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## Queensland Parliamentary Library

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# Property Distribution at the End of a De Facto Relationship

*A de facto relationship is a marriage-like relationship between two persons. Under the Australian Constitution, the Commonwealth Parliament has power to legislate with respect to marriage and divorce and related matters, but it does not have power to legislate with respect to de facto relationships; the states and territories have this power. As a result, there is discrepancy between the Australian jurisdictions as to how property is distributed at the end of a de facto relationship.*

*In Queensland, property adjustment orders are currently made under the Property Law Act 1974 (Qld). However, Queensland, some of the other Australian states and the Northern Territory have referred power to the Commonwealth Parliament to make laws with respect to the financial matters arising out of de facto relationship breakdowns. The Commonwealth Parliament proposes to introduce the Family Law (De Facto Relationships) Amendment Bill (Cth) in the 2006 Spring sittings.*

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## **EXECUTIVE SUMMARY**

A de facto relationship is a marriage-like relationship between two persons. The number of de facto couples in Australia increased by 2% between 1996 and 2001 (the most recent Census figures available) to account for 12% of all couples: **pages 1-2.**

This Research Brief provides an update on the law regarding the resolution of de facto property disputes. It discusses the referral of legislative power to the Commonwealth Parliament made by Queensland, some of the other Australian states and the Northern Territory with respect to property disputes of de facto couples whose relationships have ended: **pages 2-3.** However, as the Commonwealth Parliament has not yet passed the Family Law (De Facto Relationships) Amendment Bill (Cth) (this Bill is proposed to be introduced in the 2006 Spring sittings), Part 19 of the *Property Law Act 1974* (Qld) is still used to facilitate the resolution of financial matters at the end of de facto relationships. This Research Brief discusses relevant provisions of the *Property Law Act 1974* (Qld) and some recent cases decided by the Queensland Supreme Court: **pages 3-17.** It also sets out the comparable legislation for each Australian jurisdiction: **pages 17-18.**

## 1 INTRODUCTION

Over the past decade, the Queensland Parliamentary Library has published three research papers which have discussed legislative and judicial activity concerning property disputes at the end of de facto relationships.<sup>1</sup> This Research Brief provides a further update on the relevant law, particularly as it relates to Queensland.

Until December 1999, property disputes between de facto couples in Queensland were resolved under the common law. Since then, such disputes have been resolved under Part 19 of the *Property Law Act 1974* (Qld). In October 2003, the Queensland Parliament passed legislation referring the legislative power to deal with financial matters following the breakdown of a de facto relationship to the Commonwealth Parliament.<sup>2</sup> The Commonwealth Parliament proposes to introduce the Family Law (De Facto Relationships) Amendment Bill (Cth) during the 2006 Spring sittings.<sup>3</sup>

## 2 DE FACTO RELATIONSHIPS

A de facto relationship is a marriage-like relationship (other than a legal marriage) between two persons.<sup>4</sup> In 1996, there were 744,100 Australians in de facto

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<sup>1</sup> The relevant Queensland Parliamentary Library publications are:

- Anita Sweet, 'The Law and Resolution of De Facto Property Disputes', *Research Bulletin*, No 9/96, 1996, downloaded 1 August 2006 from website at <http://www.parliament.qld.gov.au>
- Cathy Green, 'Property Law Amendment Bill 1999', *Legislation Note*, No 10/99, December 1999, downloaded 1 August 2006 from website at <http://www.parliament.qld.gov.au>; and
- Renee Giskes, 'The Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld)', *Research Brief*, No 2003/28, October 2003, downloaded 1 August 2006 from website at <http://www.parliament.qld.gov.au>

<sup>2</sup> *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld).

<sup>3</sup> Department of Prime Minister and Cabinet, 'Legislation proposed for introduction in the 2006 Spring sittings', downloaded 8 August 2006 from website at [http://www.pmc.gov.au/parliamentary/docs/proposed\\_legislation.pdf](http://www.pmc.gov.au/parliamentary/docs/proposed_legislation.pdf)

<sup>4</sup> Section 3 of the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld).

relationships.<sup>5</sup> By 2001,<sup>6</sup> there were 951,500 Australians in de facto relationships, which is an increase of 28%.<sup>7</sup> That is, 12% of all Australian couples were in a de facto relationship in 2001, up from 10% in 1996.<sup>8</sup>

### **3 COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) ACT 2003 (QLD)**

Under the Australian Constitution, the Commonwealth has power to legislate with respect to marriage and divorce and related matters, but does not have power to legislate with respect to de facto relationships; the states and territories have this power. As a result, property is distributed differently at the end of a de facto relationship in each Australian jurisdiction.

