in 2003, so the Family Court had no jurisdiction. The husband said it ended in 2010. Both parties called witnesses as to whether they were living together between 2003 and 2010. The husband used other addresses for mail during this period, but Cronin J found that it suited him to do so because of his bankruptcy.

Cronin J rejected the view that the parties must have lived together on 1 March 2009*,* saying that:

- Requiring a de facto relationship to have existed on one specific day, 1 March 2009, to be covered by the FLA, contradicted the objectives of the amendments
- Section 90RD(2)(a) refers to either "the period, or periods, of the de facto relationship", which implies that there may be intermittent phases of living together, where the relationship is suspended rather than one continuous period
- The correct approach is to look at what occurred before 1 March 2009 and see whether all vestiges had disappeared by 1 March. To ascertain when something ends, one must see at least what existed and even when it started. That is not necessary here" (para 25).

On the balance of probabilities, Cronin J found (at para 87) that the parties had:

- A common residence until 2010;
- A sexual relationship until 2010;
- Financial dependence upon each other;
- No jointly owned property at law (because the husband was a bankrupt);
- A public reputation as a couple living together in a genuine domestic relationship.

Cronin J declared under s 90RD that the parties were in a de facto relationship and that it was extant on 1 March 2009, concluding in July 2010.

Ricci & Jones [2011] FamCAFC 222

The parties never lived together and their association ended after 7 months. They had a child together. The wife appealed against the summary dismissal of her application for a property settlement and interim orders, including for maintenance.

The husband successfully sought the dismissal of the wife's application without filing any affidavits or otherwise relying on evidence. It was a risky strategy but it worked as the wife was unable to establish the existence of a de facto relationship.

The wife did not assert that the parties lived in the same residence at any time but that:
- they had a child together;
- they did not engage in a sexual relationship until the husband advised the wife that he had finished his previous relationship.

The Federal Magistrate disagreed with Mushin J's interpretation of s 4AA(2)(b) in *Moby & Schulter* (requiring a period of cohabitation for there to be a de facto relationship), which had been followed by the trial judge. However, the trial judge also said that if she was wrong and a period of cohabitation was not required, she was not persuaded that a de facto relationship existed. as correct. While it was concluded that the parties were not in a de facto relationship, the Full Court said (at paras 57, 59):

> "We are of the view that minds might reasonably differ as to this interpretation of the subsection that would require a putative de facto couple to have lived together before satisfying the legislative test; however because of the determination of this appeal, it is unnecessary to consider this point further….

> It is in our view clear from a reading of the section, and a consideration of the authorities both in this court and in others, that cohabitation can be relevant but is by no means determinative."

The Full Court in *Ricci & Jones* agreed with Murphy J in *Jonah & White* [2011] FamCA 221 (at para 53) where he said:

> "It is, however, important to bear in mind that the emphasis on common residence (whether for varying periods of time or not) is but one of the specific factors enumerated within s 4AA of the Act. The section specifically provides that no particular finding in respect of that matter (or indeed any other specified circumstance) is “to be regarded as necessary in deciding whether the persons have a de facto relationship”."

Regan & Walsh [2014] FCCA 2535

The parties acknowledged that they had shared a residence on various occasions for a total of more than six years between 2005 to 2013. During this time there were periods where the parties lived apart due to employment reasons.

The parties disagreed as to the nature of their relationship. Mr Regan, the applicant, asserted that they were in a de facto relationship, while Mr Walsh did not concede this and described the relationship as one of "friends with benefits". Despite the fact that the parties lived together for more than six years in total, the Court held that a de facto relationship never existed between them. The lack of evidence of any joint ownership or acquisition of property, a mutual commitment to a shared life, nor an outward perception of the existence of a de facto relationship contributed to this finding. Additionally, the applicant appeared to contribute little financially to the residence, and only lived with the respondent when he chose to do so for his own benefit and convenience.

Despite a sexual relationship existing between the parties, it was not enough to find the relationship was a de facto relationship without the presence of other factors.

Asprey & Delamarre [2013] FamCA 214

The wife alleged a 9 year de facto relationship. The parties had two children, but did not live together for any period longer than seven weeks. The parties disagreed with regard to how they would live together and where. Her Honour found that this ongoing argument demonstrated a mutual commitment to a shared life. It was held that there was a de facto relationship.

Martens & Bocca [2016] FamCA 1044

The parties were in a relationship which spanned 13 years. Mr Bocca contended that the parties were not in a de facto relationship, claiming that they merely had a close friendship. Benjamin J

found that the parties had been in a de facto relationship for the 13-year period and, as a result, the applicant, Mr Martens, could continue with property settlement proceedings.

Benjamin J relied heavily on the enormous number of text messages and emails exchanged between the parties. He focussed on this aspect of their relationship when determining the "nature and extent of their common residence", in accordance with s 4AA(2)(g), despite the fact that they maintained separate homes and had never formally lived together. It was found that the parties spent a couple of nights together each week and they embarked on holidays together.

In considering the other factors in s 4AA(2), Benjamin J found that a substantially monogamous sexual relationship existed between the parties. This was backed up by a large number of text messages and emails, many of which were highly sexual in content. The written communications showed that the parties were both intimate and affectionate.

The parties were mostly financially independent but there were several factors which lead to the finding of some financial interdependence. Mr Bocca had set up a self-managed superannuation fund and Mr Martens was intentionally made a trustee, but unintentionally made a member of that fund. They had also opened a joint bank account, and Mr Martens had done work to maintain Mr Bocca's house. The parties had made plans to buy a house together, but this was never realised. Mr Bocca ended up purchasing a property on his own, although Mr Martens was heavily involved in the purchase. Mr Martens was also the sole beneficiary of Mr Bocca's will. His Honour found that there was no question that the parties had "merged their lives".

The relationship between the parties was found to be very public. They travelled together and their relationship was well-known to their families. Further, the breakdown of the relationship was highly emotional and much more akin to the breakdown of a marriage than a friendship. Therefore, the parties were found to be in a de facto relationship despite the fact that they had never officially lived together.

The case highlights the unique nature of each de facto relationship and acts as a warning to parties in long-term relationships who may not be aware of the laws relating to de facto relationships.

Wilson & Svicarovich [2017] FCWA 4

The definition of a de facto relationship is not the same in Western Australia as it is in the rest of Australia. As a result, this case can be distinguished, but the facts are a useful illustration of the problems of defining a de facto relationship.

The parties were in a relationship for 8 years. They had separate households because they each had children from previous relationships. There was no financial interdependence, but they presented themselves to others as a couple, provided care and support to each other's children and

had a deep commitment to a shared life. Ms Wilson's children gave evidence of the involvement of Mr Svicarovich in their lives and that they viewed him as a father figure. Ms Wilson cut Mr Svicarovich's children's hair and nails, helped treat their hair lice, and cooked and cleaned for them. The parties slept under the same roof for between 2 to 4 nights per week, with the 4 nights occurring in the latter stages of the relationship.

