

DE FACTO RELATIONSHIPS

Essentials in de facto property law

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Introduction

Since 1 March 2009 the Family Law Courts have been able to deal with property and maintenance disputes between de facto couples in all states except Western Australia (and South Australia since 1 July 2010).

This paper does not deal with the jurisdiction of the State and Territory courts to deal with property disputes between de facto couples who separated before 1 March 2009, and do not opt into the *Family Law Act 1975* (FLA), nor does this paper deal with the retrospective proclamation of the commencement of the *Family Law Amendment (De Facto Financial and Other Measures) Act 2008* after it was discovered that the legislation had not been properly proclaimed under s 40(1) FLA.

Instead, this paper deals with:

- Comparative provisions
- Definitions of "de facto financial cause" and "de facto relationship"
- Evidence to establish a de facto relationship
- Jurisdictional aspects - geography, time limits etc
- Recent court decisions

For reasons of convenience, the terms "wife" and "husband" are used to refer to the parties in heterosexual relationships even if the existence of a de facto relationship has not been established.

Throughout, reference is made to the differences between the law with respect to a de facto relationship and the law for legally married couples.

Comparative provisions

While it may have been simpler to amend Pt VIII FLA and give power 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 has increased. There are 40 more pages to the Act in the CCH version and 48 more section 90s.

Schedules of the relevant sections (based on schedules appearing in the CCH *Australian Master Family Law Guide* and the 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 VIII A financial agreement	(p)	(t)
Terms of order or declaration made or proposed to be made under Pt VIII	-	
Terms of Pt VIII AB 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. There is no limitation for married couples.
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.
7. Injunctions.

This paper does not deal with Pt VIII AB financial agreements except to the limited extent above, where the comparative provisions are listed. However, it is important to be aware that there are significant differences between Pt VIII A and Pt VIII AB agreements and different advice is required to be given.

De facto financial causes

For the Family Law Courts to be able to exercise power with respect to property of the parties to the marriage, it must be within the definition of a "matrimonial cause" in s 4(1). The definition of property disputes which constitutes "matrimonial cause" is:

- (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 by:

- (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:

- (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. There are various authorities, the latest of which is *Stanford and Stanford* (2012) FLC 93-495 although leave to appeal to the High Court was granted on 22 June 2012.

Definition of 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):

- (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.

A de facto relationship need not be an exclusive relationship. A de facto relationship "can exist even if one of the persons is legally married to someone else or in another de facto relationship" (s 4AA(5)). The extent to which cohabitation is a necessary pre-requisite is discussed later in this paper.

Evidence

Paul Doolan and Dr Tom 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 of, 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;
 - 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 you and your client think is obvious.

Relationships can be volatile and people will not always promptly change their address.

The reported cases about whether a de facto relationship existed and when it commenced and when it 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 Federal Magistrates Court exacerbate the problem and increase costs. Parties can wait 9 or 12 months for the jurisdictional issue to be heard and still be 9 or 12 months away from a final hearing.

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 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.

One of the following four criteria must be met under s 90SB before the court can make a maintenance order:

- (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.

Length of relationship

Section 90SB provides that a court may not make an order unless it is satisfied that the parties have been in a de facto relationship for at least two years.

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, noting (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 did not refer powers) and after 1 July 2010 in South Australia.

The proceedings must be commenced within 2 years of the date of separation. An extension of time can be granted under s 44(6). Under s 44(3) (which only applies to married couples), proceedings can also be instituted out of time with the consent of both parties.

Jurisdictional issues for de facto couples are discussed further at #

Living together

There is an unresolved issue as to whether the parties must have lived together for part or all of the two year period for there to be 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 85,063):

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.

In *Jonah & White* [2011] FamCA 221, the parties had a relationship for 17 years, lived together on occasions and significant financial support was provided by the male respondent to the female applicant. The respondent was married and lived with his wife throughout his association with the applicant. Murphy J was not persuaded that the relationship between the parties was a de facto relationship.

Cronin J in *Nghiem and Truong* [2012] FamCA 210 referred to and rejected Mushin J's view in *Moby and Schulter* saying (at paras 15, 19-21, 22-3,25):

It is important to note that to establish the existence of a de facto relationship, s 4AA(3) does not regard it as necessary to find the existence of any particular circumstance. Although that might be read as meaning any particular circumstance in the statutory list to which I have just referred, my view is that it is much wider...

Demanding a strict adherence to proving a de facto relationship existed specifically on 1 March 2009, if s 4AA(1)(c) was interpreted narrowly, would contradict the objectives of the amendments which were designed to widen access to the family law jurisdiction for the purposes of equality, simplicity and ease.

Where an ambiguity exists, the interpretation of legislation should not be one that results in an absurdity or is unreasonable. It would be absurd to simply look at the activity in the relationship on one day, that being 1 March 2009. ...

The s 4AA(2) provision which follows s 4AA(1) provides indicia to determine if a de facto relationship exists. It would seem absurd if all or even some of these were required to be evidenced to be in existence on that one date, particularly when s 4AA(3) states that no particular finding is regarded as necessary to decide whether a de facto relationship existed.

