De facto or Mistress - is there any longer any difference?

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Introduction

The criteria for determining the existence of a de facto relationship have been analysed for many years by the State Supreme Courts in the context of Family Provision, testamentary and property settlements. The ultimate question to be answered has always been held to be whether “a couple" was "living together on a genuine domestic basis”.

The amendments to the Family Law Act commencing on 1 March 2009 introduced a new type of a de facto relationship; one which can exist concurrently with another de facto relationship or legal marriage.

His Honour Mushin J. in *Moby v Schulter* [2010] FLC 93-447 conveniently summarised the pathway to determine the existence or otherwise of a de facto relationship under the Family Law Act. He summarised the statutory provisions from paragraph 130:

> *[130] Section 4AA of the Act details the definition of a “de facto relationship” and includes a number of criteria which the Court may consider in determining whether such a relationship exists between two people. There are two preliminary requirements. The first of those is that the parties to the relationship may not be "legally married to each other". The second is that the parties must not be "related by family”. These applications have been conducted on the basis that neither party is disqualified by either of those requirements.*
>
> *[131] Having eliminated both of the preliminary requirements, the definition of two people being in a "de facto relationship" provides that:*
>
> *… having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.*

[132] Sub-section 4AA(2) of the Act ("the subsection") contains a number of matters which may be considered in a determination of whether two people are, or have been, in a de facto relationship. It is in the following terms:

Those circumstances <u>may include any or all</u> of the following: [1]

(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 aspects of the relationship.

[133] The section provides that it is not necessary to make any particular finding with regard to any of the matters listed in the subsection in order to establish that there is, or is not, a de facto relationship between the parties (s-s4AA(3)). I am entitled (s-s4AA(4)):

... to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

[134] It is not necessary for a de facto relationship to be an exclusive relationship. One or both parties may be legally married or in another de facto relationship while being in the de facto relationship which is the subject of the proceedings. Further,the parties to a de facto relationship may be heterosexual or of the same sex.

[1] my emphasis

The "Twin Components" of the Test

Mushin J. then continued by reviewing some of the more pertinent state authorities and their application to the factors in sec 4AA. The "purple passages" of *Moby v Schulter* commence at paragraph 135 as follows:

> *[135] There are a number of appellate and first instance decisions which consider similar legislation in other jurisdictions. I now turn to an examination of the relevant case law.*
>
> *[136] The authorities suggest that it is appropriate to consider the definition as a whole. In* Roy v Sturgeon *(1986) DFC 95-031, Powell J considered a similar definition and held (p 75,364):*
>
> > *With respect, it seems to me that to attempt to dissect the phrase "living together as a husband and wife on a bona fide domestic basis" into discrete "elements", and then to test the facts of a particular case by reference to a set of a priori rules in order to establish whether a particular "element" is, or is not, present, is to ignore the fact that just as human personalities and needs vary markedly, so, too, will the various aspects of their relationship which lead one to hold that a man and woman are living together as husband* and wife on a bona fide domestic basis vary from case to case.
>
> *[137] Likewise, in* Simonis v Perpetual Trustee Co Ltd *(1987) DFC 95-052, Kearney J agreed with the approach of Powell J referred to in the previous paragraph and held (p 75,589):*
>
> > I consider that the expression under consideration constitutes a single composite expression of a comprehensive notion or concept, and therefore has to be approached by considering the expression as a whole and not in several parts.
>
> *[138] The approaches of both Powell J and Kearney J quoted above were adopted by the court of Appeal of the Supreme Court of New South Wales in* Light v Anderson *(1992) DFC 95-120.*
>
> *[139] While I respectfully agree with the approach of their Honours, before the definition may be considered as constituting "a single composite expression of a comprehensive notion or concept", there are two specific elements of that definition which require individual consideration. The first of those is the concept of "a couple". For*

the purposes of the definition, "a couple" is constituted by two people, whether of the same or opposite sexes.[2]

[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. On the basis that one or both members of the couple may also be legally married or in another de facto relationship at the same time as they are in the subject relationship, it must follow that it is feasible that the subject relationship might involve the parties living together for no more than half of the time of that relationship. Further, there is nothing to suggest that it must be even as much as half of the time.[3]

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

Applying the Test in *Moby v Schulter*

The passages quoted above emphasise that any declaration as to the existence of a de facto relationship calls for a *holistic value judgment* of the nature of the parties' association of one with the other. [4] Arriving at that the value judgment of necessity involves the exercise of a judicial officer's broad discretion.

