The Family Court's approach to the 'circumstances' of a de facto relationship

Michelle Fernando[1] and Olivia Rundle[2]

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Abstract

This article examines how the Family Court views the circumstances of relationships when deciding whether two people were in a 'de facto relationship' for the purposes of post-separation financial proceedings. The core of the statutory definition of a de facto relationship is 'a couple living together on a genuine domestic basis', to be identified by examining 'all the circumstances' of the relationship. By looking at all of the cases where the Family Court has determined this issue, we examined the court's approach to relationship 'circumstances', such as common residence and financial interdependence. We found that the court relies heavily on the circumstances listed in the Family Law Act, but that certain circumstances are more indicative of a de facto relationship than others, and there is a lack of clarity about what is required to satisfy some circumstances. We make suggestions of how the law might be improved so parties have greater certainty about how their relationship circumstances may be viewed if they separate.

1 Introduction

Between 2003 and 2006 New South Wales, Queensland, Victoria and Tasmania referred power to the Commonwealth to make laws about financial matters arising from the breakdown of a de facto relationship, defined as 'a marriage-like relationship (other than a legal marriage) between two persons.'[3] South Australia referred power in 2009.[4] The Commonwealth exercised the referred power with the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) ('2008 amending Act'). The main purpose of the states' referral and the 2008 amending Act was to extend the jurisdiction of the *Family Law Act 1975* (Cth) ('FLA') to couple relationships that would otherwise fall outside its scope.[5] The Commonwealth's constitutional power is to make laws about 'marriage' and 'matrimonial causes', which does not include non-married couples.[6] Referral of power by the states would achieve national consistency and provide access to the specialist family law courts for people whose relationships were functionally like a

[1] PhD; Senior Lecturer in Law, University of South Australia. Michelle.Fernando@unisa.edu.au. We acknowledge the research assistance of Anja Pich and Alyse Dickson with gratitude.
[2] PhD; Senior Lecturer in Law, University of Tasmania. Olivia.Rundle@utas.edu.au.
[3] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 3(1); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) s 3(1); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) s 3(1); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) s 3(1).
[4] *Commonwealth Powers (De Facto Relationships) Act 2009* (SA). Western Australia has not referred power because its State Family Court exercises jurisdiction of the FLA and state laws relating to non-married couples.
[5] Explanatory Memorandum, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) sch 1, Item 21.
[6] *The Australian Constitution 1901* s51 (xxi) and (xxii).

marriage.[7] The states' referral of power, and the 2008 amending Act, included de facto relationships between people of different sexes, and people of the same sex.[8]

The 2008 amending Act added a definition of 'de facto relationship' in s 4AA of the FLA, modelled on the state and territory definitions. A new pt VIIIAB was inserted for de facto relationships, which mirrors pt VIII applying to married couples. The result is that, from 1 March 2009, de facto couples have had access to the FLA,[9] and essentially the same laws as married couples for the purposes of property settlement and other financial matters. A key difference, however, is that before accessing these laws, non-married parties must first demonstrate that they were in a 'de facto relationship' within the meaning of the Act.

The core definition of a de facto relationship in the FLA is one in which 'having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.'[10] In most cases, separating parties will either agree that their relationship was 'de facto' and that the property provisions of the FLA will apply, or they will not regard their relationship as one that attracts family law rights and responsibilities, and neither will make an application for adjustment of property. However, where the parties disagree about the nature of their relationship, the Family Law Courts must examine all the circumstances of the relationship and decide whether it meets the legislative definition.[11] Relevant circumstances may include any or all of a number which appear in a statutory list.[12]

This jurisdictional hurdle has significant consequences. A finding that parties were not in a de facto relationship means that neither may proceed with an application, regardless of the merits of any substantive claim for an adjustment of property, maintenance, or other financial matter. Unless somehow recognised under state de facto legislation,[13] the former partners will be treated as strangers under the law.[14] Before making an order for a property adjustment, the court must also be satisfied that the parties were in a relationship for at least two years, or had a child together, or made substantial contributions, or registered their relationship under State or Territory law.[15] However, unless it is first established that the relationship was 'de facto', it does not matter how long the relationship lasted, whether there are children, whether contributions were made or whether the relationship was registered.

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[7] Ibid sch 1, Items 5 and 21; Lisa Young, 'New Frontiers for Family Law' (2013) *International Survey of Family Law* 61, 66; Lisa Young and Jenna Hampton, 'Separation: Must a Spouse or De Facto Partner Communicate their Intention to End the *Consortium Vitae*?' (2019) 32(3) *Australian Journal of Family Law* 249, 258.

[8] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4(1); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) s 4(1); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) s 4(1); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) s 4(1); *Family Law Act 1975* (Cth) s4AA(5)(a).

[9] In participating jurisdictions, which are all Australian states and territories except Western Australia, which has not referred power. The 2008 amending Act took effect in South Australia on 1 July 2010.

[10] FLA s 4AA(1)(c).

[11] Frank Bates, 'Reality Is the Beginning: Australian Family Law in 2009' (2011) *International Survey of Family Law* 51, 66; Juliet Behrens, '"De Facto Relationship"? Some Early Case Law under the Family Law Act' (2010) 24(3) *Australian Journal of Family Law* 350, 351.

[12] FLA s 4AA(2).

[13] Which would be unlikely due to s 90RC of the FLA.

[14] Some equitable relief may be available, for example where contributions made to property warrant such a claim. This relief is also available to people who were not partners.

[15] FLA s 90SB.

This article investigates the Family Court's approach to the 'circumstances' of a relationship when making this determination. We looked at all of the cases decided in the ten years following the 2008 amending Act where the Family Court determined whether a de facto relationship existed in connection with an application for property settlement or other financial matter. We analysed how the court regarded each of the circumstances in the statutory list, and other circumstances, in its decision-making process.

This article is confined in scope. We analysed only Family Court decisions, and did not examine decisions of the Federal Circuit Court or Family Court of Western Australia. We only considered decisions where the argument was about whether a de facto relationship existed at all, not where the dispute was primarily about the length of time for which a relationship was de facto.[16]

Our analysis is valuable because the FLA gives little guidance as to how a relationship's circumstances should be evaluated by the court. That evaluation is crucial because the statute requires it for the court to determine whether two people were 'living as a couple on a genuine domestic basis.' We examined how various relationship circumstances have been viewed by the court, including whether some circumstances appear to be more significant or indicative of a de facto relationship than others. Parties may make assumptions, such as that keeping separate residences or finances will indicate against a de facto relationship, or that a relationship's long duration or one party's financial dependence on the other will strongly indicate a de facto relationship. This article tests those assumptions and provides an evidence base upon which parties and their lawyers can conduct an informed assessment of whether parties' circumstances indicate that a relationship is likely to fall within the jurisdiction of the FLA. Many people will not contemplate the legal consequences of their relationship patterns until their former partner claims an entitlement to a property adjustment, and our analysis will support advice-giving and awareness-raising.

We first explain the tension between the nature of non-married couple relationships and the pursuit of clarity about whether a relationship is 'de facto'. We then explain the significance of the statutory 'circumstances' of a relationship, insofar as they relate to the definition of 'de facto relationship' in s 4AA of the FLA and the court's determinations about which relationships meet the definition. We explain our method of case selection and analysis and then examine how the Family Court has approached and applied each of the listed circumstances, and other circumstances. We make observations about which circumstances the court has considered indicative, and which it has not, and we critically examine how certain circumstances are treated. We conclude that, on the face of the legislation, it is difficult to accurately predict how the circumstances of a particular relationship will be treated. We make qualified recommendations about how to alleviate the problems of uncertainty and potential injustice this creates.

This article does not grapple with the overall question of what a de facto relationship is, what relationships are intended to be covered, and how it should be defined. Our analysis is confined only to how the court treats the 'circumstances' of relationships and not how the court determines the overall question of whether a de facto relationship exists (although, clearly, one informs the other). We provide no examination or critique of the court's

[16] See Part 4 for more details about our method of case selection.

approach in that regard, nor of the definition of 'de facto relationship' as it appears in the FLA. This article is confined to one part of the broad analysis required to comprehensively evaluate the FLA's de facto regime.