The court accepted Ms Wilson's explanation for telling Centrelink that she was not in a de facto relationship, but the judgment is not clear as to what explanation was.

5. How significant a factor is a sexual relationship?

There are several factors to be considered when determining whether a de facto relationship exists. All factors are considered; no sole factor is seen as conclusive and not all factors need to be present. Therefore, the presence or absence of a sexual relationship is considered but does not, by itself, indicate the existence of a de facto relationship.

For Centrelink purposes, the presence or otherwise of a sexual relationship is taken into account, along with the degree of emotional support and other forms of commitment and interdependence.[1] Important indicators which are considered are:

- whether the parties have an ongoing exclusive sexual relationship;
- the duration of the sexual relationship;
- the mutual exclusivity of the parties' sexual relationship;
- other sexual partners of the parties; and
- whether the parties have a mutual child or children.

The frequency of the parties' sexual relationship may also be relevant.[2]

Brown v Manuel (1996) QCA 65

This case was not decided under the FLA, but it is still relevant. It demonstrates that the absence of affection was not necessarily incompatible with the existence of a de facto relationship.

The trial judge found the 18 year relationship between the parties was a de facto one despite the lack of love and affection. They lived together as a couple and had expectations of each other normally found in a marital relationship. Based on the natures of the parties, "it would be unrealistic to look for evidence of manifestations of love or affection" between them. The trial judge described the husband as mean, bitter, ungenerous, and uncharitable "both financially and psychologically".

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1 Australian Government "Guide to Social Security Law", Section 2.2.5.10. Determining a De Facto Relationship, 31 May 2017, http://guides.dss.gov.au/guide-social-security-law/2/2/5/10. Accessed 13 June 2017

2 J Mellas, 'De Facto Relationships – The Threshold Issues', *Foley's Breakfast Seminar*, 22 August 2013, pp. 47, http://www.foleys.com.au/resources/Defacto%20Relationships%20-%20Threshold%20Issues_Mellas_22Aug2013.pdf Accessed 13 June 2017.

The wife, for her part, focussed on the financial aspects of the relationship, “directing her social and recreational attention outside the relationship” mainly because of the husband’s antisocial tendencies. It was clear that each of the parties maintained their independence of the other, both financially and socially.

Basically, the parties lived separate lives but found it convenient to live under the same roof. It was not a relationship built on love and affection, although the wife maintained that they lived as husband and wife.

On appeal to the Court of Appeal of the Supreme Court of Queensland, Davies and Mackenzie JJ (with Helman J dissenting with respect to one of the orders but not with respect to the finding that there was a de facto relationship) agreed that despite the lack of love and affection between the parties for many years (although there had been a sexual component to the relationship and they shared a bedroom), the parties had mutual expectations of each other. These expectations arose out of a commitment to a de facto relationship over a period of eighteen years. The relationship continued on these expectations, with each making financial contributions for their mutual benefit. It was unconscionable to not recognise these expectations.

Jonah & White [2011] FamCA 221

Murphy J held that no de facto relationship existed because the parties had failed to merge their “two lives into one” such that their relationship was not deemed to be a manifestation of “coupledom”. In Murphy J’s opinion:

> “the key to that definition [of being in a 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.”

The parties managed to keep their relationship of seventeen years hidden. They did not socialise publicly as a couple, they kept separate households, they did not combine assets, they did not share expenses, and they maintained property individually.

The applicant argued that the parties had engaged in a sexual relationship exclusive of others - aside from the respondent maintaining his relationship with his wife and engaging in a few one night stands. The respondent also provided the applicant with some financial support by contributing $24,000 to the applicant’s house and paying her up to $3,000 per month for eleven years.

Despite the presence of a sexual relationship, emotional support and a degree of financial support, the court found that a de facto relationship did not exist because they had led such separate lives.

An appeal, reported at (2012) FLC 93-522, was unsuccessful.

Newland & Rankin [2017] FCCA 210

The issue was whether or not a casual relationship over a 5 year period was a de facto relationship.

The parties began an intimate relationship in April 2003 and lived together sporadically until 2008. Despite the husband not being solely committed to the wife in the early stages of the relationship, he argued that the parties had been in a de facto relationship since 2003. The wife argued that the de facto relationship only began in 2008 once the husband had become fully committed to their relationship and moved into her home.

The Court agreed with the wife in finding that the de facto relationship began when they moved in together in 2008. Prior to that, the parties' relationship was deemed to be intermittent and casual and did not demonstrate the circumstances required to determine the existence of a de facto relationship. Before 2008, they had not purchased any property together, they were not financially interdependent and there was no mutual commitment to a shared life. The Court gave weight to the husband's rejection of the wife when she fell pregnant in 2007 which resulted in her terminating the pregnancy. This factor, in addition to other factors, lead to the Court finding that a de facto relationship did not exist prior to 2008.

While the existence of a sexual relationship can be an important factor in determining the existence of a de facto relationship, this case shows that other factors may be given greater weight.

Martens & Bocca [2016] FamCA 1044

The sexual relationship between the parties was not monogamous, but was substantially monogamous. The absence of complete exclusivity did not lead to a conclusion that the relationship was not a de facto relationship.

6. Public aspects of the relationship

The reputation and public aspects of the relationship are matters to be assessed when determining whether a de facto relationship exists. In determining this, consideration should be given to:

- Whether the parties socialised together;
- Whether the parties were known as a couple to the outside world;
- Whether they attended important functions for the other party;
- Whether they were emergency contacts for each other on certain documents.

Elias & Elias (1997) FLC 90-267

The *Elias* principle is named after *Elias & Elias* (1997) FLC 90-267. The *Elias* principle has been referred to frequently in *Family Law Act* cases since the introduction of Pt VIIIAB to that Act in disputes about the existence or length of de facto relationships.

Chisholm J in *Jordan & Jordan* (1997) FLC 92-736 reformulated the principle as (at p 83,926):

> "When a party has made representations of fact to third parties and has gained advantage from doing so, **it is open to the Court** in subsequent proceedings under s 79 of the Family Law Act to **decline to accept** from that party evidence which contradicts those representations" [emphasis added]

The High Court decision of *Nelson v Nelson* (1995) 184 CLR 538 was handed down a week prior to the commencement of the hearing in *Jordan*, but neither counsel referred Chisholm J to the High Court decision. In *Nelson*, the High Court unanimously allowed a mother to enforce her equitable interest in property that was registered in her children's names so that she could remain eligible for a financial benefit.