In December 1993, the Commonwealth Attorney-General, the then Hon Michael Lavarch MP, announced that the Commonwealth was seeking a referral of powers to resolve financial matters arising out of de facto relationships.<sup>9</sup> The Commonwealth Powers Amendment Bill 1995 (Qld), which proposed to provide the referral, was introduced into the Queensland Parliament in October 1995 but lapsed in February 1996 with the change of government.

In November 2002, the Standing Committee of Attorneys-General agreed to refer powers to the Commonwealth to deal with property disputes relating to separating de facto couples.<sup>10</sup> The Queensland Parliament subsequently passed the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) which was assented to on 6 November 2003. To date, however, that Act has not been proclaimed.

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<sup>5</sup> Australian Bureau of Statistics, *2005 Year Book Australia*, ABS Catalogue No 1301.0, Canberra, 2005, p 135, downloaded 31 July 2006 from website at <http://www.ausstats.abs.gov.au>

<sup>6</sup> These are the most recent census figures available.

<sup>7</sup> Australian Bureau of Statistics, *2005 Year Book Australia*, p 135.

<sup>8</sup> Australian Bureau of Statistics, *2005 Year Book Australia*, p 135.

<sup>9</sup> Hon Matt Foley MP, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts, 'Commonwealth Powers Amendment Bill', *Queensland Parliamentary Debates*, 19 October 1995, pp 525-527, p 527.

<sup>10</sup> Hon Daryl Williams MP, Attorney-General, 'Commonwealth wins de facto property powers', *Media Release*, 8 November 2002, last modified 1 January 2004, downloaded 27 July 2006 from website at <http://www.nationalsecurity.gov.au/agd/WWW/attorneygeneralHome.nsf/>

In the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld), Queensland referred powers to the Commonwealth with respect to property disputes of both same sex couples and heterosexual couples, but the Commonwealth has indicated that it will not accept the referral to legislate in relation to same sex couples.<sup>11</sup>

In his Second Reading Speech on the Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), the then Attorney-General and Minister for Justice, the Hon Rod Welford MP, said that the major benefit arising from having de facto property disputes dealt with under the *Family Law Act 1975* (Cth) would be that both child and property issues would be dealt with by the Family Court.<sup>12</sup> In his Speech in Reply, he said that the aim of passing the Bill was:<sup>13</sup>

*... to ensure that all parties in permanent, private relationships have the same access to the same fair principles and the same institutions for the resolution of their relationships regardless of their matrimonial status.*

The Commonwealth Parliament proposes to introduce the Family Law (De Facto Relationships) Amendment Bill (Cth) in the 2006 Spring sittings.<sup>14</sup>

## **4 PROPERTY LAW ACT 1974 (QLD)**

### **4.1 BACKGROUND**

As the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) has not yet commenced, property disputes arising as a result of the breakdown of a de facto

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<sup>11</sup> Transcript of Attorney-General Hon Daryl Williams AM QC MP, 8 November 2002, last modified 31 March 2005, downloaded 25 September 2006 from website at [www.ag.gov.au/agd/www/nationalsecurity.nsf/Page/News\\_Media\\_2002\\_Media\\_Statements\\_Media\\_Transcripts\\_08\\_November\\_2002\\_Attorney-General:\\_Doorstop\\_Fremantle](http://www.ag.gov.au/agd/www/nationalsecurity.nsf/Page/News_Media_2002_Media_Statements_Media_Transcripts_08_November_2002_Attorney-General:_Doorstop_Fremantle)

<sup>12</sup> Hon Rod Welford MP, Attorney-General and Minister for Justice, 'Commonwealth Powers (De Facto Relationships) Bill', Second Reading Speech, *Queensland Parliamentary Debates*, 9 September 2003, pp 3274-3275, p 3275. Issues about children are dealt with by the Family Court following a referral of power from all the states, except Western Australia, between 1986 and 1990.

<sup>13</sup> Hon Rod Welford MP, Attorney-General and Minister for Justice, Commonwealth Powers (De Facto Relationships) Bill 2006 (Qld), *Queensland Parliamentary Debates*, 28 October 2003, pp 4394-4395, p 4395.

<sup>14</sup> Department of Prime Minister and Cabinet, 'Legislation proposed for introduction in the 2006 Spring sittings'.



relationship continue to be resolved in Queensland using Part 19 of the *Property Law Act 1974* (Qld) (the PLA).<sup>15</sup>

Amongst other things, Part 19 of the PLA provides a statutory framework “to facilitate the resolution of financial matters at the end of a de facto relationship”.<sup>16</sup> Prior to the commencement of Part 19, property disputes arising at the end of a de facto relationship were resolved under the common law.<sup>17</sup> Enacting Part 19 was seen as the best option for Queensland because the state Attorneys-General could not agree on uniform legislation relating to de facto relationships, and there was insufficient support among the states and territories for a referral of power to the Commonwealth.<sup>18</sup>

Part 19 of the PLA is modelled on the equivalent provisions of the *Family Law Act 1975* (Cth) which deal with property disputes at the end of marriages.<sup>19</sup> The main difference in the relevant provisions of these Acts is that the *Family Law Act 1975* provides for spousal maintenance while the PLA does not. In its report on de facto relationships published in 1993, the Queensland Law Reform Commission (QLRC) stated that it was concerned that “serious injustice could result” if de facto relationship legislation did not provide for maintenance payments.<sup>20</sup> The QLRC recommended that de facto relationship legislation should contain provisions which conferred maintenance rights and obligations in appropriate cases.<sup>21</sup> However, the QLRC’s recommendation with respect to maintenance was not included in Part 19.

