

WHEN ALL ROADS LEAD TO ROME: THE PROBLEM OF TREATING DE FACTO RELATIONSHIPS AS MARRIAGES IN AUSTRALIA

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THE STORY OF CAMERON AND SANDRA¹

Cameron and Sandra are a young couple in their mid-20s. Cameron graduated from Monash University in Melbourne. He has been working in a hospital as a radiologist. Sandra is a nurse. They met just over two-and-a-half years ago at a social event in the hospital. One thing led to another. Before too long, their relationship became sexual.

In the first few months they were a couple they had a conventional dating relationship involving occasional overnight stays at one place or another. Sandra lived at that time in nurses' quarters close to the hospital. She had her own room, but it was not all that large, and she only had a single bed. Cameron felt a little awkward sleeping over there, so they tended to have sex at Cameron's place and Sandra would stay the night there unless she was on the early shift. Initially, she stayed over about two nights per week, but after a while, that increased to about four nights per week. Of course, it varied one week to another, and no one kept records. Why would it matter?

Cameron's apartment is a one-bedroom place in the inner city. Cameron had managed to purchase it with a \$100,000 loan from his parents and a huge, but manageable, mortgage.

About twenty months ago, Cameron suggested to Sandra that she might like to move into his place. There was no point in her paying rent for the room in the nurses' quarters if she wasn't living there all that often. She agreed and, about three weeks later, she moved in.

Mostly, they kept their finances separate. Cameron paid all the mortgage and outgoings on the apartment. They put money into a joint account for groceries. When they went out to a restaurant or to the cinema, Sandra usually paid because Cameron really couldn't afford it while paying the mortgage and electricity bills. Sandra didn't mind. It was the price of going out and having a good time together.

1. Reprinted with permission from PATRICK PARKINSON, *LAW AND POLICY IN MODERN FAMILY FINANCE: PROPERTY DIVISION IN THE 21ST CENTURY* 19-23 (Jessica Palmer, Nicola Peart, Margaret Briggs & Mark Henaghan, eds., 2017).

Over the last few weeks, they have been talking about their future. Sandra would quite like to get married — or at least she thinks so. There is a part of her that is very traditional. Sandra, in that frame of mind, wants the white dress and the large party. She wants that special day. However, another part of her recognises that the special day can be extraordinarily expensive and changes little. After that special day — and perhaps the honeymoon in an exotic location — their lives will be exactly the same as they were before. Sandra is not religious, so marriage is not important to her from that perspective; but, it is what her parents did, and while they probably wouldn't say it so bluntly to her, it is what they would like for her too.

Cameron is very hesitant about marriage. He loves Sandra but is also unsure whether this relationship is a long-term prospect. One reason for this hesitancy is the arguments they have had recently; he knows these are mostly his fault. He buries his feelings and they build up until he explodes. Then, he finds it really difficult to get over the fight for days on end. He sulks and broods. Apologies are eventually offered and received, but each of these arguments has left their relationship just a little more unsteady. Another reason for being uncertain about marriage is that he is really attracted to a female colleague in his office. Cameron is just not too sure about the whole fidelity thing.

Perhaps the main reason why he is hesitant is that his long-term plan has been to work overseas for a few years — perhaps in the UK. He has a UK passport, and can quite easily find work as a radiologist. Sandra has made it clear that she doesn't want to move overseas, and in particular has no interest in living in Europe. She is very close to her parents and her older sister who has two young children. Sandra's sister loves having her around to help out.

Cameron and Sandra have yet to have a serious conversation about children. Sandra still feels too young and is content to enjoy her sister's children while being able to hand them back.

Cameron has a friend, Tim, who recently graduated in law and now works for a family law firm in Melbourne. They invited him over to dinner one night and openly talked about their thoughts about getting married. Tim went through the different options. They may choose a religious wedding, as long as they can

find a minister of religion prepared to marry them. There are some nice old Anglican churches with a medieval stone look, if that is the kind of setting that they want for their wedding.

Alternatively, if they just want something secular, they could get married in a registry office. Tim showed them the website for the Victorian Marriage Registry which offers a 'classic' ceremony in one of Melbourne's finest heritage listed buildings.² Another option, he explained, is to purchase the services of a private marriage celebrant who may be able to conduct the wedding in some other special location.³ "If you don't want to marry", Tim explained, "you could just register your relationship." In Victoria,⁴ as in many other parts of the country, couples can enter into a 'registered relationship'. A registered relationship has the same effects as marriage for the purposes of the law of that jurisdiction.⁵ In federal law, the relationship will be treated as a 'de facto relationship'.⁶

"How is a registered relationship different from a marriage at a registry office?" Sandra asked.

"I don't know really," said Tim. "I suppose you just skip the 'classic' ceremony bit".

"Much cheaper," said Cameron.

Tim explained that while these are all options for Sandra and Cameron to formalise their relationship, actually they have no need to do so, for they will be treated as married just by living together for at least two years.

"There is now almost no difference at all between being married and living in a 'de facto relationship' in any area of state or federal law," he told them.

2. *Victorian Marriage Registry*, BIRTHS DEATHS AND MARRIAGES VICTORIA, <https://www.bdm.vic.gov.au/marry> (last accessed Oct. 19, 2021).

3. By authorising marriage celebrants, Australia has partially privatised the solemnisation of marriages. It need not be a state official who pronounces the couple duly married. It is sufficient that it is someone who has been authorised by the government to take weddings. For secular celebrants it is a professional occupation, or a business.

4. Relationships Act 2008 (Vic) s 6 (Austl.).

5. For example, the Civil Unions Act 2012 (ACT) s 6(2) (Austl.) provides: "A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage."

6. Family Law Act 1975 (Cth), s 4AA 1 (Austl.).

Tim went on to explain (in a little more detail than Cameron and Sandra wanted to hear) that the trajectory of law reform at both state and federal levels over the last twenty years had been to insert the words ‘or de facto’ wherever the word ‘marriage’ or ‘spouse’ appears in legislation. Initially, this was to address the issues for heterosexual couples who do not marry, and later the term ‘de facto’ was extended to include same-sex couples.

“So, you mean that it doesn’t matter whether you marry, register your relationship without marrying, or don’t formalise your relationship at all — you just end up being married anyway?” said Sandra, astonished.

“Oh no,” Tim replied, “if you are married and the relationship ends you need to get divorced.”

Then he thought for a moment, and went on: “Well, you need to get divorced if you want to marry again; but I suppose if you just want to live with someone else you don’t really need to get divorced at all. Anyway, a divorce is just a formality. It takes less than five minutes for the Registrar to pronounce the divorce, and if there are issues about property, maintenance, or the children, they are dealt with entirely separately.”

“So, all roads lead to Rome?” said Cameron.

“Exactly,” Tim replied.

A few days later, Cameron rang Tim and asked him what counts as a de facto relationship. Tim explained that it is very complicated. You don’t actually have to be living together full-time to be treated as a de facto couple. Cameron said that he and Sandra had now been living together for about twenty months, but for some time before that Sandra had been sleeping over quite regularly.

“How regularly?” asked Tim.

“Well, it varied,” Cameron replied. “Sometimes two nights a week; often it was four nights per week. To be honest, I can’t remember all that clearly. Why does it matter?”

“It matters,” Tim replied, “because the court may say you were living together long before Sandra actually moved in full-time; but there is no rule about it. Two nights per week might not be enough. Four nights per week probably would be. It all depends on the judge.”

“Do you mean that already, we could have been living together for over two years when I thought we had only been living together for twenty months?”

“Yes, and that has the same legal effect as being married,” said Tim.