Always bear in mind that, perhaps more than others, each of these types of cases is *sui generis* in nature. [5] Precedents may be of little value unless the facts in your case are essentially replicated in your precedent. There are no lofty legal principles. Judges have to determine the facts and then apply the law and use their common sense.

With only one exception, notwithstanding some variations between jurisdictions, the factors in sec 4AA reflect in substance the tests applied at common law and in various

[2] my emphasis
[3] my emphasis
[4] sec 4AA (4)
[5] "unique to its own facts".

statutes both State and Federal over many years. The exception (and it is a very significant exception) is the insertion of sec 4AA (5)(b) in the Family Law Act, which is makes it possible to make a finding of a de facto relationship existing concurrently with another relationships.

> b. *a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.*

Few cases about concurrent relationships have been reported and to my knowledge only one has been to the Full Court, namely Jonah & White [2011] FamCA 221 a decision of His Honour Murphy J. delivered on 4 April, 2011 and heard by the Full Court on 28 May, 2012.

In that case the threshold issue of whether there had been a de facto relationship between the parties was the only matter for determination. The Applicant, Ms Jonah, was seeking that declaration concerning her 17 year association with Mr White.

The facts of Jonah and White

> Ms Jonah had had a 17 year association with Mr White, a married man. During that period, the respondent gave Ms Jonah an allowance of up to $2,500 a month. He paid a $24,000 deposit on her home. He took her on his business trips and holidays. The relationship spanned two states, Queensland and New South Wales. The relationship between them involved at times a sexual relationship and they spent sizeable amount of time together (seeing each other between fortnightly and monthly). Much of the time she lived in Queensland and visited where he lived (New South Wales). They both kept the relationship secret from Mr White's wife and three children and indeed very few people knew them to be a couple. They did not have children together nor did they set up a home although they spent a lot of time on Mr White's farm.

His Honour found that 'absent from the relationship … was the *"merger of two lives into one"*, or the *"coupledom"* as he called it, and thus that there was no de facto relationship. [6]

[6] [paragraph 67]

The specific findings

The factors His Honour said supported a de facto relationship were: [7]

- *the long-standing nature of the relationship (17 years)*
- *the parties maintained a consistent sexual relationship*
- *the sexual relationship was exclusive of other partners, apart from the respondent maintaining a relationship with his wife and having "a few one night stands"*
- *the respondent financially supported the applicant for a number of years (up to $3000 per month for 11 years)*
- *the respondent contributed financially (a lump sum of $24,000) to the applicant's home*

Factors indicating there was no de facto relationship were: [8]

"…

- *Each of the parties kept and maintained a household distinct from the other;*
- *In the respondent's case, that household involved the maintenance of family relationships, including the support of children;*
- *The evidence did not reveal any relationship, or any intended relationship, between the applicant and the respondent's children who, it ought be observed, were relatively young when the relationship commenced;*
- *The relationship between the applicant and the respondent was clandestine and the time spent between the parties was spent (on either party's case) very much together, as distinct from time spent socialising as a couple;*
- *His Honour accepted the respondent's evidence that he continued to emphasise the limits of the relationship with the applicant and, in particular, Mr White told the applicant that, if circumstances ever required him to "make a choice", he would "choose" his wife and family over the applicant;*
- *Despite the regular monthly payments and the payment of $24,000 earlier referred to, the parties maintained no joint bank account; engaged in no joint investments together; and acquired, or maintained, property in their own individual names;*
- *The parties rarely mixed with each other's friends. In that respect the evidence of the applicant's witnesses – Ms R, Ms H and Ms W – is indicative of very little contact between the respondent and each of them. Ms R said she had never met the*

