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(Don't Forget) In Text Referencing In Exam

Author, Title & Page Number or Author (seminar materials) Page Number.

Example - (Dworkin, Law's Empire, 1988, 25).

Problem Question: Template

Jonah v White (2012) 48 Fam LR 562

Definitions

Clandestine

characterized by, done in, or executed with secrecy or concealment, especially for purposes of subversion or deception; private or surreptitious: Their **clandestine** meetings went undiscovered for two years.

De facto relationship

Definition of a 'de facto relationship's 4AA(1). Jonah v White discusses (c) "having regard to all the circumstances of their relationship, they have a relationship as a couple living together on genuine domestic basis".

What is the legal definition of a de facto relationship?

The reforms to the FLA provide that two people may be said to be in a de facto relationship if, "having regard to all the circumstances of their relationship", they are "a couple living together on a genuine domestic basis", they are not legally married to each other and they are not related to each other by family.

The question of whether a de facto relationship exists is one to be determined by reference to the *FLA* definition, rather than in accordance with "external society views of what constitutes a de facto relationship or by what the parties themselves thought their relationship to be"

Facts

- Appeal to the decision of Murphy J, court found Ms Jonah and Mr White did not satisfy s 4AA of Family Law Act 1975 (Cth) in relation to having a 'de facto relationship'.
- In 1992 Ms Jonah began working in a business run by Mr White. Shortly after they entered into an intimate relationship that continued until early 2009. Mr White married with two children, relationship with Ms Jonah was kept a secret up until the time of the case.
- Ms Jonah contends that the parties had a "de facto relationship" within the meaning of s 4AA of the *Family Law Act 1975* (Cth) [4].
- Ms Jonah having made an application for orders of the type mentioned in s 90RD(1)(a) [5]
- Appellant argued his honour failed to take into account the Clandestine nature of the respondent's relationship - thus taking into account irrelevant matters. His honour failed to accord sufficient weight to matters which would have concluded that a de facto relationship existed.

Legal Issue

- Were the parties living together on a genuine domestic basis?
- The parties may have 'lived together' but they did not satisfy 'a couple living together on genuine domestic basis'
- The parties, at no stage, made any investment in joint names, did not commit funds to any joint purpose, and maintained no joint bank account [22]
- There was, however, financial dependence on the part of the applicant [23]

- There is no evidence that any relationship existed, or was intended, between the applicant and the respondent's children. I consider this important in the question to be answered here (Murphy J). [29].

Judicial Review

- Appellants Argument
  - Argued that Ms Jonah and Mr White lived together through their emotional connection – the judge dismissed this. Appellant also argued they lived together at the farm, overseas and at her residience.
  - Counsel for the applicant submitted that the provision of the Queensland legislation which defines "de facto partner" is not "entirely cognate" with s 4AA of the Act [42].
  - The applicant contends that the parties had a "de facto relationship" within the meaning of s 4AA of the *Family Law Act 1975* (Cth) ('the Act'). She seeks a declaration to that effect pursuant to s 90RD of the Act, having made an application for orders of the type mentioned in s 90RD(1)(a). [4]
  - Counsel for the applicant submitted that, when one looks at the circumstances prescribed in the Act which may be taken into account by a court when deciding whether two persons are living together as a couple on a genuine domestic basis, "so many are answered in the affirmative". [30]
  - Mr Galloway, counsel for the applicant, referred in argument to an expression used by Justice Byrne in *JJR v PH* [2005] QSC 253, a decision with respect to the relevant Queensland Legislation in the Queensland Supreme Court. His Honour said at par 29 "[the applicant's] attitude confuses an unsatisfying, often unhappy, de facto relationship with the absence of one". Counsel argues that the same might be said of the respondent and his attitude here. [34]

