De Facto Relationships (or Maybe Not) in New Zealand

Nicola Peart Professor of Law, University of Otago, New Zealand

In 2001 the New Zealand legislature adopted the Property (Relationships) Amendment Act. It was a radical amendment of the Matrimonial Property Act 1976 and had several aims. The most controversial aim was the extension of the Act's equal sharing regime to unmarried cohabitants, known in New Zealand as de facto partners. There was considerable opposition to the inclusion of de facto couples, especially same-sex couples, in an Act designed for marriage. It was seen as devaluing marriage. But the proposal was eventually adopted and the amended Matrimonial Property Act was renamed the Property (Relationships) Act 1976 (hereinafter the PRA) to reflect the expanded range of relationships to which the Act was to apply. The amended Act came into force on 1 February 2002 and applies to de facto relationships ending on or after that date: s 4C. The PRA was amended again in 2005 to include civil unions, following the adoption of the Civil Union Act 2004. Same-sex as well as heterosexual couples may enter into a civil union.

The effect of these amendments is that de facto partners (if they have lived together for three or more years) and civil union partners have the same property rights as married couples on separation or death. But what is a de facto relationship? Unlike a marriage or civil union, a de facto relationship is not a legal state. Nor is it registered. Its existence is a question of fact that has to be proved on a balance of probabilities. Deciding whether a 'de facto relationship' exists for purposes of the PRA is a complex task, and pinpointing its commencement is especially difficult. As Justice Preedy observed in Bannerman v Ball (2007) NZFLR 127 (HC), at [33]:

'Assessing the start date of a de facto relationship is bedevilled with difficulty, particularly given the dynamic and progression of affectionate relationships, which usually evolve without specific way-points.'

Yet the existence and the commencement date of a de facto relationship are critical to the scope of the Act and the entitlement of de facto partners. Since the PRA came into force in 2002, these issues have been considered in over 60 cases. They reveal the uncertainty inherent in the concept of a 'de facto relationship'. This article aims to distil some general principles from the evolving jurisprudence and determine whether the courts are giving effect to Parliament's intent and society's expectations. But first, a brief outline of the property sharing regime is called for so that the significance of determining the 'meaning of a de facto relationship' can be fully appreciated.

The PRA's property sharing regime

The focus of the Matrimonial Property Act 1976, and now the PRA 1976, is on contributions to the relationship, not contributions to property. Earlier legislation gave the court a discretion to adjust property rights between spouses based on their respective contributions to the property in dispute. The court's undervaluing of non-financial contributions and its insistence on a direct nexus between the claimant's contributions and the property in dispute commonly resulted in an unequal division of the couple's assets, usually to the detriment of the wife. Dissatisfaction with that approach prompted Parliament to change track. The 1976 Act treats marriage as a partnership to which both partners are presumed to contribute equally, if differently, thus entitling them to an equal share of the fruits of their partnership. That principle now applies also to civil unions and de facto relationships of 3 or more years' duration. Section 18 lists among the qualifying contributions the care of children, domestic contributions and emotional support of the spouse or partner. It also stipulates that there is no presumption that monetary contributions are of greater value than non-monetary contributions.

Classification

The PRA distinguishes between 'relationship property' (formerly matrimonial property) and 'separate property'. Only relationship property is shared between the parties. Classification of assets beneficially owned by either partner is therefore critical to the regime and is often disputed. Relationship property is exhaustively defined in ss 8-10 of the PRA. It includes the family home and family chattels whenever they were acquired, because they are seen as the cornerstone of the relationship. Any property acquired during the relationship, or before the relationship but in contemplation thereof and for the common benefit or use of the parties, is also relationship property. Property received during the relationship from a third party by way of gift, succession, survivorship or as a beneficiary of a trust settled by a third party is separate property of the recipient partner: s 10. This exception recognises that these assets were not produced by the partnership. However, if they are intermingled with relationship property they they can lose their status as separate property and become relationship property. Separate property is retained by the spouse or partner who owned it. But if separate property increases in value during the relationship because of the application of relationship property or the direct or indirect actions
of the non-owning partner, the increase becomes relationship property: s 9A. Classification thus depends not only on the existence of a de facto relationship, but also on the dates of its commencement and ending.