II. MANY FORMS, SAME OUTCOME

The story of Cameron and Sandra illustrates a number of different issues about the recognition of *de facto* relationships in Australia. Cameron was not sure he wanted to make the commitment of marriage. For him, living together was an arrangement for the time being, a stage in his life when he lived in Melbourne, and so did she; but, that didn’t mean that their future plans coincided. Nor was he even sure that he wanted them to. The possibility that he would be treated in law as having already made the very decision over which he agonised came as a shock to him.

Sandra is in a different place – actively thinking about marriage, and leading Cameron into discussions about it. It is not unusual for one party in a relationship to be in a different place from the other when it comes to commitment. As Scott Stanley and colleagues observe, people often slide into cohabitation, rather than making a clear decision that they want to make a commitment to one another.⁷

De facto relationships are heterogeneous.⁸ Some people live together with the intention of getting married. Indeed, more than 80% of couples who marry in Australia have lived together for some time first.⁹ Others may enter a cohabiting relationship with a hope or intention, on the part of at least one of them,¹⁰ that they will marry, but the relationship does not survive long enough for

7. Scott Stanley, Galena Rhoades & Howard Markman, *Sliding versus Deciding: Inertia and the Pre-Marital Cohabitation Effect*, 55 FAM. REL. 499, 505 (2006).

8. PARKINSON, *supra* note 1, at 32.

9. *Marriage Rates in Australia*, AUSTL. INST. OF FAM. STUD., <https://aifs.gov.au/facts-and-figures/marriage-rates-australia> (last accessed Oct. 4, 2021).

10. Penelope Huang et al., *He Says, She Says: Gender and Cohabitation*, 32 J. OF FAM. ISSUES 876, 889 (2011); Susan Brown, *Union Transitions among Cohabitors: The Significance of Relationship Assessment and Expectations*, 62 J. OF MARRIAGE AND FAM. 833, 836 (2000).

this to occur. Others reject the idea of formal marriage entirely but see themselves as being in a committed and ongoing relationship.¹¹

III. THE EMERGENCE OF THE EQUIVALENCE PRINCIPLE IN AUSTRALIA

The position that de facto relationships should be treated the same way as marriages when it comes to property division upon relationship breakdown emerged gradually over the decades from 1984 onwards,¹² and was finally established across the country when federal legislation was passed in 2008.¹³

Australia is a federation, with six states and two territories that have law-making powers.¹⁴ Marriage is governed by federal law.¹⁵ Same-sex marriage was legalised at the end of 2017.¹⁶ Prior to this, laws allowing for registered relationships or civil partnerships were enacted in various states and territories as a

11. On the different meanings of commitment, see Jan Pryor & Josie Roberts, *What is Commitment? How Married and Cohabiting Parents Talk About Their Relationships*, 71 FAM. MATTERS 24, 30 (2005) (pointing out some committed cohabiting couples view marriage as unimportant).

12. The first significant statute in this area was in New South Wales: De Facto Relationships Act 1984 (NSW). This provided a statutory regime of property division and maintenance for former partners to de facto relationships. In 1999, this was renamed the Property (Relationships) Act 1984 and was extended to include homosexual couples and adults in close personal relationships within its ambit.

13. See Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) sch 1 pt 1 sub-div 4 (Austl.) (providing for property division on the breakdown of de facto relationships); PARKINSON, *supra* note 1, at 18 (explaining how Australia adopted provisions to treat property rights of de facto couples the same as married couples, thereby creating a federal jurisdiction to divide the property of former de facto partners and to order maintenance, following a reference of powers under the federal Constitution by which the various states gave up their power to legislate in this area and agreed that the federal Parliament could develop a national law on the subject).

14. *Three Levels of Government: Governing Australia*, PARLIAMENTARY EDUCATION OFFICE (Jan. 19, 2022), <https://peo.gov.au/understand-our-parliament/how-parliament-works/three-levels-of-government/three-levels-of-government-governing-australia/> (describing the structure of Australian government, including that the Australian Capital Territory and the Northern Territory are self-governed).

15. Marriage Act 1961 (Cth) (Austl.).

16. Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) sch 1 sub-div 3 (Austl.) (changing the definition of marriage from “a man and a woman” to “2 people”).

means of formally recognising same-sex relationships.¹⁷ The effect of registration was that the couple was treated as if they were married for the purpose of all relevant state or territory laws.¹⁸ No jurisdiction where relationship recognition legislation was passed thought it necessary to confine the right to register to same-sex couples.¹⁹ Those laws remain on the statute books notwithstanding that same-sex marriage is now permitted.²⁰ The consequence is that a couple, whether heterosexual or same-sex, may choose to marry or register their relationship under state law in most states and territories.

Or, a couple can just live together; as Cameron and Sandra discovered to their astonishment, that has all the same legal consequences as being married. It is very difficult to think of any area of Australian law, either federal or in the states or territories, where marriage makes a legal difference compared with living in a *de facto* relationship, at least once the couple has lived together for a certain time.

This is because, as Tim explained, the pattern of law reform has been to insert the word ‘*de facto*’ in statutes wherever there is a reference to marriage, or to the status of being a spouse, so that the relevant provision applies equally to *de facto* partners.²¹ Initially, this was to recognise heterosexual *de facto* relationships; but, reforms to laws to recognize same-sex

17. Civil Unions Act 2012 (ACT) div 2.1 6 (2) (Austl.); Relationships Registration Act 2010 (NSW) pt 2 (Austl.); Civil Partnerships Act 2011 (Qld) pt 2 div 1 4 (1) (Austl.); Relationship Register Act 2016 (SA) pt 1 3 (Austl.); Relationships Act 2003 (Tas) pt 1 4 (1) (Austl.); Relationships Act 2008 (Vic) pt 1.1(a)-(ca) (Austl.) (confirming that registered relationship and civil partnership laws were enacted to recognize same sex-unions).

18. *Id.*

19. *Id.*

20. Civil Unions Act 2012 (ACT) div 2.1 6 (2) (Austl.); Relationships Registration Act 2010 (NSW) pt 2 (Austl.); Civil Partnerships Act 2011 (Qld) pt 2 div 1 4 (1) (Austl.); Relationship Register Act 2016 (SA) pt 1 3 (Austl.); Relationships Act 2003 (Tas.) pt 1 4 (1) (Austl.); Relationships Act 2008 (Vic) pt 1.1(a)-(ca) (Austl.) (showing that registered relationship and civil partnership laws were enacted to recognize same sex-unions); Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) sch 1 sub-div 3 (Austl.).

21. PARKINSON, *supra* note 1, at 21–22 (explaining law reform trends were to replace “marriage” with “*de facto*” in statutes referencing marriage).

relationships travelled the same route.²² Over time, wherever the term ‘de facto’ appeared in state and territory legislation, the law was amended to make clear that the relevant de facto relationship could be a same-sex partnership. Omnibus legislation was passed at the federal level in 2008, which amended 69 different federal statutes to ensure equivalence of treatment for same-sex couples.²³

This is of particular significance in terms of relationship breakdown. Under the federal *Family Law Act 1975*, the same provisions concerning division of property upon marriage breakdown and spousal maintenance apply to those who have been in de facto relationships once they have been together for two years or if they have a child.²⁴

Of course, the situation concerning property division and maintenance upon relationship breakdown is only one of a myriad of statutes where rights, privileges or obligations may arise because of relational status. While marriage and divorce, as well as the sequelae of a relationship breakdown in terms of financial matters and parenting disputes, are governed by federal law, certain other areas where relational status matters are governed by state and territory laws, such as the law of succession, definitions of next of kin for medical purposes, access to public housing, and a multitude of other matters of that kind.²⁵

22. Civil Unions Act 2012 (ACT) div 2.1 6 (2) (Austl.); Relationships Registration Act 2010 (NSW) pt 2 (Austl.); Civil Partnerships Act 2011 (Qld) pt 2 div 1 4 (1) (Austl.); Relationship Register Act 2016 (SA) pt 1 3 (Austl.); Relationships Act 2003 (Tas.) pt 1 4 (1) (Austl.); Relationships Act 2008 (Vic) pt 1.1(a)-(ca) (Austl.) (showing that Acts were passed to recognize both heterosexual and same-sex de facto relationships).