2 The challenges of defining 'de facto' relationships

Relationships that have not been formalised through marriage or relationship registration[17] are inherently uncertain in legal status because, unlike marriage, there has been no formal declaration that a legally recognised relationship has been entered. Often, the property rights and entitlements (if any) flowing from non-married relationships are not determined until after the relationship has ended.[18] People do not necessarily pay attention to how the law might view their relationship until a significant event prompts their consideration, and people who have not formalised their relationship may particularly lack awareness in that regard. However, knowledge that an individual is (or is not) in a de facto relationship may inform their decisions, including how they organise their financial and household affairs, whether they take employment opportunities or make future plans, and whether they consider entering an agreement with their intimate partner, such as a binding financial agreement. Without being able to discern the legal status of their relationship, people who assumed that their relationship would be legally recognised as 'de facto' may discover, after separation, that it is not, and people who did not regard their relationship as 'de facto' may nevertheless find themselves subject to the same rights and responsibilities as married couples.[19]

Uncertainty about legal status conflicts with broad principles of the rule of law, which requires that the law is capable of being known by everyone to whom it applies.[20] The fact that many people do not inquire about the law does not affect the principle that they should be able to know with reasonable clarity what law applies to them, should they make such an inquiry. According to this basic principle, a person should be able to ascertain whether their relationship with another person attracts family law rights and responsibilities. However, the diverse and changeable nature of human intimate relationships and family life makes achieving legislative certainty an extremely difficult task for lawmakers.[21] Finlay wrote, prior to the legislative definition of de facto relationships:

> *It is the element of unpredictability and uncertainty that has remained the most serious weakness of the informal marriage. In this respect, it compares unfavourably with legal marriage which has the advantage of certainty of status and legal consequences ascribed by law. Is it possible*

[17] Residents may register one non-married couple relationship in ACT, NSW, Queensland, South Australia, Tasmania, and Victoria (see n94). Opting into these schemes will attract certain recognition for most legal purposes, including some Commonwealth laws. However, s 4AA of the FLA does not treat non-married relationship registration as decisive of relationship status; it is merely one of the listed relationship circumstances.

[18] Henry Finlay, 'Defining the Informal Marriage' (1980) 3 *UNSW Law Journal* 279, 300.

[19] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System: Final Report* (Report No 135, March 2019), [6.35] and [7.21] citing Submission 68 by the Family Court of Australia.

[20] Tom Bingham, *The Rule of Law* (Allen Lane, 2010), 38.

[21] Finlay (n18) 290.

> *then or desirable for legislation to spell out the criteria which shall be deemed to give rise to a relationship...?*[22]

Finlay argued that leaving the decision making to courts in disputed cases would be preferable to fixed and inflexible legislative rules that could do injustice. However, he also noted that relying upon judicial consideration maintains uncertainty and is a cumbersome means of delivering justice.[23] In 2006, Millbank explored how the meaning of 'de facto' had evolved through judicial consideration, demonstrating the changeable understanding of what qualifies a relationship to be a 'couple' relationship for legal purposes.[24]

Australian legislatures have embraced the challenge of defining those couple relationships that have a status equivalent to marriage. Australia has adopted a presumptive approach, attaching recognition to relationships that fall within statutory definitions.[25] No intention or mutual commitment to the legal consequences of the relationship is necessary for a de facto relationship to be found.[26] Instead, a decision maker will determine whether or not the relationship meets the statutory definition by considering the facts presented about the nature of the relationship.

The legislative framework of the FLA reflects a normative assumption that a 'de facto relationship' can be identified and distinguished from other kinds of relationships by examining its circumstances. The identification of de facto relationship status in the FLA determines a jurisdictional fact,[27] quite distinct from the discretionary determination of whether and what adjustment of property interests between a couple is 'just and equitable.'[28] The identification and weighing of relationship circumstances is not an exercise of discretion.[29] Rather, the circumstances guide the court towards evidence that will help it to recognise whether the relationship was, factually, 'de facto'. If the relationship was 'de facto', then the court's jurisdiction is attracted and the property or financial claim can be considered.[30] Relationship circumstances are the key means by which the jurisdictional fact is determined.

3 The 'circumstances' of a de facto relationship

The definition of 'de facto relationship' is contained in section 4AA(1) of the FLA:

> **Meaning of de facto relationship**
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> (1) A person is in a de facto relationship with another person if:

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[22] Ibid 289.
[23] Ibid 298.
[24] Jenni Millbank, 'The changing meaning of "de facto" relationships' (2006) 1 *Current Family Law* 1.
[25] See Kathy Griffiths, 'From "Form" to Function and Back Again: A New Conceptual Basis for Developing Frameworks for the Legal Recognition of Adult Relationships' (2019) 31(3) *Child and Family Law Quarterly* 227.
[26] Normann Witzleb, 'Marriage as the Last Frontier - Same-Sex Relationship Recognition in Australia' (2011) 25 *International Journal of Law, Policy and the Family* 135, 139; Karen Upton-Davis and Robyn Carroll, 'Living Apart Together: Is it an Effective Form of Asset Protection on Relationship Breakdown?' (2017) *Journal of Family Studies* 1, 3–4.
[27] *Jonah v White* (2011) 45 Fam LR 460 [39] citing *Corporation of the City of Enfield v Development Association Commission* (2000) 199 CLR 135, 148.
[28] FLA s 90SM(3).
[29] *Jonah v White* (2011) (n27) [39] per Murphy J. Affirmed by the Full Court on appeal *Jonah v White* (2012) 48 FamLR 562.
[30] *Jonah v White* (2011) (n27) [39]; affirmed in *Taisha v Peng* (2012) 48 Fam LR 150 [6].

(a) the persons are not legally married to each other; and
(b) the persons are not related by family (see subsection (6)); 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 (emphasis added).

Paragraph (c) has effect subject to subsection (5).

Subsection (1)(c) is the core of the definition. It defines positively the nature of a de facto relationship, as 'a relationship as a couple living together on a genuine domestic basis.' The Full Court of the Family Court recently described this phrase as the 'touchstone or foundational fact establishing jurisdiction.'[31]

Despite its importance, the core definition is widely observed to be inherently ambiguous and uncertain.[32] Dickey described it as 'amorphous to the point of vacuity.'[33] None of the key terms such as 'couple', 'domestic' or 'genuine' are defined or explained. Judges have, from time to time, attempted to give meaning to those terms[34] or have been perceived to expound the definition,[35] however the Full Court has been clear that a court is to confine itself to the legislative wording and that no 'impermissible gloss' is to be supplied.[36] The parties' own perceptions about the nature of their relationship are relevant but are not determinative.[37] The core definition is subject to sub-s (5), which makes clear that a de facto relationship can exist between a same-sex or an opposite-sex couple, and that a de facto relationship can exist even if one person is legally married to, or in a de facto relationship with, someone else.

Section 4AA(1)(c) makes clear that the core definition alone is insufficient to distinguish which relationships are and which are not de facto. It requires the court to have 'regard to all the circumstances' of a relationship. The court's determination about whether a de facto relationship exists will therefore be based on its findings about a relationship's 'circumstances'.[38] Section 4AA(2) provides a list of circumstances to which the court may have regard, stating 'those circumstances may include any or all of the following:…'. This list is supplemented by s 4AA(4) which states that a court 'is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case'. A court may therefore have regard to *any* circumstances of a relationship, and is not confined to the list in s 4AA(2).

The listed 'circumstances' in s 4AA(2) are:

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[31] *Herford and Berke (No 2)* [2019] FamCAFC 182 [10], [16] reiterating the earlier Full Court in *Jonah v White* (2012) (n29).
[32] Bates (n11) 62; Witzleb (n26) 139; Young (n7) 63.
[33] Anthony Dickey, 'Family Law: Further Consideration of a De Facto Relationship' (2012) 86 *Australian Law Journal* 163, 163.
[34] For example, Cronin J provided definitions of 'domestic' and 'couple' in *Taisha v Peng* (n30).
[35] Murphy J in *Jonah v White* (2011) (n27) used the phrases 'merger of two lives' and 'manifestation of coupledom'. Austin J in *Na v Tiu* [2017] FamCA 282 [36] said the relationship lacked the 'bilateral dedication of the deeply emotional and financial kind intrinsic to de facto relationships'.
[36] *Sinclair v Whittaker* [2013] FamCAFC 129 [94], *Na v Tiu (No 2)* [2017] FamCAFC 269 [41]; *Crick v Bennett* [2018] FamCAFC 68 [65].
[37] *Sinclair v Whittaker* (n36) [65]; *Sam v Lamothe* [2016] FamCA 576 [48].
[38] See *Jonah v White* (2011) (n27) [39] per Murphy J.

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.

This list is similar to other lists found in state and territory statutory definitions of 'de facto', 'significant' or other non-married couple relationships.[39] No particular finding in relation to any 'circumstance' is to be regarded as necessary in the court's determination.[40] The court has confirmed that the question of whether a de facto relationship exists can be decided with reference to the s 4AA(2) list.[41] However, as noted above, the court is not confined to the items in this list and may consider any matter, and attach weight to any matter, as appears appropriate in each case.[42]

It is clear from the cases that the statutory 'circumstances' assume great importance in the overall decision. However, the court must take care to form an overarching view of whether the parties were in a 'de facto relationship' as defined, and not to simply work its way through a checklist.[43] In particular, in determining whether the core definition is met, the court must have regard to all the circumstances of the relationship, and 'each circumstance or element that makes up a relationship should be considered in the context of all of the aspects of the particular relationship'.[44] In other words, the court's findings about the various statutory circumstances do not, on their own, determine the overall question.