- Respondents Argument
  - The respondent denies any such relationship, describing his relationship with the applicant as "an affair" and agreeing with her counsel's suggestion that he regarded her as having been a "kept woman". [4]
  - It is submitted in the respondent's case outline, and again orally by his counsel Mr Maurice, that the question of whether a de facto relationship exists involves the exercise of a discretion.[37]
  - Further, it is submitted that s 4AA(5)(b) has a purpose which "ought be limited to circumstances where a party would otherwise unjustly benefit by asserting there was no domestic relationship" and, in turn, that the "merits and prospects of [the applicant's] case for property settlement, periodic and lump sum spousal maintenance generally" ought be taken into account in the exercise of the asserted discretion. I reject those submissions.[38]

Appeal Judges Argument

- Judges: May, Strickland and Ainslie-Wallace JJ.
- In the case, the appellant challenged the correctness of the trial judge's decision that the relationship did not sit within the strict definition of a de facto relationship (Section 4AA of the Family Law Act)
- The appeal challenges his honours application of s 4AA of the Act and , in particular, subs (5)(b)
  - " a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship"
  - Appellant argued his honour failed to take into account the Clandestine nature of the respondent's relationship - thus taking into account irrelevant matters. His honour failed to accord sufficient weight to matters which would have concluded that a de facto relationship existed.

    - Judge stated it is immediately apparent that finding if the couple were in a de facto relationship will be determined if they are a "couple living together on a genuine domestic basis". [32]
    - Found an error in regards to his honours conclusion that the couple
- They found no substance in the challenge to his Honour's (Murphy J) findings of fact, nor the conclusions based on them [69].
- HELD: 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".

Answering the question

Issue (legal question of law – what client has to answer)
Example:

Whether Peter and Katie, were living together on a genuine domestic basis, therefore satisfying the conditions for pursuant of a de factor relationship s 90RD Family Law Act 1975 (Cth).

Were the parties living together on a genuine domestic basis?

Relevant Law (what did the court say)
Example:

- The key to the definition is the manifestation of a relationship where the parties have so merged their lives that they are, for all practical purposes, living together as a couple on a genuine domestic basis. It is the manifestation of "coupledom".[1]
- The parties, at no stage, made any investment in joint names, did not commit funds to any joint purpose, and maintained no joint bank account [22]
- There was, however, financial dependence on the part of the applicant [23]
- There is no evidence that any relationship existed, or was intended, between the applicant and the respondent's children. I consider this important in the question to be answered here (Murphy J). [29].

➢ Cases referred to; authorities relied on in the trial case
- Mr Galloway (counsel for the applicant) refers to *JJR v PH [2005] QSC 253* (Justice Byrne) in relation the the respondents attitude "confuses an unsatisfying, often unhappy, de facto relationship with the absence of one.[2]
- Both parties relied on Mushin J *Moby v Schulter* (2010) FLC 93-447; [2010] FamCA 478 (Moby)
- Respondents counsel presents the argument to whether a de facto relationship exists involves the exercise of discretion.
- S 4AA(5)(b) has a purpose which "ought be limited to circumstances where a party would otherwise unjustly benefit by asserting there was no domestic relationship" – here Murphy rejected these claims my the applicant as she received monies which exercised asserted discretion.
- *Corporation of the City Enfield v Development Assessment Commission* (2000) 199 CLR 135 ; 169 ALR 400 ; 60 ALD 342 ; [2000] HCA 5, applied
    - The question of whether a de facto relationship exists is a determination of fact. The ultimate question is in the nature of jurisdictional fact.[3]
- *Moby v Schulter* (2010) FLC 93-447 ; *PY v CY* (2005) 34 Fam LR 245; *KQ v HAE* [2007] 2 Qd R 32; *FO v HAF* [2007] 2 Qd R 138; *Vaughan v Hoskovich* [2010] NSWSC 706, applied

[1] Ibid [60].
[2] Ibid [34].
[3] Ibid [39].