23. *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (amending 69 federal statutes to provide for equal treatment of same-sex couples).

24. *Family Law Act 1975* (Cth) pt 1 div 2 s.90SB (Austl.) (showing there is just one small difference between the legal consequences of a marriage and of an informal de facto relationship. An order for spousal maintenance automatically ceases if the recipient of that maintenance remarries, but it does not automatically cease if the recipient enters into a de facto relationship).

25. Mary Anne Neilsen, *Same-sex marriage: issues for the 44th Parliament*, PARLIAMENTARY LIBR., 1, 36 (Sept. 2015) (noting state laws have been modified to accommodate de facto same-sex and heterosexual couples).

IV. DURATIONAL THRESHOLDS AS THE BASIS FOR ENTITLEMENTS

In some situations, no durational threshold exists as a condition for a de facto relationship to have legal significance. The question is simply whether, at the moment in time when the issue arises, the couple is in a de facto relationship. For example, a lesbian de facto partner may be a parent of a child born through artificial reproduction if, at the time of conception, she was the de facto partner of the woman who gave birth, and to the exclusion of the donor of the semen.²⁶ This is so as long the de facto partner consented to the procedure and thereby was an 'intended parent'.²⁷

Where a durational threshold arises in Australian law, it is most commonly two years.²⁸ However, a longer time period might apply in some circumstances. So for example, a domestic partner may apply to the court in South Australia for provision out of a deceased estate²⁹ if he or she contends that inadequate provision was made in the deceased person's will, or he or she considers that the fixed shares allocated where there is no will are inadequate under the circumstances.³⁰ The claim to be a domestic partner is readily made if the couple had registered their relationship. If they had not, then the issue of whether a domestic partnership existed is for the court to determine. The relevant statute stipulates three years of living together continuously, or an aggregate of three years in a four-year period.³¹

Another example of a longer durational threshold is in the federal *Judges' Pension Act 1968*. This provides certain pension rights to those in a 'marital or couple relationship,' but imposes a durational threshold as a condition for entitlement, subject to

26. Family Law Act 1975 (Cth) pt VII div 1 60H (1) (Austl.).

27. Family Law Act 1975 (Cth) pt VII div 1 60H (1)(b)(i) (Austl.). This has given rise to difficult cases where the relationship between the two women was something less than a full-time cohabiting domestic partnership. See *e.g. Aldridge and Keaton* (2009) 235 Fam LR 450.

28. Family Law Act 1975 (Cth) pt I div 2 90SB (Austl.) (noting a childless de facto relationship must have lasted two years for legal significance).

29. Inheritance (Family Provision) Act 1972 (SA) s 6 (Austl.).

30. *Id.* at s 7.

31. Family Relationships Act 1975 (SA) s 11A (Austl.).

ministerial discretion.³² In this instance, the durational threshold applies to married couples as well as de facto relationships. Section 4AB(2) of the *Judges' Pension Act* provides:

...a person is to be regarded as ordinarily living with another person as that other person's husband, wife, spouse or partner on a permanent and bona fide domestic basis at a particular time only if:

(a) the person had been living with that other person as that other person's husband, wife, spouse or partner for a continuous period of at least 3 years up to that time; or

(b) the person had been living with that other person as that other person's husband, wife, spouse or partner for a continuous period of less than 3 years up to that time and the Minister, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person's husband, wife, spouse or partner on a permanent and bona fide domestic basis at that time;

whether or not the person was legally married to that other person.³³

Where there is a durational threshold, but the legislation allows for periods in aggregate to meet that threshold, the courts have taken an approach that is generous to the person who will benefit from the application of the statute.³⁴ For example, courts have interpreted the expression "period, or the total of the periods", of a de facto relationship in such a way as to allow for significant discontinuities in the relationship.³⁵ In one case under the *Family Law Act 1975* (Cth), two women had a lesbian

32. Judges' Pensions Act 1968 s 4AB (Austl.).

33. *Id.*

34. *Dahl v Hamblin* [2011] 46 Fam LR 231–234 (Austl.).

35. *Id.* at 229, 230 (Austl.) (arguing that a de facto relationship can have breaks and still be recognized as a relationship).

relationship for several years.³⁶ They ceased to cohabit, but still saw each other regularly.³⁷ That arrangement ended when one of them formed a relationship with another woman.³⁸ On the eventual demise of the latter relationship, they got back together again and lived together for a further period, which did not last as long as two years.³⁹ The appeal court⁴⁰ held that they had lived together for two years as required by the legislation and that the applicant had filed within two years of the breakdown of that relationship.⁴¹ This was the decision, notwithstanding that to reach this result the court had to ignore the long period in which one of them was living with another woman.⁴²

Specifying a minimum durational threshold for being in a marriage-like relationship makes sense from a legal perspective. The court must be able to define the point at which it has jurisdiction and the power to alter property rights or order maintenance. However, this may well be at odds with the realities of how people form cohabiting relationships. A wedding date is easily ascertained; a moving-in date is not so clear. When does a couple transition from seeing one another regularly, and having sex, to actually living together? This is, in practice, often a gradual process of increasing enmeshment with one another over time.⁴³ At the latest, it might be said, a couple is living together when one of them ceases to have a separate residence; but could they be living together before then for the purposes of satisfying a durational threshold? Cameron was rather shocked to discover that he might be deemed to be living with Sandra even when she had a separate residence, due to the frequency of her overnight stays.

36. *Id.* at 231 (stating that the appellant, Ms. Dahl, and Ms. Hamblin were in a de facto relationship).

37. *Id.* at 233.

38. *Id.* (finding that the respondent was in a de facto relationship with a third party that was another woman).

39. *Id.* at 236.

40. References to the appeal court herein are to the Full Court of the Family Court of Australia.

41. *Dahl v Hamblin* [2011] 46 Fam LR 237–38 (Austl.)

42. *Id.* at 233.

43. Wendy Manning and Pamela Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. OF MARRIAGE AND FAM. 989, 995 (2005).

Just as the commencement date of a cohabitation is sometimes difficult to assess, so the date of separation may also be difficult to determine.⁴⁴ Where the parties separate physically and their relationship ends, the date of separation, or an approximate date at least, is readily identified; but, human relationships being complicated, sometimes a relationship continues in some form or other even though the parties are not living together. This issue arose in a 2019 case where, having lived together for a period, the female partner moved out.⁴⁵ The man said that subsequently, their relationship continued as 'boyfriend and girlfriend' while the woman asserted that the same relationship continued as before, arguing that nothing had changed but for their joint residence.⁴⁶ The consequence of this, she argued, was that the de facto relationship continued its legal existence until their relationship finally broke down many years later.⁴⁷ The trial judge treated their relationship as having ended when the woman first moved out.⁴⁸ They had agreed to separate at that time, and thereafter their visits to each other were by prearrangement.⁴⁹ Neither of them had a key to the other's home.⁵⁰ Neither performed domestic tasks for the other.⁵¹ The appeal court affirmed.⁵²

The other complicated situation is where the parties separate but remain living in the same house. Divorce law provides that a person may apply for a divorce if they have been separated for 12 months, but specifically provides also for the parties to be able to separate under one roof.⁵³ The intention of at least one party to

44. *Id.* at 996.