Division

The Act’s sharing regime comes into effect only when a relationship ends. That occurs when the spouses or partners cease living together as a couple or one of them dies. During the relationship each party is free to deal with their assets as they wish: s 19. Creditors are not affected by the Act either, apart from a limited protection in the family home (s 20A and 20B). When the parties separate, their assets are classified and the relationship property is then valued and divided between the parties. Section 11 entitles each party to an equal share unless the relationship was of less than 3 years’ duration (s 14-14AA and 85) or there are extraordinary circumstances that make equal sharing repugnant to justice (s 13). The latter exception is notoriously difficult to satisfy and the former is a particular challenge in the context of de facto relationships, because they tend to evolve over time. The court cannot make orders in respect of a de facto relationship of less than 3 years’ duration unless there was a child of the relationship or the claimant made substantial contributions to the relationship, and the court is satisfied that serious injustice would result if no order were made. If both criteria are met, the parties’ relationship property is divided according to the parties’ respective contributions to the relationship. Once the relationship has passed the 3-year mark, equal sharing is virtually inevitable unless the parties have formally agreed otherwise.

Contracting out of the Act

Section 21 permits spouses and partners to make any agreement they want with respect to the status, ownership and division of their property, including their future property. They can do so at the start of the relationship to contract out of the Act’s regime, or later on to settle their relationship property entitlements, for example on separation. The agreement is valid only if it is in writing and signed by both parties after each party has received independent legal advice about the effect and implications of the agreement (s 21F). These requirements are strictly enforced. Even if the requirements are met, the agreement may later be set aside if enforcing the agreement would cause serious injustice: s 21J. The agreement may have been seriously unjust from the start or become so over time because circumstances have changed. The ‘serious injustice’ requirement is a tougher standard than under the Matrimonial Property Act 1976, where ‘injustice’ sufficed. This change was made in part to counter criticism that agreements were being set aside too easily under the Matrimonial Property Act and in part to reassure de facto couples that the PRA was a genuine opt-out scheme. The courts have thus far given effect to this change: Harrison v Harrison [2003] 2 NZLR 349 (CA). Nonetheless, the agreement can still be set aside, in which case the full force of the Act’s equal sharing regime applies. The court cannot give partial effect to such an agreement.

Change for de facto partners

For de facto partners the FRA is a radical change. Prior to 2002, they had to rely on general property principles, usually constructive trust law, to obtain a share of their partner’s property. Applicants started from nothing and had to satisfy the court that they had made financial or non-financial contributions directly or indirectly to property owned by the respondent and that both parties had a reasonable expectation that the beneficial ownership would be shared. Applicants were aided by a presumption that de facto partners would expect to share the beneficial ownership of assets they had helped to accumulate. Unless the owning partner had made it plain throughout the relationship that the property was not to be shared, the court would find a subsequent denial of an interest unconscionable: Lekhota v Rose [1995] 1 NZLR 277 (CA). While the courts took a broad approach to the type of qualifying contributions and their nexus to the property in dispute, awards were usually moderate and less than in matrimonial property cases. That was deemed appropriate, even in cases where the applicant had made significant contributions over many years, because de facto relationships were not to be treated as the full equivalent of marriage: Phillips v Phillips (1993) 10 FRNZ 110 (CA). The PRA removes that distinction. It treats marriages and de facto relationships of 3 or more years’ duration alike, in view of the comprehensive nature of the equal sharing regime and the court’s lack of discretion, the meaning of a ‘de facto relationship’ assumes critical importance.

De facto relationship defined

The Property (Relationships) Amendment Bill, as originally drafted, defined a de facto relationship as ‘a relationship in the nature of marriage’. But that definition met with several objections. Some couples could not marry and others had chosen not to do so. The reference to marriage was therefore inappropriate and dropped. Instead, s 2D defines a ‘de facto relationship’ as:

’a relationship between two persons (whether a man and a woman, or a man and a man, or a woman and a woman)—

(a) who are both aged 18 years or older; and
(b) who live together as a couple; and
(c) who are not married to or in a civil union with one another.’

The core element is the requirement of ‘living together as a couple’. To clarify what that phrase
(2) In determining whether two persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) whether or not a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
(e) the ownership, use, and acquisition of property;
(f) the degree of mutual commitment to a shared life;
(g) the care and support of children;
(h) the performance of household duties;
(i) the reputation and public aspects of the relationship.'

As with marriage, it was appreciated that not all of these indicia would be present or necessary. Nor should they be treated as a checklist. Accordingly, s 2D(3) provides:

(3) In determining whether two persons live together as a couple—

(a) No finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.'