Notwithstanding the court's understanding of its overall task, its general approach is to consider each of the s 4AA(2) 'circumstances', either explicitly in the order in which they appear in the sub-section, or otherwise. The court often discusses the evidence relevant to that circumstance, drawing a conclusion on whether that evidence indicates a de facto relationship, indicates against a de facto relationship, or is neutral. When all relevant circumstances have been considered, the court then draws on its findings about the

[39] For example, see *Property (Relationships) Act 1984* (NSW) s 4(2).
[40] FLA s 4AA(3).
[41] *Herford and Berke (No 2)* (n31) [10] citing *Sinclair v Whittaker* (n36) [51]–[54].
[42] FLA s 4AA(4); *Jonah v White* (2012) (n29) [33].
[43] *Na v Tiu* (*No 2)* (n36) [14]. See also *Sinclair v Whittaker* (n36) [55] quoting from *Lynam v Director-General of Social Security* (1983) 52 ALR 128, 131.
[44] Full Court in *Sha v Cham* [2017] FamCAFC 161 [28] quoting from *Lynam v Director-General of Social Security* (n43) 131.

circumstances of the relationship to determine whether the parties met the core definition in s 4AA(1)(c) of a 'couple living together on a genuine domestic basis' and were therefore in a de facto relationship. This was explained by Baumann J in *Walt v Quinn*, who said, 'Although it is not necessary [for] every element of the definition under s 4AA to be present in a genuine domestic relationship, the combination of findings using the definition prescribed by the Act, establishes where jurisdiction exists.'[45]

4 Method of case selection

We identified all decisions of the Family Court of Australia about the existence of a de facto relationship made in the ten years between commencement of the 2008 amending Act on 1 March 2009 and 1 March 2019. We did not examine cases where the court considered whether parties were in a de facto relationship for the purposes of parentage or other child-related matter.[46] We acknowledge that the court's approach to these issues may be different.[47] The cases we analysed concerned a determination of whether a de facto relationship existed as a threshold question for an application under pt VIIIAB of the FLA.

We confined our analysis to decisions of the Family Court of Australia and we excluded decisions of the Federal Circuit Court and Family Court of Western Australia[48] to maintain a manageable sample size and confine the analysis to one court. Where any of the judgments were appealed, we also examined the appeal judgment. We acknowledge that there could be some benefit to a separate analysis of cases from the other family law courts.

We excluded cases where it was agreed that a de facto relationship existed and the dispute was mainly about when the relationship started and/or ceased, or whether the de facto relationship lasted for the required jurisdictional duration of two years. We also excluded cases where one party's version of the facts clearly indicated toward the existence of a de facto relationship, and the other party's version clearly indicated against. These cases involved disputed facts, not disputes about whether certain facts were indicative of a de facto relationship. We confined our analysis to cases where the evidence, as accepted by the court, led to a real question of whether a de facto relationship existed and the court applied and assessed the relevant circumstances in s 4AA(2), and other relevant circumstances.

Potential cases were identified through the AustLII Family Court of Australia database[49] using the search term '4AA'. We briefly perused all those cases to identify those which met the criteria for inclusion. Our last search was conducted on 4 September 2019 to ensure that all relevant cases decided between 1 March 2009 and 1 March 2019 were captured.

We identified 42 cases which met the criteria for inclusion. In 25, the court found that a de facto relationship existed. In 17, the court found that the parties' relationship did not meet

[45] *Walt v Quinn* [2018] FamCA 855 [13].
[46] Child-related matters are dealt with in pt VII of the FLA. Provisions that rely upon application of the definition of 'de facto' include ss 60EA, 60H and 60HA.
[47] See Fiona Kelly, Hannah Robert and Jennifer Power, 'Is there Still No Room for Two Mothers? Revisiting Lesbian Mother Litigation in Post-Reform Australian Family Law' (2017) 31(1) *Australian Journal of Family Law* 1.
[48] All three courts exercise jurisdiction under the FLA. In Western Australia the equivalent is the *Family Court Act 1997* (WA).
[49] <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/FamCA/>

the definition of 'de facto' in s 4AA. Six decisions were appealed. No appeal was successful because no appealable error was demonstrated.[50] Table 1 lists the 42 cases.

Table 1: Family Court cases determining whether two people were in a de facto relationship decided between 1 March 2009 and 1 March 2019

#	Date of judgment	Case name	Medium neutral citation	De facto?	Appeal judgment
1	25/08/10	*Moby v Schulter*	[2010] FamCA 748	y	
2	15/12/10	*Barry v Dalrymple*	[2010] FamCA 1271	n	
3	4/04/11	*Jonah v White*	[2011] FamCA 221	n	[2012] FamCAFC 200
4	9/06/11	*Vaughan v Bele*	[2011] FamCA 436	y	
5	9/06/11	*Smyth v Pappas*	[2011] FamCA 434	y	
6	3/08/12	*Malcher v Seares*	[2012] FamCA 643	y	
7	12/12/12	*Whittaker v Sinclair*	[2012] FamCA 1050	y	[2013] FamCAFC 129
8	15/01/13	*Kazama v Britton*	[2013] FamCA 4	y	
9	31/01/13	*Volen v Backstrom*	[2013] FamCA 40	y	
10	27/03/13	*Jacob v Lawrence*	[2013] FamCA 188	n	
11	5/04/13	*Asprey v Delamarre*	[2013] FamCA 214	y	[2014] FamCAFC 218
12	23/04/13	*Zau v Uong*	[2013] FamCA 347	n	
13	21/06/13	*Ward v Trench*	[2013] FamCA 478	y	
14	11/10/13	*Crowley v Pappas*	[2013] FamCA 783	y	
15	18/10/13	*Cadman v Hallett*	[2013] FamCA 819	y	[2014] FamCAFC 142
16	16/12/13	*McMaster v Wyhler*	[2013] FamCA 989	n	
17	23/06/14	*Spencer v Speight*	[2014] FamCA 436	y	
18	25/07/14	*Condie v Quirke*	[2014] FamCA 567	n	
19	24/09/14	*Locke v Norton*	[2014] FamCA 811	n	
20	15/05/14	*Rooks v Padley*	[2014] FamCA 444	y	
21	15/05/15	*Cham v Sha*	[2015] FamCA 355	y	[2017] FamCAFC 161
22	18/02/15	*Yarde v Haine*	[2015] FamCA 168	n	
23	17/07/15	*Joss v Chadwell*	[2015] FamCA 550	n	

[50] In *Sha v Cham* (n44) an order was amended to clarify the date on which it was declared the parties were in a de facto relationship but this was not material to the trial judge's findings.

24	25/09/15	*Hankinson v De Vries*	[2015] FamCA 833	y	
25	30/06/16	*Luk v Choy*	[2016] FamCA 534	n	
26	15/07/16	*Sam v Lamothe*	[2016] FamCA 576	y	
27	2/12/16	*Abroon v Taliz*	[2016] FamCA 1031	y	
28	7/12/16	*Martens v Bocca*	[2016] FamCA 1044	y	
29	1/05/17	*Na v Tiu*	[2017] FamCA 282	n	[2017] FamCAFC 269
30	9/06/17	*Bolt v Waldo*	[2017] FamCA 402	y	
31	20/09/17	*Yeatman v McKeown*	[2017] FamCA 736	n	
32	22/09/17	*Valdes v Styles*	[2017] FamCA 752	n	
33	27/10/17	*Rushdie v Moshin*	[2017] FamCA 859	y	
34	15/03/18	*Coulbeck v Pins*	[2018] FamCA 156	y	
35	28/05/18	*Capleman v Capleman*	[2018] FamCA 457	y	
36	1/08/18	*Milliford v Milliford*	[2018] FamCA 581	n	
37	13/07/18	*Leonidas v Wenham*	[2018] FamCA 514	n	
38	14/09/18	*Grohl v Acland*	[2018] FamCA 732	y	
39	1/10/18	*Ying v Lang*	[2018] FamCA 784	n	
40	26/10/18	*Walt v Quinn*	[2018] FamCA 855	n	
41	5/11/18	*Bannister v Pergolesi*	[2018] FamCA 888	y	
42	6/11/18	*Lao v Wei*	[2018] FamCA 893	y	

We prepared a summary of each case which briefly explained the facts, the parties' arguments and the outcome.[51] It also summarised the trial judge's discussion, reasoning and findings (if any) in relation to all of the circumstances in s 4AA(2). We then prepared an electronic spreadsheet which included the identifying details of each case and the court's findings in relation to each circumstance. Two of the listed circumstances were divided: section 4AA(2)(d) was separated into 'financial dependence' and 'financial support', and s 4AA(2)(e) was separated into 'bought property' and 'used property'. We were then able to easily manipulate the spreadsheet to display what had been said in every case in relation to each circumstance.

[51] The decision of *Whittaker v Sinclair* [2012] FamCA 1050 is not available on the AustLII website. We relied on information from the Full Court judgment.

