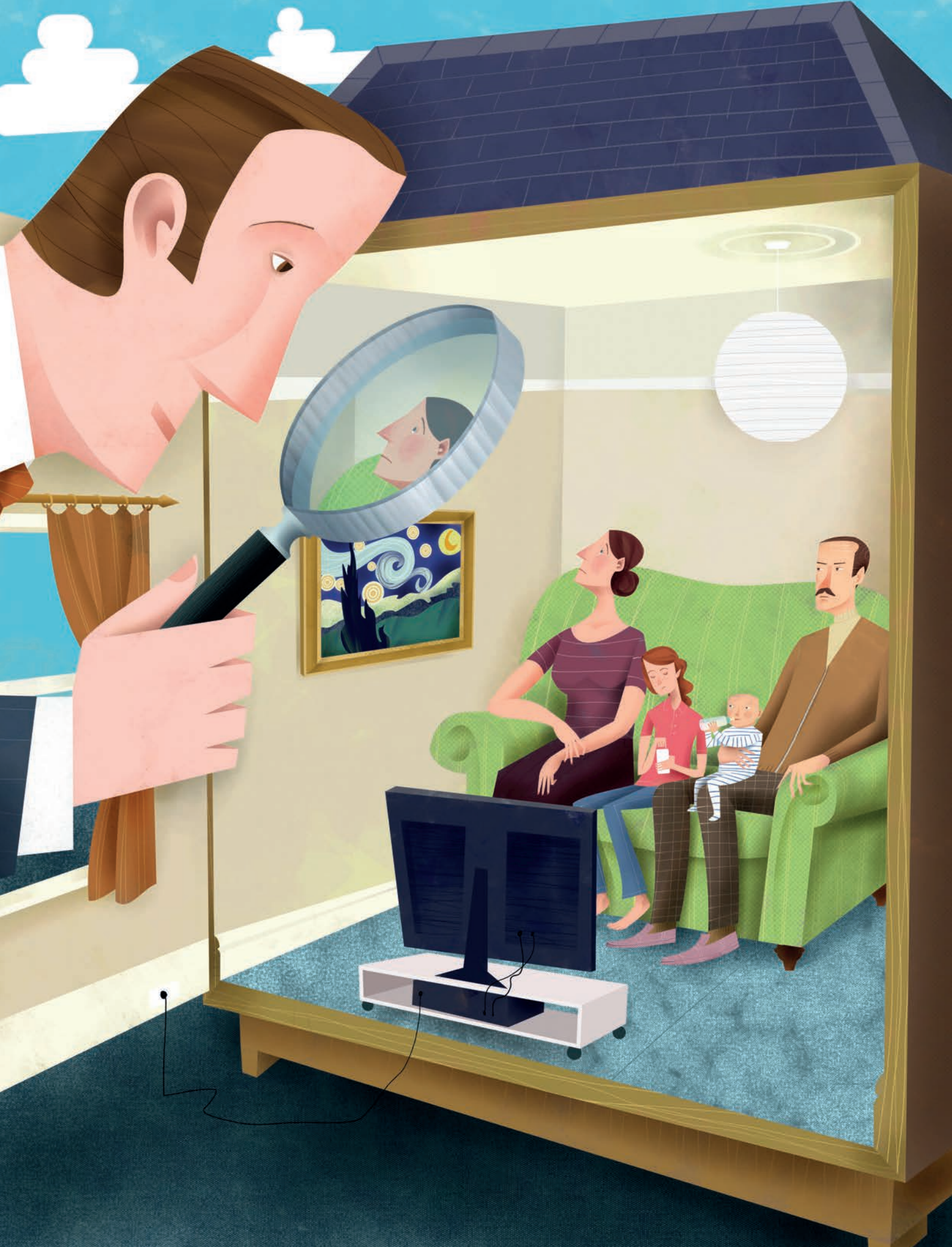

THE FACTS ON DE FACTO

When can a de facto relationship be said to start? Did a relationship end before de facto provisions were introduced in the *Family Law Act*?

By Anna Parker and Keturah Sageman

Many articles have been written about the courts' interpretation of the de facto relationship provisions of the *Family Law Act* 1975 (Cth) (FLA) since their introduction on 1 March 2009.[1] This article aims to add to practitioners' knowledge in this area with a specific focus on decisions of the Full Court of the Family Court of Australia in relation to the questions of when a de facto relationship can be said to have been in existence and whether the relationship broke down before or after the commencement date of the de facto provisions.