Despite this guidance, 'living together as a couple' remains a vague concept that is proving difficult to apply in practice. While 'living together' might suggest that a common residence is required, the courts have repeatedly held that it is not essential. There are several cases where the parties did not share a residence, or not on a full-time basis, and yet were found to be living together as a couple. Conversely, a common residence is not sufficient to establish a de facto relationship. The existence of a sexual relationship is similarly a common ingredient of de facto relationships, but it is neither necessary nor sufficient. In Horsfield v Giltrap (2001) 20 FRNZ 404 (CA), for example, the parties never physically lived together and nor did they have a sexual relationship for religious reasons. But they shared their lives in all other respects for 22 years. The relationship ended shortly before the PRA came into force and was therefore not covered by the Act, but the case has since been cited as an example of a relationship that would have come within the ambit of the Act, despite the lack of common residence and sexual relationship (for example Scragg v Scott [2006] NZFLR 1076 (HC)).

A common residence is of course a strong indicator of a de facto relationship, especially if the parties are also engaged in a sexual relationship, but even in combination these factors are not sufficient. The parties could be living together, but not 'as a couple'. They might be flatmates who had sex from time to time. The key ingredient that differentiates such casual relationships from a de facto relationship is the mutual commitment to a shared life for the foreseeable future. This is an essential ingredient. It goes to the heart of what it means to be 'a couple'. It signifies an emotional bond between the parties and a permanence about the relationship. But it is an abstract concept that is not easily analysed, especially after the relationship has ended and the parties' views of their relationship and their role within it is coloured by self-interest and the effect that a finding of a qualifying relationship will have on their property rights. In the absence of a public commitment, as in a marriage or civil union ceremony, this ingredient has to be inferred from other evidence.

The financial arrangements of the parties have featured prominently in this regard. Financial interdependence and the intermingling of finances suggests an assumption of responsibility and support by each partner for the other consistent with a mutual commitment to a shared life. The care and support of children, whether born to the couple or from other relationships, is also relevant to the commitment of the parties. So is the public aspect of the relationship. Do their friends and families see them as a couple? But a mutual commitment to a shared life is not enough. The parties will not be in a de facto relationship unless they are also living together. Both elements of the definition must be satisfied.

These general principles can be distilled from the cases, but applying them in practice is a complex and imprecise task, as the following case examples show. Each relationship is different and fact specific, making generalisations difficult. It is an evaluative process heavily dependent on the credibility of the parties and the reliability of their witnesses. Subtle differences in otherwise similar factual circumstances may legitimately produce contrasting outcomes. Notwithstanding these caveats, the cases discussed below have precedent value in construing the meaning of a de facto relationship.

Case examples

Scott v Scragg

The existence, commencement and ending of a de facto relationship were all disputed in Scott v Scragg [2005] NZFLR 577 (HC). Mr Scragg lived and worked in Guam, while Ms Scott lived in New Zealand throughout most of their 12-year relationship. They had been teenage sweethearts in
the late 1950s and met again in May 1990 when Ms Scott’s marriage was in trouble. She was in need of support and Mr Scragg saw an opportunity to rekindle an old flame. While she was still living with her husband, they spent a few days together during which a sexual relationship developed. As she was separating, Mr Scragg suggested that she move in to his New Zealand home, which she did. He also invited her to accompany him to view a property he was interested in buying. Shortly thereafter he returned to Guam while Ms Scott stayed in New Zealand. Mr Scragg’s brother purchased the new property on Mr Scragg’s behalf and in June 1990 Ms Scott moved to that property. The following month she went to Guam at Mr Scragg’s invitation and spent 2 months with him. That was the first of several visits, all at Mr Scragg’s expense. Mr Scragg also came to New Zealand regularly on business or holiday and would then live with Ms Scott at his house. When they were together they socialised as a couple. In 1994 Ms Scott had a brief affair with another man.

In 1996 she invested the settlement from her former marriage in rental properties. Mr Scragg gave her $10,000 to cover the shortfall. She sold those properties in 1997 and purchased another in Australia. Mr Scragg joined in that investment, making an equal contribution and becoming a co-owner. In 1999 Mr Scragg acquired an ice cream drive-thru business to enable Ms Scott to remain in Guam. The business failed. The parties disagreed as to Ms Scott’s role in the business and after 9 months she returned to New Zealand. Her departure marked the beginning of the end of the relationship. She did not go back to Guam for several years. Meanwhile, Mr Scragg started living with another woman. He spent less time in New Zealand, but when he did, he lived with Ms Scott, engaging in sexual relations and socialising with her as a couple. In 2000 he decided to construct a new house on his property. Ms Scott assisted by liaising with builders and contractors.

Towards the end of 2001, Ms Scott told him she thought she would have rights under the PRA that was about to come into force. Anxious to protect his assets, Mr Scragg asked his solicitor to draw up an agreement. The agreement provided that if their ‘de facto relationship’ ended, Ms Scott would take the Australian investment while Mr Scragg would retain the house in New Zealand. Ms Scott refused to sign the agreement, having been advised that she would be entitled to more under the PRA.