5 The court's consideration of the s 4AA(2) circumstances and other circumstances

We examined the court's treatment of each of the s 4AA(2) circumstances in their order of appearance in the legislation and observed how each was applied in the cases and what general comments were made. We also noted additional circumstances that the court regarded when assessing a relationship. We aimed to determine whether, in practice, certain circumstances were regarded by the court as strongly indicative of a de facto relationship. We also looked at whether the absence of any circumstance appeared to indicate that a de facto relationship could not be found, and whether there were some circumstances that did not appear particularly relevant to the court's considerations. We looked at what kinds of evidence satisfied the court of the existence of particular circumstances. We also examined whether there were differences in the way individual judges have interpreted a particular circumstance or regarded certain evidence in relation to a circumstance.

In approaching our analysis in this manner, we do not suggest that any particular circumstance or combination of circumstance in s 4AA(2) is determinative of a de facto relationship, nor that the absence of any circumstance will determine that a de facto relationship does not exist. As outlined above, the court is well-aware that its primary task is to determine whether the parties meet the core definition in s 4AA(1)(c). While it is apparent that the court regards examination of the listed circumstances as integral to this task, there is no indication that the court conflates the circumstances with the core definition.

5.1 Duration of the relationship s 4AA(2)(a)

According to our analysis, the length of the parties' relationship did not appear to be indicative of whether a de facto relationship existed. For example, long relationships did not correlate with the existence of a de facto relationship and short relationships did not correlate with a de facto relationship not being found. In the 25 cases where a de facto relationship was found, the length of the relationships ranged from 16 months to 23 years. In the 17 cases where a de facto relationship was not found, the duration ranged from two years to 20 years.

Judges referred to the duration of the relationship and, in the case of long relationships, referred to this circumstance as being favourable to the party seeking to prove the de facto relationship. However, there was no case where the judge considered a relationship's duration in a deliberate manner that indicated it influenced their view as to the outcome. This can be contrasted, for example, with the 'reputation and public aspects' (s 4AA(2)(i)), which was discussed in detail in many cases. In some cases, the two circumstances were linked because the absence of 'reputation and public aspects' in the context of a long relationship was considered significant.[52] Nevertheless, the fact that there was a long relationship did not, on its own, appear to be indicative of a de facto relationship.[53]

[52] *Ying v Lang*, case 39; *Walt v Quinn*, case 40. References to case numbers refer to Table 1 above.
[53] Duration is, however, relevant to determining the court's jurisdiction to make a property order: FLA s 90SB.

5.2 Nature and extent of common residence s 4AA(2)(b)

Despite the core definition of de facto relationship being a 'couple *living together* on a genuine domestic basis', cases have made clear that there is no requirement that the parties physically live together all of the time, or even for a majority of the time.[54] The maintenance of separate residences is not necessarily inconsistent with a de facto relationship.[55]

Some judicial comments suggested that a de facto relationship can only exist where the parties have lived together at some time.[56] Nevertheless, our case analysis confirmed that two people may be in a de facto relationship, even when they never shared a single residence.[57] In six of the 25 cases where a de facto relationship was found, the court also found that the parties did not share a common residence.

While the absence of a full-time common residence does not indicate that a de facto relationship does not exist, the presence of a common residence is a strong indicator that the relationship is de facto. In only three of the 17 cases where a de facto relationship was not found were the parties living in the same house. In one, the applicant was living in as a personal assistant and carer and the parties had separate bedrooms.[58] In another, the parties lived under the same roof for only 77 days of a two year relationship.[59] However, in the third, the parties lived together for short periods which amounted to around six years of their 16 year relationship.[60] This case appears anomalous and the remainder of the cases supported our finding that the sharing of a common residence is indicative of the existence of a de facto relationship. However, the absence of a common residence does not necessarily indicate that a de facto relationship does not exist.

5.3 Whether a sexual relationship exists s 4AA(2)(c)

Unlike the preceding circumstance, which invites an evaluation of the 'nature and extent' of common residence, this circumstance merely refers to the existence or non-existence of a sexual relationship. We observed that a sexual relationship is an expected characteristic of a de facto relationship and the absence of a sexual relationship will indicate that a de facto relationship does not exist.

There was a sexual relationship, at least for a period of time, in all of the 25 cases where a de facto relationship was found. We observed that the court is not concerned with the frequency of sexual relations, and it recognised situations where sex had been necessarily limited, such as where it had waned due to one party's ill-health,[61] or where a party had taken a vow of celibacy.[62]

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[54] *Whittaker v Sinclair*, case 7; *Cham v Sha*, case 21. A person can be in a marriage or another de facto relationship simultaneously (s 4AA(5)(b)).
[55] *Jonah v White* (2011) case 3 [65] per Murphy J; approved by Watts J in *Kazama v Britton*, case 8 [69].
[56] *Moby v Schulter*, case 1 [140] per Mushin J; *Zau v Uong*, case 12 [36] per Cronin J.
[57] For example, *Asprey v Delamarre*, case 11; *Kazama v Britton*, case 8; *Whittaker v Sinclair*, case 7.
[58] *Barry v Dalrymple*, case 2.
[59] *Luk v Choy*, case 25.
[60] *Joss v Chadwell*, case 23.
[61] *Crowley v Pappas*, case 14; *Spencer v Speight*, case 17.
[62] *Cadman v Hallett*, case 15.

In four of the 17 cases in which a de facto relationship was not found, the court found there was also no sexual relationship. In two, there was no evidence of sexual activity, the court characterising the relationship as one of 'friendship' or a close business relationship rather than a couple relationship.[63] In another, the parties had previously been married and divorced, with one party alleging that the relationship had continued after the divorce (which was not substantiated on the facts).[64] In the final case where the court concluded that there was no sexual relationship, the parties had sex on only four occasions, of which three were a paid transaction.[65]

Consistent with the legislation,[66] the court was not concerned if the parties' sexual relationship was not exclusive. In many of the cases, one or both of the parties had sex with other people during the relationship,[67] including several where one party was married to someone else during the relationship.[68] The fact that a sexual relationship is indicative of a de facto relationship is not surprising because sex is an expected characteristic of a romantic or 'couple' relationship and distinguishes those attachments from friendship, carer and other relationships.

5.4 Degree of financial dependence or interdependence, and any arrangements for financial support s 4AA(2)(d)

This circumstance looks at the extent to which the parties relied on each other's finances during their relationship. The distinction between 'financial dependence' and 'financial support' is unclear, as both suggest that one partner has given money to or paid expenses for the other. In any event, the fact that one partner provided financial assistance to the other did not appear particularly indicative. There were several cases where one partner was partly or even entirely financially dependent on the other and this was not treated as a particularly significant circumstance.[69] In *Locke v Norton*, for example, the fact that the wealthy respondent provided, at times, significant financial support to the applicant was considered 'neutral' in the 'overall consideration of the circumstances'.[70]

In each of these cases the judge noted that while financial support had been provided, there had been no combining of resources, or 'interdependence', suggesting that this would be more indicative of a de facto relationship.[71] This was supported by our findings. Again, it is not entirely clear what 'interdependence' means, however the cases often referred to 'joint finances' or 'intermingling of finances,' and included things such as the sharing of bills and household expenses, or joint bank accounts. It is noted that joint bank accounts could also be viewed as joint property, which is relevant to the next circumstance. Where parties

[63] *Ying v Lang*, case 39; *McMaster v Wyhler*, case 16.
[64] *Milliford v Milliford*, case 36.
[65] *Barry v Dalrymple*, case 2.
[66] FLA s 4AA(5)(b).
[67] *Whittaker v Sinclair*, case 7; *Joss v Chadwell*, case 23; *Hankinson v DeVries*, case 24; *Crowley v Pappas*, case 14.
[68] *Cha v Sham*, case 21; *Na v Tiu*, case 29; *Jonah v White*, case 3.
[69] For example *Locke v Norton*, case 19; *Na v Tiu*, case 29. Although note that in *Jonah v White* (2011), case 3 [68], Murphy J said that the respondent's financial support of the applicant was a factor 'pointing toward' the existence of a de facto relationship.
[70] *Lock v Norton,* case 19 [136].
[71] *Jonah v White*, case 3 [69], *Locke v Norton*, case 19 [133], *Na v Tiu*, case 29 [35].

shared expenses or pooled funds into a joint account, this indicated a de facto relationship.[72]

While financial mingling was significant, the fact that the parties maintained separate finances and financial independence did not necessarily indicate that a de facto relationship did not exist.[73] This is because there is no expectation, even in married relationships, that a couple will mingle their finances. In *Asprey v Delamarre*, Cleary J said, in relation to the parties having separate finances and no joint bank account:

> *[s]uch financial independence is not uncommon in modern relationships including marriages. I do not consider this aspect inconsistent with life as a couple on a genuine domestic relationship.*[74]

We conclude that the mingling of finances will indicate the existence of a de facto relationship. However, the fact that one party has been partially or even fully financially supported by the other is not necessarily indicative. Further, the fact that the parties have maintained financial independence will not necessarily indicate that they were not in a de facto relationship.

