FAMILY COURT OF AUSTRALIA

RICCI & JONES ***[2011] FamCAFC 222***

FAMILY LAW – APPEAL – DE FACTO RELATIONSHIP – Where the appellant appeals against the summary dismissal of proceedings brought by her seeking property division between her and the respondent pursuant to Part VIIIAB of the *Family Law Act 1975* (Cth) ("the Act") – Where the appellant conceded that the Federal Magistrate had identified the correct legal principles in relation to summary dismissal – Where the Federal Magistrate had accepted all of the evidence of the appellant for the purposes of the summary dismissal proceedings – Whether the Federal Magistrate erred by making findings based on insufficient or untested evidence before the court – Whether the Federal Magistrate erred by considering only those circumstances listed in s 4AA(2) of the Act and thereby failing to have regard to all the circumstances of the parties' relationship as required by s 4AA(1)(c) of the Act – Whether the Federal Magistrate erred by failing to take into account the fact that at a subsequent final hearing the court could, in exercising its discretion under s 4AA(4) of the Act, choose to have regard to one or more additional matters to which her Honour did not have regard, or to attach to one or more matters a different weight than her Honour attached, and could on that basis conclude that a de facto relationship did exist between the parties – Whether the Federal Magistrate erred by failing to independently consider, and reach her own independent conclusion on, the question of whether it is a necessary precondition of a de facto relationship that the parties must live together – No appealable error established.

Family Law Act 1975 (Cth), s 4AA

Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd (2006) 236 ALR 720
Jonah & White [2011] FamCA 221
Moby v Schulter (2010) FLC 93-447

APPELLANT:	Ms Ricci
RESPONDENT:	Mr Jones
FILE NUMBER:	MLC 5237 of 2010
APPEAL NUMBER:	SA 8 of 2011
DATE DELIVERED:	24 November 2011
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Melbourne

JUDGMENT OF:	May, Ainslie-Wallace & Johnston JJ
HEARING DATE:	6 October 2011
LOWER COURT JURISDICTION:	Federal Magistrates Court
LOWER COURT JUDGMENT DATE:	17 December 2010
LOWER COURT MNC:	[2010] FMCAfam 1425
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Mr McConchie
SOLICITOR FOR THE APPELLANT:	Fong & Co
COUNSEL FOR THE RESPONDENT:	Ms MacMillan SC
SOLICITOR FOR THE RESPONDENT:	Schetzer Constantinou

ORDERS

(1) That the appeal against the orders made by the Honourable Federal Magistrate Riley on 17 December 2010 be dismissed.

(2) No order as to costs.

IT IS NOTED that publication of this judgment under the pseudonym *Ricci & Jones* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT MELBOURNE

Appeal Number: SA 8 of 2011
File Number: MLC 5237 of 2010

MS RICCI
Appellant

And

MR JONES
Respondent

REASONS FOR JUDGMENT

1. Ms Ricci ("the appellant") appeals against an order for summary dismissal of her application brought against Mr Jones ("the respondent").

2. On 5 October 2010, by amended application, the appellant sought final orders for alteration of property interests between her and the respondent. The appellant also sought interim orders requiring the respondent to make disclosure of his financial interests and a payment towards her legal costs of the proceedings, the payment of interim spousal maintenance by him and orders restraining him from dealing with the proceeds of sale of a particular property.

3. By response filed on 7 December 2010, the respondent sought final orders that the appellant's application be struck out both as to the final and interim orders sought, that she file a further amended initiating application and that she pay his costs on an indemnity basis.

4. The respondent's application for summary dismissal was heard on 17 December 2010 and on 12 January 2011 the Federal Magistrate dismissed the appellant's application for financial orders against the respondent. It is from this determination that the appeal is brought.

BACKGROUND

5. The parties are not married. It is uncontentious that the appellant and respondent had a relationship and in September 2009 the appellant bore a child. It is undisputed that the respondent is the father of the child.

6. The appellant brought her application for financial orders on the basis that she and the respondent had been in a de facto relationship as defined by s 4AA of the *Family Law Act 1975* (Cth) ("the Act").

7. The hearing before the Federal Magistrate was conducted solely on the basis of the affidavit and other documents filed by the appellant. While not conceding the accuracy of those assertions generally, for the purposes of the hearing, the respondent requested and the Federal Magistrate did assume the accuracy of every fact asserted in the appellant's documents.

8. At the conclusion of the hearing the Federal Magistrate dismissed the appellant's application for financial orders (both as to final and interim orders) and made directions for the filing of submissions on the question of costs of the application.