In *JPDJ v DADJ* [2005] FMCAfam 86, Ryan FM, as her Honour then was, noted that Chisholm J, writing extra-judicially in an article titled "Exclusion of Evidence Inconsistent with earlier statement: the rise and fall of the *Elias* principle" argued that although such a principle seems to be asserted in a number of Family Court decisions, it is inconsistent with High Court authority and does not represent the law. She found the conclusion reached by Chisholm J to be compelling. He wrote:

> "If the argument in this paper is accepted, the *Elias* line of authorities is wrong insofar as it suggests that there is a principle, apart from estoppel the court may or must prevent a party from leading evidence of a proposition that is inconsistent with an earlier statement made to a third party. It follows that in property cases the court will consider all the evidence and make findings about the property of the parties and about their contributions. Earlier inconsistent statements of the kind that feature in the Elias cases will of course be relevant to this fact finding exercise. The court will have to consider whether the earlier statement or the later statement is more likely to be true. Further, the contradiction will be taken into account in determining what confidence the court will have in that party's evidence generally. That all of this falls into the ordinary process of fact finding: no evidence would be excluded, and there would be no presumptions that one or other of the inconsistent statements is more likely to be true."

The Full Court in *Crandall & Crandall* [2009] FamCAFC 120 said (at para 81) that the *Elias* principle:

> "does not represent an inflexible rule – rather, it imparts a discretion permitting the Court to exclude certain evidence".

Jonah & White (2012) FLC 93-522

The Full Court held that the parties did not have a reputation as a couple as they kept their relationship secret and rarely mixed with each other's friends. Witnesses were called at trial on the issue. As there were very few public aspects of the relationship, this pointed towards the non-existence of a de facto relationship.

Asprey & Delamarre [2013] FamCA 214

With regard to the public aspects of the relationship, the Court heard evidence from four friends of Mr Delamarre and extended family. It was well known to each of their families that the parties were a couple. The Court was also presented with various photographs of the parties at family events. It was largely for this reason that the Court found the existence of a de facto relationship.

Dandridge & Barren (2012) FMCAfam 141

It was common ground that the parties were in a relationship from 2000 to 2009. Ms Dandridge alleged that they were in a de facto relationship while Mr Barren denied this, claiming that the relationship was no more than "boyfriend and girlfriend". Both parties accepted that they presented themselves publicly as a couple and a family unit with the children they had together. They attended a wedding together and various sporting events. Ms Dandridge, however, displayed through her social media that she was single and open to other sexual relationships.

His Honour noted that the following factors were supportive of a de facto relationship:

- The relationship was approximately 10 years in duration.
- There were two children of the relationship.
- There had been a degree of financial support of Ms Dandridge by Mr Barren. Ms Dandridge also submitted that they consistently and regularly argued over financial matters and this was a relevant factor.
- There was a longstanding sexual relationship.
- There were some public aspects of the parties as being a “couple”.

The facts which pointed to the opposite conclusion were that:

- Ms Dandridge maintained her own residence throughout the majority of the relationship
- Ms Dandridge held herself out to Centrelink and the Child Support Agency as being financially independent of Ms Barren.

The court found that there was not a de facto relationship. The applicant’s public statements of social and financial independence, together with her retaining her own residence, were decisive. The public aspects of their relationship supported there being no de facto relationship.

Kazama & Britton [2013] FamCA 4

Ms Kazama asserted that a de facto relationship existed between 9 November 2002 and 9 September 2009. Mr Britton conceded in cross-examination that a de facto relationship existed, but only between 2006 and 2009. Mr Britton sponsored Ms Kazama to move to Australia on a spouse visa. He made representations to the Department of Immigration that the parties had commenced a de facto relationship. The parties were publicly open about their relationship. The children of both parties were aware of it and the parties attended public functions as a couple.

Watts J found that a de facto relationship existed from 2002 to 2009, and gave significant weight to the representations made to the public and the Department of Immigration with regard to the relationship. This finding was made despite the fact that they maintained separate residences.

Martens & Bocca [2016] FamCA 1044

The public aspects which indicated that the parties' relationship fell within the definition of de facto were as follows:

- Evidence of text messages whereby they would refer to the other as "hubby" or "partner" was adduced.
- The parties had named each other as the beneficiaries of their Will.
- They attended family functions together.
- They travelled overseas together.

The Court held there was a de facto relationship, although the parties did not officially live together.

Cham & Sha [2015] FamCA 355

Ms Cham and Mr Sha met in 2011 whilst Ms Cham was working at a massage parlour. Mr Sha had been married since 1997 and for most of his relationship with Ms Cham he was still living with his wife. With regard to the public aspects of their relationship, the parties had a social life whereby they frequently visited restaurants, beaches and shopping centres. While they were occasionally accompanied by Ms Cham's daughter, there was no involvement of other people in these activities. Ms Cham had only limited contact with members of Mr Sha's family. The Court held that despite this, there were other public aspects to the relationship. This included numerous documents addressed to Mr Sha at Ms Cham's house, such as electricity accounts for her home which were in their joint names. They also conceived a child through IVF. The Court was satisfied that there was a de facto relationship for approximately 18 months.

Sinclair & Whittaker (2013) FLC 93-551

The parties commenced a relationship in 2002 and commenced a sexual relationship in 2003. Mr Sinclair moved into Ms Whittaker’s premises in August 2004. He contributed $600 per month towards her rent. In December 2005, the parties purchased a property together and Mr Sinclair paid the deposit and stamp duty. Ms Whittaker lived in this property and Mr Sinclair usually spent three nights per week there. In December 2006, Mr Sinclair gave Ms Whittaker a diamond ring, which he described as a "promise ring". The relationship broke down in September 2010.

On appeal, Mr Sinclair denied that there was a de facto relationship from August 2004 until 21 September 2010. One of the grounds of appeal was that the trial judge did not give sufficient weight to representations of Ms Whittaker that she was single. She made representations to the Australian Taxation Office, the Chief Commissioner of State Revenue, a mortgage provider and a financial

provider that she was single. The trial judge held that the representations were not determinative, but were part of the circumstances to be taken into account when determining if there was a de facto relationship. The Full Court said (at para 66):

> "The fact that such statements are made to lenders or government authorities does not elevate them to a higher status".

Mr Sinclair's appeal was unsuccessful.

7. To what extent do financial affairs need to be mingled?

The degree of financial dependence or interdependence and arrangements for financial support between parties is a factor to be considered under the legislation when determining if a de facto relationship exists. It has been noted that "modern relationships" may give less weight to financial affairs as more people seek financial independence. The following should be considered when giving weight to financial affairs in de facto matters:

- Whether the parties have joint bank accounts;
- How the parties met their expenses such as mortgage or rent and living expenses;
- Whether one party financially supported the other and to what extent;
- Whether the parties acquired property during the relationship, and if so, who paid for it, who owned it and how was it used?

Jonah & White (2012) FLC 93-522

The parties maintained no joint bank account, engaged in no joint investments together, and only acquired/maintained property in their own individual names. There were, however, regular monthly payments of up to $2,500 made to Ms Jonah from Mr White for approximately 11 years. Mr White also contributed a one off payment of $24,000 to Ms Jonah for a deposit on her home.