5.5 Ownership, use and acquisition of property s 4AA(2)(e)

This examines evidence about how the parties treated their joint and individual property. In the cases, 'use' of property was generally satisfied by the parties living in the same house or, where they did not live together, using the other's home. What constitutes 'use' was not fully explained in the judgments, however in *Asprey v Delamarre*, Cleary J found this aspect satisfied because the parties 'made all residences that they owned or rented over the years available to the other and to their children as needed'.[75] In all but one of the cases where a de facto relationship was found, the court found that the parties made 'use' of property. In most cases where a de facto relationship was not found, it was also found that the parties did not 'use' each other's homes. In two, it was significant that one partner did not have a key to the other's house.[76] 'Use' of property was also satisfied by the ownership of joint bank accounts or having access to the other party's bank accounts or credit cards. We conclude that 'use of property' is indicative of a de facto relationship, and the term is interpreted widely to include use of a house.

While many of the parties in the cases had purchased property together, joint acquisition or ownership of property did not seem to be very indicative in the court's determination of whether a relationship was 'de facto'. This was particularly so where it could be said that the property was bought for investment purposes. During the course of the relationship in *Joss v Chadwell*[77] the parties purchased a number of properties separately or with others and two properties together. In finding that there was no de facto relationship, Loughnan J

[72] See *Malcher v Sears*, case 6; *Volen v Backstrom*, case 9; *Crowley v Pappas*, case 14.
[73] See, for example, *Whittaker v Sinclair*, case 7; *Martens v Bocca*, case 28. In both these cases the parties also maintained separate residences.
[74] *Asprey v Delamarre* (2013), case 11 [75].
[75] Ibid [48].
[76] *McMaster v Wyhler*, case 16; *Locke v Norton*, case 19.
[77] Case 23.

found that at least one of these purchases suggested a business arrangement rather than a personal one.[78]

One-off joint purchases appeared to be far less indicative than an intermingling or joining of finances such as joint bank accounts. In *Luk v Choy*[79] the fact that the parties had purchased a property together as joint tenants warranted very little discussion and did not seem to greatly impact the court's decision that the parties were not in a de facto relationship. Similarly, in *Condie v Quirke*, Dawe J noted that it was 'unusual' that a property had been purchased as joint tenants[80] without appearing to attach any significant weight to that fact. In that case, more emphasis appeared to be placed on the fact that the parties' finances were otherwise kept separate and their relationship was perceived by others to be one of 'boyfriend and girlfriend' rather than a committed de facto partnership.[81]

5.6 Degree of mutual commitment to a shared life s 4AA(2)(f)

The 'degree of mutual commitment to a shared life' invites evidence that the parties were each committed to the relationship and to sharing a life together. It distinguishes circumstances where only one party is committed, and relationships that fall short of the 'degree' of mutual commitment that warrants legal recognition. Evidence of mutual commitment to a shared life was constituted by a diverse range of activities including socialising or engaging in hobbies together, holidaying, co-parenting, sharing domestic duties, talking about business or investment decisions, discussing future plans such as marriage or buying property together, affectionate or emotional emails or text messages, symbols of commitment such as getting engaged or wearing rings, and public declarations such as obtaining a family medical insurance policy,[82] signing a BFA,[83] or listing the other as step-parent in school enrolment,[84] trustee in a superannuation fund[85] or beneficiary in a will.[86] It was clear from the court's treatment of this circumstance that a positive finding is highly indicative of a de facto relationship, and a negative finding is highly indicative that a de facto relationship does not exist.

In all cases but one where a de facto relationship was found, the court also found that the parties had a mutual commitment to a shared life. The exception was *Sam v Lamothe*, where the facts were equivocal as to the degree of the parties' commitment and it may have been that their only commitment was to sharing parenting and support for their child.[87] It is not clear from the judgment whether the court considered that this form of commitment satisfied a 'mutual commitment to a shared life'. In all but two cases where a de facto relationship was not found, the court concluded that the parties did not have a mutual commitment to a shared life. The exceptions were *Jonah v White*, where Murphy J

[78] *Joss v Chadwell*, case 23 [213].
[79] Case 25.
[80] *Condie v Quirke*, case 18 [66].
[81] Ibid [72]–[77].
[82] *Abroon v Taliz*, case 27.
[83] *Cham v Sha*, case 21.
[84] *Hankinson v DeVries*, case 24.
[85] *Martens v Bocca*, case 28.
[86] *Rooks v Padley*, case 20; *Malcher v Seares*, case 6.
[87] *Sam v Lamothe*, case 26 [92]–[97].

found a 'significant degree of commitment',[88] and *Luk v Choy*[89] where the parties got engaged and discussed marriage and buying property, but many of these events occurred in the very early stages of the relationship, which began online, and was before the date on which the applicant alleged that the de facto relationship began.

The cases confirmed that the fact that one of the parties remains married or in a relationship with someone else will not affect their ability to commit to another person, even if they wish to remain married.[90] However, it is not enough for only one partner to be committed.[91] Unless there is a *mutual* commitment to a shared life, this circumstance is not made out. An uneasy distinction is made in some of the cases between a de facto relationship and a mere 'boyfriend/girlfriend' relationship.[92] It is not clear what the difference is, but presumably it is a distinction between a less committed dating relationship and a 'de facto' relationship that attracts the rights and responsibilities of a marriage. It is not enough that both parties are committed to being in a relationship (of any kind) with the other person. They must be committed to a *shared life* which entails more than a mere romantic attachment.[93]

5.7 Whether the relationship is or was registered under a prescribed State or Territory law s 4AA(2)(g)

Most states and one territory operate relationship registration schemes which enable parties in non-married relationships to formalise their relationship status and thereby secure its legal recognition, at least for the purposes of state and territory laws.[94] Registration in a state or territory also establishes that a person is a 'de facto partner' for most Commonwealth laws.[95] Each state and territory scheme is prescribed under the *Family Law Regulations 1984* (Cth) for the purpose of s 4AA(2)(g).[96] However, registration is not determinative of de facto relationship status for the purposes of pt VIIIAB.[97] It is only one of the 'circumstances' to be taken into account in s 4AA(2).

We identified no case in which the relationship had been registered under a prescribed state or territory scheme. In our view, parties who choose to formalise their relationship

[88] *Jonah v White* (2011), case 3 [27].
[89] Case 25.
[90] *Na v Tiu*, case 29; *Cham v Sha*, case 21; *Jonah v White*, case 3.
[91] *Jacob v Lawrence*, case 10; *Yard v Haine*, case 22; *Na v Tiu*, case 29; *Yeatman v McKeown*, case 31; *Leonidas v Wenham*, case 37.
[92] *Na v Tiu*, case 29; *Walt v Quinn*, case 40; *Leonidas v Wenham*, case 37; *Condie v Quirke*, case 18.
[93] *Na v Tiu*, case 29; *Locke v Norton*, case 19; *Walt v Quinn*, case 40.
[94] *Civil Unions Act 2012* (ACT) 'civil unions'; *Domestic Relationships Act 1994* (ACT) 'civil partnerships'; *Relationships Register Act 2010* (NSW) 'registered relationship'; *Civil Partnerships Act 2011* (Qld) 'registered relationship'; *Relationships Register Act 2016* (SA) 'registered relationship'; *Relationships Act 2003* (Tas) 'deed of significant relationship'; *Relationships Act 2008* (Vic) 'registered domestic relationship'. There is no relationship registration scheme in the Northern Territory or in Western Australia. See Olivia Rundle, 'An examination of relationship registration schemes in Australia' (2011) 25(2) *Australian Journal of Family Law* 121.
[95] *Acts Interpretation Act 1901* (Cth) ss 2D and 2E.
[96] *Family Law Regulations 1984* (Cth) reg 12BC.
[97] See, by contrast, s 60EA(a) which provides that for the purposes of pt VII, relationship registration in a prescribed scheme establishes de facto partnership. The broader Commonwealth approach of the *Acts Interpretation Act* (n95) s 2E is adopted.

through registration should have certainty that their relationship will be recognised for the purposes of the FLA. We make that recommendation in pt 7 below.

5.8 Care and support of children s 4AA(2)(h)

This circumstance is not confined to the care and support of children of the relationship, but includes the care and support that one party has provided to the children of the other party. It is not relevant where neither party has children, or where there are adult children who do not require care or support. However, a parties' relationship (or lack thereof) with their partner's adult children may be considered relevant under 'reputation and public aspects', discussed below.

