

# Yours, Mine, Ours.

A Guide to Family Law and Estates

By Dixie Ann Middleton & Associates

Welcome to the third edition of our Newsletter—"Yours, Mine, Ours".

**Dixie Ann Middleton**  
Principal

**Emma Louise Turner**  
Associate



**Samantha Jane Vickery**  
Solicitor

**September 2011**

**FAMILY LAWYERS**  
The Thynne Centre  
4/18 Thynne Road  
MORNINGSIDE Qld 4170

Ph (07) 3395 5502  
Fax (07) 3399 1692  
E:mail@middletonlawyers.com.au  
www.middletonlawyers.com.au

**Please note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.**

## **MISTRESS/CARER BUT NOT DEFACTO**

On the 1 March 2009 the Family Law Act was changed so that it covered not only married couples but, de facto couples. According to the 2006 census figures there were nearly 1.2 million people in Australia who at that time, identified themselves as living in a de facto relationship. Therefore, it is important for many people to know whether their relationship falls within the definition, under the Family Law Act.

In the case of *Jonah v White* the Judge found that the parties had had a relationship "for 17 years". During this period they had a sexual relationship and there had been financial dependency by the woman on the man. However, there was not sufficient evidence to establish that this relationship was a de facto relationship. Mr White was married with children and the relationship with Ms Jonah had been conducted in a clandestine manner over the years. They had met on a regular basis of 2 to 3 days at a time in a regular pattern of 2 to 3 weeks apart. Mr White had made it clear to Ms Jonah that if he ever had to choose between them, he would choose his wife and children.

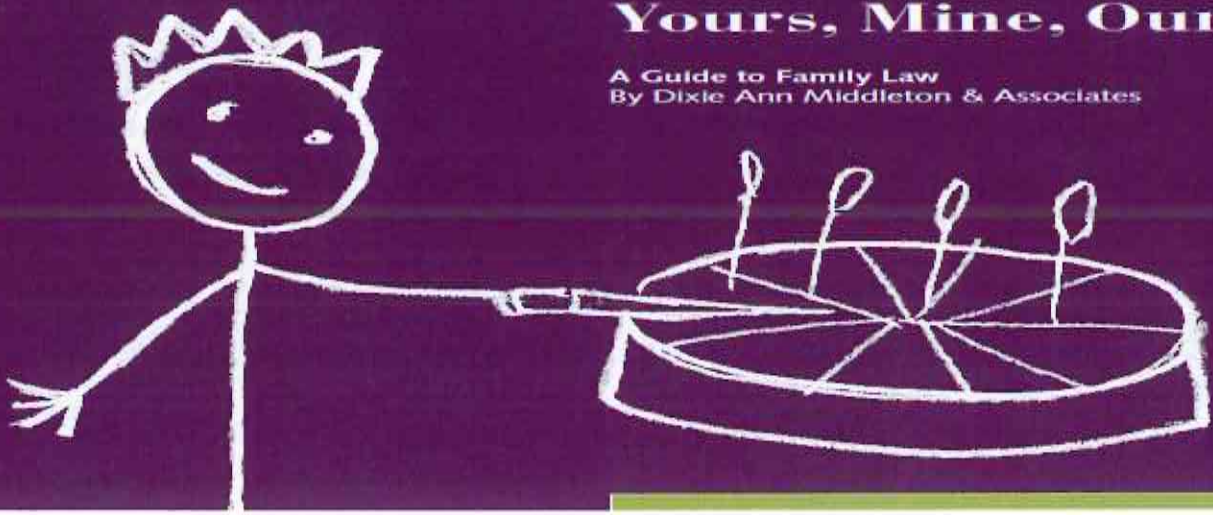
It was also clear that each party kept and maintained a household distinct from the other. Ms Jonah did not have any relationship with the respondent's children. As the relationship was clandestine, they did not socialise as a couple.

**The person asserting the existence of a de facto relationship is the person who must prove the existence of that relationship in any Court proceedings in which it is disputed.**

Whilst Mr White provided financial support there were no joint bank accounts, no joint investments, no jointly acquired property and neither mixed with the other's friends or did so very rarely. Ms Jonah had no involvement with Mr White's business, her life in Brisbane was one in which

Mr White had little or no involvement. In all of these circumstances the Judge found that there was no de facto relationship and thus, Ms Jonah's claim for ongoing financial support and property settlement failed.

In the case of *Barry v Dalrymple* the Court was asked to establish whether a de facto relationship existed within the definition of the Family Law Act between 2 men called Mr Barry (the Applicant) and Mr Dalrymple (the Respondent). Mr Barry asserted that there was such a relationship while Mr Dalrymple asserted the relationship was one of personal assistance and/or carer and thus, didn't come within the definition of the Family Law Act.



## MISTRESS/CARER BUT NOT DEFACTO

The person asserting the existence of a de facto relationship is the person who must prove the existence of that relationship in any Court proceedings in which it is disputed. The Court has to decide as a question of fact whether or not a de facto relationship exists. In making that decision they will look at the evidence of the contesting parties to the dispute. They will also look at the evidence of lay and expert witnesses that maybe submitted by both contestants. The Court will also look at circumstantial evidence eg invitations, cards, internet records, hotel accounts, bank records, photographs etc to ascertain whether the necessary indicia exists to establish that a couple are living together on a genuine domestic basis.

The various cases show that each person's relationship is different and that no given set of indicia can or will be present in every relationship. It is the composite picture not individual characteristics that will determine whether or not the appropriate relationship is found to exist.

Thus, the characteristics that must be at least considered and weighted up in determining whether or not the appropriate relationship exists are the following:-

1. Duration of the relationship;
2. The nature and extent of their common residency;
3. Whether a sexual relationship exists;

4. The degree of financial dependency or interdependency and any arrangements for financial support, between them;
5. The ownership, use and acquisition of their common property;
6. The degree of mutual commitment to a shared life;
7. Whether a relationship is registered under any prescribed State or Territory Law;
8. The care and support of children;
9. The reputation and public aspects of the relationship.

While it is often difficult for outsiders to give evidence in regards to any of the above indicia corroborating evidence from third parties certainly assists, in any contested hearing.



In the case of Mr Barry and Mr Dalrymple the Court found that on the balance of probability no de facto relationship existed as on the evidence the Court found:-

1. All decisions in regard to the common residence was made by Mr Dalrymple who owned these properties and he made decisions regarding them without reference to Mr Barry;

1. All expenses for any joint holidays were undertaken by Mr Dalrymple;
2. They always maintained separate bedrooms and bathrooms;
3. They ate together on occasions but, this was not inconsistent with a carer/patient role;
4. There was very limited sexual activity between the parties and Mr Dalrymple had paid for the sexual services on 3 of the 4 occasions to which he agreed there had been a sexual encounter but, otherwise denied any sexual relationship;
5. There was no financial dependency or interdependency other than Mr Barry provided services to or for the benefit of Mr Dalrymple and Mr Dalrymple remunerated Mr Barry for same. Mr Dalrymple did not discuss his finances with Mr Barry or consult him in relation to same and there was no evidence of a planned future together, they did not even appear to share interests or activities. There was not evidence of a reputation and public aspects of the relationship other than what would be consistent with carer and patient.

For a de facto relationship to exist there would need to be a common intention of the parties as to that relationship, whether that intention was expressed or implied. In both of the examples cited above, that common intention could not be established.