    - Common residence under s 4AA ("to be regarded as necessary in deciding whether the persons have a de facto relationship").[4]
- *Piris v Egan* [2008] NSWCA 59; *Vaughan v Hoskovich* [2010] NSWSC 706
    - it should be recalled that the list of "circumstances" in s 4(2) are reminders of matters that possibly might be relevant in deciding whether two people are in a de facto relationship, but do not state its essence. The essence is to be found in the definition in s 4(1). If two people do not "live together as a couple" they do not satisfy the definition of being in a de facto relationship, regardless of what might be the situation concerning the various "circumstances" listed in s 4(2).[5]
- The evidence as a whole sees here two people who each sought to, and did in fact, maintain separate lives, but who came together, on a regular basis, for periods of time during which they enjoyed a loving, sexual relationship. But absent from the relationship was the "merger of two lives into one", or the "coupledom" as earlier referred to. In all of the circumstances, it has not been shown that the relationship between the parties was a de facto relationship as defined in the Act.[6]
- Murphy J found that 'absent from the relationship … was the "merger of two lives into one", or the "coupledom" as earlier referred to', and thus that there was no de facto relationship [67].[7]
- Applicant seeker to pursue s 90RD Family Law Act 1975 (Cth) that her and the respondent had a 'de facto relationship as per s 4AA Family Law Act 1975.
- Relationship – 17 years, sexual relationship, and respondent contributed money to applicant's house and made monthly payments for a period of time. But did not maintain residence together, did not acquire property together or poll resources. Relationship was secret and they were not a 'public' couple.
- Murphy states that the applicant was skewed with feelings of emotion and so forth the evidence was less reliable.[8] But also notes in this case it doesn't really dramatically count towards the end result.
- Applicant states she kept property in her own name because she wanted to keep assets separate from the respondent [22].[9]
- "Circumstances" are not taken into account to answer the central question here.
- Murphy J notes that the first two of the statutory provisions in s 4AA(a) and (b) are plainly met.
- Murphy states the application in relation to s 90RD of the act does not involve exercise of judicial discretion [39].[10]
- The question of law is "jurisdiction fact" which enlivens the power of the decision make to exercise a discretion.[28][11]

Judges Argument

Present Case

- Ms Jonah, the appellant, appealed from a decision of Murphy J in which the trial judge declined to declare that Ms Jonah had been in a de facto relationship with Mr White, the respondent, pursuant to s 90RD of the Family Law Act 1975 (Cth).[12]
- The evidence as a whole, sees here two people who each sought to, and did in fact, maintain separate lives [67].
- The key to the definition is the manifestation of a relationship where the parties have so merged their lives that they are, for all practical purposes, living together as a couple on genuine domestic basis. The manifestation of "coupledom" which involves the 'merger of two lives' that is the core of a de facto relationship.[13]

[4] Ibid [53].
[5] Ibid [54].
[6] Ibid [66, 67, 71].
[7] *Jonah v White* (2012) 48 Fam LR 562, [67].
[8] Ibid [9].
[9] Ibid [22].
[10] Ibid [39]
[11] Ibid [28].
[12] *Family Law Act 1975* (Cth) s 90RD.
[13] *Jonah v White* (2012) 48 Fam LR 562, [60].

- Jonah v White demonstrates two people who each sought to, and did in fact, maintain separate lives, but who came together during a period of time. But absent from the relationship was "merger of two lives into one" or the "coupledom". In all of the circumstances the relationship could not be defined as de facto as defined by the act.[14]
- In all of the circumstances I am not persuaded that the relationship between the parties was a de facto relationship as defined in the Act [71].

Murphy J discusses his interpretation of the statue

Murphy J found that absent from the relationship was the "merger of two lives into one", or the "coupledom" as earlier referred to, thus there was no de facto relationship.[15] In relation to s 90RD *Family Law Act 1975* the statue does not involve judicial discretion, it is a matter of fact (albeit based on findings in relation to a non-exclusive number of statutory considerations).[16] Secondly, the existence of common residence is significant when determining a 'de facto relationship' due to its specific nature under s 4AA(2)(b). Murphy J stated "to be regarded as necessary whether the persons have a de facto relationship".[17] Further, the circumstances in s 4AA(2) states matters that might be relevant when deciding on a 'de factor relationship' status but do not state its essence.