[7] [paragraph 68]
[8] [paragraph 69]

respondent, but had spoken to him on the phone. Ms H said her dealings with the respondent were "very limited". Ms W said she met the respondent "only once";

- *The respondent ran what seems to have been a successful business, in which for some (early) years, the applicant was employed, but the parties did not mix with the respondent's business associates. After the applicant's employment with that business had ceased she had no involvement with it at all;*
- *There was virtually no involvement by the respondent in the applicant's life in Brisbane (where she lived between about 1996 and 2006), and virtually no involvement by the respondent in the applicant's life in S where she has resided since 2006.*
- *The respondent accepted that he hoped that the relationship with the applicant was permanent but said that "we were in a relationship; we were having an affair";*
- *There was very little time spent by the applicant and the respondent with the applicant's family. But, in any event, he do not consider that the evidence was indicative of the "coupledom" or "merger".*
- *Despite (or, perhaps, because of) the evidence filed by friends of the applicant in support of her case, His Honour did not accept that the applicant and respondent had a "reputation" as a couple; indeed, there was, on the evidence before him, very few public aspects to their relationship. "*

Notion of 'coupledom'

[At paragraph 60] 'In my 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". It is the manifestation of "coupledom", which involves the merger of two lives as just described, that is the core of a de facto relationship as defined and to which each of the statutory factors (and others that might apply to a particular relationship) are directed.' [9]

[At paragraph 66] '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

[9] My emphasis

statutory considerations and the non-exhaustive nature of them and, in turn, a finding that there is a "de facto relationship".'

Maintenance of separate residences not inconsistent with 'coupledom'

[At paragraph 65] '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. So much is, in my view, clear from the statutory recognition that parties to a relationship can be married but also be in a de facto relationship.'

Decision of the trial judge

Ms Jonah's Application was dismissed as the weight of findings were against her. In my view it was due principally to two factors, firstly that the parties did not share a home at any stage, even on a part time basis. This supports the obiter dicta in *Moby v Schulter* at paragraph 140 (above).

Secondly, the relationship was clandestine. For example only one of three witnesses called by the Applicant had ever met the Respondent and even then it was only very briefly.

The Appeal

The Full Court heard the Appeal on 28 May, 2012 and delivered a judgment on 30 October, 2012. The Appellant argued that it was not necessary for the parties to have shared a home, even on a part time basis and that rather all that was required was an *"emotional communion"* between them. It was further argued that a de facto relationship could still be found even if none of criteria in sec 4AA(2) were established because of sec 4AA(3.) The Appeal was dismissed.

In dismissing the Applicant's appeal [10] the Full Court approved the approach taken by Murphy J. and quoted the passages referred to above and some others accompanying them.

The Full Court examined methodically the concept of "living together on a genuine domestic basis" commencing at paragraph 30 and concluding at paragraph 44 of their Honour's reasons.

Whilst the Full Court confirms that the parties do not have to live together continuously, the other requirements set out in Section 4AA(2) of the Act have to be fulfilled at least to a significant extent even if not each and every one of them applies. [11] The commitment to a de facto relationship must be mutual. A de facto relationship cannot be based upon the feelings of commitment of just one party alone.

Federal Magistrates decisions

There have been numerous decisions in the FMC concerning declarations under sec 90RD absent a concurrent relationship. They still offer guidance on the application of sec 4AA. A few cases of note are:

DANDRIDGE & BARRON [2012] FMCAfam 141
RATHBONE & ROBINSON [2012] FMCAfam 358 (a same sex couple)
DAKIN & SANSBURY [2010] FMCAfam 628

Summary - so is there any longer any difference?