9. An order was made by the Federal Magistrate on 10 February 2011 that provided:

> 1. The applicant pay the respondent's costs of the property aspects of the amended application filed on 10 June 2010 fixed in the sum of $5865.

10. The Federal Magistrate subsequently, on 21 February 2011, made the following orders:

> 1. The applicant pay the respondent's costs of the property application fixed in the sum of $5,865.
>
> 2. The applicant pay the respondent's costs of today fixed in the sum of $200.
>
> 3. The costs orders be stayed until the determination of the appeal in SOA8/2011 [RICCI & JONES].
>
> …

THE EVIDENCE IN SUPPORT OF THE APPLICATION

11. On 5 October 2010 the appellant filed an affidavit in support of her application for financial orders. She had earlier filed an affidavit in support of an application for parenting orders. This too was considered by the Federal Magistrate as part of the summary dismissal application. Three further documents in the form of statements each sworn on 10 December 2010 were considered by the Federal Magistrate. One was of the appellant and the others were made by friends of hers, Ms S and Ms Z.

12. The respondent filed a brief affidavit on 7 December 2010 in which he denied ever having been in a de facto relationship with the appellant.

13. The appellant's case was that she met the respondent in July 2008 when she was proposing to rent a property and the respondent was engaged by the real estate agent to paint the property. The appellant and respondent struck up a friendship and he assisted her to move. Although the respondent was apparently in another relationship, the appellant said that they spent time together and, in her opinion, the respondent pursued her to form a romantic relationship with him. The appellant said that in December 2008 the respondent told her that his former relationship was at an end. They then embarked on a sexual relationship and she became pregnant with their child shortly afterwards.

14. In her sworn statement, the appellant expanded on her affidavit filed on 5 October 2010. She said that in February 2009 (after she had told him of her pregnancy) she did not see the respondent with the same frequency as before. In early August she and the respondent met for dinner at his request and she believed that their relationship had returned to its previous warmth and affection. The respondent gave her some money towards purchases for the baby. Although not entirely clear, it appears that from this time, the respondent had nothing further to do with the appellant. He has not seen nor had any contact with their child.

15. The supporting statement of Ms S refers to a party in October 2008 at which she observed the relationship between the appellant and respondent to be one of open and mutual affection.

16. In her sworn statement, Ms Z said that she was first introduced to the respondent in July 2008 when he was overseeing the work on the house the appellant was to rent. She met him several times afterwards in the company of the appellant. Her last contact with him was in December 2008.

17. At the respondent's request, the Federal Magistrate had regard to the affidavit sworn by the appellant and filed on 10 June 2010 in support of parenting orders for the child in which she asserted at paragraph 10:

> …We did not live together. The association ended after 7 months after I became pregnant with [the child]…

THE FEDERAL MAGISTRATE'S REASONS FOR JUDGMENT

18. After traversing the facts as asserted by the appellant, the Federal Magistrate considered s 4AA of the Act which is in the following form:

> **4AA De facto relationships**
>
> Meaning of **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 (see subsection (6)); 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.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include 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.

19. The Federal Magistrate also had regard to the authorities on the determination of the existence of a de facto relationship including that of Mushin J in *Moby v Schulter* (2010) FLC 93-447 in which his Honour said at paragraph 85,063:

> The second specific element is the concept of "living together". In my view, if a couple do not live together at any time, they cannot be seen as being in a de facto relationship. However, the concept of "living together" does not import any concept of proportion of time. In particular, it does not require that a couple live together on a full-time basis…

20. The Federal Magistrate accepted as correct and adopted his Honour Mushin J's interpretation of s 4AA(2)(b). In considering Mushin J's interpretation, the Federal Magistrate said at paragraph 45 of her Honour's reasons for judgment (AB 34):

> …It seems to me that the requirements of the legislation are that the parties in the case, having regard to all the circumstances of the relationship, have a relationship as a couple living together on a genuine domestic basis. It seems to me that, with respect, Justice Mushin was correct in his analysis of the legal position. But even if I am wrong about that, it seems to me that a consideration of the various factors in this case also leads to a conclusion that the parties were not in a de facto relationship. I consider in all the circumstances of the case that that conclusion could not alter at a final hearing on the preliminary point about whether the parties are in a de facto relationship. Taking all of the applicant's evidence as true, accepting it entirely, there is still the situation that the relationship between the applicant and the respondent in this case was of a very limited nature.