Murphy J also states that if two people do not "live together as a couple"[18] they do not satisfy the definition of being in a de facto relationship regardless if what the situation might be regarding the various "circumstances" s 4AA(2).

- NSW – de facto relationship is defined in s 4(a) Property (relationships) Act 1984 (NSW)
- Individual elements of the definition which require considerations; The first is the concept of "couple" and second "living together" – the courts should approach this on a case by case basis.
- Barnes v de Jesus [2011] NSWSC 19 [26] - Einstein J held. The test is an objective one it involves assessing the nature and extent of the claimed common residence.
- White J in *Vaughan v Hoskovich* [2010] NSWSC 706 – noted that you do not need to live together full time to share a common residence.
- Common residence in s 4AA one specific factor [52].
- Couple need to live together as a couple on a genuine domestic basis. [6][19]
- Couple never lived together in "common abode" taken into consideration [20].

Application of the Law (according to the facts)

- **Were the parties living together on a genuine domestic basis?**
- Advice the client based on the decision in Jonah v White.
- How are the facts the same and different? How could this impact the decision?

Conclusion

Advice to the client. What is the likely outcome?

[14] *Jonah v White* (2012) 48 Fam LR 562, [66, 67, 71].
[15] *Jonah v White* (2012) 48 Fam LR 562, [67].
[16] *Corporation of the City Enfield v Development Assessment Commission* (2000) 199 CLR 135.
[17] *Jonah v White* (2012) 48 Fam LR 562, [53]; *Moby v Schulter* (2010) FLC 93-447;*PY v CY* (2005) 34 Fam LR 245; *KQ v HAE* [2007] 2 Qd R 32; *FO v HAF* [2007] 2 Qd R 138; *Vaughan v Hoskovich* [2010] NSWSC 706.

[18] *Piris v Egan* [2008] NSWCA 59; *Vaughan v Hoskovich* [2010] NSWSC 706

[19] Jonah v White (2012) 48 Fam 562

Example Essay Structure – Australian Legal System

Pink Tabs in textbook

EXAMPLE ESSAY PLAN

***Define all concepts**

***Advantages and Disadvantages**

Thesis Statement Example:

While it is argued that more is needed to be done in order to reconcile with Indigenous Australians, the prospect of Constitutional reform is not a prospect that should be looked into lightly. The Australian government needs to assess these avenues profusely, and educate the Australian public on these choices before a decision is entered into. This decision needs to put the interests of Indigenous Australians at the forefront, if there is any hope of reuniting this relationship.

1) Introduction: federation, briefly pinpoint different options of constitutional change

2) Defining constitution–discuss Australia's current position as a constitution, only nation with no treaty formed, not properly demonstrating the society we pride ourselves on being.

3) Constitutional change option 1–amendment to the preamble –signifies mindset at time constitution was drafted -not an accurate depiction to be modified! Cheapest and simplest option for constitutional change providing durable recognition for Aboriginal race.

4)Impact of 1967 referendum promoting greater equality for aboriginals –discuss it's impacts, not all as positive as expected... not enough education of the public of what was to be expected, what needs to be done differently if we were to amend the constitution again.

5) Constitutional change option 2–amendment to s25 and s51 of constitution: elimination of racially discriminatory sections to allow for a greater sense of nationalism –not an 'us' and 'them' mentality, all Australians governed by the same identical laws

Themes

Australian Legal History (Terra Nullius – 1990)