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<sup>15</sup> Part 19, which commenced in December 1999, was inserted into the PLA by the *Property Law Amendment Act 1999* (Qld).

<sup>16</sup> Property Law Amendment Bill 1999, Explanatory Notes, p 1.

<sup>17</sup> Numerous disadvantages of relying on the common law to resolve de facto property disputes are identified by Anita Sweet in ‘The Law and Resolution of De Facto Property Disputes’, pp 12-13.

<sup>18</sup> Renee Giskes, ‘The Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld)’, p 7.

<sup>19</sup> Lindy Willmott, ‘De Facto Property Claim: Eligibility – Queensland Style’, *The Queensland Lawyer*, Vol 23, August 2002, pp 14–28, p 24. Part VIII of the *Family Law Act 1975* (Cth) deals with property, spousal maintenance and maintenance agreements.

<sup>20</sup> Queensland Law Reform Commission (QLRC), *De Facto Relationships*, Report 44, June 1993, p 69.

<sup>21</sup> QLRC, *De Facto Relationships*, p 71.

## **4.2 MEANING OF “DE FACTO PARTNER”**

The *Discrimination Law Amendment Act 2002* (Qld) inserted a definition of “de facto partner” into the *Acts Interpretation Act 1954* (Qld) (AIA) and an “extended meaning of de facto partner for Part 19” into section 260 of the PLA. Section 260 of the PLA now provides that a reference to a “de facto partner” is a reference to either one of two persons who:

- are, under section 32DA of the AIA, de facto partners of each other; or
- have been, or would have been had section 32DA of the AIA applied, de facto partners of each other, but who are no longer living together as a couple on a genuine domestic basis within the meaning of section 32DA.

A “de facto partner” is defined in section 32DA of the AIA as “either [one] of [two] persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family”. The section goes on to state how it can be decided whether two persons are living together as a couple on a genuine domestic basis. Any of their circumstances may be taken into account, including, for example, any of the following:<sup>22</sup>

- a) the nature and extent of their common residence;*
- b) the length of their relationship;*
- c) whether or not a sexual relationship exists or existed;*
- d) the degree of financial dependence or interdependence, and any arrangement for financial support;*
- e) their ownership, use and acquisition of property;*
- f) the degree of mutual commitment to a shared life, including the care and support of each other;*
- g) the care and support of children;*
- h) the performance of household tasks;*
- i) the reputation and public aspects of their relationship.*

## **4.3 PROPERTY OF DE FACTO PARTNERS**

Part 19 of the PLA provides for a number of matters relating to the property of de facto partners. These include:

- de facto partners being permitted to make cohabitation and separation agreements that, in particular circumstances, exclusively regulate the resolution of financial matters at the end of their relationship;
- providing that a court can declare any title or rights a de facto partner or another party to the proceeding has in a property; and

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<sup>22</sup> Section 32DA(2) of the AIA.

- allowing a court to make a declaration about the existence or non-existence of a de facto relationship.

#### 4.4 PROPERTY ADJUSTMENT ORDERS

Under the PLA, a court may make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property.<sup>23</sup> A court may make a property adjustment order only if it is satisfied:<sup>24</sup>

- a) the de facto partners have lived together in a de facto relationship for at least 2 years; or*
- b) there is a child of the de facto partners who is under 18 years; or*
- c) the de facto partner who applied for the order has made substantial contributions of the kind mentioned in section 291<sup>25</sup> or 292<sup>26</sup> and failure to make the order would result in serious injustice to the de facto partner.*

The matters that a court may consider in deciding what is just and equitable for adjusting the property interests of a de facto couple “closely reflect”<sup>27</sup> those that may be considered by the Family Court under the *Family Law Act 1975* (Cth). These include financial and non-financial contributions to property or financial resources and contributions to family welfare. The Explanatory Notes for the Bill inserting Part 19 of the PLA state:<sup>28</sup>

*As the Bill reflects the corresponding provisions of the Family Law Act 1975 (Cwth), any court in construing the provisions of the Bill should have regard to the case law and principles applicable to the Family Law Act 1975 (Cwth) – for example – domestic violence could be a relevant factor in assessing contributions for the purpose of adjusting property interests ...*

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<sup>23</sup> Section 286 of the PLA.