45. *Herford & Berke* (No. 2) [2019] FamCAFC 182 1–2 (Austl.).

46. *Id.* at 2.

47. *Id.* (arguing that the nature of the relationship did not change even after appellant moved out).

48. *Id.* (finding that the de facto relationship ended before March 1, 2009 because the appellant moved out of the respondent's house).

49. *Id.*

50. *Id.*

51. *Id.* at 3.

52. *Id.* at 7.

53. Family Law Act 1975 (Austl.) s 49(2) ("The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have

treat the marriage as at an end is essential, and communication of that intention may be the only way to prove that the requisite intent was present.⁵⁴ There must also be a discernible difference between their relationship before the alleged date of separation and after it.⁵⁵ The existing body of law on separation under one roof as a married couple applies equally to working out the date of separation for a de facto relationship.⁵⁶

V. DEFINING A DE FACTO RELATIONSHIP

In federal law, there is a consistent definition unless a particular statute provides a different one.⁵⁷ That general definition is in the *Acts Interpretation Act 1901* (Cth), s.2F. The same definition is used in s.4AA of the *Family Law Act 1975*, so it is this definition which is controlling for the purposes of rights of one partner to a de facto relationship to seek an order for property division or maintenance from the other following the breakdown of the relationship.⁵⁸

Section 2F reads as follows:

- (1) ... a person is in a ***de facto relationship*** with another person if the persons:
 - (a) are not legally married to each other; and
 - (b) are not related by family (see subsection (6)); and

continued to reside in the same residence or that either party has rendered some household services to the other.”).

54. *In Marriage of Falk* (1977) 3 Fam LR 11,238 (Austl.). See also Lisa Young and Jenna Hampton, *Separation: Must a spouse or De Facto Partner Communicate their Intention to End The Consortium Vitae?* 32 AUSTL. J. FAM. L. 249 (2019) (explaining the legal importance of communication for separating from a de facto relationship).

55. *In Marriage of Pavey* [1976] 1 Fam LR 11358 (Austl.) (noting the evidence should be assessed if parties continue to live together by contrasting the parties’ relationship state before the alleged separation and after).

56. See generally *Russell v Rovano* (2013) FamCA 1047 (Austl.); *Onslow v Onslow* (2016) FamCAFC 7 (Austl.); *Aitken v Deakin* (2010) FMCAfam 35 (Austl.).

57. Justice John Middleton, *Statutory interpretation – Mostly common sense?*, MELBOURNE UNIVERSITY LAW REVIEW ANNUAL LECTURE (Apr. 14, 2016), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20160414>.

58. See *Family Law Act 1975* (Cth) s 4AA (Austl.).

- (c) have a relationship as a couple living together on a genuine domestic basis.
- (2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:
 - (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) the care and support of children;
 - (h) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance mentioned in subsection (2) is necessary in determining whether 2 persons have a relationship as a couple for the purposes of paragraph (1)(c).
- (4) For the purposes of paragraph (1)(c), the persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of:
 - (a) a temporary absence from each other; or
 - (b) illness or infirmity of either or both of them.
- (5) For the purposes of subsection (1), a de facto relationship can exist even if one of the persons is legally married to someone else or

is in a registered relationship...with someone else or is in another de facto relationship.

- (6) For the purposes of paragraph (1)(b), 2 persons are ***related by family*** if:
- (a) one is the child (including an adopted child) of the other; or
 - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
 - (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

- (7) For the purposes of subsection (6), ***adopted*** means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.⁵⁹

This is not a simple definition, and in the context of relationship breakdown, it has thrown up a lot of different issues. There has now been a large number of cases in which the court has been asked to declare whether the parties have been in a de facto relationship, and if so, for how long.⁶⁰ Typically, the parties agree they were in a ‘relationship’ but one might characterise their time together as just involving ‘staying overnight’ or ‘just having sex’ while the other characterises it as ‘living together’, but not on a full-time basis.⁶¹ The modern usage of the term ‘partners’ to describe relationships does not differentiate between the status and intensity of different relationships.⁶²

59. See Marriage Act 1961 (Cth) s 4(1).

60. Russell *supra* note 56.

61. See *Newland v Rankin* [2017] FCCA 210 (Austl.).

62. See Caroline Kitchener, “Forget ‘boyfriend’ or ‘girlfriend.’ Why Millennials are using the word ‘partner.’”, WASH. POST: LIFESTYLE (Jan. 21 2019), <https://www.washingtonpost.com/lifestyle/2019/01/21/forget-boyfriend-or-girlfriend-why-millennials-are-using-word-partner/>.

VI. THE PROBLEM OF DEFINITION INFLATION

There is, in federal law, at least a definition contained within the definition. This is found in subsection (1)(c). That is, in order to be in a de facto relationship there are three requirements: they must be a couple, they must be living together, and they must be in a ‘genuine’ domestic relationship,⁶³ meaning that they must have a domestic relationship of some kind.⁶⁴ The rest of the section seeks to amplify the definition contained in subsection (1)(c).

The courts have tended to take an expansive view of that definition for three reasons. First, there is the breadth of the definition, which one Family Court judge frankly described as ‘vague’.⁶⁵ Second, there is a view that the *Family Law Act* should be interpreted favourably to its intended beneficiaries. Third, there is a great reluctance, amongst some appellate judges, to give any guidance about what the definition means because this involves adding to the words that Parliament has chosen to use, or using different words from Parliament.

A. *The Breadth of the Definition*

While subsection (1)(c) defines the relationship as involving a couple ‘living together’, the provisions in the definition that seek to amplify it arguably have the effect of confusing it. The next subsection provides that in determining whether the couple are living together, the judge must consider, *inter alia*, the nature and extent of their common residence, which would seem to suggest that something less than living together as the couple’s sole residence is in contemplation.⁶⁶ As the appeal court said in a 2016 case: . . . [s]ince one of the matters in the checklist is “the nature and extent of [the parties’] common residence”, it inexorably

63. The term ‘genuine’ is an English translation of ‘bona fide’. It has not been attributed any significant meaning in the case law. *Genuine*, Meriam-Webster Dictionary (11th ed. 2020) (noting that bona fide is a synonym for genuine).

64. *Taisha v Peng* (2012) 48 Fam LR 150, 152 (Austl.) (Cronin J., noting that this involved activities of running a household or shared households. He contrasted this with a boarding house or backpacking hostel where individuality reigns. In his view, a couple living in a domestic relationship is the opposite of a couple of individuals).