In March 2002, at Mr Scragg’s invitation, she joined him on a business trip to the US. In June 2002 she travelled to Guam, unannounced, to confirm her suspicions that he was living with another woman. On discovering that he was, they nonetheless spent 2 weeks together, engaging in sexual relations. Thereafter Ms Scott started actively looking for other relationships. In February 2003 Mr Scragg came to New Zealand, and again stayed with Ms Scott. But when he suddenly returned to Guam, Ms Scott initiated proceedings under the PRA.

Ms Scott submitted that she and Mr Scragg had been living together as a couple from June 1990 until February 2003. Mr Scragg denied that their relationship ever became a de facto relationship within the meaning of the Act, but if it did, it ended in 1999 before the Act came into force. The Family Court reviewed the parties’ relationship in general and with reference to the indicia in s 2D. It found that the couple spent very little time physically living together, especially after 1999; that their relationship was not monogamous; and that they kept their finances separate save for the property investments in Australia. The parties’ commitment to a shared life was the most troublesome aspect. It raised real concerns. In addition to their very limited shared life and their infidelity, Ms Scott seldom knew Mr Scragg’s whereabouts after 1999, nor did she offer to assist him when his business was in financial crisis. While the agreement Mr Scragg’s solicitor had drafted referred to the relationship as a de facto relationship, the court accepted Mr Scragg’s evidence that he did not understand the significance of those words. Besides, the agreement was only one of many factors and not determinative.

Against these findings of fact, and acknowledging the task was exceptionally difficult in this case, the court nonetheless concluded that the parties were living in a de facto relationship, not from 1990 as claimed by Ms Scott, but from 1996 when Mr Scragg started assisting Ms Scott with her investments. The court inferred that he must have been supporting Ms Scott with income as well, because she was not employed or on social welfare. The relationship ended in June 2002 when she discovered he was living with another woman and she started looking for a new relationship. In the period 1996–2002 the court found an emotional interdependence between the parties and actions indicating an intention to live in a permanent relationship. The consequence of this finding was that the parties’ relationship was covered by the PRA and that Ms Scott was entitled to an equal share of their relationship property, which included the house in New Zealand, the Australian investment property and any other assets acquired by either of them during the relationship.

Mr Scragg appealed, arguing that the finding of a de facto relationship was against the weight of evidence. Ms Scott cross-appealed on the duration of the relationship. Upsetting findings of fact on appeal is notoriously difficult so it is no surprise that both appeals were dismissed: Scragg v Scott [2006] NZFLR 1076. The High Court endorsed much of the Family Court’s legal analysis and factual conclusions. It traversed the PRA’s legislative history, quoting the following paragraph from the Justice and Electoral Committee Report to Parliament in regard to the type of relationship the PRA was intended to cover:
There is a wide variety of de facto relationships. At one end of the scale there are long-term relationships where a couple have children together, share property, operate as an economic partnership and are committed to sharing their lives. At the other end of the scale there are couples who live together, but are not committed to sharing their lives, remain financially independent and do not have children together. Such couples may be people who seek companionship and may be living in a de facto relationship expressly because they do not wish to share their property. We believe that a definition should aim to capture the first group, but avoid unduly covering the second.

While the factual findings would suggest that Scott and Scragg's relationship came within the second group of relationships, the High Court held that their relationship 'clearly' came within the ambit of the Act. It even saw merit in Ms Scott's submission that the relationship began in 1990 when she first travelled to Guam, even though the relationship had barely started at that point. These comments suggest a much wider scope for the FRA than Parliament intended.

**Allison v Scott**

As an even wider view was taken in this case where the court found that the parties' de facto relationship began before Ms Allison moved in with Mr Scott ([FAM 2006-045-5826] November 2007, Judge Smith, Family Court Dunedin). Mr Scott died in an accident on his farm in June 2005. His family argued that the relationship began when Ms Allison moved to the farm in September 2004, whereas Ms Allison claimed the relationship began several years earlier. The issue was whether the relationship was one of short duration.