RICCI & JONES[2]

In this appeal to the Full Court, Ms Ricci appealed against an order by Riley FM[3] for summary dismissal of her application for financial orders against the respondent, Mr Jones. The appellant asserted that she and the respondent had been in a de facto relationship as defined by s4AA of the FLA. There was a child from the relationship. The respondent disputed ever having been in a de facto relationship with the appellant.

Although the respondent was apparently in another relationship when they met, the appellant said that in December 2008 the respondent told her his other relationship had ended and they developed a sexual relationship which led to the birth of the child. The parties did not live together and their association ended after seven months when the respondent learned of the pregnancy. He did not have contact with the child.

The trial magistrate considered the evidence as it applied to s4AA and considered authorities on the determination of the existence of a de facto relationship by Mushin J in *Moby v Schulter*,[4] who said if a couple did not live together at any time, they could not be seen as being in a de facto relationship.

Riley FM concluded that the parties were not in a de facto relationship. This was based on the requirements of the Act that, having regard to all the circumstances of the relationship, the parties did not have a relationship as a couple living together on a genuine domestic basis.

The Full Court dismissed the appeal and noted it was the appellant who had the burden of proving the asserted de facto relationship. On the question whether s4AA(2)(b) required the parties to have lived together, the Full Court said: "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".[5]

DAHL & HAMBLIN[6]

The Full Court dismissed an appeal against a decision of Demack FM declaring that a de facto relationship of at least two years existed between the parties.

It was held that if parties to a de facto relationship separated after 1 March 2009 (the commencement date of the amending

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legislation) proceedings for alteration of property interests could be commenced if they could establish that their relationship had existed for periods aggregating at least two years, and that at least one of those periods occurred after the commencement date. For the purposes of establishing jurisdiction, it did not matter how long ago the other period or periods occurred or what were the circumstances of any breakdown in the relationship.

In this case the two periods in which it was agreed that the parties had been in a de facto relationship were between 1994 and 1998, and between April 2008 and October 2009, the periods being almost 10 years apart. The trial magistrate had aggregated the two periods in making a declaration as to the existence of a de facto relationship under s90RD of the FLA.

Because Part VIIIAB of the FLA introduced the concept of "periods", the Full Court said the better view was that there could be only one relationship, albeit in some cases broken into periods, as opposed to the resumption of the relationship being a "new relationship".

JONAH & WHITE[7]

This was an appeal against a refusal by Murphy J to declare that the parties had lived in a de facto relationship. The respondent was married throughout the parties' 13-year relationship. The parties maintained separate households and kept their relationship secret. There was no relationship between the appellant and the respondent's children. The respondent had given the appellant a lump sum payment of $24,000 early in their relationship and had made monthly payments to her for approximately 11 years. The parties had otherwise maintained separate finances. The respondent asserted that their relationship was merely an affair.

The trial judge had focused on the nature and quality of the parties' relationship and found that they had not been "living together on a genuine domestic basis" as required by the legislation. His Honour found that the relationship of the parties lacked "the merger of two individual lives into life as a couple"[8] at the core of the definition of "de facto relationship" in s4AA of the FLA. The decision was upheld on appeal. The Full Court held that: "His Honour's conclusion that the proper focus of his determination was the nature and quality of the asserted relationship rather than a quantification of time spent together was, in our view, entirely correct".[9]

SINCLAIR & WHITTAKER[10]

This was an appeal against a declaration that the parties lived in a de facto relationship from August 2004 to September 2010. They began dating in late 2002. The respondent's flatmate subsequently vacated their rented unit, and the appellant moved some of his belongings into it and made monthly contributions of $600 towards the rent.

In December 2005, the parties bought a unit together, with the appellant providing the deposit and paying the stamp duty. The unit was owned in proportions of 70 per cent by a corporation controlled by the appellant and 30 per cent by the respondent. The parties each contributed to a joint fund which was used for furnishings and household contents for the unit. In December 2005, the respondent started living in the unit and the appellant spent, on average, three nights a week there. In December 2006, the appellant gave the respondent a diamond ring.

Before the parties' separation in September 2010, the respondent represented to lending institutions and government agencies that her marital status was "single" rather than "de facto". The appellant asserted that he had undertaken similar "significant relationships" with other women during the same period, but failed to call evidence from these women. His Honour found, having regard to the evidence, that the parties displayed a substantial mutual commitment to a shared life.