Despite this, it was held by the trial judge and upheld by the Full Court that the parties were not in a de facto relationship, largely because of the lack of public aspects to the relationship. However, the trial judge highlighted that the financial aspects of the relationship supported the finding of a de facto relationship.

Regan & Walsh (2014) FLC 96-614

On most matters about their relationship the parties disagreed, except that there had been a sexual relationship. The applicant, Mr Regan, asserted that there was a joint bank account, although he was unable to produce any evidence to support this. Mr Regan made some minimal payments which were attributed towards groceries or other household items, and the court found that Mr Regan used Mr Walsh's stronger financial position for his own interests and Mr Walsh was unable or unwilling to resist the demands. This was the extent of co-mingling of their financial affairs. The

Court highlighted that evidence of a jointly opened bank account would have been a significant matter. The parties were held not to be in a de facto relationship.

Asprey & Delamarre [2013] FamCA 214

The trial judge viewed the parties' relationship as one of a "modern relationship" where financial independence is not uncommon. Because of this, she accorded less weight to the financial circumstances. The parties had no financial dependency on the other and both maintained separate bank accounts. They each purchased properties in their own name, but did not acquire any property in joint names. Cleary J said (at para 75):

> "Such financial independence is not uncommon in modern relationships, including marriages. I do not consider this aspect inconsistent with life as a couple living together on a genuine domestic basis."

Nevertheless, the Court was convinced that the parties were in a de facto relationship because, in the words used by Murphy J in *Jonah & White*, there was a "… merger of two lives into coupledom". On appeal, the Full Court in *Delamarre & Asprey* [2014] FamCAFC 218 agreed with the above passage and dismissed the appeal other than to amend the dates of the relationship in the s 90RD declaration.

Luk & Choy [2016] FamCA 534

Ms Luk and Mr Choy met through an internet dating website. Mr Choy lived in China and travelled to Australia to meet Ms Luk. The parties were in a relationship from July 2012 to February 2014. Ms Luk asserted that this was a de facto relationship, while Mr Choy argued that it was not.

Mr Choy purchased Ms Luk a watch and handbag costing over $10,000 and an engagement ring for approximately $30,000. The parties purchased a property together. Mr Choy paid the deposit and the parties obtained a joint mortgage. Ms Luk lived in the property. She paid the mortgage instalments and other outgoings. Mr Choy gave Ms Luk a credit card which she used for a period of time. There was an argument about use of this credit card and Ms Luk returned the sum in dispute and the credit card to Mr Choy. The Court was not satisfied that the parties were in a de facto relationship, largely due to the lack of public aspects to the relationship and that they only stayed together for periods totalling a fraction of the duration of their relationship.

8. Later stage relationships – when are they de facto relationships?

In the context of personal relationships between elderly parties, the main issue is distinguishing relationships between that of a carer and friend from that of a de facto couple. The issues may be more fraught where there is a stark age difference between the parties. Allegations of elder abuse

may be made. While little case law is available in relation to parties of advanced years, the following cases illustrate the issues which may arise.

Dobbins & Gibbs [2011] FMCAfam 35

Both parties were aged 87 at the time of hearing. The applicant, Mr Dobbins, passed away after the first day of trial and the proceedings were delayed pending the appointment of a legal personal representative. Mr Dobbins contended that a de facto relationship existed for a period of 16 years. The respondent, Ms Gibbs, said the relationship was nothing more than a friendship and that, particularly in the later years, Ms Gibbs was more or less a carer for Mr Dobbins, he being legally blind and in need of constant assistance. The parties lived together for about 15-16 years.

The court held that a de facto relationship was established on the evidence before it and made a declaration of the existence of a de facto relationship pursuant to s 90RD. Weight was given to:

1. The public aspects of the relationship: Mr Dobbins' estate called on evidence from various third parties who were close to the parties as to their view of the relationship. One witness gave evidence that he spent regular time at the parties' residence, including staying overnight when travelling from interstate and that the parties slept in the same bed when he was there. Mr Dobbins' estate also called evidence from Mr Dobbins' neighbour, his grandson and a friend of the family – all giving evidence of their view of the relationship. The court gave considerable weight to the evidence that publicly the parties held themselves to be an intimate relationship.

2. The existence of an intimate relationship: there was evidence to suggest that at one point or another a sexual encounter occurred. It was Mr Dobbins' position that for the first 6 or so years of their relationship, a normal intimate relationship existed and thereafter by reason of the encroaching years, there was a change. It was Ms Gibbs' position that despite sharing the same bed, there was no intimacy save for one sexual encounter when she moved in. The court held that the presence or absence of a sexual relationship was not determinative of the issue but, on the balance of the evidence, there was some degree of intimacy.

3. The extent of common residence: it was not disputed that the parties lived together in Mr Dobbins' property. However, Ms Gibbs contended that the relationship was one of that boarder and landlord. On the evidence of shared expenses, sleeping in the same bed and third parties, the court held that it was not a relationship of landlord and boarder, or friends.

4. The degree of mutual commitment to a shared life: the court accepted the evidence on behalf of Mr Dobbins that there was a degree of commitment to a shared life together, despite Ms Gibbs' assertions that the relationship was either that of a boarder or a carer relationship.

5. The degree of intermingling of financial affairs: Ms Gibbs contended that in relation to the question of the ownership, use and acquisition of property jointly acquired or owned, the parties maintained separate properties aside from the common residence. It was clear that Ms Gibbs always had the intention to keep it that way in anticipation of any entitlements that might arise from her Will.

On the balance of the available evidence, the court held that while the relationship may not have been one reflecting that of a younger couple, from Mr Dobbins' perspective and certainly for all the third parties, there was a significant relationship appropriately described as a de facto relationship.

The court then turned to determining the application under s 90SM. It found that the parties contributed equally in terms of non-financial contributions and Ms Gibbs made greater financial contributions. The s 90SF(3) factors were heavily weighted in favour of Ms Gibbs, due to Mr Dobbins' death. The court decided that a division of 85% in favour of Ms Gibbs and 15% in favour of the estate of the late Mr Dobbins was just and equitable. If Mr Dobbins had not passed away, the division would have been 80% / 20%. Following *Van der Linden & Kordell* [2010] FamCAFC 157, the court considered that some s 90SF(3) adjustment was necessary in favour of Ms Gibbs, but not so as to completely erode the recognition of Mr Dobbins' contributions.

The case raises interesting implications of relationships in later stages of life, where the relationship can be construed as that of either a carer or friendship or a de facto relationship. However, the case ultimately adheres to the relevant factors as defined by the Act and expanded by case law.

Alternatively, if the parties were unable to establish a de facto relationship, relief may be sought from state courts under equitable principles – namely estoppel by representation or promissory estoppel if one party cared for the other to their detriment on the expectation of receiving an interest under a will either by a representation made by the second party or express promise to do so.