THE APPEAL

21. The grounds of appeal are set out in an Amended Notice of Appeal. They are as follows:

1. The evidence before the Court was insufficient for Her Honour to make the orders made on 12 January 2011.

2. Her Honour erred by making findings based on untested evidence before the Court.

3. Her Honour erred by considering only those circumstances listed in s.4AA(2) of the *Family Law Act 1975* ("the Act") and thereby failing to have regard to all the circumstances of the parties' relationship as required by s.4AA(1)(c) of the Act.

4. Her Honour erred by failing to take into account the fact that at a subsequent final hearing the Court could, in exercising its discretion under s.4AA(4) of the Act, choose to have regard to one or more additional matters to which her Honour did not have regard, or to attach to one or more matters a different weight than her Honour attached, and could on that basis conclude that a de facto relationship did exist between the parties.

5. Her Honour erred by failing to independently consider, and reach her own independent conclusion on, the question of whether it is a necessary precondition of a de facto relationship that the parties must live together. This followed as a result of her Honour's earlier

conclusion that she should follow the non-binding decision of Mushin J in *Moby v Schulter* [2010] FamCA 748 unless she was satisfied that it was clearly wrong.

Ground 1 - The evidence before the Court was insufficient for Her Honour to make the orders made on 12 January 2011

22. The thrust of this ground was that, because the respondent placed no evidence before the court, the Federal Magistrate did not have sufficient evidence on which to base her decision.

23. It is first to be observed that the appellant carried the burden of proving the asserted de facto relationship and that, in addition to her affidavit, the Federal Magistrate took into account a sworn statement made by her.

24. Secondly, as we have noted, the respondent conceded, for the purposes of the determination of the application for summary dismissal, the matters of fact asserted by the appellant. None of the appellant's assertion of facts was challenged by the respondent.

25. Nevertheless it was argued that, had counsel for the appellant been permitted to cross-examine the respondent, it would have provided further evidence in support of the appellant's case for a de facto relationship. Counsel who appeared on the appeal could not articulate what probable answers could have been given in cross-examination that may have strengthened the appellant's case and, given that the respondent did not challenge her assertions, nor can we imagine what that evidence might have been. We are unable to accept this argument.

26. It was further argued that the respondent did not provide evidence of his finances and this evidence, had it been available, would have assisted the Federal Magistrate to conclude the existence of a de facto relationship between the parties.

27. The relevance of the respondent's finances was not explained either in the written argument or in oral argument and we reject the assertion.

Ground 2 - Her Honour erred by making findings based on untested evidence before the Court

28. While the appellant's argument conceded that the Federal Magistrate correctly identified and applied the law in relation to the determination of an application for summary dismissal, it was asserted that her Honour erred in failing to take account of all of the appellant's evidence "at its highest level" in determining whether there was a real question to be tried.

29. In particular it was said that the Federal Magistrate did not give "full weight" to the appellant's evidence that the respondent had disclosed to her significant financial interests both in Australia and overseas.

30. In her evidence, the appellant gave considerable detail of the respondent's financial position as he told her.

31. At paragraphs 15 and 16 of her Honour's reasons for judgment, the Federal Magistrate recounted the appellant's evidence in this regard as part of her recital of the facts which she was urged to accept for the purposes of the determination.

32. The thrust of the argument is found in the transcript. A submission was made that the disclosure by the respondent to the appellant of the detail of his finances "…clearly take[s] this relationship to a totally different level…", to which her Honour said: "Well, it could just be regarded as boasting".

33. Counsel for the appellant replied:

> Well, yes, your Honour, but the evidence before the court – and, your Honour, you have to decide the merits of this case on the best evidence before you, and the best evidence you have is the affidavit material. In that affidavit material, [Mr Jones] has had in excess of three months to respond. He responds by way of one affidavit, we never resided together, period…

34. There, the matter of the financial disclosure rested.

35. It was argued that her Honour ought to have accepted the appellant's assertion that the respondent told her of the extensive financial resources. While the written argument is not altogether clear, it was asserted that the Federal Magistrate by not accepting the appellant's assertions about the respondent's wealth "at its highest" and coupled with not requiring the respondent to file evidence in the matter:

> 7. …erred in dismissing the application of the wife without availing herself of the best evidence including, but not limited to evidence from the husband that may have enabled her to properly decide if the decision of Mushin J in Moby & Schulter... was clearly wrong.
>
> 8. … [and] did not take the evidence of the wife at its highest level and as such has denied the wife the opportunity to place her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. These processes could have included subpoenas on UBS Investments Singapore and evidence from the husband in response to the allegations made by the wife.