<sup>24</sup> Section 287 of the PLA.

<sup>25</sup> Section 291 of the PLA sets out the contributions to property or financial resources made by the de facto partners that a court must consider.

<sup>26</sup> Section 292 of the PLA sets out the contributions to family welfare made by the de facto partners that a court must consider.

<sup>27</sup> Property Law Amendment Bill 1999, Explanatory Notes, p 10.

<sup>28</sup> Property Law Amendment Bill 1999, Explanatory Notes, p 12.

## 5 RECENT CASES

Six recent de facto relationship property adjustment cases decided by the Supreme Court of Queensland are summarised below.

By way of summary:

- in the first case, the judge had to decide what nexus with Queensland is required for Part 19 of the PLA to apply;
- the second and third cases provide illustrations of how courts determine whether there is a de facto relationship which meets the requirements of section 287 of the PLA;
- the fourth and fifth cases provide examples of how the Supreme Court of Queensland, in interpreting Part 19 of the PLA, has regard to cases decided by the Family Court; and
- the fourth and sixth cases show how property interests are adjusted by the courts to take account of the financial responsibility of looking after the children of a de facto relationship.

### 5.1 *C v B & ANOR* [2006] QSC 195 (4 AUGUST 2006)<sup>29</sup>

#### 5.1.1 Issue

What nexus with Queensland is required for Part 19 of the PLA to apply?

#### 5.1.2 Background

The female plaintiff contended that she and the male first defendant had lived together as de facto partners in a number of places, including the Gold Coast. The defendants contended that there was no jurisdiction for Part 19 of the PLA to apply.

The plaintiff alleged that she and the first defendant were in a de facto relationship in Majorca from July 1997 until May 1998 when she returned to Sydney to give birth to their son. She claimed they lived together again from 1998 to 2000 in the Cayman Islands and in New Zealand before she returned to Australia because of their son's medical condition. The first defendant stayed with the plaintiff on his

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<sup>29</sup> *C v B & Anor* [2006] QSC 195, downloaded 11 August 2006 from website at <http://www.courts.qld.gov.au>

“frequent”<sup>30</sup> visits to Sydney, and the plaintiff and her son travelled to New Zealand to stay with the first defendant. In late 2001, the plaintiff and the first defendant resumed living together, at one stage at the Gold Coast.

In 2003, in consultation with the plaintiff, the first defendant arranged to purchase a house in Queensland in the name of the second defendant, a company. The only shareholders in the second defendant were the first defendant and another man.

The plaintiff contended that the de facto relationship ended on 1 January 2005. She pleaded that she made various contributions to the property and financial resources of the first defendant, but did not make a financial contribution. She alleged that the first defendant “has within his control assets and resources in Australia, New Zealand and elsewhere of a value the total of which is unknown to the plaintiff, but exceeding \$50 million”.<sup>31</sup> She sought:<sup>32</sup>

*A Property Adjustment Order in her favour pursuant to [s]ection 286 of the ... Act by which the First Defendant causes the Second Defendant to transfer to the Plaintiff its interests in the house and/or the First Defendant pays to the Plaintiff the sum \$2.5 million or such further or other sum as to the Court may seem just.*

### 5.1.3 Decision and reasons

The PLA does not set out the territorial application of Part 19. That is, it does not state that the parties must have lived in Queensland, or begun or ended their relationship in Queensland, or that their property or financial resources must be in Queensland. Nevertheless, Justice McMurdo stated:<sup>33</sup>

*Some territorial limitation upon the operation of Part 19 must be implied. Part 19 cannot be understood as applying to the world, and to confer potential rights and impose potential obligations regardless of any connection with Queensland.*

His Honour went on to state:<sup>34</sup>

*The court must make orders that, as far as practicable, will end the financial relationship between the de facto partners (s 337), a task which would be impeded and often prevented if the court was unable to make orders affecting some of the property owned by both or either of them. And the essential criterion affecting the*

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<sup>30</sup> *C v B & Anor* [2006] QSC 195, para 3, per McMurdo J.

<sup>31</sup> *C v B & Anor* [2006] QSC 195, para 6, per McMurdo J.

<sup>32</sup> *C v B & Anor* [2006] QSC 195, para 7, per McMurdo J.

<sup>33</sup> *C v B & Anor* [2006] QSC 195, para 15, per McMurdo J.

<sup>34</sup> *C v B & Anor* [2006] QSC 195, para 20, per McMurdo J.