Teh & Muir [2017] FamCA 138

The applicant was 37 and the respondent was 86 at the time of trial. The respondent's case was run by his case guardian, as the respondent suffered from dementia.

Although the applicant lived in the respondent's home, there was very little other evidence to support the existence of a de facto relationship.

Berman J found that the applicant had taken financial advantage of the respondent's deteriorating mental state and infirmity, and had neglected the respondent and not provided the homemaking contributions she alleged she made. He found that there was no de facto relationship.

9. Relationships over the internet

It is now recognised that "modern relationships" are challenging the traditional notion of a relationship, especially internet-based and virtual relationships. We are seeing a rise in relationships established and/or maintained through the internet. This adds an additional complexity when determining if parties were in a de facto relationship. There are no special rules for those relationships over the internet. These cases simply turn on their own facts when considering whether the other aspects of the relationship fall within the definition of a de facto relationship.

Volen & Backstrom [2013] FamCA 40

The parties' first interaction was via an online dating website in April 2005. Within weeks of their virtual meeting, they met in person and commenced a sexual relationship. Ms Volen commenced living at Mr Backstrom's home in December 2005. It was not the existence of a de facto relationship but rather its length that was in dispute. Ms Volen argued that the de facto relationship commenced in December 2005 and ended in April 2010. Mr Backstrom only conceded that a de facto relationship was in existence between Easter 2006 and November 2007. The court was satisfied that a de facto relationship commenced in December 2005 and ended in April 2010. The period in which they had a virtual relationship only was not included in the de facto relationship period.

Luk & Choy [2016] FamCA 534

There was found to have been the promise of a de facto relationship in the parties' early internet communications, but that was not borne out after the relationship commenced. The parties met on the internet, and both aspired to a long-term meaningful, personal relationship. They bought a house together and stayed together there and on holidays for short periods. They had a sexual relationship.

The respondent did not introduce the applicant to his family, although there was opportunity to do so. The applicant was more public about the relationship than the respondent was, but the trial judge found there was "scant evidence" on the public aspects. There was no de facto relationship.

10. Determining the start and end of the relationship – evidence

Paul Doolan and Judge Altobelli in a paper entitled "De Facto Financial Proceedings - Where have all the Mistresses and Toy Boys Gone?" set out the following useful list of evidence which can help establish the existence, as well as commencement and end dates, of a de facto relationship:

(a) The duration of the relationship

- Direct evidence from the parties;
- Evidence from acquaintances who can give direct evidence about the start and end point of the relationship;

- Documents that might prove the duration of the relationship (eg: letters, emails, text messages, cards, phone records, social networking entries on websites);
- Evidence about change to sleeping arrangements or separate bedrooms;
- Evidence of the end of counselling, or statements made in the course of non-confidential counselling or therapy sessions about the end of the relationship or start of a relationship;
- Income tax returns making declarations as to a spouse or de facto spouse;
- Centrelink records;
- Diary notes.

(b) The nature and extent of their common residence:

- Direct evidence from the parties;
- Direct evidence from friends or family;
- Title records;
- Rental records;
- Bank records in relation to payments towards mortgages or rent;
- Drivers' licences showing address;
- Electoral roll records;
- Taxation records as to address (if any);
- Employment records as to address;
- Telephone records;
- Mailing address for official documents for parties from financial institutions, medical practitioners, government agencies;
- Whether a party had rented out or subleased other premises owned by them;
- Road toll records and parking records which may show residence predominantly in one place or another, or the extent of residence in one particular place.

(c) Whether a sexual relationship exists:

- Presumably only from direct evidence from the parties, unless some record of such matters otherwise exists.

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

- Banking records of any joint accounts or regular deposits to the account of the other party;
- Any employee records showing salary records being paid into joint accounts or partly into the account of another partner;
- Credit card statements, whether for joint credit cards or for secondary holders;
- Evidence in relation to payment of mortgage and household outgoings;
- Payments for mutual activities such as entertainment, holidays, restaurants;
- Payment of debts or liabilities of the other party;
- Distributions of income from a trust to a de facto spouse;
- Evidence of provision of personal guarantees or indemnities to assist the other party in borrowings or operation of a business;
- Declarations to taxation authorities or financial institutions in relation to the existence of a partner or de facto spouse;
- Insurance records.

(e) The ownership, use and acquisition of their property:

- Title records;
- Lawyers' files in relation to purchase of property or other assets;
- Transfer of property from sole name to joint names;
- Evidence of financial contributions to property owned by the other party;
- Financial records and bank statements.

(f) The degree of mutual commitment to a shared life:

- Direct evidence from each party;
- Observations of friends and family about attendance at major events in the life of each party or attending other family events;
- Registration of relationship;
- Evidence of an engagement or a request to marry;
- Purchase of a ring;
- Description of a person as a de facto spouse or next of kin or contact person on school records, employer records etc;
- Contents of a Will that may name the other party as executor or primary beneficiary;
- Contents of insurance policy that may name a person as a beneficiary;
- Nominated beneficiaries under a superannuation benefit;
- Evidence of household or other activities undertaken by each party for the benefit of the other or mutually;
- Medicare or private health insurance records in relation to who is covered under a particular card.

(g) Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship:

- Official records.

(h) The care and support of children:

- Birth certificates;
- Financial and banking records in relation to payments;
- Cheque butts;
- Other evidence of financial payments for school fees, extra curricular activities, medical expenses;
- Records from schools or kindergarten/day care about responsible adults authorised to drop off and collect children from a centre.

(i) The reputation and public aspects of the relationship:

- Social security records/Centrelink records (eg: sole parent/single person claims);
- Direct evidence of the parties;
- Evidence from family and friends;
- Evidence in respect of adoption of a single family name of one party;
- School records, medical records, insurance records, taxation records in relation to description of the other party as being a partner or de facto spouse.

Documents are obviously very valuable as evidence; however, it is surprising how often a document can be ambiguous. People may use different addresses for different purposes. There may be another explanation for the document's existence than the one that a lawyer or a client may think is obvious. Relationships can be volatile and people will not always promptly change their address. There is also the problem that Government records may be covered by privacy provisions and therefore not obtainable under subpoena e.g. Centrelink, Tax Office, State Revenue Office.

The applicability of the *Elias* principle also needs to be considered – at least to the extent that the client may be giving evidence which contradicts statements made to Government authorities or elsewhere. The client's credit may be in issue.

The reported cases about whether a de facto relationship existed and when it commenced and ended have generally been costly to run and often last several days with lengthy and numerous affidavits and exhibits. Delays in listing interim hearings in the courts exacerbate the problem and increase costs. Parties can wait 12 months or more for the jurisdictional issue to be heard and determined, and still be 12 months or more away from a final hearing.