65. See *Moby v Schuller* (2009) FamCA 1285, 11 (Austl.).

66. Family Law Act 1975 (Cth) s 4AA (Austl.).

follows that it is possible for a couple to be in a de facto relationship without residing in the same home on a full-time basis.⁶⁷

Subsection (5) confuses the definition even more. It indicates that a person may be in two de facto relationships simultaneously. The question necessarily arises, how much living together qualifies? The views of one judge, Mushin J, are representative of the consensus in Australia. He observed,

In my view, if a couple do not live together at any time, they cannot be seen as being in a de facto relationship. However, the concept of 'living together' does not import any concept of proportion of time. In particular, it does not require that a couple live together on a full-time basis. On the basis that one or both members of the couple may also be legally married or in another de facto relationship at the same time as they are in the subject relationship, it must follow that it is feasible that the subject relationship might involve the parties living together for no more than half of the time of that relationship. Further, there is nothing to suggest that it must be even as much as half of the time.⁶⁸

B. *Benevolent Interpretation*

Some judges hold the view that the *Family Law Act* is right-creating legislation, and so it should be interpreted favourably to its intended beneficiaries, notwithstanding that in private litigation there are always competing interests and an interpretation favourable to one will be detrimental to another.⁶⁹

For that reason, an outcome which favours women, particularly those with children, may well prevail over consistency or rigour of statutory interpretation. The Family Court of Australia has long had a somewhat troubled relationship with Parliament. The Court has tended to favour broad discretion

67. *Clarence v Crisp* (2016) FLC 93-728, 46 (Austl.).

68. *Moby v Schuller* (2010) FamCA 748, 140 (Austl.).

69. See e.g., *Dahl & Hamblin* [2011] FamCAFC 202, 49–50 (Austl.).

and chafes at rules that confine it.⁷⁰ Family Court judges in Australia quite like to sit under palm trees, notwithstanding that, properly understood, judicial discretion is always circumscribed.⁷¹ This affects the willingness of the appellate court to put too many constraints upon the interpretation of the definition of a *de facto* relationship. One appeal court has even cast doubt on whether living together in a household is necessary, despite the clear terms of subsection (1)(c).⁷²

An illustration of this outcome-driven interpretation is *Sha & Cham*.⁷³ The parties met at a ‘massage parlour’ where Ms Cham was working at the time.⁷⁴ One thing led to another. Mr Sha invited Ms Cham out on a date.⁷⁵ They had sex that night.⁷⁶ He was at this time married and living with his wife.⁷⁷ The relationship progressed, and a month or so later, in April 2012, they began to talk about having a baby.⁷⁸ In August 2012 they entered into a legal agreement that made provision for Ms Cham financially during their *de facto* relationship.⁷⁹ The agreement also committed Mr Sha to pay a certain weekly amount for the child they planned to have.⁸⁰ In September 2012, Ms Cham fell pregnant through IVF.⁸¹ However, it was only in early October

70. Patrick Parkinson, *Why Are Decisions on Family Property So Inconsistent?*, 90 AUSTRALIAN LAW JOURNAL 498 (2016).

71. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (rev’d ed, 1978), 31 (arguing that discretion in law is like the hole in the doughnut; it does not exist except as an area left often by a surrounding belt of restriction). *See also* Patrick Parkinson, *Constitutional Law and the Limits of Discretion in Family Property Law*, 44 FEDERAL LAW REVIEW 49 (2016).

72. *Ricci v Jones* [2011] FamCAFC 222, 59 (“It is in our view clear from a reading of the section, and a consideration of the authorities both in this court and in others, that cohabitation can be relevant but is by no means determinative.”).

73. *Sha v Cham* (2017) FamCAFC 161, 10 (Austl.) (demonstrating the outcome-determinativeness if requirements of s 4AA(1) are met).

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Family Law Act 1975* (Cth) s 90UC (describing the agreement as a binding financial agreement).

81. *Id.* at 14.

2012 that Mr Sha actually separated from his wife.⁸² He had continued to live with her until that time.⁸³ A year or so later, he separated from Ms Cham.⁸⁴

The case concerned the enforceability of the financial agreement. The question of enforceability turned on whether Mr Sha and Ms Cham were in a de facto relationship in August 2012 (when the agreement was signed) at a time when he remained living with his wife.⁸⁵ The agreement was premised on there being a current de facto relationship at that time. If there was not, the agreement was legally unenforceable. Mr Sha sought a declaration that they were not in a de facto relationship as of August 2012.⁸⁶

The evidence showed that at this time Mr Sha was supporting Ms Cham financially, that they were planning a baby together, and that they slept together on a fairly regular basis.⁸⁷ How regular? The evidence on this was murky.⁸⁸ The trial judge observed that it is more probable than not that Mr Sha “spent considerable time each week” at Ms Cham’s home including spending time overnight there regularly.⁸⁹ He was unable to quantify the time so spent.⁹⁰ He concluded that they were in a de facto relationship at the relevant time, three months before Mr Sha separated from his wife, finding that they had “a common residence” at the woman’s home, “albeit for relatively confined periods of time.”⁹¹ This decision was upheld on appeal.⁹²

Cases such as *Sha & Cham* blur the distinction between being in a relationship and living together. Undoubtedly, they were in a relationship, and that relationship was a serious one; but, given that Mr Sha was unquestionably still living with his wife - that

82. *Id.* at 16.

83. *Id.* (noting that Mr Sha lived continuously with his wife and Ms Cham).

84. *Id.* at 18.

85. *Id.* at 80.

86. *Id.* at 82.

87. *Id.* at 34–35.

88. *Id.* at 32 (showing the parties advanced different accounts regarding frequency).

89. *Id.* at 32.

90. *Id.*

91. *Id.* at 33.

92. *Id.* at 64–65.

is, his place of residence was the matrimonial home - could it be said that he was at the same time, “living together on a genuine domestic basis” with Ms Cham? The case was arguably resolved on the basis of what seemed to the court to be a just outcome (a small child being involved).⁹³ The statutory text became subservient to the end that was seen as desirable.

C. *The Virtue of Non-Guidance*

The third reason for definition inflation is that there is a great reluctance, amongst some appellate judges, to give any guidance about what the definition means because of a fear of “putting a gloss on the statute”.⁹⁴ The belief is that it is the judge’s job just to apply the statutory criteria to the facts. The appellate court is not to assist the trial judge by giving guidance on how to interpret and apply those statutory criteria.

That is fine as far as it goes, but it means that the Family Law Act in Australia lacks a theory of interpretation, an overarching framework to understand what it is the statutory discretion is meant to achieve.⁹⁵ The result is that the language of the statute is applied to the circumstances of each case without a sense of coherence that informs the work of the Family Court as a whole.

This can be seen in the fate of an attempt by one judge to place the definition of a de facto relationship within a broader framework of understanding why it is that a relationship between two individuals who are not married gives rise to significant rights and obligations.

In *Jonah and White*,⁹⁶ Murphy J had to consider whether a couple who had a clandestine affair for seventeen years were

93. *Id.* at 55 (finding that Johnston, J. correctly did not treat the execution of the agreement as an admission of a de facto relationship at law, rather he considered the fact that Mr Sha, when signing the agreement, understood his obligations pursuant to the agreement and the content of the agreement, and that those matters supported a finding that a de facto relationship existed at that time).

94. Parkinson, *supra* note 70, at 3, 34 (arguing that one explanation for the existence of divergent understandings of the law is that appellate courts cannot “fetter the discretion” of the trial judge).

95. *Id.* at 44.

96. *Jonah v White* (2011) 221 FamCA 460, 460 (Austl.).

‘living together’ within the meaning of the *Family Law Act*. The female applicant in this case commenced employment at a business run by the respondent in 1992.⁹⁷ They began an intimate relationship, which continued until early 2009.⁹⁸ During the whole of that time, the respondent was married.⁹⁹ His wife was, until the end of that period, unaware of the relationship.¹⁰⁰ Each of the parties maintained their own household, independent of the time they spent together.¹⁰¹ The respondent continued to live with his wife and their three children at their home in Sydney.¹⁰² The applicant maintained a separate residence in Sydney and, after a move in 1996, in Brisbane.¹⁰³ They saw each other every second or third week for two to three days each time when the respondent could absent himself from his wife and children.¹⁰⁴ He also supported her financially.¹⁰⁵

At trial, Murphy J said:

It seems to me to be clearly established by authority that the fact that, for example, the parties live in the same residence, for only a small part of each week does not exclude the possibility that they are “living together as a couple on a genuine domestic basis” or that the maintenance of separate residences is necessarily inconsistent with parties having a de facto relationship. So much is, in my view, clear from the statutory recognition that parties to a relationship can be married but also be in a de facto relationship.¹⁰⁶

He argued, essentially, that the question of whether a couple is living together is a qualitative one, not a quantitative one.¹⁰⁷

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 12.