Further, under s 90RD(2)(a), the legislation refers to either “the period, or periods, of the de facto relationship”. This implies that the legislation allows for intermittent phases of living together, where there may be periods when the relationship is suspended rather than one continuous period. This could encompass 1 March 2009 if the relationship was found to have ended, as opposed to being suspended, after that time...

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.

Although not expressly stated in the judgment, an unfortunate aspect of the 4 day trial was that it was solely to enable the Family Court to exercise jurisdiction in circumstances where, although the date of separation was disputed, the one party who alleged separation was prior to 1 March 2009 was prepared to opt into the FLA jurisdiction. However, item 90A(1) of the transitional provisions does not permit the parties to opt in where one party contends that the court already has jurisdiction. Both parties sought declarations under s 90RD.

On the balance of probabilities, Cronin J made findings (at para 87) which included 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 and Jones [2011] FamCAFC 222 was an appeal against the summary dismissal of an application by the wife for:

- final property orders;
- interim orders requiring disclosure of the husband's financial interests;
- payment to the wife for her legal costs of the proceedings;
- payment of interim spousal maintenance; and
- order restraining the husband from dealing with the proceeds of sale of a particular property.

The husband sought the dismissal of the wife's application without filing any affidavits or otherwise relying on evidence. A risky strategy but it worked as the wife was unable to establish the existence of a de facto relationship. The Federal Magistrate dismissed the wife's application for final and interim orders. The Full Court dismissed the wife's appeal.

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 accepted Mushin J's interpretation of s 4AA(2)(b) in *Moby & Schulter* as correct. 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.

Her Honour made it abundantly clear that even if his Honour's interpretation was wrong to require a period of cohabitation, taking into account all of the evidence, she was not persuaded that a de facto relationship existed.

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 agreed with Murphy J in *Jonah & White* (at para 39) where he said:

In my view, the making of a declaration of the type contemplated by s 90RD of the Act does not involve the exercise of a judicial discretion. The question of whether a de facto relationship exists is a determination of fact (albeit based on findings in relation to a non-exclusive number of statutory considerations) which founds the jurisdiction to make orders of the type contemplated by that part of the Act. The ultimate question is in the nature of a jurisdictional fact.

The Full Court also agreed with Murphy J (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".

Interim orders and injunctions

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.

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 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 with 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 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.

Cases in which the court refused to make interim orders include *Esdale & Schenk* [2012] Fam CA111 and *Wall & Mitchell* [2010] FamCA1194. In *Esdale*, Murphy J said (at para 18):

In my view, the Court's jurisdiction and power to make interlocutory orders in the circumstances under consideration is confined to powers ancillary to the jurisdiction and power to make orders determining whether the Court has jurisdiction. This Court does not have jurisdiction or power to make interlocutory orders with respect to 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 where jurisdiction is not yet established.

In *Wall & Mitchell* [2010] Fam CA1194, 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.

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 upfront.

Dinunca & Rhodes [2009] FamCA1181 was an early case. The issue of the jurisdiction of the court was live but no argument was put to the court that the court had no power to make orders on an interim basis pending the determination of its jurisdiction. An injunction was made under s 114 FLA. This case is unlikely to be followed.

Superannuation

Part VIII B 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 VIII B refer to Pt VIII AB. 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.

Third parties

De facto relationships are dealt with in Pt VIII AA, 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.

Recent Full Court decisions

Reported cases raising issues in de facto relationships which are different from disputes between legally married couples have been referred to earlier in this paper. The following 2 cases are Full Court judgments. The first, *Benson & Owens*, deals with a forum issue and the second case raises the question as to whether an asset by asset approach will be more common in de facto cases - an issue which remains unresolved.

Benson and Owens [2011] FamCAFC 236

The duration of the de facto relationship was controversial and in particular when it broke down. The husband contended that it broke down in January 2010. The wife argued that it broke down in 2006. The husband issued Pt VIII AB 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 New South Wales 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, being his mother, lived in New South Wales, was 67 years of age and was in reasonable health. She was the carer of her 47 year old daughter who had "Downs Syndrome and is mentally retarded."
- The wife's primary witness, being her father, lived in Adelaide with the wife and was aged 87. He had had 2 major heart attacks and was frail.

The Full Court found (at para 55) that the:

circumstances of both parties were compelling. It could not reasonably be suggested that the circumstances of one were materially more compelling than of the other. The possibility that the need for either parent to travel might be averted by the use of videolink facilities rendered elevating the difficulties of one parent above those of the other more problematic.

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) *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 the ground of this error.

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 Baker FM 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 the case of *Muir & Royston* [2010] FamCA 374, her Honour determined (at para 30) it “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.

Conclusion

The assumption cannot be made about de facto relationships, that the applicable legislation is the same as for legally married couples. The most stark differences are the jurisdictional hurdles. These are complex and can be a significant financial disincentive to litigation because of the increased risk, time delay and costs.

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 four step process using the precise wording of the sections of Pt VIIIAB.

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