36. The Federal Magistrate was entitled to assume that the appellant had placed before the court all of the material facts on which she sought to assert a de facto relationship. A perusal of the transcript shows that counsel for the appellant at no time sought an adjournment to obtain further evidence nor indicated that her evidence was incomplete. Neither was it suggested to her Honour that the production of documents under subpoena would advance the proof of the

appellant's contention that a de facto relationship existed. In those circumstances, it seems to us that to issue subpoenas would have amounted to no more than a fishing expedition.

37. In any event, it was not made clear what effect proof of the respondent's financial holdings could have had on the determination of the existence of a de facto relationship.

38. Further, her Honour's comments about whether the respondent may have been "boasting" about his financial resources does not indicate that she did not accept the appellant's evidence that he had told her that he held considerable funds, but that her Honour was wondering about the truth of the assertion of the respondent.

39. In any event, as we have already indicated, we see no relevance in the state of the respondent's finances to the determination of the matter before the Federal Magistrate and counsel for the appellant could not make it relevant.

40. In the light of the appellant's acceptance that her Honour applied the correct test in proceeding with the application for summary dismissal, we find no substance in this asserted ground of appeal.

Ground 3 - Her Honour erred by considering only those circumstances listed in s.4AA(2) of the *Family Law Act 1975* ("the Act") and thereby failing to have regard to all the circumstances of the parties' relationship as required by s.4AA(1)(c) of the Act.

41. The thrust of this submission was that, in applying the appellant's evidence to the various paragraphs of s 4AA(2), her Honour removed from consideration "other circumstances that applied to this case and [sic] could have been relevant had the husband filed answering material and the evidence properly tested allowing the usual interlocutory and trial process to follow." (original emphasis).

42. Although not entirely clear, this submission seems to be twofold. First that the appellant may have been able to derive support for her claim to a de facto relationship with the respondent had he been compelled to answer her assertion and/or may have found supporting material through interlocutory processes.

43. It was never said what that supporting material may have been, and one wonders, since it is the appellant who asserts the de facto relationship and the respondent who denied its existence, what comfort she may have hoped to get from further evidence from the respondent or through interlocutory processes. Further, it is to be remembered that, on the concession of the respondent, the appellant's evidence about the nature of the relationship with the respondent was not challenged for the purposes of the interlocutory hearing.

44. We are of the view that this asserted error has no substance.

45. It was secondly said that her Honour erred in applying a rigid approach to the paragraphs of s 4AA(2) and thus attempted to apply "all of the circumstances as listed in the act instead of applying the circumstances relevant to this particular relationship".

46. Support for this submission was said to be found in her Honour's use of the word "stipulate" when considering the paragraphs of s 4AA(2).

47. Her Honour considered the appellant's evidence in which she claimed the existence of a de facto relationship at length (at paragraphs 9 to 35). She then set out the provisions of s 4AA and made reference to the decision of *Moby v Schulter* on which the respondent relied. At paragraph 46 her Honour turned to consider the paragraphs of s 4AA(2) by reference to the evidence on which the appellant relied. At paragraph 56, her Honour concluded:

> Taking all of the matters into account that are stipulated by s.4AA of the Act, it seems to me that there is no prospect at all that the relationship between the applicant and the respondent could be regarded as a de facto relationship. That is, even if the decision of Mushin J requiring the parties to have lived together as an absolute requirement turns out to be wrong, the overall circumstances of the relationship are such that this relationship could never be regarded as a de facto relationship. Accordingly, the parts of the application filed on 5 October 2010 which are contingent upon there being a de facto relationship must be dismissed.

48. It was argued that her Honour's use of the word "stipulate" indicated a slavish adherence to the criteria of the subsection; that she failed to consider other circumstances that may have pointed to the existence of a de facto relationship but which did not otherwise fall to be considered under the subsection; and that she demonstrated an erroneous view that it was mandatory that "all or any" of the circumstances referred to in that subsection needed to exist before a de facto relationship could be said to exist.

49. In the absence of any indication as to what other evidence or circumstance her Honour ought to have considered, we are not satisfied that her Honour restricted her consideration of whether a de facto relationship existed in the way asserted. It is clear from a reading of the judgment that her Honour considered the paragraphs of s 4AA(2) in the context of the facts of the matter as a whole.

Ground 4 - Her Honour erred by failing to take into account the fact that at a subsequent final hearing the Court could, in exercising its discretion under s.4AA(4) of the Act, choose to have regard to one or more additional matters to which her Honour did not have regard, or to attach to one or more matters a different weight than her Honour attached, and could on that basis conclude that a de facto relationship did exist between the parties.