*court's determination of an application for a property adjustment order is what the court considers just and equitable, about which the court is to consider the state of the assets and financial resources of the respective parties and their respective contributions to that position. It would be artificial for the court to purport to assess what is just and equitable by looking at only part of the picture. ...*

Justice McMurdo held that the territorial limitation is that accepted by the court in *Baker v Johnson* (unreported, de Jersey CJ, SC No 7262 of 2005, 30 September 2005). That is, cohabitation is an “essential element”<sup>35</sup> of a de facto relationship and cohabitation enables it to be worked out where the parties have been in a de facto relationship. Thus a holiday in Queensland would not mean that the parties were cohabitating in Queensland (and thus there would be insufficient nexus with Queensland for Part 19 to apply), but having a place of residence in Queensland would be a sufficient nexus with Queensland to provide jurisdiction. The judge concluded:<sup>36</sup>

*[T]here is jurisdiction in relation to the first defendant's property wherever it is situated, because the parties were in a de facto relationship under which they lived together in Queensland ... .*

## **5.2 K v H-J [2006] QSC 168 (7 JUNE 2006)<sup>37</sup>**

### **5.2.1 Issue**

Did a de facto relationship exist between the female plaintiff and the male respondent as required by section 287 of the PLA? That is, either:<sup>38</sup>

- did the de facto partners live together in a de facto relationship for at least two years; or
- did the plaintiff make substantial contributions of the kind mentioned in sections 291 and 292 of the PLA and the failure to make a property adjustment order would result in serious injustice to her?

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<sup>35</sup> *C v B & Anor* [2006] QSC 195, para 22, per McMurdo J.

<sup>36</sup> *C v B & Anor* [2006] QSC 195, para 24, per McMurdo J.

<sup>37</sup> *K v H-J* [2006] QSC 168 (7 June 2006), downloaded 1 August 2006 from website at <http://www.courts.qld.gov.au>

<sup>38</sup> *K v H-J* [2006] QSC 168 (7 June 2006), para 1, per Douglas J.

### 5.2.2 Background

The female plaintiff contended that she and the male defendant were in a de facto relationship from 1995 to the end of 2002. The defendant, on the other hand, maintained that they were friends who had a sexual relationship for a short period.

The plaintiff and defendant did not live together at any time. Early in their relationship they saw each other regularly and had sexual relations but after a few months they began to see each other less often and their sexual relationship lessened. Witnesses for the defendant gave evidence that the defendant never mentioned that he was in a relationship with the plaintiff. They also stated that if they had met the plaintiff, she was not introduced to them as his partner. In about 1998, the defendant instituted what he called a “one metre rule” with the plaintiff. That is, the plaintiff had to stay one metre away from the defendant.

After the defendant’s brother died, leaving the defendant over \$8 million, the plaintiff assisted the defendant in a number of ways regarding the brother’s estate, including with some wordprocessing. The respondent allowed her to live in one of his houses rent free whilst he lived at another property, and he gave her a car to use.

### 5.2.3 Decision and reasons

Justice Douglas held:<sup>39</sup>

*... At no stage did they live together and their sexual relationship did not persist to such an extent as to permit me to treat them as de facto partners.*

*There was some evidence of financial support provided by each to the other at various stages of their friendship but it was limited support and normally expressed in terms requiring repayment and inconsistent with financial dependence or interdependence between them. ...*

*They did not acquire or own property in common. The plaintiff has used the defendant’s property, including cars and a house owned by him. After he received his inheritance he was in a position to be generous to his friends. ...*

*The issue described as the degree of mutual commitment to a shared life, including the care and support of each other, again did not extend beyond the support and care that good friends supply to each other. ... [I]t seems clear to me that the defendant was never committed to a shared life, the “one metre rule” being perhaps the most obvious expression of his sentiments.*

*... There was a little evidence about the performance of household tasks but nothing to take that out of the range of the normal behaviour of friends towards each other.*

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<sup>39</sup> *K v H-J* [2006] QSC 168 (7 June 2006), paras 58–71, per Douglas J.

*On balance the evidence of the reputation and public aspects of the relationship was clearly against the conclusion that they were de facto partners. ...*

...

*Nor has the plaintiff established any entitlement to a property adjustment order on the basis that she has made substantial contributions of the kind mentioned in s 291 or s 292 of the Property Law Act. ... There is no serious injustice to her in any failure to make a property adjustment order. ...*

*Accordingly the application should be dismissed.*

### **5.3 PY v CY [2005] QCA 247 (15 JULY 2005)<sup>40</sup>**

#### **5.3.1 Issue**

This case involved an appeal against the District Court's declaration under section 319 of the PLA that the male appellant and the female respondent were in a de facto relationship from about September 1988 until 25 December 2000. In the District Court, the judge accepted the evidence of the respondent and her witnesses and rejected the contrary evidence of the appellant and his witness. The respondent contended that she and the appellant were in a de facto relationship from September 1988 until December 2000, while the appellant alleged that he had never been in a de facto relationship with the respondent. He gave evidence that she looked after his house in return for accommodation for herself and her son.

In the Court of Appeal, the appellant accepted that he was in a de facto relationship from September 1988 to March 1997 but disputed the finding that he was in a de facto relationship between that date and December 2000. He contended that he and the respondent could not have been de facto partners at that time primarily because they did not share a common residence.