102. *Id.*

103. *Id.*

104. *Id.* at 15.

105. *Id.* at 17.

106. *Id.* at 65.

107. *Id.* at 66.

The key to the definition, he thought, is the manifestation of a relationship where the parties have so merged their lives that they were, for all practical purposes, ‘living together’ as a couple on a genuine domestic basis.¹⁰⁸ He went on to say that it is the manifestation of “coupledom”, which involves the merger of two lives, that is the core of a de facto relationship.¹⁰⁹ Applying this test, the couple was not in a de facto relationship. Theirs was a very long affair, but one in which they had not ‘merged their lives’.¹¹⁰

The decision was upheld on appeal,¹¹¹ but the appeal court went to great pains not to endorse Murphy J’s explanation or to provide any other. The following year, the appeal court observed:

It is important to note that his Honour’s comments were made in the context of the facts of the matter that was before him. It is clear from reading the judgment as a whole that his Honour had the statutory definition firmly in mind at all times...Comments made in the course of discussing facts are not to be elevated to the status of the provisions of the statute or substituted for the statutory test. This is because, taken on their own, they either add nothing to the statutory test or, if they do, they are adding an impermissible gloss. Thus it is not appropriate to consider the facts other than in the light of the statutory test.¹¹²

The only guidance the appeal court gave is that the trial judge must consider all the circumstances of the case, taking account of the factors listed in the statute.¹¹³ The Full Court has made clear its rejection of the Murphy test in other cases since.¹¹⁴

108. *Id.* at 65.

109. *Id.* at 67, 71.

110. *Id.* at 67–68.

111. *Jonah & White* [2012] FamCAFC 200.

112. *Sinclair v Whittaker* [2013] FamCAFC 129, ¶¶ 93–94 (Austl.).

113. *Id.* at ¶¶ 50–54.

114. See e.g., *Cadman v Hallett* (2014) 52 Fam LR 149, 155 ¶¶ 40–43 (Austl.) (explaining Cadman’s claims would fail because the Murphy test was previously rejected by the Court); *Fleming v Schmidt* [2017] FamCAFC 12, ¶¶ 15–16 (Austl.) (explaining the appellant’s claims would fail because the Murphy test was previously rejected by the

VII. LIVING APART TOGETHER

These three reasons for definition inflation help explain why judges have interpreted the idea of living in a domestic relationship rather liberally. On a fairly consistent basis, the courts have made it clear that regularly staying over at the other's house and engaging in sexual intercourse may well be enough, provided there are other indicators of mutual commitment such as making financial contributions to the other and representing that the other is a 'partner'.¹¹⁵ The boundary line between having an intimate relationship involving regular overnight stays at the residence of another person without living together, and conversely being a de facto partner, is difficult to draw.¹¹⁶

This can be illustrated by the cases where the parties have been living 'apart together'.¹¹⁷ One example is *Greenwood v Merkel*, a case decided under NSW law, but using a similar test to that in federal law.¹¹⁸ From about June 1992, the parties formed a relationship which involved Ms Merkel spending a substantial number of the nights of the week at Mr Greenwood's residence.¹¹⁹ He also spent some nights at her place.¹²⁰ They were involved with each other's families and she provided assistance

Court); *Crick v Bennett* [2018] FamCAFC 68, ¶¶ 13–14 (Austl.) (describing the lengthy line of precedents rejecting the Murphy test); *Herford v Berke* [No. 2] [2019] FamCAFC 182, ¶¶ 14–15, ¶ 18 (Austl.) (noting the rejection of the Murphy test).

115. See e.g., *Cadman*, 52 Fam LR at 149 ¶¶ 20–30 (noting that the parties lived in a house owned by one party, were sexually intimate, and one party provided financial support to the other); *Crick*, [2018] FamCAFC at ¶¶ 44–46 (explaining the parties were sexually intimate, one party financially supported the other, and the parties socialized and presented as partners); *Sinclair*, [2013] FamCAFC at ¶¶ 4–6, ¶ 78 (stating that the parties were sexually intimate, moved in together, and the appellant's former driver was told the respondent was the appellant's "partner"); *Asprey v Delamarre* [2013] FamCA 214, at ¶ 22, ¶¶ 72–74 (Austl.) (explaining the parties were sexually intimate, lived mainly at the home of the respondent, and the respondent filled in the name of the applicant as "partner").

116. Anna Reimondos, Ann Evans & Edith Gray, *Living-Apart-Together (LAT) Relationships in Australia*, 87 FAM. MATTERS 43, 45 (2011) (discussing the difficulty of drawing the line between intimate relationships and de facto relationships).

117. *Id.*

118. *Greenwood v Merkel* (2004) 31 Fam LR 571, 576 ¶ 15 (Austl.).

119. *Id.* at 575 ¶ 12.

120. *Id.*

financially and in business matters.¹²¹ For a period of approximately seven months from mid 2005 to January 1996, she lived in his house paying some rent because he owned the house with his sister.¹²² That arrangement ended because of conflict between Mr Greenwood and one of her sons.¹²³ Notwithstanding the very brief period when they lived together (and this being in a landlord-tenant relationship), the judge concluded that throughout a period of nearly six years “they lived together as husband and wife on a bona fide domestic basis in the way that suited them.”¹²⁴

As *Greenwood v Merkel* indicates, living apart together may well suffice, if the other circumstances point to a continuing and serious intimate relationship. In *Asprey & Delamarre*,¹²⁵ a couple had a personal relationship for about nine years producing two children. They lived together for only seven weeks in total, in periods immediately following the birth of each child.¹²⁶ However, they spent a great deal of other time together, living in one another’s homes for weekends, holidays, and special occasions.¹²⁷ They considered moving in together full-time but could never agree on how to do so.¹²⁸ The judge found overall there was a de facto relationship.¹²⁹

Similarly, in *Kazama & Britton*,¹³⁰ the question arose whether an old man (who was 86 by the time of the hearing) had been in a de facto relationship with a younger Japanese woman. It was acknowledged from the outset that the parties had not had a common residence.¹³¹ They had at all material times kept separate residences.¹³² One reason for this was that the man was enmeshed, for much of the decade, in litigation with his ex-wife,

121. *Id.* at 576 ¶ 13.

122. *Id.* at 576 ¶ 14.

123. *Id.*

124. *Id.* at 576–77 ¶¶ 14–15.

125. *Asprey v Delamarre* [2013] FamCA 214, ¶ 8 (Austl.).

126. *Id.* at ¶ 34.

127. *Id.* at ¶ 73.

128. *Id.* at ¶ 36.

129. *Id.* at ¶ 77.

130. *Kazama v Britton* (2013) 48 Fam LR 664, 666 ¶¶ 7–9 (Austl.).

131. *Id.* at 665 ¶ 3.