Care and support of relevant children is generally indicative of a de facto relationship, and an absence of care and support is indicative that a de facto relationship does not exist. In all the cases where a de facto relationship was found and there were relevant children,[98] the parties either cared for their children together, or one party provided care and/or support for the other's child. Where there was no relationship between a party and the children of the other party, this indicated that a de facto relationship did not exist. In *Jonah v White*,[99] for example, it was significant to Murphy J that, during the 17 year relationship, there was no relationship between Jonah and the children of White, who were unaware of Jonah's existence until after the relationship ended.[100] Similarly, in *Jacob v Lawrence*, McMillan J considered it relevant that Jacob described her reaction to Lawrence referring to her as a grandmother of his grandchild as a 'shock to the system'.[101] In *Na v Tiu*, Tiu lied to her children about the nature of her relationship with Na, presenting him as her 'colleague'.[102]

However, amongst cases where a de facto relationship was not found, the court at times found that the role a party played in the life of relevant children did not indicate a de facto relationship. In *Zau v Uong*[103] and *Milliford v Milliford*[104] the parties had children together for whom both parties provided care, but the court indicated that this was in the nature of a separated parent relationship. In *McMaster v Wyhler*,[105] McMaster spent a lot of time with Wyhler's son but Tree J found that this was consistent with a relationship of friendship. In *Leonidas v Wenham*, the respondent spent significant time with the applicant's children, taking them to school and to sporting events. Nevertheless, the court found that he had not taken on a role as 'step-parent'.[106]

It appears that, where there are relevant children, care and support of those children is very important to a finding of a de facto relationship. However, even where one party provides significant care and support to relevant children, this will not necessarily indicate a de facto relationship.

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[98] In this context, 'relevant children' are children of the parties or non-adult children of one of the parties.
[99] Case 3.
[100] *Jonah v White* (2011), case 3 [29], [69].
[101] *Jacob v Lawrence*, case 10 [39], although this was discussed under of 'mutual commitment' and not 'care and support of children'.
[102] *Na v Tiu*, case 29 [24], [35].
[103] Case 12.
[104] Case 36.
[105] Case 16.
[106] *Leonidas v Wenham*, case 37 [39].

5.9 Reputation and public aspects of the relationship s 4AA(2)(i)

Where two people dispute whether their relationship was 'de facto', evidence about the way the relationship presented to others assumes great importance. Our analysis revealed that this circumstance is extremely influential and, in the cases we examined, it appeared that the court would only determine that a relationship was 'de facto' if the parties had a reputation as a couple and there were public aspects to their relationship. There was only one case where there was no evidence of public aspects and a de facto relationship was found.[107] In one case no finding could be made because the facts were disputed.[108] In another, no specific finding was made, although the trial judge made mention of the parties presenting as a couple when they travelled together.[109] There were only two cases where the court found that there were public aspects to the relationship and a de facto relationship was not found.[110] Evidence of reputation or public presentation as a couple strongly correlated with a finding that a de facto relationship existed.

The cases emphasised the importance of being 'known as a couple', socialising with family and friends, attending significant events such as birthday and Christmas celebrations together, holidays, public outings and 'family time', especially with children. Often, family and friends of the parties were called as witnesses to describe what they saw of the parties' relationship and how it was perceived by outsiders.[111] Particularly in the context of a long relationship, it will be expected that the parties have a reputation as a couple and spent time socialising with family and friends.[112] The court may also consider a party's conduct in prior relationships, such as in *Joss v Chadwell* where the court considered it significant that the respondent had not established a superannuation fund with the applicant or made a formal declaration about the relationship status, as he had in previous relationships.[113]

5.10 Other circumstances taken into account

Our analysis also revealed that the court took into account circumstances of the parties' relationship which do not appear in s 4AA(2). These include the performance or sharing of household duties,[114] and providing emotional support in times of trouble or illness.[115] These were considered to be indicative of a de facto relationship. It is appropriate that the court had regard to these aspects because of s 4AA(4) which entitles the court to 'have regard to such matters, and attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case'. We did not identify any other additional circumstances to which the court regularly had regard.

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[107] *Volen v Backstrom*, case 9. The parties lived in a rural area and did not go out very often.
[108] *Sam v Lamothe*, case 26.
[109] *Coulbeck and Pins*, case 34.
[110] *Condie v Quirke*, case 18; *Yeatman v McKeown*, case 31.
[111] For example *Jonah v White*, case 3; *Grohl v Acland*, case 38; *Na v Tiu*, case 29; *Capleman v Capleman*, case 35; *McMaster v Wyhler*, case 16.
[112] *Ying v Lang*, case 39; *Walt v Quinn*, case 40.
[113] *Joss v Chadwell*, case 23 [199].
[114] *Martens v Bocca*, case 28; *Ward v Trench*, case 13; *Volen v Backstrom*, case 9; *Luk v Choy*, case 25.
[115] *Bolt v Waldo*, case 30; *Yarde v Haine*, case 22; *Cadman v Hallett*, case 15.

6 Discussion

From our analysis, we were able to make a number of observations about the Family Court's approach to the 'circumstances' of a de facto relationship. Particularly, we observed that the court generally relies on the statutory list of circumstances, that some circumstances are more indicative of a de facto relationship, or significant to the court's determination, than others, that some circumstances of interdependence are not necessarily treated as indicative, and that there is a lack of legislative clarity about what is required to satisfy some circumstances.

6.1 The court is generally reliant on the s 4AA(2) statutory list

Our analysis confirmed that, while there is no indication that the court conflates the list of 'circumstances' with the 'core definition' in s 4AA(1)(c), the court often treats the statutory list as a 'checklist'. It considers all the items in the list that are relevant to the factual circumstances of the case and makes findings in relation to each before discussing whether the 'core definition' is met. The court has demonstrated a willingness to consider other circumstances of the relationship which do not appear in the statutory list, including the performance of household duties and provision of emotional support. However, the fact that there were very few circumstances falling outside the statutory list which were regularly examined by the court suggests that the court generally considers the matters in s 4AA(2) to be inclusive of the necessary 'circumstances' to determine whether two people were in a de facto relationship for the purposes of s 4AA(1)(c).

6.2 Some circumstances are more indicative than others

Despite the fact that s 4AA(2) provides no sign that some circumstances are more indicative, important or influential than others, our analysis clearly disclosed this to be the case. While, of course, it is entirely appropriate that the court emphasise certain aspects and de-emphasise others according to the particular intricacies of a case (as is envisioned by s 4AA(3) and (4)), what we observed went beyond a natural variation due to factual differences between cases. Certain circumstances consistently appeared to be highly indicative in the court's determination of whether a de facto relationship existed, and others did not appear indicative at all. In particular, we observed that certain circumstances were practically necessary for a de facto relationship, others were not particularly important or relevant, and there was a 'cluster' of circumstances which, if present, generally indicated a finding that a de facto relationship existed.

Circumstances that appeared to be highly indicative were that the parties had, at some point, engaged in a sexual relationship, made use of each other's property (which was satisfied by making use of each other's homes), were mutually committed to a shared life, had a reputation as a couple and that there were public aspects to the relationship. The strong indicator of 'reputation and public aspects' (s 4AA(2)(i)) is problematic for people who deliberately keep their relationship secret from family, friends or the general public.[116] This may include parents who keep relationships secret from their children, people of diverse sexualities who manage their visibility to family or the public, and people whose

[116] See Michelle Fernando and Olivia Rundle, 'Love 'em, Keep 'em, Leave 'em: (Non) Application of De Facto Relationship Laws to Clandestine Intimate Relationships' (2016) 41(2) *Alternative Law Journal* 93.

relationship would be looked upon unfavourably for cultural or religious reasons.[117] *Jonah v White*[118] highlighted this issue in the context of a long term relationship between a married man (White) and Jonah. Although Jonah's family and friends knew about her relationship with White, and she spoke about him often, the parties spent almost all of their time alone. The Full Court found that, because there was nothing clandestine about the relationship from Jonah's perspective, the fact that the parties did not socialise with Jonah's friends 'strongly supported' the trial judge's finding that the parties did not have a reputation as a couple.[119]

If the parties (or one of them) had children, there must be some evidence that care and support was provided. This is practically necessary to find a de facto relationship, however the fact that one party has provided significant care for the other party's child does not necessarily indicate the existence of a de facto relationship.[120]

The fact that the parties lived together in one household is likely to indicate a finding of a de facto relationship, although it is not necessary for parties in a de facto relationship to share a common residence. As we will discuss below, we observed a lack of clarity about this circumstance because, in some cases, the court found that the parties shared a common residence even though they maintained separate houses. The intermingling of finances will also be indicative, but an absence of joint or intermingled finances will not necessarily indicate that a de facto relationship does not exist.

There were several circumstances that, although appearing in the statutory list, did not appear to be indicative of a de facto relationship. We observed that the duration of the relationship was of little relevance, the court not appearing to be influenced by a relationship's length when making determinations. The length of a relationship may contextualise other circumstances rather than act as an independent indicator. Similarly, the fact that one party financially supported or had been financially dependent on the other was not treated as necessarily indicative. Nor did the joint ownership or acquisition of property appear to be particularly indicative, even when purchased as joint tenants. We discuss these findings further below.

We observed that a finding of a de facto relationship is associated with a 'cluster' of circumstances. These are that the parties enjoyed a sexual relationship, were mutually committed to a shared life, had a reputation as a couple, socialised with family and friends, cared for each other's children (if relevant) and either lived in the same home, or treated each other's homes as if they were their own. Other circumstances may also be relevant to the court's decision, but do not form part of what appears to be a highly indicative group of circumstances.

