



Précis Paper

De Facto Relationships in Family Law

This is one hour five minutes of gold. There is no better commentator on family law than Ian Coleman. Everyone should watch – all the family.

Discussion Includes

- De facto relationships under section 4AA of the *Family Law Act 1975* (Cth)
- The indicia under the Act for determining whether a de facto relationship exists, which are identical to those in section 4 of the *Property (Relationships) Act 1984* (NSW)
- Key cases relating to de facto relationships
- Protecting assets from the consequences of a finding that a de facto relationship exists
- Similar rules apply to de facto relationships as those for married couples in relation to property settlement

Précis Paper

De Facto Relationships in Family Law

1. In this edition of BenchTV, the Hon. Ian Coleman SC (Barrister) discusses the application of the *Family Law Act 1975* (Cth) and the *Property (Relationships) Act 1984* (NSW) to couples in de facto relationships. Mr Coleman SC is a former Family Court Judge in the Appeal Division who now privately practices from Culwulla Chambers.

Characterising a De Facto Relationship

2. Mr Coleman explores the factors the court takes into account in determining whether a relationship is appropriately characterised as de facto. The *Family Law Act 1975* (Cth) s 4AA(1) provides that:

SECTION 4AA:

De facto relationships

- (1) A person is in a **de facto relationship** with another person if:
 - (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.

Section 4AA(2) provides a list of circumstances that may be taken into account under s 4AA(1)(c) including:

SECTION 4AA:

De facto relationships

- (2) Those circumstances may include any or all of the following:
 - (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.*

3. Mr Coleman notes that there is a slight distinction between the Cth and NSW provisions governing de facto relationships. Section 4(1) of the *Property (Relationships) Act 1984* (NSW) does not require that the relationship was conducted on a "genuine domestic basis." Mr Coleman suggests this slight division may lead to future litigation in circumstances where couples only cohabitate when they happen to be in the same city though ordinarily reside apart.
4. The Cth Act began operating on 1 March 2009 such that those de facto relationships which ended prior to 1 March 2009 would not fall under its purview. However, parties to a former de facto relationship may 'opt in' to the Cth scheme by mutual consent. Further, there is a requirement that a de facto relationship needs to have persisted for at least 2 years for a property settlement order to be made under the Cth provisions: s 96SB. This requirement is somewhat ameliorated by allowances for aggregation such that the 2 years need not be continuous. For example, where a relationship breaks down after 18 months, so long as it is resumed for 6 months it is likely that the Cth provisions will still apply.

Factors that May be Relevant to Whether a Couple is De Facto

5. The question of whether a relationship is de facto for the purposes of s 4AA involves the judicial determination of a jurisdictional fact (because it enlivens the jurisdiction of the Family Court). The determination is appropriately categorised as a value judgment and factors including the public perception of the relationship may be relevant, particularly for determinations at the margin. This issue was considered in *Jonah v White* [2012] Fam CAFC 200, where a 17-year affair was found not to have given rise to a de-facto relationship. The evidence suggested the relationship (was understandably) conducted in secret, with friends not considering the parties to be in a relationship given the parties never socialised together as a couple.
6. Another factor that was critical to the decision in *Jonah v White* (2012) and that was also relevant in *Sidhu v Van Dyke* [2014] HCA 19, is the perception of the parties to the purported de facto relationship. In circumstances, such as *Jonah v White* (2012), where one of the parties overtly does not consider themselves in a de facto relationship and the other party is not disabused of that perception, then the relationship will not likely be determined de facto in law.
7. On account of the above factors, mistresses (*Ashton v Pratt* [2015] NSWCA 12) and carers are unlikely to establish a de facto relationship.

Further Procedural Matters to Bear in Mind

8. Mr Coleman SC highlighted that parties ought to be mindful before they assert that a particular relationship is de facto because it may have repercussions on other aspects of their lives. For example, where a de facto relationship is established, this may impact social security payments made on the basis of being single and also in relation to child support payments which may be minimised where the parties are found to have not been in a de facto relationship.
9. In light of the High Court's judgment in *Stanford v Stanford* [2012] HCA 52, Mr Coleman SC further notes that even after parties establish that a relationship was legally de facto, there is the need to satisfy the threshold test that any property settlement is 'just and equitable.' Although *Stanford* was decided in relation to married couples, Mr Coleman SC suggests that there is "virtually no difference" between de facto couples and married couples in relation to property settlement. Property may be removed from the jurisdiction of the Family Court via a valid binding financial agreement. Additionally, where parties seek to put property 'at-arms-length' it is necessary that the property indeed be at-arms-length and that the transfer of the property is not merely a sham: *Kennon v Spry* [2008] HCA 56.
10. Finally, there is a limitation period of 2 years for parties to a de facto relationship to bring an application to the Family Court pursuant to s 44. However, extensions may be granted where there is a prima facie case, a reasonable explanation of delay and limited prejudice caused to the respondent: *Gallo v Dawson* (1990) 93 ALR 479 (McHugh J).

BIOGRAPHY

The Hon. Ian Coleman SC

The Hon. Ian Coleman SC was admitted as a Lawyer in 1974, called to the NSW Bar in 1975 and appointed Senior Counsel in 2013. He has a long history on the Bench in the Family Court of Australia, having been appointed to the Trial Division in 1991, The Appeal Division in 1999, and serving from 2009 to 2013 on the Western Plains. He was a Judge Advocate for the Australian Defence Force from 1992 to 1997 and a Commissioner of the Australian Law Reform Commission from 1993 to 2003. He is also currently an Adjunct Professor at the Western Sydney University, School of Law.

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Cases

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Muschinski v Dodds (1985) 160 CLR 583
Norton v Lock [2013] FamCAFC 202
Sidhu v Van Dyke [2014] HCA 19
Stanford v Stanford [2012] HCA 52
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
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Legislation

Family Law Act 1975 (Cth)
Property (Relationships) Act 1984 (NSW)