

De Facto or not De Facto – That is the Question...



Article by Townsville Family Lawyer, [Emma Donald](#)

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In this article, I will explain what a *de facto* relationship is according to the *Family Law Act 1975* (Cth).

If the other party in the relationship disputes it was *de facto* and says it was just a 'casual thing', I will explain what you would have to show the Court, to prove you were living together on a genuine domestic basis.

If you can show the Court you are in a *de facto* relationship, I will address what that means for a property settlement.

What is a *de facto* relationship according to the Family Law Act?

Family Law Act 1975 - Section 4AA sets out the meaning of a ***de facto* relationship**:

- (1) A person is in a ***de facto relationship*** with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family; and
 - (c) having regard to all the circumstances of their relationship, **they have a relationship as a couple living together on a genuine domestic basis**.
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What do you have to show the Court to prove you were living together on a genuine domestic basis if the other party says it was just a casual thing?

Family Law Act 1975 (Cth) Section 4AA says the Court will consider any or all of the following:

- (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of children;
 - (i) the reputation and public aspects of the relationship
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Dating or De Facto? De Facto or 'Friends with Benefits'?

There is a difference. Many cases that go to Court focus on whether the parties had a relationship as a couple living together on a genuine domestic basis. Often the Court has to choose one party's version of the facts.

One of the leading cases on whether a *de facto* relationship exists is ***Moby & Schulter*** [2010] FamCA 748. In this case, an 'on and off' relationship of 9 years was found to be a *de facto* relationship. The parties had lived together in multiple residences 'on and off' and the *de facto* husband had made financial contributions to the *de facto* wife's business.

Another important case is ***Regan & Walsh*** [2014] FCCA 2535. In this case, the Federal Circuit Court of Australia declined to find the relationship between the parties was *de facto* despite the existence of several characteristics of a *de facto* relationship.

Judge Coker said there was insufficient evidence to establish a *de facto* relationship existed. In this case, the parties were a male couple aged 53 and 41. They met in 2005 and commenced a sexual relationship and had lived together for approximately 8 years.

Following the breakdown of the relationship Regan brought an application in the Federal Circuit Court of Australia in Townsville for property settlement and sought a declaration that the couple had been in a *de facto* relationship. It was claimed by Regan that a *de facto* relationship existed because the couple had lived together, shared household duties and had a sexual relationship.

Walsh asserted the relationship was not *de facto* but friends with benefits. He described Regan as a friend with whom he had a sexual relationship at different times. He was adamant that there was no relationship that could be considered one of a genuine domestic character.

Interestingly, the primary issues that ultimately led the Court to decide there was no *de facto* relationship (living together on a genuine domestic basis) were:

- There was a lack of financial interdependence:
 - Regan had made minimal contributions to the household expenses and "perhaps in relation to groceries" only,
 - Walsh was in a significantly stronger financial position having a substantial investment portfolio following a previous marriage,
 - There appeared to be no arrangement or agreements in relation to financial support, and
 - Walsh was able to establish a clear intention to independently protect his assets for his children.

- The ownership and acquisition of property was not indicative of mutual commitment or financial interdependence, but evidence of the maintaining separation in financial resources and assets.

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- The parties showed vastly differing levels of commitment to a shared life in relation to:
 - Family gatherings and important occasions,
 - The degree of fidelity displayed between the parties, and
 - The lack of circumstances evidencing an exclusive relationship.
 - Regan was unable to adequately establish a reputation among peers or the public aspects of the relationship.
 - The Court considered the relationship to be best described as 'friends with benefits' and not a *de facto* relationship under the *Family Law Act 1975*.
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When can the Court make an Order for De Facto Property Settlement?

If you can establish you were in a *de facto* relationship, the Court may make an order under section 90SE, 90SG, 90SM of the *Family Law Act 1975 (Cth)* or a declaration under 90SL in relation to a *de facto* relationship, if the Court is satisfied that:

- The period of the *de facto* relationship is at least 2 years; or
- There is a child of the *de facto* relationship; or
- The party to the *de facto* relationship who applies for the order made substantial contributions under section 90SM(4)(a), (b) or (c) and a failure to make the order would result in serious injustice to the applicant; or
- The relationship is or was registered under a prescribed law of a state or territory.

Even if the Court finds that parties were in a *de facto* relationship - before making an application to the Court for property orders, it should be considered if the applicant has made substantial contributions to the property and if they will suffer serious injustice if the Court does not make an order.

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If you are thinking of separating or have recently left a relationship where you were living together *on a genuine domestic basis*, we recommend you seek legal advice as soon as possible to know and protect your legal rights.

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