11. Can more than one de facto relationship exist?

It is possible that more than one de facto relationship can be in existence at the same time. Section 4AA(5)(b) of the FLA states that a de facto relationship can exist, even if one person is legally married or in a de facto relationship with another person. In fact, there have been numerous cases in which one or both parties are in other relationships at the same time as they were in a de facto relationship with each other. In *Dakin & Sansbury* [2010] FMCAfam 628, Bender J followed Riethmuller FM in *Baker & London* [2010] FMCAfam 280 and said (at para 50):

> "The definition of de facto relationship…does not require exclusivity and makes it clear that such relationship can be established even if one or other of the parties is married or in another de facto relationship".

Whether one or both of the parties are in another relationship can impact upon considering the degree of mutual commitment to a shared life between the parties, but it is not, on its own, a determinative factor.

Jonah & White (2012) FLC 93-522

This case involved a 17 year relationship in which Mr White was married and remained living with his wife and children. The court found that the parties were not in a de facto relationship, but for reasons other than because Mr White was in another relationship.

Cham & Sha [2015] FamCA 355)

Mr Sha was in a marriage of 14 years at the time of commencing a relationship with Ms Cham. In 2012 Mr Sha admitted his relationship with Ms Cham to his wife. He said that he did not want to ruin his marriage so stayed at home as much as possible for a few weeks. During this time, he only visited Ms Cham a couple of times per week, but did not stay overnight. Ms Cham asked him on multiple occasions to divorce his wife but said it appeared that he did not want to do so.

It was held that the parties were in a de facto relationship. In fact, the court held that Mr Sha demonstrated a desire to have both a relationship with Ms Cham and his wife. Johnston J said "his behaviour demonstrated considerable effort by him in endeavouring to maintain both relationships".

12. Consequences of threshold issue on availability of interim or interlocutory relief

An interim order such as for maintenance or interim costs cannot be made until the court first finds that it has jurisdiction to make orders. A declaration may need to be made under s 90RD if the existence of the de facto relationship is in dispute or its start date, end date or other relevant aspects. The court must also be satisfied that the time and geographic hurdles are met and that s 90SB is satisfied. The inability to obtain an interim costs order unless jurisdiction is first established is likely to be a significant barrier for many potential claimants. Jurisdictional disputes can be costly, risky and time consuming so lawyers will often be reluctant to run them without funds.

Section 114(2A) enables the court to grant injunctions:

- for the use or occupancy of a residence of the de facto couple, or
- to restrain the other party from entering the residence or within a specified area; or
- as it considers proper with respect to the property of the parties or either of them

The breadth of the injunction power with respect to de facto couples under s 114(2A) is far more limited than under s 114(1) with respect to married couples which allows a far broader range of injunctions.

The distinction between s 114(1) and 114(2A) may initially seem strange, as s 90SS(1), which sets out the powers of the court, includes the power to:

> (k) make any other order or start any other injunction, (whether or not of the same nature as those mentioned in the preceding paragraph of this section) which it thinks or is necessary to make as to do justice.

In addition, s 90SS(5) specifically refers to the ability of the court to grant injunctions under Pt VIIIAB. It states:

> Without limiting paragraph (1)(k), the court may:
>
> (a) grant:
> (i) an interlocutory injunction; or
> (ii) an injunction in aid of the enforcement of a decree in any case which it appears to the court to be just or convenient to do so; and
> (b) grant an injunction either unconditionally or upon such terms and conditions as the court considers appropriate.

The limitations on the injunctive powers make sense when reference is made to the referral of powers and the definition of a "de facto financial cause". Injunctions which can be made under s 114(1) which are within the definition of "matrimonial cause" para (e) in s 4(1) but not within the definition of "de facto financial cause" (even if re-worded to refer to a de facto relationship) are:

> (a) an injunction for the personal protection of a party to the marriage;
> (c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage; and
> (d) an injunction for the protection of the marital relationship.

The absence of the powers to grant comparable injunctions to s 114(1)(a) and (c) will be most problematic. Section 114(1)(f) is replicated for de facto couples in s 114(2A)(a). Section 114(1)(e) is replicated in s 114(2A)(c). Section 114(1)(b) is replicated in s 114(2A)(b), but only if an order is made for use and occupancy of a specified residence under s 114(2A)(a).

Section 80(k) is similarly worded to s 90SS(k) except that it excludes reference to granting an injunction. Sections 80 and 90SS are considered to be enabling provisions and not in themselves to be heads of power.

Esdale & Schenk [2012] FamCA 111

The respondent denied the existence of a de facto relationship. The applicant sought a litigation funding order. Murphy J said (at para 18):

> "This Court does not have jurisdiction or power to make interlocutory orders with respect to s 90SM or 90SS, pending a determination of whether there is a de facto financial cause."

Murphy J said that although an interim costs order may be made under s 117 without first finding that the court has jurisdiction to make property or maintenance orders, the application must be judged by reference to the primary position under s 117(1) that each party bear their own costs. He considered s 117(1) to be an even greater obstacle to a litigation funding order where jurisdiction is not yet established.

Wall & Mitchell [2010] FamCA 1194

The applicant sought a litigation funding order in circumstances where the respondent denied that there was a de facto relationship. Johnston J said (at paras 43-4):

> "Would it be just within the meaning of s 117(2) to order the respondent to pay money to the applicant to be used by her to fund the costs of her litigation with the respondent when it is far from clear that there is at least some likelihood that the Court would make any substantive order in her favour? In my view, if the Court was to make a preliminary costs order, and ultimately it turned out to be the Court's finding that there was no basis upon which the respondent could be required to make a substantive payment to the applicant, this would be most unjust to the respondent. This is because it is clear that the applicant has no means by which any such preliminary payment could be refunded to the respondent.
>
> Having considered the relevant matters in s 117(2A) of the Act I find myself unable to conclude that it would be **just** within the meaning of s 117(2) of the Act to make any preliminary costs orders in favour of the applicant at this stage of the proceedings."

Teh & Muir [2015] FamCAFC 224

The Full Court heard an appeal by Ms Teh against an interim order preserving assets. It was held that if one party disputes the existence of a de facto relationship, a court can grant an interlocutory injunction to preserve the assets before the issue of jurisdiction is determined.

Ms Teh and her son moved to Australia in January 2010 on a temporary visa and lived with Mr Muir, aged 85 years, in his home. In February 2014, the parties allegedly entered into a financial agreement under s 90UC setting out that upon the breakdown of the parties' relationship all property would be divided equally "regardless of whose name was on the asset titles".

Mr Muir subsequently moved into a nursing home and in May 2014 and Ms Teh issued proceedings to enforce the financial agreement. In her capacity as case guardian, Mr Muir's daughter filed a response on his behalf, arguing that he had never been in a de facto relationship at the time of the financial agreement and that he did not have the mental capacity at that time to make the agreement. Therefore, an order was sought to set aside the agreement and for the proceeds of the sale of his home be paid to him.