Definitions

- ✓ *Terra Nullius*
  - Translated into English means "land belonging to no one. In International Law 'terra nullius' describes territory that nobody owns so that the first nation to discover it is entitled to take it over, as "finders keepers (James and Field, 'The new layer', 2013, 89)
- ✓ *Indigenous*
  - originating or occurring naturally in a particular place; native
- ✓ *Australian Customary Law*
  - Customary law in Australia relates to the systems and practices amongst Aboriginal Australians which have developed over time from accepted moral norms in Aboriginal societies, and which regulate human behaviour, mandate specific sanctions for non-compliance, and connect people with the land and with each other, through a system of relationships. Customary laws are passed on by word of mouth and are not codified (nor can they be easily codified). In addition, they are not singular throughout Australia — different language groups and clans have different concepts of customary law, and what applies within one group or region cannot be assumed to be universal.
- ✓ *Colonisation*
  - Colonisation is the forming of a settlement or colony by a group of people who seek to take control of territories or countries. It usually involves large-scale immigration of people to a 'new' location and the

expansion of their civilisation and culture into this area. Colonisation may involve dominating the original inhabitants of the area, known as the indigenous population.

- ✓ *Repugnancy*
  - An inconsistency or opposition between two or more clauses of the same deed, contract, or statute, between two or more material allegations of the same Pleading or between any two writings.
  - Inconsistent defences or claims are permitted under the Federal Rules of Civil Procedure.
- ✓ *Legal pluralism*
  - Legal pluralism is the existence of multiple legal systems within one (human) population and/or geographic area. Plural legal systems are particularly prevalent in former colonies, where the law of a former colonial authority may exist alongside more traditional legal systems (c.f compare customary law).

Cases

- *Ball v McIntyre* (1966) 9 FLR 237 (pages 237 – 246) – s 4 Summary Offences Act 1988 (NSW)
  - Ball v McIntyre – Ball political demonstration about Vietnam war, hung place card and squatted on the step of memorial King George V outside parliament house.
  - Decision – Held found not guilty, the behaviour did not satisfy "offensive" behaviour within the meaning of s 17 (d) of the Police Offences Ordinance 1930-1961 (A.C.T)
- *R v Ballard* [1829] NSWSupC 26
  - The legal status of aboriginal people was under questions in the 1829 case of R v Ballard. Ballard was an aboriginal man accused of murdering another aboriginal. At the beginning of the NSW trail attorney general asked the judges to decide if Ballard as an aboriginal was subject to the court's jurisdiction. R v Lowe established that the court had jurisdiction in cases when aboriginal people were in conflict with Europeans. The question with Ballard was whether court has jurisdiction over non Europeans. Decision Ballard was not subject to courts jurisdiction. Larissa Behrendt et al, Indigenous Legal Relations in Australia (Oxford University Press, 2009) 6-17.
- *R v Murrell* [1836] NSWSupC 35
  - Murrell overturned Ballard which was also about a killing of one aboriginal by another. Chief Justice proceeded on the grounds British law did apply to everyone in NSW including aboriginal people. Murrell also found that there was a unitary principle of law.

Sub-themes

- ➢ Indigenous Law/Colonisation/Terra Nullius
- ➢ British Independence 1800's
- ➢ Repugnancy and reception
- ➢ Statutory Interpretation

Main points

- Australian courts do not accept legal pluralism and the distinct identity of the Indigenous people.
- During colonisation, principles of the rule of law were broken. Laws were acted upon the aboriginals arbitrarily, the governor of NSW had total power (judicial, legislative and parliamentary)
- Indigenous were British subjects from the start however the relationship was paternalistic, if indigenous were compliant they were to be 'protected', it not Phillips authorised them to treat them arbitrarily. No due process Larissa Behrendt et al, Indigenous Legal Relations Australia (2009) p 9)
- Mass murders are martial law would be considered unjust and against rule of law. (Kercher, An Unruley Child (1995) p 7)

Terra Nullius

Dispossession of land

• At time of colonisation English law outlined that the crown could acquire new territories and did not require this acquisition to be made in compliance with intl law, it is up to the crown to determine whether sovereignty has been attained for the purpose of English law (James & Field, The New Lawyer, 89)