#### **5.3.2 Background**

In 1997, the respondent moved to the Sunshine Coast from Rockhampton, where she had been living with the appellant, so that she could look after her elderly parents who were in poor health. The respondent and the appellant agreed that the appellant would remain in Rockhampton until he sold his house and business whereupon he would move to the Sunshine Coast to be with the appellant.

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<sup>40</sup> PY v CY [2005] QCA 247 (15 July 2005), downloaded 1 August 2006 from website at <http://www.courts.qld.gov.au>



At the Sunshine Coast, the respondent first lived with her brother, then moved into a house leased by the appellant. In May 1999, the appellant purchased a property in the Sunshine Coast hinterland and the respondent moved into it. As the appellant had been unable to sell his business in Rockhampton, he remained living in that city but visited the respondent and her son on average every second weekend. During the holidays he lived with her and her son for longer periods and sometimes brought along his children.

On Christmas Day in 2000, the appellant assaulted the respondent's son. While the respondent had tolerated violence directed at her by the appellant, the assault on her son caused the breakdown of the de facto relationship, and the respondent moved out of the appellant's house in May 2001.

### 5.3.3 Decision and reasons

Part 19 of the PLA applies to all de facto relationships other than relationships that ended before the commencement of section 257. That section commenced on 21 December 1999. Thus, if the appellant was successful in his appeal against the District Court's declaration that the de facto relationship existed between March 1997 and December 2000, the respondent would not be able to seek a declaration of property interests under section 280 of the PLA or a property adjustment order pursuant to section 286.

Section 32DA(2) of the AIA lists "common residence" as one of the circumstances a court may take into account in determining whether the parties were de facto partners. Chief Justice de Jersey noted that "common residence" of itself was not necessary for there to be a de facto relationship.<sup>41</sup> He also noted that the primary judge held that even though the parties had separate residences, it did not mean that their de facto relationship had ended. Jerrard JA stated that a couple may be in a de facto relationship even though they are a long distance apart because of circumstance.<sup>42</sup>

Jerrard JA explained:<sup>43</sup>

*If the business and house the appellant had intended and endeavoured to sell had been sold by the end of three months, during which period the parties had maintained their regular alternate weekend visits to each other, it would be fanciful to suggest that their de facto relationship had ended when the respondent moved to care for her parents, and did not exist while she and the appellant waited for the*

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<sup>41</sup> *PY v CY* [2005] QCA 247 (15 July 2005), para 22, per de Jersey CJ.

<sup>42</sup> *PY v CY* [2005] QCA 247 (15 July 2005), paras 44-46, per Jerrard JA.

<sup>43</sup> *PY v CY* [2005] QCA 247 (15 July 2005), para 45, per Jerrard JA.

*property sale. The whole point of resuming cohabitation once the sales happened, and the sole reason for the sales in the first place, was because that de facto relationship had existed and had continued to exist, even while the parties were forced to live apart while intending they would live together again as soon as possible.*

Williams JA stated:<sup>44</sup>

*... the most critical feature of the relationship between the parties was the personal one, that is regarding themselves as a family unit and enjoying whenever possible the sexual relationship which is a normal attribute of family life. Apart from the fact that they were not living on a daily basis in the same residence there was nothing which occurred between 1997 and Christmas 2000 which indicated that there had been a termination of the de facto relationship which had existed since 1988.*

The Court of Appeal ordered that the appeal be dismissed. That is, that the District Court's declaration that the appellant and respondent were in a de facto relationship between September 1988 and December 2000 would stand.

## **5.4 F v H [2006] QSC 100 (28 APRIL 2006)<sup>45</sup>**

### **5.4.1 Issue**

In *F v H*, Justice Douglas:<sup>46</sup>

*... [was] required to identify and value the property, liabilities and financial resources of the parties, identify and assess their respective contributions to their property, financial resources and family welfare taking into account the matters referred in ss 291-309 of the Property Law Act 1974 and determine, under s 286 of that Act, what order, if any, is just and equitable having regard to these considerations ... .*

### **5.4.2 Background**

The female plaintiff and the male defendant were in a de facto relationship for approximately four and a half years. They had one child who was primarily cared for by the female plaintiff. The total value of their net assets and financial

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<sup>44</sup> *PY v CY* [2005] QCA 247 (15 July 2005), para 37, per Williams JA.

<sup>45</sup> *F v H* [2006] QSC 100 (28 April 2006), downloaded 1 August 2006 from website at <http://www.courts.qld.gov.au>

<sup>46</sup> *F v H* [2006] QSC 100 (28 April 2006), para 1, per Douglas J.

resources was approximately \$1.8 million. At the time of the trial, the plaintiff's superannuation was worth approximately \$23,655 and the defendant's superannuation was valued at approximately \$452,565.