At first instance in *Teh & Muir* [2014] FamCA 483, Dawe J made interim orders that half of the proceeds of Mr Muir's home be paid to Mr Muir and the other half be held in his solicitor's trust account. She also ordered that Ms Teh disclose the bank statements of herself and her son and she be restrained from dealing with or disposing of any funds held in any bank account with the exception of her daily needs.

Ms Teh appealed the decision, arguing that the Judge did not have the jurisdiction to make the orders freezing her 50% share of the net proceeds of sale to which she said that she was entitled under the financial agreement.

The primary issue on appeal was whether or not a de facto relationship ever existed between the parties. If there was no such relationship, there was no jurisdiction for a court exercising jurisdiction under the *FLA* to determine the dispute between the parties. Conversely, if there was a de facto relationship and the respondent continued to challenge the validity of the financial agreement, the Court would have to determine whether there was jurisdiction for the Court to make orders freezing the assets of the parties.

Finn and Strickland JJ dismissed the appeal. They deemed it appropriate for the Family Court to grant an interlocutory injunction to protect the proceeds of sale that were in dispute until the Family Court determined whether or not it had jurisdiction to hear the matter.

Ryan J agreed with Finn and Strickland JJ, but for different reasons. Under s 31(1)(aa) of the *Family Law Act* the Family Court has original jurisdiction to confer on matters arising in respect of de facto

financial causes, which includes dealing with financial agreement disputes. Therefore, the judge at first instance had the power to determine Mr Muir's challenges to the validity of the binding financial agreement.

In addition, Ms Teh had argued that the judge could not restrict her access to her bank accounts as well as the sale proceeds of Mr Muir's home. However, interlocutory orders are intended to protect assets until final orders are made, and therefore Ms Teh failed in her attempt to challenge the interlocutory orders made in the initial judgment.

Furthermore, s 34 of the *Family Law Act* states that the Family Court "has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, and to issue, or direct the issue or, writs of such kinds, as the Court considers appropriate". This general power encompasses interlocutory injunctions and because it was determined that the Court did have jurisdiction, the appeal was dismissed.

Merrill & Burt (No 3) [2017] FamCA 399

The wife sought interim orders that funds held on trust by the wife's solicitor be distributed: $30,000 to her for living expenses, and $32,500 to the child's school. The wife held that it was not just and equitable to make an order altering the property interests of the parties, whilst the husband disagreed as he sought final orders that the entirety of the remaining property be paid to him.

The court ruled that the wife not receive the $30,000, either by way of an interim property settlement or under the spousal maintenance or costs powers. This finding was reached on the basis that orders should not be made in circumstances where the wife's case was such that she will retain all the property, however the husband argued that all of the wife's property be transferred to him. Any funds provided to the wife would not be able to be "clawed back" by the husband.

The court did, however, order the $32,500 payment of school fees and expenses, as it was agreed that this was a joint expense on both of the parties.

13. Case Law update

The first of these cases, *Benson & Owens*, deals with a forum issue. The second case, *Wane & Brandon*, raises the question as to whether an asset by asset approach will be more common in de facto cases - an issue which remains unresolved. The third case, *Chancellor & McCoy*, looks at whether it was just and equitable to make a property settlement order. The final cases, *Na & Tiu* and *Somers & Collier*, are recent cases on whether there was a de facto relationship.

Benson & Owens [2011] FamCAFC 236

The duration of the de facto relationship, and in particular when it broke down, was controversial. The husband contended that it broke down in January 2010. The wife argued that it broke down in 2006. The husband issued Pt VIIIAB proceedings in the Federal Magistrates Court in Sydney. The wife successfully applied to transfer the proceedings to the Federal Magistrates Court at Adelaide. The husband appealed.

When the proceedings commenced, both parties were resident in South Australia. The husband argued that 4 of the 6 years of the de facto relationship were spent in NSW and that most of their property dealings occurred in that state. In October 2007 a property was purchased by the wife in her sole name in South Australia.

The husband's main complaint was that having chosen a forum which was not clearly inappropriate and did not involve "forum shopping" he ought not be lightly denied the opportunity to have his claim determined by that forum.

Rule 8.01 *Federal Magistrates Court Rules 2001* requires the court, in considering an application for change of venue, to have regard to:

(a) the convenience of the parties; and
(b) the limiting of expense and the cost of the proceeding; and
(c) whether the matter has been listed for final hearing; and
(d) any other relevant matter.

The dispute in the Federal Magistrates Court was largely about the circumstances of the parties and their witnesses, particularly:

- The husband's primary witness, his mother, lived in NSW, was 67 years of age and was in reasonable health. She was the carer of her 47 year old disabled daughter.
- The wife's primary witness, her father, lived in Adelaide with the wife and was aged 87. He had had 2 major heart attacks and was frail.

The "fine balance" between the difficulties of both parents reinforced the conclusion that the Federal Magistrate erroneously took judicial notice of the fact that the wife was likely to obtain an earlier hearing date in Adelaide. This was not a matter about which judicial notice could be taken under s 144(1) of the *Evidence Act 1995* and it was not a matter raised with the parties to enable them to make submissions within s 144(4). The appeal was upheld on this ground.

The Full Court then went on to consider the possible disadvantage to the husband by reason of the date of referral of State powers. This issue did not seem to have been argued before the Federal Magistrate but it re-enforced the Court's conclusion that leave to appeal be granted and the appeal upheld.

The Full Court said (at para 61):

> "It was common ground that the referral of power with respect to de facto relationships by the State of South Australia became operative on 1 July 2010. It was submitted that, if the husband's assertion that the de facto relationship between the parties ended in January 2010, the Federal Magistrates Court may not have jurisdiction to determine the proceedings if they were heard in South Australia, rather than in New South Wales where the referral of powers became effective on 1 March 2009."

It then said (at paras 66, 68-69):

> "The "threshold issue of jurisdiction" is not without complexity. Aspects of the issue appear to involve questions of law, primarily involving statutory interpretation: does the Federal Magistrates Court sitting in the state of South Australia have jurisdiction under Pt VIIIAB of the Act with respect to de facto relationships which concluded after 1 March 2009 but prior to 1 July 2010? Having regard to the terms of s 90SB(c) and 90SM(4) of the Act, that issue may involve questions of fact, and law. Other aspects of the issue appear to primarily involve issues of fact, although the terms of s 90SD of the Act suggest that questions of law would also arise in that context...
>
> If the Federal Magistrates Court concludes that the de facto relationship between the parties concluded in 2006, as the wife asserts, it will make no practical difference where that issue is determined. The Federal Magistrates Court would have no jurisdiction to entertain the proceedings, having regard to the terms of Item 86 of Pt 2 of Schedule 1 to the Act which amended the *Family Law Act* to introduce Pt VIIIAB.
>
> Whether, if, the Court concludes that the de facto relationship broke down in January 2010, as the husband asserts, the Federal Magistrates Court sitting in South Australia would have jurisdiction to entertain the proceedings, is less than certain. What is certain is that, subject to issues in relation to the "geographical connection", the Federal Magistrates Court sitting in New South Wales would have jurisdiction to do so, the date of commencement of Pt VIIIAB of the Act in the state of New South Wales having been 1 March 2009."