As to the respondent's representations as to her marital status, the Full Court held that "given the nature of the definition of a de facto relationship in the Act the ultimate decision as to whether there is a de facto relationship at any given time is a matter for the court and not a matter for the parties. Although their perception of the nature of the relationship is a relevant matter it is not determinative".[11] Regarding the parties' living arrangements more generally, the Full Court said "it is also to be remembered, perhaps making the task of a trial judge applying s4AA more difficult, that the nature of relationships and commitments for both married and unmarried couples find expression in many different domestic arrangements".[12] The appeal was dismissed.

FENTON & MARVEL[13]

This was an appeal against a declaration that the Court lacked jurisdiction to determine a de facto property settlement. The appellant asserted that the parties had been in a de facto relationship from March 1999 to August 2009. The respondent asserted that the de facto relationship had ended in December 2001. His Honour held that although the parties had a relationship between 1999 and August 2009, he could not determine that it was a de facto relationship as at 1 March 2009.

The appeal was allowed on the basis, *inter alia*, that his Honour had erred in finding that he needed to "detect the relationship as at 1 March 2009". As Murphy J explained, "expressing the test as whether a relationship existed as at the commencement date does not answer the essential question (although, the Court might have jurisdiction in respect of a relationship that existed as at or on that date). That is so because it is permissible for the court to aggregate periods . . . and there is no requirement that any of the periods embrace 1 March 2009".[14]

NORTON & LOCKE[15]

This was an appeal against interim orders made by Federal Circuit Court Judge Scarlett in a case where the existence of a de facto relationship was in dispute. The orders included injunctions restraining the appellant from interfering with the respondent's exclusive occupancy of a real property owned by the appellant and from otherwise dealing with that property. The appellant denied that the parties had been in a de facto relationship.

The appeal was allowed. The Full Court held that the trial judge lacked jurisdiction to grant the injunctions. The Full Court held that: "This court does not have power to make an interlocutory injunction [pursuant to the injunctive relief provisions in the FLA]. That relief is dependent upon the establishment of a 'de facto financial cause' which, in this case, is dependent upon the establishment of facts central to jurisdiction which are bona fide in dispute and which have not been established".[16]

The Full Court held that while the Court has jurisdiction to determine whether it has jurisdiction and make orders that are necessary for that determination, the injunctive powers included within that jurisdiction were limited to "holding orders" to "preserve the status quo" pending resolution of the jurisdictional issue, when, in "compelling circumstances", this is necessary to prevent an abuse of the Court's process and protect its function as a Court.[17]

The Full Court re-exercised the discretion and declined to grant injunctive relief, holding that "while it may be open to the respondent to argue that the failure to grant an interlocutory injunction may leave her without the remedy she seeks, the evidence falls short of that which would persuade us that the subject matter of the action will be lost . . . or that the respondent will be left without a remedy should the injunction not be granted".[18]

CONCLUSION

Further valuable guidance will no doubt emerge as more cases regarding de facto relationships come before the Full Court. The cases summarised here provide the following useful principles for practitioners:

- The birth of a child is not sufficient to found jurisdiction if the existence of a de facto relationship cannot be independently established.
- Periods of a de facto relationship before 1 March 2009 can be aggregated with periods after that date to found the required two years' duration. For this reason, the non-existence of a de facto relationship as at that date is not determinative of jurisdiction.
- Until jurisdiction is established, the Court has limited jurisdiction to provide interim relief.
- The extent to which the parties' relationship constituted a "merger of two lives" is relevant to the determination of the existence of a de facto relationship.
- Whether the parties cohabit, and the parties' perception of whether they were in a de facto relationship may be relevant factors, but are not determinative of a de facto relationship. ●

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1. *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 (Cth). For examples, of such articles, see William Stidston, "Are There Really No Strings Attached?" (2012) 86 (12) *LIJ* 46; Ewan Hall, "Equal Under the Law?" (2009) 83(7) *LIJ* 28; Juliet Behrens, "'De Facto Relationship'? Some Early Case Law Under the Family Law Act" (2010) 24 *AJFL* 350; Jim Mellas, "De Facto Relationships: The Threshold Issues" (Foley's breakfast seminar 22 August 2013).
2. [2011] FamCAFC 222.
3. As her Honour then was.
4. (2010) FLC93-447
5. At [59]
6. [2011] FamCAFC 202.
7. [2012] FamCAFC 200.
8. At [23].
9. At [44].
10. [2013] FamCAFC 129.
11. At [65].
12. At [95].
13. [2013] FamCAFC 132.
14. At [68].
15. [2013] FamCAFC 202
16. At [42].
17. At [43]–[59].
18. At [73].