Prior to the birth of their child, both the plaintiff and the defendant worked in the same industry. At the time of the trial, the defendant continued to earn a substantial income while the plaintiff was the primary carer of their child.

Part of the plaintiff's contribution to the couple's property or financial resources was a loan of \$350,000 made by the plaintiff's father at interest rates favourable to the plaintiff and respondent. The loan (which was used to purchase a property) assisted the parties in a number of ways including subsidising their housing costs and allowing the respondent to retain shares and property which appreciated in value.

### 5.4.3 Decision and reasons

Justice Douglas decided to adjust their interests globally (rather than asset by asset) due to:<sup>47</sup>

*... the differing nature of their contributions and the difficulty of quantifying mathematically the homemaker role of the plaintiff, the economic effects on her and the defendant of her entry into the relationship and of her bearing the major responsibility of raising their child, quite apart from the major advantage brought by her to the relationship by the generosity of her father's loan for the island property and his other support for her, which is also difficult to quantify with mathematical precision ... .*

Because of the size of the property pool, the judge stated that it was possible to make a property adjustment taking into account the disparity in superannuation entitlements. He commented: “[i]t is often an appropriate way to deal with the similar issue in the Family Court and seems the logical approach to take here.”<sup>48</sup>

The judge decided to divide the property 70:30 in favour of the plaintiff (leaving out the parties' superannuation). He said:<sup>49</sup>

*... The defendant ... pointed to the limited contribution of the plaintiff to the superannuation he had accumulated during his working life and other assets he had acquired and his contribution from his income to their living expenses during the period of the relationship. These are relevant and significant matters. By the same*

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<sup>47</sup> *F v H* [2006] QSC 100 (28 April 2006), para 70, per Douglas J.

<sup>48</sup> *F v H* [2006] QSC 100 (28 April 2006), para 23, per Douglas J.

<sup>49</sup> *F v H* [2006] QSC 100 (28 April 2006), paras 71 and 72, per Douglas J.

*token [the plaintiff] contributed greatly in her role as the principal homemaker and, by her father's generosity, to the increase in the capital value of their assets. Her father has also been contributing to their son's school fees.*

*... when one also takes into account the defendant's significantly greater earning capacity and superannuation entitlements, which continue to be contributed to by the plaintiff's role as the main carer for their child, ... the available assets should be adjusted to reflect not only her significant contribution to the pool but her continuing obligations as the parent of their child and their effects on her earning capacity.*

The judge also noted that the birth of their child had adversely affected the plaintiff's earning capacity and that her superannuation would be much lower than if she had been able to continue working full-time.

## **5.5 SAP v JAD [2006] QSC 178 (10 JULY 2006)<sup>50</sup>**

### **5.5.1 Issue**

Justice Atkinson was required to make an order for a property adjustment following the end of a de facto relationship between the female plaintiff and the male respondent.

### **5.5.2 Background**

The plaintiff and respondent were in a de facto relationship for approximately 14 years and had one child. There had been instances of domestic violence by the respondent. During the relationship, the plaintiff and the respondent bought and sold properties and businesses. At the time that the parties separated they owned a mini-mart with a dwelling attached, as well as a house.

Without the plaintiff's knowledge, the respondent sold the business and premises. Documents produced to the court from the relevant banks under subpoena showed that in one week in August 2005, the respondent withdrew \$235,000 in cash and another \$180,000 subsequently. In an affidavit, the respondent stated that he lost the money gambling. In late September 2005, the respondent lodged a debtor's petition under the *Bankruptcy Act 1966* (Cth). It was accepted by the Official Receiver and the respondent became bankrupt. In February 2006, a Federal Magistrate annulled the bankruptcy of the respondent pursuant to section 153B of the *Bankruptcy Act 1966* (Cth) because the Federal Magistrate was satisfied that

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<sup>50</sup> *SAP v JAD* [2006] QSC 178 (10 July 2006), downloaded 1 August 2006 from website at <http://www.courts.qld.gov.au>

the respondent was solvent at the time of lodging the debtor's petition and, therefore, the petition was an abuse of process.

Despite being served with numerous court orders, the respondent failed to disclose his financial circumstances and, therefore, pursuant to section 289 of the PLA, the court was unable to make an order in his favour.

### 5.5.3 Decision and reasons

Justice Atkinson held that the respondent had received a premature distribution of property and therefore the amount that he had already received should notionally be included in the parties' asset pool to be considered in the application. Her Honour stated:<sup>51</sup>

*The authority for this in the Family Court of Australia is well settled and the authorities on this point are of some assistance here. In In the Marriage of Milankov Kay J observed:*

*In several circumstances, well identified by the cases, this first step often involves including in the 'pool of assets' items which no longer exist but which in order to do justice and equity to the parties need to be notionally considered in determining what a fair share of the existing pool of assets should be ... .*

The plaintiff had had a legal interest in the business and premises and the mortgage was in both her name and the respondent's.