Wane & Brandon [2012] FamCAFC 95

In summary, the orders made by the Federal Magistrate provided for the husband to pay the wife $66,843 within 30 days. At the time of trial the husband was 60 years old and a self-employed business consultant, and the wife was 67 years old and a retired business consultant. The parties were in a de facto relationship from September 1997 until sometime in late 2009 or early 2010. The parties lived in the wife's house for 12 years. The parties agreed the assets totalled $2,178,492 and the liabilities totalled $231,125.

The husband proposed at trial that an asset-by-asset approach was appropriate because the wife's property was the only asset the subject of any improvement during the relationship. The wife urged the Court to adopt a global approach.

The parties were in a relationship for approximately 12 years, they had no children together, they kept their finances separate, each had superannuation and at the commencement of cohabitation

they both owned real estate and other assets. The Federal Magistrate ultimately concluded that the asset-by-asset approach was appropriate.

The wife sought a 60/40 per cent division in the husband's favour with a 5-7.5 per cent adjustment on account of s 90SF(3) matters. The husband sought that there be no property adjustment, leaving a division of non-superannuation property so the wife had 40% and the husband had 60%.

Ultimately, the Federal Magistrate determined there should be an adjustment of assets in the wife's favour, which equated to a sum of $97,638. After considering *Muir & Royston* [2010] FamCA 374, her Honour determined (at para 30) it was "appropriate to apply an adjustment to the total pool...notwithstanding contributions were assessed on an asset-by-asset approach".

Her Honour determined that a "global check" of the order resulted in a 63.5% / 36.5% division of the total pool in favour of the husband.

Chancellor & McCoy [2016] FCCA 53

This case involved a de facto relationship which lasted 27 years. Ms Chancellor submitted that the parties had a long de facto relationship during which time both parties contributed to the large property pool and therefore it was just and equitable for the Court to consider a property division. Ms McCoy submitted that despite the parties being in a long de facto relationship, the parties' finances were kept separate, with each party accumulating their own financial pool and therefore it would not be just and equitable to divide the property assets.

Ms McCoy had purchased property in her name one year after the relationship commenced. Both parties lived in the property and renovated it. The renovations were financed by Ms McCoy. Ms Chancellor assisted with the labour of the renovations and paid $100-120 per fortnight to Ms McCoy throughout most of the relationship.

In 2002, Ms Chancellor bought a property in her name. She funded the renovations herself and Ms McCoy assisted with the labour of the renovations.

The Court found that "it would not be just and equitable to make an order altering the property interests" of the parties and cited *Stanford v Stanford* (2012) FLC 93-512, *Bevan & Bevan* (2013) FLC 93-545 and other cases. Despite there being a de facto relationship, the parties kept their finances so separate that "neither party could or would have acquired an interest in the property owned by the other". They did not feature in each other's wills, they did not combine their finances, they remained responsible for their own debts, and they used their incomes as they wished without accounting for the other party. As a result, Ms Chancellor's application for a property order was dismissed because to make an order would not have been just and equitable.

Na & Tiu [2017] FamCA 282

It was common ground the parties enjoyed a sexually intimate relationship for a number of years, which commenced in or about late 2005 and ended in early 2012, but they each perceived the relationship differently. The applicant honestly felt he and the respondent were a couple living together on a genuine domestic basis, whereas the respondent did not have the same degree of emotional investment in the relationship. She considered they were only boyfriend and girlfriend.

Austin J found (at para 35):

> "In this case, as in most, the weight of the evidence was not all one way. Some aspects of the evidence tended to support the applicant's contention that a de facto relationship existed: in particular, the sexuality of their relationship, the regularity of their personal interaction over some six years, their joint holidays, and the modest degree to which they used their own money for the benefit of the other. However, the preponderance of evidence did not support the applicant's contention the parties lived together as a couple on a genuine domestic basis because, in summary:
>
> (a) The respondent demanded secrecy about the sexual nature of the parties' relationship from start to finish….
>
> (b) The respondent maintained her relationship with her husband, to whom she was and still is married. Although their personal relationship may be enigmatic and difficult to define, they maintain relations on several different levels – sexual, domestic, and commercial. They still associate, with and without their children, in both Australia and China. They still jointly conduct their business in both Australia and China. The marriage is not an empty shell.
>
> (c) The parties never shared a common household. They associated during daylight hours at their respective homes on occasions during the week, when they would not be disturbed by the respondent's children. They only ever stayed overnight together when the children were not with the respondent, either because they were visiting their father and relatives in China during school holidays or they were away from the respondent's home for some other unusual reason….
>
> (d) At no stage of the relationship did the parties ever jointly acquire property and, although from time to time they each used their money for the benefit of the other, they did not combine their resources in a concerted effort to mutually improve their financial fortunes. It was notable how the parties' investments and the respondent's business interests remained segregated."

The appropriate manner to dispose of the dispute was to declare, consistently with the evidence, that the parties were never in a de facto relationship, as permitted by the Act (s 90RD(1)) rather than declare that no de facto relationship existed between specific dates.

Somers & Collier [2017] FamCAFC 123

The Full Court upheld a finding that there was no de facto relationship. The parties commenced dating in August 1998 and their relationship continued until late 2012. The appellant lived in the respondent's home between May 2011 and March 2013. The parties

attended social and family events as a couple over many years and were known to some family and friends as a couple. The parties had a sexual and romantic monogamous relationship. It was common ground that neither party referred to the other as a partner in any third party notification, such as their tax returns and the respondent's health insurance.

The trial judge found that the evidence did not demonstrate that the parties had mutually committed to a future shared life together. They had a mutually satisfying relationship. Whilst the appellant may have hoped for a more lasting commitment from the respondent when he moved into her home, after a few positive weeks the respondent pulled back and insisted on him sleeping separately.

Conclusion

The most important tip is to read the *Family Law Act* carefully, always check that the jurisdiction hurdles are met, and if they are met, apply the usual process for determining a property settlement or spousal maintenance claim by using the precise wording of the sections of Pt VIIIAB.

In determining whether a de facto relationship exists and, if so, when it started and ended, it is important to look at all the factors. No particular factor carries more weight than any other. Whilst the fact of cohabitation may appear at first glance to be a powerful indicator, the case law shows that parties can be in a relationship and living under the one roof but not be in a de facto relationship, and they can be in a de facto relationship although not living under the one roof.