• Cooper v Stuart (1889), formally recognised that NSW was settled land, meaning that Australia was seen as Terra Nullius before the colonisation by the British, therefore no treaty was needed between ATSI and colonists as they were seen to not have sovereignty o Influenced by John Locke and Vattel's thinking that if no sign of agriculture and appropriating land, natives were living in a state of nature and did not own the land o This is contrary to the Cook's experiences on the ground, which suggests that Aboriginal peoples had systems of laws which governed relationships between them Inga Clendinnen, Dancing with strangers, 2003

Readings

- James and Field, 85-91, 98-99
- Inga Clendinnen Dancing with Strangers (Melbourne 2003) pp 83-93; 230-237.
  - Philip tried to develop relationships with the Australians.
  - Narrative, descriptive and
  - Convicts created an unsettled community
  - Soil didn't provide good farming
  - Did recognise land as anyone's and settled in different area of Sydney, Botany Bay, Parramatta etc.
- Larissa Behrendt et al, Indigenous Legal Relations in Australia (Oxford University Press, 2009) 6-17
  - The rule of law
  - Racist judgements against Aboriginals
  - *R v Ballard & R v Murrell* – racist rulings
- Patrick Parkinson, Tradition and Change in Australian Law (Thomson Reuters, 5th ed, 2013) 129-133, 97-100
  - Empty continent / Terra Nullius
  - At first Phillip sought relationship with Indigenous
  - Transfer to British law – imperial law placed aborginials in an ambiguous position
- Bruce Kercher, An Unruly Child (Allen & Unwin, 1995) 5-12
  - Aboriginal massacres under martial law
  - No legal status for Aboriginals
  - R v Murrell Case significant
- Michelle Sanson and Thalia Anthony, Connecting with Law (Oxford, 3rd ed, 2014) 368
  - 1823 – legislative council
  - Governor all power to create legislation
  - 1825 – Executive council to advise Governor

1990 – Today

Definitions

- ✓ *Federation*
  - A system of government where legislative, executive and judicial power is shared between a national government and various state and regional governments. (a unitary system of government) (James & Field, p 512).
- ✓ *Protection Era*
  - By the beginning of the twentieth century, the colonial authorities felt it necessary to protect the Indigenous population, in order to ease the process of extinction. This was the beginning of the Protection Era.
  - In the name of 'protection', Indigenous Australians were made wards of the state and subjected to policies that gave government the power to determine where Indigenous people could live, who they could marry, and where they could work. Despite the benevolent intentions behind these policies, in practice, they denied Indigenous people control over almost every aspect of their lives.
- ✓ *Australian Constitution*
  - The Australian Constitution is the set of rules by which Australia is run. It came into effect on 1 January 1901, establishing the Commonwealth of Australia. It has been an important document in shaping Australian society ever since.

Readings

- Nickolas James and Rachel Field, The New Lawyer (Wiley, 2013) 100-102, 105-110, 121-131, 135-137
- Larissa Behrendt et al, Indigenous Legal Relations in Australia (Oxford University Press, 2009 21-27
  - 'Protection' Era
  - Regulations of Aboriginal life
  - Each legislation set out by state in relation to protection policies.
  - Police powers to control and segregate aboriginals.

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  - Right to vote – 1967 then 1983 same voting conditions as non-indigenous
  - Inclusion in the census did not see a psychological shift
  - 1967 referendum
- Chris Graham, 'A punter's guide to not getting defensive about Adam Goode's truth bombs', New Matilda (online), 13 November 2014,
  - Modern perspective of why indigenous Australian's are disadvantaged and the impact of "Invasion Day" or Australia day as non-indigenous Australians call it.
  - Forced Indigenous into poverty them took their children off them
  - Aboriginal Child removal still common today – DOCS

- Creative Spirits, 'Stolen Wages', Creative Spirits (online)
  - Wages under total government control until 1968
  - Governments knew they were breaking the law
  - Stolen generation
  - Stolen wages prevented equality and education

Sub themes

- 'Protection Era and Indigenous Citizenship (1967)