After considering the parties' contributions to property or financial resources, contributions to welfare, effect on future earning capacity and child support, Justice Atkinson ordered, amongst other things, that the respondent transfer his interest in the house to the plaintiff.

## 5.6 *M v M* [2006] QSC 148 (19 JUNE 2006)<sup>52</sup>

### 5.6.1 Issue

The plaintiff was seeking a property adjustment order under Part 19 of the PLA.

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<sup>51</sup> *SAP v JAD* [2006] QSC 178 (10 July 2006), para 38, per Atkinson J, quoting *In the Marriage of Milankov*, (2002) 28 Fam LR 514, paras 113-114 per Kay J.

<sup>52</sup> *M v M* [2006] QSC 148 (19 June 2006), downloaded 1 August 2006 from website at <http://www.courts.qld.gov.au>

### **5.6.2 Background**

The female plaintiff and the male respondent were in a de facto relationship for about four years. They had twins aged five years (at the time of the trial) who lived with the plaintiff. The respondent had been ordered to pay about \$21 per month towards their maintenance but he was about \$671 in arrears.

The plaintiff brought a number of assets into the de facto relationship – two properties, a vehicle and furniture. The respondent brought about \$125,000 into the relationship.

The respondent is an earthmoving work contractor. During their de facto relationship, the plaintiff primarily looked after the children. The parties shared the domestic duties.

### **5.6.3 Decision and reasons**

Justice McMurdo stated that the plaintiff contributed about two and a half times more to the pool than the respondent at the outset of their de facto relationship,<sup>53</sup> but that neither party made a significantly greater contribution than the other during their relationship. His Honour would have divided the assets at the same percentages as their original contributions except that the plaintiff was likely to have a greater financial responsibility looking after the children of the relationship. Therefore he increased the percentage to be awarded to the plaintiff from 70-75% to at least 80% of the net pool of assets (\$600,000 in total) and made the necessary orders regarding their property.<sup>54</sup>

## **6 PROPOSED FAMILY LAW (DE FACTO RELATIONSHIPS) AMENDMENT BILL (CTH)**

The Commonwealth Parliament proposes to introduce the Family Law (De Facto Relationships) Amendment Bill (Cth) during the 2006 Spring sittings of Parliament.<sup>55</sup> Queensland, New South Wales,<sup>56</sup> the Northern Territory,<sup>57</sup>

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<sup>53</sup> *M v M* [2006] QSC 148 (19 June 2006), para 10, per McMurdo J.

<sup>54</sup> *M v M* [2006] QSC 148 (19 June 2006), para 31, per McMurdo J.

<sup>55</sup> Department of Prime Minister and Cabinet, 'Legislation proposed for introduction in the 2006 Spring sittings'.

<sup>56</sup> *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW).

Tasmania<sup>58</sup> and Victoria<sup>59</sup> have introduced or passed legislation referring to the Commonwealth Parliament their power to legislate on certain financial matters arising out of the breakdown of de facto relationships. Western Australia has passed legislation referring certain superannuation matters arising out of the breakdown of de facto relationships to the Commonwealth.<sup>60</sup>

## 7 DE FACTO RELATIONSHIP LEGISLATION

In 2004, South Australia indicated that it did not intend to refer its power with respect to de facto relationship property adjustments to the Commonwealth.<sup>61</sup> The *De Facto Relationships Act 1996* (SA) facilitates the resolution of property disputes arising on the termination of de facto relationships.

In the Australian Capital Territory, the *Domestic Relationships Act 1994* (ACT) provides for the adjustment of property interests and maintenance for de facto couples.

Part 5A of the *Family Court Act 1997* (WA) enables the Western Australian Family Court to adjust the property interests of de facto partners where the de facto relationship has ended.

Until the Commonwealth Parliament passes the proposed Family Law (De Facto Relationships) Amendment Bill (Cth), property disputes at the end of a de facto relationship in Queensland, New South Wales, Victoria, Tasmania and the Northern Territory will continue to be resolved under the relevant state or territory legislation. These statutes are:

- *Property (Relationships) Act 1984* (NSW);
- *Relationships Act 2003* (Tas);
- *Property Law Act 1958* (Vic);
- *De Facto Relationships Act* (NT); and
- *Property Law Act 1974* (Qld).

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<sup>57</sup> *De Facto Relationships (Northern Territory Request) Act 2003* (NT).

<sup>58</sup> *Commonwealth Powers (De Facto Relationships) Bill 2006* (Tas).

<sup>59</sup> *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic).

<sup>60</sup> *Commonwealth Powers (De Facto Relationships) Act 2006* (WA).

<sup>61</sup> Donna Cooper, 'The proprietary consequences of loving and living together', *University of Tasmania Law Review*, Volume 23(1), 2004, pp 45–67, p 57.





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