50. Her Honour's task was to determine whether the evidence of the appellant, taken at its highest, was capable of establishing that there existed a de facto relationship between her and the respondent. In coming to that decision, she took into account all of the appellant's evidence about the nature and quality of her relationship with the respondent. We were not taken to any other "additional matters" which the Federal Magistrate might have taken into account in her determination.

51. This submission, in our opinion, misconceives the nature of the hearing on which the Federal Magistrate embarked, that is to determine whether "…the party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim…"

52. True it is that the authorities urge caution in making such a finding in circumstances where "contested evidence might reasonably be believed one way or the other so as to enable one side or the other to succeed" as per Rares J in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* (2006) 236 ALR 720 at paragraph 45.

53. The respondent replied to the appellant's claim by denying the existence of a de facto relationship and (for the purposes of the hearing) made no challenge to the evidence on which she asserted its existence. What more could the appellant have hoped for in any answer provided by the respondent?

54. We find no substance to this challenge to the decision.

Ground 5 - Her Honour erred by failing to independently consider, and reach her own independent conclusion on the question of whether it is a necessary precondition of a de facto relationship that the parties must live together. This followed as a result of her Honour's earlier conclusion that she should follow the non-binding decision of Mushin J in *Moby v Schulter* [2010] FamCA 748 unless she was satisfied that it was clearly wrong.

55. As can be seen, much of this submission traverses submissions previously made and considered by us and we will consider this submission to the extent that it raises a different ground of challenge.

56. Her Honour did consider and accept the decision of Mushin J that s 4AA(2)(b) required parties to have lived together for some time before their relationship could be considered a de facto one.

57. We are of the view that minds might reasonably differ as to this interpretation of the subsection that would require a putative de facto couple to have lived together before satisfying the legislative test; however because of the determination of this appeal, it is unnecessary to consider this point further.

58. Her Honour made it abundantly clear that even if his Honour's interpretation was wrong to require a period of cohabitation, taking into account all of the evidence, she was not persuaded that a de facto relationship existed.

59. 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.

60. In *Jonah & White* [2011] FamCA 221, a single judge decision of Murphy J, the factual background included the parties having a relationship for seventeen years, living together on occasions, accompanied by significant financial support from the male respondent. In that case, the respondent was also married and lived with his wife throughout his association with the applicant. His Honour was not persuaded that the relationship between the parties was a de facto relationship as defined in the Act.

61. We agree with Murphy J at paragraph 39 that the making of a declaration that a de facto relationship existed does not involve the exercise of discretion but rather a consideration of the facts which may found the jurisdiction.

62. Further, at paragraph 53, Murphy J said:

> It is, however, important to bear in mind that the emphasis on common residence (whether for varying periods of time or not) is but one of the specific factors enumerated within s 4AA of the Act. The section specifically provides that no particular finding in respect of that matter (or indeed any other specified circumstance) is "to be regarded as necessary in deciding whether the persons have a de facto relationship".

63. In this case, it was not asserted that the parties had lived in the same residence at any time. In support of the submissions, the appellant relied on her evidence that she did not engage in a sexual relationship with the respondent until he told her that he had finished his previous relationship, a matter of which her Honour was well aware as she recited it when dealing with the evidence on which the appellant relied.

64. The appeal will be dismissed.

COSTS

65. As is customary, we sought the parties' submissions as to costs at the conclusion of the hearing in order to save the time and expense of making further submission once the appeal was determined.

66. The respondent argued that if the appeal failed, he would seek an order for costs against the appellant. In the course of submissions on this issue, counsel for the appellant argued that she had neither money nor resources from which a costs order could be met.

67. Were the determination of an award of costs to be made solely on the basis of merit, we would have no hesitation in ordering the appellant to bear the respondent's costs of the appeal because in our view the appeal was entirely without merit. However, the determination as to whether costs are ordered must be considered within the context of s 117 of the Act. We take into account in this regard that in dismissing the appeal, the costs order made by the Federal Magistrate against the appellant is revived, the appellant's apparently poor financial circumstances and that it appears that the respondent may be in a stronger financial position. In all of the circumstances, we will not order the appellant to pay the respondent's costs of the appeal.

I certify that the preceding sixty seven (67) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (May, Ainslie-Wallace & Johnston JJ) delivered on 24 November 2011.

Associate:

Date: 24 November 2011