DECLARATION ABOUT EXISTENCE OF DE FACTO RELATIONSHIP

This can be a preliminary issue in a de facto case. It is usually raised by a respondent who, by seeking an interim declaration under s 90RD FLA, disputes the applicant's right to property orders. (In WA a respondent must seek an interim order dismissing the case for want of jurisdiction under s 205Z FCA. If the court does lack jurisdiction it may still award costs: FCR 11.1.) See "jurisdiction" above as to the right to bring a de facto property claim.

A person is in a "de facto relationship" with another person if they are not married or related to each other and, having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis: s 4AA(1) (in WA *s 13A Interpretation Act 1984* (WA)). A "de facto relationship" includes same sex partners and can exist if a partner is married to someone else or is in another de facto relationship: s 4AA(5). Under s 4AA(2) those circumstances may include:

- length of the relationship
- nature and extent of their common residence
- whether a sexual relationship exists
- degree of financial dependence and support
- ownership, use and acquisition of property
- degree of mutual commitment to a shared life
- care and support of children
- reputation and public aspects of the relationship
- whether the relationship is or was registered e.g under *Relationships Act* (Tas & Vic), *Civil Partnerships Act* (ACT & Qld) and *Relationships Register Act* (NSW and SA)

A declaration may be sought under s 90RD (for WA see the 1st para above) that a de facto relationship of at least two years existed or did not exist between the parties; that the relationship broke down before Part VIIIAB commenced (1/3/09 or 1/7/10 for SA); as to whether there is a child of the relationship; whether a party made substantial contributions under s 90SM(4)(a), (b) or (c); and where each party was ordinarily resident during the relationship. For samples, see "Response" under "precedents" in Chapter 6 and "declaration" at our online "forms and precedents".

As to the existence of a "de facto relationship" see *Moby & Schulter* [2010] FamCA 748 at [126]-[132]; *Jonah & White* [2011] FamCA 221 at [34]-[67] and *Taisha & Peng and Anor* [2012] FamCA 385 at [6]-[21] as to the meaning of "couple" and "living together on a domestic basis". Family violence is highly relevant: *Mayson & Wellard* [2021] FamCAFC 115 at [35].The lack of a common residence was not fatal in *Dakin & Sansbury* [2010] FMCAfam 628 at [170]-[173] or *Smyth & Pappas* [2011] FamCA 434 at [9] and [110] but was in *Jensen & Taylor* [2011] FMCAfam 1251 at [51]. For WA cases under the FCA, see *Truman & Clifton* [2010] FCWA 91.

Also see *Dahl & Hamblin* [2011] FamCAFC 202 at [48] (aggregation of time where an interrupted relationship is resumed); *A & G* [2009] FCWA 110 (separation under one roof); *Miller & Trent* [2011] FMCAfam 324 at [46]-[103] (substantial contributions and serious injustice under s 90SB(c)); *Allenby & Kimble* [2012] FamCA 614 at [91] (emails and documentation given weight); *Kazama & Britton* [2013] FamCA 4 (separate homes not fatal; prior inconsistent statement to Dept of Immigration); *Keene & Scofield (No. 2)* [2013] FCCA 1107 at [419]-[432] (onus of adducing independent evidence). For more case law, see "de facto" at our online "case notes – property".

Applicants where "relationship" will be disputed
Where any relationship aspect of your client's application is likely to be disputed, send a detailed proof of evidence as to all of the above relationship aspects to counsel for an opinion as to the likelihood of the relationship being held to satisfy the requirements of a de facto claim under the FLA (and, if not, which aspects of the evidence should be strengthened, and how).