6.3 Some circumstances of interdependence are not necessarily treated as indicative of de facto status

Following from our finding that some circumstances are more indicative than others, we observed that circumstances of shared financial or caring responsibilities do not necessarily

[117] Ibid, 96.
[118] Case 3.
[119] *Jonah v White* (2012), case 3 [59].
[120] See 5.8 above.

indicate that a de facto relationship exists. While financial intermingling such as shared expenses or joint bank accounts is likely to be indicative,[121] financial dependence by one party on the other, care of the other's children and joint purchase of property were not necessarily treated as indicative.

Locke v Norton[122] involved a woman being financially dependent on a wealthy man, who paid her rent and later bought an apartment that she lived in and a car for her to use, and paid her a monthly allowance until he ended the relationship. Her financial dependence was treated as neutral to the question of whether their relationship was de facto.[123] In *Na v Tiu*,[124] Na relocated his home to live closer to Tiu, and Tiu provided $100,000 to enable him to purchase that apartment. At times Na had free access to Tiu's bank account. These arrangements were described by the trial judge as 'the modest degree to which they used their own money for the benefit of the other'.[125] We find the court's characterisations of significant financial support curious, given that these kinds of investments in another person's home or life expenses would not normally be expected between strangers.

We discussed several cases at 5.8 where a party had provided, at times, significant care for their partner's child but this did not necessarily indicate a de facto relationship. Providing care for children may mean foregoing other opportunities in order to prioritise family commitments. However, the relationship a party had with their partner's children, and the contributions made to that relationship, will not necessarily be regarded as evidence of a de facto relationship.

Parties who purchased property together might not necessarily be viewed as building financial resources for their shared life. In *Joss v Chadwell*,[126] joint property transactions were viewed as a 'business' rather than 'personal' investments, even where formal ownership was held in one party's name. During their relationship the parties purchased several properties together which Joss renovated and sometimes lived in, and they both contributed to the costs of renovation and loan repayments. They divided the proceeds between them when the properties were sold, regardless of who had done the renovation work, and in whose name the property was held. As we observed in relation to financial dependence, these informal arrangements would not usually be expected outside of a family relationship. Nevertheless, there were several cases where the parties jointly contributed to the purchase of property, including as joint tenants, and this had little impact on the court's decision that there was no de facto relationship.[127]

Our observation that circumstances of interdependence do not necessarily indicate that the parties were in a de facto relationship suggests that people who make financial or lifestyle sacrifices during their relationship may find that de facto status is denied when they apply for ongoing maintenance or an adjustment of property. This is concerning, because the underlying rationale for the legal recognition of non-married relationships is to protect people who are financially disadvantaged by the way their family life is organised, regardless

[121] See 5.4 above.
[122] Case 19.
[123] *Locke v Norton*, case 19 [136].
[124] Case 29.
[125] *Na v Tiu*, case 29 [35].
[126] Case 23.
[127] See 5.5 above.

of their marital status.[128] It is also worth noting that aspects such as financial dependence, caring responsibilities for children and financial contributions to property are highly relevant in the exercise of a court's discretion to adjust the property interests of de facto couples pursuant to pt VIIIAB.[129]

In addition, we observed that maintaining financial and lifestyle independence does not necessarily indicate that a relationship is not de facto. Because of this, two people may be found to be in a de facto relationship, and subject to the property provisions of the FLA, even if they deliberately organised their relationship to maintain independence. *Whittaker v Sinclair*[130] involved two middle-aged people in an intimate relationship who kept separate homes and finances and enjoyed spending time and socialising together but, during their relationship, did not regard or declare themselves to be 'de facto'. The court concluded that their relationship was de facto, based largely on the highly indicative factors of their degree of mutual commitment and the way the relationship was presented to others.[131] People in intimate relationships often maintain separate residences and finances, spend time apart, do not leaving personal items at their partner's home, or do not contribute to the other's home expenses or maintenance. Sometimes this is a deliberate attempt to avoid de facto status, despite being in a loving and affectionate relationship.[132] Our analysis suggests that these kinds of actions will not necessarily indicate, for the court, that the parties are not in a de facto relationship.

6.4 There is a lack of legislative clarity about what is required to satisfy some circumstances

The way some of the circumstances in s 4AA(2) are expressed leads to variation in the court's treatment of evidence in relation to them. While it is easy to ascertain the meaning of terms such as 'whether a sexual relationship exists' (s 4AA(2)(c)), or 'care and support of children' (s 4AA(2)(h)), many of the other listed circumstances are drafted in terms that are vague or incapable of precise meaning. We observed this in relation to three circumstances: 'nature and extent of their common residence' (s 4AA(2)(b)), 'the degree of mutual commitment to a shared life' (s 4AA(2)(f)) and 'the reputation and public aspects of the relationship' (s 4AA(2)(i)).

We observed different interpretations of the term 'common residence'. While most judges attributed a meaning of 'living together full time in a single residence', others departed from a straightforward view of the parties' living arrangements. For example, *Cham v Sha*[133] and *Jonah v White*[134] both involved relationships where the male partner was concurrently living with his wife. In *Cham v Sha* the parties spent 'considerable time each week' living at Cham's apartment. Johnson J found that, despite the maintenance of separate homes, and

[128] Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 86. See also Finlay (n18) 290 citing *Report of the Royal Commission on Human Relationships* (1977) vol 4, 73, para 129.
[129] See FLA s 90SM(4).
[130] Case 7.
[131] See also *Martens v Bocca*, case 28 where a similar finding was reached.
[132] See Shannon Molloy, 'The Wildest Pre-nup Ever Written' *NewsMail,* 12 September 2018 <https://www.news-mail.com.au/news/divorce-lawyers-prenup-includes-everything-includi/3518384/>
[133] Case 21.
[134] Case 3.

confined periods of time living together, the parties had a common residence at Cham's home.[135] However, in *Jonah v White* it was found that the parties did not share a common residence even though they lived together in one house on every occasion they were able to meet, which was for several consecutive days every few weeks.

There is nothing in the legislation that indicates what is necessary to demonstrate a 'mutual commitment to a shared life' or 'reputation and public aspects', and we observed variable treatment of evidence in our case sample. This is particularly concerning because, as discussed above, these two circumstances were observed to be particularly influential in the overall determinations about de facto status.

An assessment of whether or not two people have a 'mutual commitment to a shared life' is open to subjective expectations about how couple relationships function and is inherently difficult to decide as an objective fact. In *Na v Tiu*,[136] despite demonstrations of 'commitment' to each other, the judge found that Tiu was not committed in the manner intended by s 4AA(2)(f). Tiu remained married to her husband, who lived in China, and lied about the nature of her relationship with Na to her children and others. The parties signed a fake marriage certificate, exchanged rings, and photographs were taken of them in wedding attire. The photographs were displayed in Na's home but not in Tiu's. Austin J did not consider that these ceremonial demonstrations of commitment supported the applicant's case, saying:

> *The relationship had no public notoriety. The parties had no mutual friends. They only displayed affection publicly when in the company of complete strangers, [Na's] adult son and his wife, or one other person they barely knew. The symbolism of the importance of their relationship, manifest in the mock marriage certificate, rings, and photographs, was artificial because such symbolism is usually intended for public display, but in this case it was kept private. Most likely, the respondent decided to indulge and appease the applicant's desire for the trappings of permanence.*[137]

By this interpretation, Tiu engaged in the trappings of a wedding, in a context where she could not legally marry, not because the parties were mutually committed to a shared life, but because Tiu wanted to indulge Na's wish that they were so committed. The prioritisation of Tiu's intention to not be committed over her actual demonstrations of commitment appears at odds with the general lack of emphasis placed on the parties' subjective intentions about the status of the relationship. This example highlights the lack of clarity in what is required to satisfy this circumstance, as well as the significance of keeping a relationship secret.[138]

In *Jonah v White*,[139] both the trial judge and the Full Court emphasised the parties' lack of reputation and public notoriety because they did not socialise with friends and there was no relationship between Jonah and White's children. However, these circumstances were entirely consistent with the clandestine nature of the parties' relationship and their geographic distance, as White was married and the parties lived several hours' drive apart

[135] *Cham v Sha* (2015), Case 21 [88], [90].
[136] Case 29.
[137] *Na v Tiu* (first instance judgment), case 29 [35]. The decision was upheld on appeal.
[138] See also 6.2 above.
[139] Case 3.

throughout their 17 year relationship. In addition, although they did not spend time together socialising with others, Jonah's family and friends certainly knew about the relationship and Jonah spoke about White frequently. It appears that Jonah was penalised for not being able to demonstrate that her relationship had a 'reputation and public aspects' in a situation where the lack of these aspects was entirely explainable, and where the parties did, at least from the perspective of Jonah's family and friends, have a 'reputation'.