132. *Id.*

who blamed the Japanese woman for the breakdown of the marriage.¹³³ The parties avoided spending time with one another in the presence of their children.¹³⁴ Nonetheless, there was otherwise much evidence of domesticity.¹³⁵ The parties holidayed together.¹³⁶ The man regularly came to stay at the Japanese woman's villa and she supported him in various ways domestically.¹³⁷ He provided a lot of financial support for her. He had also filled in and signed a form to sponsor her for immigration purposes as his de facto partner.¹³⁸

VIII. POLYAMOROUS OR POLYGAMOUS RELATIONSHIPS

What about polyamorous¹³⁹ or polygamous relationships? The statutory definition refers to a 'couple', but it also says one can have two de facto relationships at the same time.¹⁴⁰ So does the Act apply to 'thrupples', quadratic relationships, and other 'big love' arrangements?

Robert McLelland, the Attorney-General who introduced the federal legislation, rejected the interpretation of the statutory definition as being applicable to polygamous de facto relationships.¹⁴¹ For now, judicial interpretation of the idea of a de facto relationship remains dyadic.¹⁴² In *Taisha & Peng*,¹⁴³

133. *Id.* at 668, 671.

134. *Id.* at 668.

135. *Id.* at 669 (outlining how the woman went to the man's villa every day, did the cooking, cleaning, and ironing, and wore a ring he gave her on her wedding ring finger).

136. *Id.* at 669–71.

137. *Id.* at 669.

138. *Id.* at 666–67.

139. Polyamorous relationships are sexually intimate relationships between three or more consenting adults. Sexual relations may occur between any of the participants in the group, rather than involving concurrent dyadic heterosexual relationships with one man. See Hadar Aviram & Gwendolyn Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. AND GENDER 269, 273 (2015). See generally Luke Brunning, *The Distinctiveness of Polyamory*, 35 J. APPLIED PHIL. 513 (2016) (broadly discussing polyamorous relationships).

140. Family Law Act 1975 (Cth) pt I s 4AA(5)(b) (Austl.).

141. Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2008, 6544 (Robert McClelland, Attorney-General) (Austl.).

142. PARKINSON, *supra* note 1, at 26.

143. *Taisha v Peng*, (2012) 48 Fam LR 150 (Austl.).

Cronin J sought to offer a definition of a ‘couple’. This was a case where a younger woman lived for 17 years with a married couple and their children.¹⁴⁴ The younger woman asserted that there was a lesbian relationship with the mother.¹⁴⁵ The mother and her husband denied this.¹⁴⁶ Cronin J noted that the burden of proof was on the applicant and did not find it satisfied.¹⁴⁷ In the course of judgment, he said:

The applicant must establish that the parties were a couple and then establish that the couple lived together in a domestic relationship. The word “genuine” in my view, adds nothing to the definition. The word “couple” is not defined.

The Australian Bureau of Statistics defines a “couple relationship” as:

being two people usually residing in the same household who share a social, economic and emotional bond usually associated with marriage and who consider their relationship to be a marriage or marriage-like union. This relationship is identified by the presence of a registered marriage or a de facto marriage. (See www.abs.gov.au/ website DBS).

I note that that definition is used for census purposes.

The Shorter Oxford Dictionary defines “couple” as a union of two. (See 6th edit (2007)). The very word “couple” comes from the Latin which is a tie or a bond.¹⁴⁸

It seems doubtful, therefore, that de facto polygamy within the one household could be recognised, but it seems likely, given the legislation contemplates two simultaneous de facto

144. *Id.* at 151, 154.

145. *Id.* at 154–55.

146. *See id.* at 155, 159.

147. *Id.* at 161.

148. *Id.* at 153.

relationships, that a person could live across two different households with each of the partners during parts of each week or month.¹⁴⁹

IX. THE CONSEQUENCES OF A FINDING THAT THERE IS A DE FACTO RELATIONSHIP

What follows from a finding that a de facto relationship existed? Australia does not have a community property regime and nor does the Family Law Act mandate equal division of marital property, as is typical in the United States.¹⁵⁰ The legislation confers a very broad discretion on trial judges.¹⁵¹ It requires the court to consider the contributions of the parties, including as a homemaker and parent, and their respective future needs.

The most common approach is to treat the contributions of the parties, during the course of the relationship, as equal.¹⁵² Difficulties arise in how to treat pre-relationship assets, particularly where an increase in the value of an asset is due to inflation rather than any effort or expenditure put in by the parties during the course of the relationship. The 'rule of thumb' (for nothing more precise can be offered) is that the longer the relationship lasts, the less weight is put on the value of the pre-relationship assets.¹⁵³ Significant pre-relationship assets may not

149. See Theodore Bennett, *The Inclusion of Others? Polygamy and Australian Law*, 32 AUSTL. J. FAM. L. 263, 275 (2019). See also Jenny Richards & Hossein Esmaeili, *The Position of Australian Muslim Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still 'Taking Multiculturalism Seriously'?* 26 AUSTL. J. FAM. L. 142, 162 (2012) (noting that there are potential gaps in the protection Australian law affords Muslim women entering into Islamic marriages that amount to polygamous relationships).

150. Thomas Oldham & Patrick Parkinson, *Evaluating Judicial Discretion - Family Property Law in Australia and the USA Compared*, 30 AUSTL. J. FAM. L. 134, 138-39 (2016).

151. *Id.* at 154.

152. *In the Marriage of Waters and Jurek* (1995) 20 Fam LR 190, 190 (Austl.).

153. See e.g., *In the Marriage of L A and E A Pierce* (1998) 24 Fam LR 377, 385 (Austl.); *GWH v PGH* (2005) FamCA 388, 16 (Austl.). See also Thomas Oldham, *Should Separate Property Gradually Become Community Property as a Marriage Continues?*, 72 LA. L. REV. 127 (2011) (discussing debates in the U.S. on whether separate property should gradually become jointly owned); Jens Scherpe, *A Comparative Overview of the Treatment*

dwindle in significance to nothing, but in a twenty- year marriage which produces children, they are unlikely to be given much weight in the overall outcome of a case.¹⁵⁴

Shorter childless relationships – up to five or six years – are treated differently.¹⁵⁵ The parties may each keep their own assets with joint assets being divided equally, or the party with fewer assets may be given some benefit from increases in value of the other person's assets, but only to a limited degree.¹⁵⁶

There is another line of cases now emerging that treats the parties as having no right to one another's property at all¹⁵⁷ if they have kept their assets separate, as is more commonly the case for de facto partners.¹⁵⁸ This approach is illustrated by *Chancellor & McCoy*.¹⁵⁹ The parties were both teachers, and lived in a same-sex de facto relationship for 27 years.¹⁶⁰ They kept their financial affairs almost entirely separate.¹⁶¹ Joint expenses were shared, but there were otherwise few indications of financially

of *Non-Matrimonial Assets, Indexation and Value Increases*, 25 CHILD. AND FAM. L.Q. 61 (2013) (discussing the positions of various European countries on the same topic).

154. *Cahill v Cahill* [2003] FCA 172 (7 March 2003) ¶¶ 11, 12, 16 (Austl.) (holding that the husband's purchase of a home prior to the marriage had little effect on the contributions of the party over the 23-year marriage).

155. *See Anson v Meek* (2017) 57 Fam LR 23, 39–41 (Austl.) (discussing the division of property in various cases involving childless marriages lasting around five years where one party had significantly more pre-marital assets than the other).

156. *Id.* at 23–24 (finding that although the wife owned only 3.5% of property at the commencement of cohabitation, she was entitled to 40% of the value of the property at conclusion of a five-year relationship, as she made equal contributions to the property during marriage).

157. *See* Patrick Parkinson, *Family Property Division and the Principle of Judicial Restraint*, 41 UNIV. OF NSW L. J. 380, 381 (2018).