My anecdotal information and direct experience (having been involved in several of these type of cases now) is that applicants seeking a sec 90RD declaration face difficult hurdles when relying on sec 4AA (5)(b) of the Family Law Act.

[10] See attached decision dated 30.10.12

[11] Appeal decision of Jonah & White (ibid) paragraph 40.

It is obvious that a de facto partner also in another relationship will not live with each partner full time. This was commented upon by Mushin J. in Moby v Schulter. However, His Honour Murphy J.'s view was that to be in a de facto relationship sec 4AA(1)(c) required parties to live together in a domestic setting for at least part of the time. The concept of "living together" ought to be read with the phrase "genuine domestic basis" so that there must be some domestic character to it, not simply that people are visiting each other, going out socially or travelling on a holiday together. Indeed the ordinary meaning of "living together" is to cohabit whilst "domestic" ordinarily refers to a home.

Whilst the categories in secs 4AA(2) & (3) are not closed, meeting the definition required, inter alia, in sec 4AA(1)(c) is an essential requirement for a declaration of a de facto relationship to be made. The sub section requires the parties to cohabit in a domestic setting at least for part of the time.

Sec 4AA(1) is not expressed to be subject to sec 4AA (5)(b) and there is nothing in the words of the section that would suggest that cases where 4AA(5)(b) applies cases are decided on criteria any different to those where the parties were otherwise in a monogamous relationship.

The ultimate question in Jonah & White was whether the parties could have been found to *living together on a genuine domestic basis* in circumstances where on the findings of the trial judge the bulk of indicia were against it. His Honour put it succinctly by observing that it "is the nature of the union rather than how it manifests itself in quantities of time".

The parities were found by the trial judge to be "two people who each sought to, and did in fact, maintain separate lives" although they did come together on a regular basis the periods of time during which they enjoyed a loving sexual relationship.

In my view, if the arguments of the Appellant in Jonah & White were accepted, it would be the throw open the definition of de facto relationship to include any type of close personal relationship between two people living their lives, whether together or

apart, in practically any circumstances (which is clearly not what parliament intended).

I also think the judiciary are conscious about not opening the floodgates.

My view is supported by the decision of the Full Court in Yoxall & Eide [2024] FedCFamC1A 200 (29 October 2024), the Full Court (Austin, Gill & Baumann JJ) heard a de facto husband's appeal against a declaration by Williams J that the parties had lived in a de facto relationship between March 2017 and December 2020.

The appellant complained that there is no relevant or adequate factual finding regarding the start of the de facto relationship in March 2017 to underpin the declaration. The appellant contended that the absence of such a finding points to the primary judge neither turning her mind to the issue of the commencement in March, nor providing reasons for such a conclusion. …

The primary judge concluded that, whilst not the sharing of a residence in the traditional sense, their use of the J Hotel formed a 'quasi-common residence'. The primary judge then reasoned that the concept of residence should be considered in the light of the parties' 'preferences to live a luxurious lifestyle in which travel, and holidays were at the fore' … [and] that this constituted 'shared life as a couple with their daughter, although in an unusual and unorthodox manner' (at [152]).

In that case under circumstances where the end of the relationship was uncontroversial, once the aggregation of factors had led to the conclusion that there was a de facto relationship, little reasoning was necessary to determine the end date of the relationship.

However, a more explicit reasoning process was necessary to establish a particular date early in the relationship as forming an adequate conglomeration of factors. That was not done, and so the basis on which March 2017 was perceived by the primary judge to be the start of the de facto relationship was not adequately exposed."

The appeal was allowed and the Full Court set aside the order, substituting another order declaring " … [T]hat a de facto relationship existed between the parties, ending in December 2020"

Postscript

Finally, always bear in mind however that although in the real world we use the word "relationship" interchangeably with a "de facto relationship" or a legal marriage, the legal concepts are quite different. Using them interchangeably in sec 90RD proceedings is likely to lead to confusion.

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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and Vega and Riggs [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

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