Ms Allison and Mr Scott had been boyfriend and girlfriend before their respective marriages. Mr Scott's marriage ended in 1992 and Ms Allison separated in 1999. Both had children. They met again in late 1999 and began a sexual relationship in early 2000. From then on they spent as much time together as their work and family commitments allowed. They were both concerned about their children's sensitivities and introduced their children gradually to their relationship. Mr Scott's relationship with Ms Allison's children developed quickly. He was often at Ms Allison's house and the children visited his farm. In April 2002 Mr Scott put up permanent beds at the farm for Ms Allison's children, after which they spent most weekends there. Ms Allison contributed to the farm by developing the garden and doing the household tasks, while Mr Scott helped with the children. In April 2003 Ms Allison purchased a house with financial assistance from Mr Scott. They decided not to cohabit because, although the timing was right for them, he knew it would upset his family. Ms Allison moved into the new house with her children and Mr Scott assisted with renovations, paying for most of them. Their finances became increasingly intermingled, as did their furniture. In January 2004 Mr Scott bought a sleep-out which he erected on the farm for Ms Allison's children. Ms Allison was pregnant at the time, but miscarried shortly thereafter. In September 2004 Ms Allison and her children finally moved to the farm permanently.

Mr Scott died there 10 months later. Ms Allison was by then pregnant again and gave birth to a son in September 2005.

The court held that the relationship began in or about June 2003. It found that they had a commitment to a long-term relationship by early 2002, but they could not be said to be living together as a couple until they started to merge their finances, exchange furniture and Mr Scott started renovating the house. All of that happened in mid-2003. So, in spite of their decision not to cohabit at that point, they were found to be 'living together as a couple' for purposes of the FRA. That meant that the relationship was still one of short duration in which the court's jurisdiction is limited.

**C v A**

In this case the court found no de facto relationship on broadly similar facts ([2007] 26 FRNZ 389 (FC)). Again, it was the partners' concern about the sensitivities of their respective children and the reaction of their families that delayed their cohabitation. Mr A was killed in a plane crash before Ms C moved in. They were both Jehovah's Witnesses and their decision to leave their marriages and live together led to them being publicly disfellowshipped by their Church. In 2004 Mr A bought a property for them to live in, which Ms C helped to furnish and redecorate. During the course of the year, she moved some of her furniture, including her piano, into the house. To give Mr A's children time to adjust to their father's new relationship, Ms C's move was planned for January 2005. Her mother's death delayed the move and shortly thereafter Mr A was killed. The court found evidence of a mutual commitment to a shared life, but the couple did not live together in the sense of intermingling their households, finances and children. Ms C's FRA claim failed, but she succeeded on other grounds.

**Conclusion**

These cases reveal the complexity of deciding whether two people were living together as a couple and, especially, when they began doing so. Whether the conclusion the court came to in each case was within the contemplation of the parties is open to question. While the finding in **C v A** seems plausible, it is improbable that Mr Scragg, or even Ms Scott, thought that they were living in a de facto relationship when Ms Scott first travelled to Guam in 1990, nor that Mr Scragg's gift of $10,000 would have the significance that it did. Similarly, did Ms Allison genuinely believe that she was 'living
together' with Mr Scott when they decided not to cohabit? Finding a de facto relationship in these circumstances seems to stretch the meaning of 'living together as a couple' beyond Parliament's intent and society's expectations. Not finding a de facto relationship is not fatal to the applicant's property rights. He or she may invoke the general law, which in New Zealand has been developed to respond to the particular circumstances of de facto relationships.

There are good reasons for being cautious in construing the meaning of a de facto relationship. If it is given too wide a meaning, the scheme of the PRA is undermined. One of the Act's foundations is its opt-out nature. As France J observed in Wells v Wells [2006] NZFLR 870 at [38], 'it was an integral feature of its public legitimacy'. If parties are unaware that their relationship qualifies as a de facto relationship, their right to contract out of the Act is meaningless. By the time they realise that they are within the Act's ambit, it is often too late to opt out, as Mr Scrabb discovered. Relationship property rights have been acquired by then, and any attempt to defeat them is likely to fail. So, there are sound pragmatic reasons for not construing the meaning of a de facto relationship liberally.

The inclusion of de facto relationships in the PRA is also problematic on a deeper level. Unlike a marriage or civil union, both of which provide a clear and predictable path into the PRA's equal sharing code, a de facto relationship does not. The inherent vagueness of the de facto relationship concept does not sit well with a rigid property regime. The two concepts are in a sense incompatible. A de facto relationship defies precise definition, lacks certainty and has no clear boundaries. Yet, it determines access to an equal sharing regime that lacks flexibility and is hard to avoid. To make a rigid code of rules dependent on such a fluid and imprecise requirement is asking for trouble. Little wonder that the requirement is so often disputed. Adapting a conservative approach to the meaning of a de facto relationship may alleviate this problem, but it will not resolve it. Overseas jurisdictions would do well to bear these problems in mind when developing statutory property rights for de facto partners.

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