Different approaches were taken to evidence of 'reputation and public aspects' (s 4AA(2)(i)) when it came to statements made by parties during the relationship to government agencies and others about their relationship status. In *Whittaker v Sinclair*, Whittaker made declarations to various agencies and lending institutions that she was 'single', when 'de facto' was available. When asked why she had not declared herself to be in a de facto relationship, Whittaker replied, 'I did not understand what de facto was… and what it meant at the time'.[140] Her explanation was accepted. The Full Court said that public statements about the status of a relationship are 'persuasive'[141] but accepted McColl JA's view in *Hayes v Marquis*[142] that:

> *Statements to a government authority apparently inconsistent with a party's case may complicate the resolution of the issue of the nature of the relationship, but they are not determinative. They are taken into account as part of all the circumstances…*[143]

The same approach was taken in *Sam v Lamothe*,[144] with the court accepting Lamothe's evidence that she had deliberately misled Centrelink when declaring that she was 'single'. Similarly, in *Hankinson v De Vries*,[145] Hankinson had referred to De Vries in her will as her 'friend' and had made representations to Centrelink and other agencies that she was not in a relationship. The trial judge found that these representations were clearly a lie.

In direct contrast, the fact that the applicant in *Locke v Norton* made two declarations to Centrelink during the relationship that she was not in a de facto relationship was considered by the court as a relevant representation to a public authority about the status of the relationship.[146] A similar finding was made in *Leonidas v Wenham*[147] where the applicant did not declare the respondent as her spouse in correspondence with her bank, the Australian Taxation Office or her bankruptcy trustee. We acknowledge that these declarations did not appear to be highly persuasive in the court's overall decision in either of these cases, however it highlights different approaches to similar facts and the need for better clarity on what kind of evidence is necessary to indicate 'reputation and public aspects' of a de facto relationship.

[140] *Whittaker v Sinclair* (2013), case 7 [63 –64].
[141] Ibid [63].
[142] [2008] NSWCA 10.
[143] *Hayes v Marquis* [2008] NSWCA 10 [99].
[144] Case 26.
[145] Case 24.
[146] *Locke v Norton*, case 19 [205].
[147] Case 37.

7 Conclusions and recommendations

The drafting of s 4AA(2) and the 'circumstances' a court can take into account is intentionally able to accommodate variety in relationships that meet the core definition. However, our analysis of the court's approach to relationship circumstances revealed nuances not apparent on the face of the legislation, and variable treatment of some factual circumstances. People in intimate relationships who separate may find themselves bound to or precluded from a set of laws, contrary to their assumptions or intentions. For example, couples who choose to maintain separate households and finances, but share time in public and in each other's homes, may find that their mutual commitment to a shared life is treated as more indicative of their relationship status than their deliberately independent arrangements. People who have been financially dependent on their partner cannot rely upon that fact as a particularly strong indicator of their entitlement to apply for a property adjustment when the relationship ends. Because a finding that the parties were in a de facto relationship is a threshold issue which enlivens the court's jurisdiction, the fact that the court's determination may not reflect any shared expectations or assumptions that parties may have had during the relationship may lead to injustice.

We tentatively suggest a number of qualified recommendations with the aim of furthering a discussion about how some of the problems of uncertainty and potential injustice may be resolved.

7.1 Greater willingness to regard circumstances of interdependence as indicative of a de facto relationship

Circumstances of interdependence, such as relying on financial support from a partner, a mingling of finances and joint property purchases suggest that parties have made decisions on the basis of their personal relationship which may have not have otherwise been made. Nevertheless, as noted above at 6.3, some circumstances of interdependence are not necessary considered to be indicative of a de facto relationship. We suggest that the court should be more willing to accept circumstances of interdependence as indicative of a de facto relationship. This would make it more likely that the court determines interdependent parties to have been in a de facto relationship, which would allow them to access pt VIIIAB of the FLA. This is in keeping with the purpose of the 2008 amending Act, and would alleviate injustice caused to vulnerable parties who may otherwise fall outside the family law jurisdiction.

The jurisdictional question of whether a relationship is de facto does not determine property rights. It is only a threshold question which allows the applicant to make an argument that existing legal and equitable property interests ought to be adjusted. A court will not make an adjustment unless it is just and equitable to do so, based on the parties' contributions and future needs.[148]

7.2 Greater consideration of the parties' express intentions

We are troubled by the lack of consideration given to intentions expressed by parties during their relationship in determining whether a relationship is de facto. Even if the parties perceived their relationship in the same way, or formalised their union through a State or

[148] FLA s 90SM.

Territory relationship registration scheme,[149] or entered a binding financial agreement ('BFA') between de facto partners,[150] none of those facts would be determinative of de facto relationship status, should one of them make an application under pt VIIIAB of the FLA. It is also concerning that parties who have deliberately chosen not to marry, have organised their relationship to maintain individual status and wish to avoid the legal consequences of marriage may find themselves nonetheless treated as a de facto couple. In these circumstances, the law should be slow to impose the obligations of marriage on them.[151] We suggest that evidence about the parties' expectations and preferences regarding their legal obligations, expressed during their relationship, should be considered routinely, perhaps by an inclusion in the list of statutory 'circumstances' in s 4AA(2).

7.3 Mechanisms for opting in and opting out of de facto relationship recognition

An alternative way to address the need to respect parties' individual intentions is to allow parties to 'opt-in' or 'opt-out' of de facto relationship status, which is not currently possible under the FLA.

First, where two people have taken the positive step of attracting legal recognition through a state or territory register system, this should be treated as decisive of de facto relationship status for the purposes of the FLA, just as registration of a marriage is for married couples. This would require amendment of s 4AA(1). This mechanism would not assist parties who live in a state that does not have a relationship registration system.

In addition, we propose that a Commonwealth relationship register be established, thereby providing an 'opt-in' option for all Australian couples. De facto relationship registration would be an alternative to marriage[152] and would serve as proof of relationship at the relevant time for the purposes of a claim for property or financial claims under the FLA. Registration would only benefit parties who agree that their relationship is de facto. Some parties will face unwillingness by their partner to commit to the consequences of relationship recognition, particularly when that individual is the more financially resourced and has more to lose by a property adjustment following separation.

For people who do not regard themselves as being in a de facto relationship, we tentatively recommend that there be a mechanism to 'opt-out' of de facto status for the purposes of pt VIIIAB of the FLA. Currently, unless the parties enter a BFA,[153] which has strict requirements, they cannot exclude the jurisdiction of the court to make property orders under pt VIIIAB. However, a BFA requires that the parties accept that they are in a de facto relationship and the court can only enforce the agreement if satisfied that the relationship was indeed de facto. Therefore, parties who do not consider their relationship to be de facto would not enter into a BFA.

Challenges of an 'opt-out' system include injustice that could result for parties who opt out without full knowledge. There are also risks that a partner may be coerced into opting out

[149] Relationship registration schemes which are available in some states and territories are discussed at 5.7 above.
[150] FLA pt VIIIAB Div 4.
[151] See, for example, Finlay (n18) 290 citing *Report of the Royal Commission on Human Relationships* (1977) vol4, 73, para 129.
[152] See discussion in Rundle (n94).
[153] FLA pt VIIIAB Div 4.

by the other party, contrary to their interests. We suggest a written agreement entered into with the benefit of legal advice would be appropriate, which would provide the same safeguards as BFAs for informed consent. We note that a BFA may be set aside in certain circumstances.[154] There are significant challenges to designing an effective 'opt-out' system, but it is worthy of further consideration.

7.4 Amending s 4AA

We would be remiss if we did not consider the possibility of amending the list of 'circumstances' in s 4AA(2). For example, particularly significant circumstances might be made more prominent. Circumstances that are vague, uncertain or otherwise unhelpful to the court's determination could be amended or omitted. However, we acknowledge that amendment of s 4AA(2) is incomplete without consideration of the 'core definition' in s 4AA(1) and whether it, too, should be amended. The two sub-sections are inexorably linked. This article has not considered the 'core definition' in sufficient detail to propose amendments to s 4AA. Greater research is required before the provision could be appropriately amended.

This article has not grappled with the wider conceptual question of what a de facto relationship is, or what kinds of relationships the legislation is intended to cover. The Commonwealth was referred power over 'marriage-like' relationships, and the listed circumstances of de facto relationships reflect the 'coupledom' features of marriage.[155] A fundamental re-examination of the meaning of 'marriage-like' for couples who have not married,[156] and aspects such as patterns of relationship conduct, societal expectations, and community needs may be timely and is well beyond the scope of this article. Such an inquiry would inform amendments to the way de facto relationships are defined.

In the meantime, people in intimate relationships are warned to 'proceed with caution,' as they may find themselves included in or precluded from a set of laws that they did not intend or anticipate, based upon the consideration of 'all the circumstances' of their relationship.

[154] See FLA s90UM.

[155] Established by Watson J in *Marriage of Todd (No 2)* (1976) 1 Fam LR 11,186, 11,188, approved and added to by the Full Court in *Marriage of Pavey* (1976) 1 Fam LR 11,358. Adopted as the indicators of a non-married relationship in *D v McA* (1986) 11 Fam LR 214; Young (n7) 66.

[156] Bates (n11) 63; Behrens (n11) 354; Young (n7) 64–5; Young and Hampton (n7) 257 citing *Moby v Schulter* (2010) FLC 93-447, [163] (Mushin J).