158. Supriya Singh & Clive Morley, *Gender and Financial Accounts in Marriage* 47(1) J. OF SOCIO. 3, 4 (2010) ("According to [a large national survey] in 2006-7, 83 percent of married persons had joint accounts, either only joint or combined with separate accounts. Joint accounts have become a symbolic expression of the jointness of marriage. This pattern distinguishes married persons from people in de facto relationships, for 85 percent of persons in de facto relationships had separate accounts, with or without joint accounts.").

159. *Chancellor v McCoy* [2016] FamCAFC 256 (2 Dec. 2016), ¶¶ 1-3 (Austl.)

160. *Id.* ¶¶ 1, 4.

161. *Id.* ¶ 1.

intermingling.¹⁶² They lived in homes owned by the respondent.¹⁶³ The applicant made modest contributions to the housing costs every fortnight. By the time they separated, the respondent's assets and superannuation were worth more than twice as much as those of the applicant, largely because the respondent was better at saving, and salary-sacrificed into her superannuation account.¹⁶⁴ The trial judge concluded that each should keep their own assets and no order for property alteration was made.¹⁶⁵ The appeal court affirmed.¹⁶⁶

The difficulty for practising lawyers is in knowing when this approach will be taken and when a partnership approach will be adopted. Most cases settle, so the challenge is how to bargain in the shadow of the law when the law casts very little shadow. The task is easier for longer relationships where there are children, since the range of likely outcomes, if the matter proceeds to trial, is more likely to reflect the gravitational pull of equality and to take significant account of the future needs of the primary caregiver to the children.¹⁶⁷ That reduces the scope for disagreement between lawyers.

One way of avoiding the lottery of the court system is to have a cohabitation agreement. A binding financial agreement can be made prior to commencement of cohabitation, during a *de facto* relationship or after a relationship breakdown,¹⁶⁸ as is the case with marriages. Drafting such an agreement does not come cheaply, as it needs to be carefully drafted, with proper advice on each side, to survive challenge down the track.¹⁶⁹ There are various grounds on which such an agreement can be set aside.¹⁷⁰

162. See *id.* ¶¶ 5–11 (discussing how appellant financed property and improvements in her name only—while respondent contributed only joint expenses and labour).

163. *Id.* ¶¶ 5–7.

164. *Id.* at 159, ¶¶ 25, 27(h).

165. *Id.* ¶ 2.

166. *Id.* at para. 1.

167. See PARKINSON, *supra* note 157, at 393.

168. See Family Law Act 1975 (Cth) ss 90UB–UD (Austl.) (detailing how to create a financial agreement before, during, and after a *de facto* relationship).

169. See Family Law Act s 90UJ(1)(b) (providing that it is mandatory to get independent legal advice before entering a financial agreement).

170. Family Law Act s 90UM.

X. CONCLUSION

The justification for treating *de facto* relationships like marriages is that they are like marriages. Cameron and Sandra might not agree in their circumstances, given that both of them saw marriage as an additional step in their commitment, indicating a desire to be together for the long-term.

When it comes to property division upon relationship breakdown, the particular justification for treating *de facto* relationships like marriages is that the parties' financial lives are intertwined. As a consequence, the state of the legal title does not properly reflect their intentions, or the contributions each may have made to the assets of the other, or to their shared lives more generally. There may also be a reasonable expectation that one party should meet the needs of the other, particularly if they have had children together. Couples in *de facto* relationships do not make explicit promises to love and support one another in sickness and in health, 'till death them do part; but it may be reasonable that some financial consequences follow from their cohabitation and its cessation, beyond the payment of child support.

Australian law has developed by looking at the words of the text, reading it very liberally, rather than looking at the justification for altering property rights. Surprisingly, these developments have all occurred with very little questioning or complaint from the public or examination by the press. It is not only Cameron and Sandra who would be surprised to know how the law applies to their circumstances.

That there has not been more controversy about the issue, as has been the case in other countries,¹⁷¹ is perhaps surprising. The explanation may lie in the fact that no large-scale research was conducted in Australia to determine the views of couples living

171. See *e.g.*, LAW COMMISSION, *COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN*, 2007, Cm. 7182, ¶¶ 1.1–1.2 (UK) (recommending the creation of a statutory regime that would allow one party to a former cohabiting relationship to make a claim on the assets of the other, based upon contributions and taking account of the needs of any dependent children of the couple); HOUSE OF COMMONS LIBRARY, "COMMON LAW MARRIAGE" AND COHABITATION, 2020–21, HC 03372, 3 (UK) (discussing how the government of the day decided not to proceed with the reform, and successive governments have taken the same view—as of March 2022, no reform had been enacted).

together on whether they wanted to be treated as married; furthermore, there was, and is, no organised constituency opposed to the equivalence principle.¹⁷² It is doubtful that many ordinary couples who move in together in the way that Cameron and Sandra did, have any idea what the applicable law is, and in any event the outcome that is likely to come from litigation in a highly discretionary system cannot readily be predicted in advance of the date of separation. Everything depends upon the circumstances at the time of separation and subsequently; it is much harder in Australia to give out a message that living together has such and such an outcome on property ownership compared with a jurisdiction that has some version of community property or equal division of the marital assets on relationship breakdown.

Organisations representing family lawyers in Australia almost universally supported the equivalency principle at the time when law reform bodies were considering it.¹⁷³ For family lawyers, of course, it means more work if family property litigation is not confined to the formerly married and those well-off enough to argue about their entitlements under the law of equity and trusts. This, and an understandable Robin Hood ethic when it comes to making provision for women on relationship breakdown, may help explain why the issue of equivalence between married couples and *de facto* couples was not controversial among family lawyers. The equivalence principle reflects an intuitive sense amongst family lawyers that if the parties have had an intimate relationship that goes beyond mere dating:

172. See Rachel Carson, *Property and Financial Matters Upon the Breakdown of De Facto Relationships*, in CHILD FAM. CMTY. AUSTL. 2014, at 15 (CFCA Paper No. 24, 2014) (noting, “despite the difficulties, on balance, the introduction of a (near) national, uniform, property/financial regime for separating families has been broadly identified as being warranted.”).

173. See *id.* at 12 (discussing support of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 by family lawyer groups).

- if there is at least some degree of living together, even if each keeps their own residence
- then the less well-off party to the relationship is entitled to share in the assets of the more well-off.¹⁷⁴

That said, the case law on when a couple can be said to be in a de facto relationship is unsatisfactory. It is likely that any change to the law will not involve revisiting the issue of whether de facto relationships should be treated just like marriages, but rather whether the partnership model of intimate relationships should be reconsidered,¹⁷⁵ in the light of vastly changed patterns of family formation and dissolution compared with 50 years ago.¹⁷⁶ Reconsideration of these issues in Australia is long overdue.

174. That assumption does not necessarily apply in the courts when women have most of the assets. Women's pre-relationship contributions seem to be credited to them to a much greater extent than when men bring assets into the relationship. For examples, see *See e.g., Shewring v Shewring* [1988] Fam LR 139, 139 (Austl.); *Cook v Langford* [2008] FamCAFC 84, ¶¶ 101–02 (Austl.); *Agius v Agius* [2010] FamCAFC 143, ¶¶ 1–3 (Austl.).

175. See generally Mary Ann Glendon, *Is There a Future for Separate Property?* 8 FAM. L. Q. 315, 321 (1974).

176. Cf. GLENDON, *supra* note 180, at 319–20 (discussing trends in heterosexual spousal relationships and family formation during the early 1970s).

