FINDING CERTAINTY IN DETERMINING WHETHER A "DE FACTO RELATIONSHIP" EXISTS: AN IMPOSSIBLE TASK?

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Abstract

Section 2D(1) of the Property (Relationships) Act 1976 defines a "de facto relationship" as "a relationship between 2 persons … who live together as a couple". Although the Act does not define "living together as a couple", section 2D(2) & (3) provides that "[i]n determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including … [a list of 9 matters]" and that none of these nine matters is "to be regarded necessary" and "a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate … in the circumstances of the case". The seemingly unfettered discretion of the Court, delegated by section 2D, may be helpful in pursuing a fair and just outcome for each case, but it also raises a great concern as to uncertainty. This paper examines some relevant cases and argues that "mutual commitment to a shared life" should be at the core of section 2D and be the most important test, and by which certainty can be found to a large extent, in determining whether a de facto relationship exists. Accordingly, this paper recommends that amendments should be made to the legislation to aid the interpretation and application of section 2D.

I. Introduction

The purpose of the Property (Relationships) Act 1976 is to recognise the equal contribution, including but not limited to financial contribution, of both spouses to a marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship; and to provide for a just division of relationship property when their relationship ends.[1] Therefore, determining whether there was a marriage, civil union or de facto partnership between the parties is a prerequisite to achieving these goals. Determining whether there was a marriage or a civil union relationship is a relatively easy task because the certificate and/or ceremony clearly indicate that the parties voluntarily contracted into the relationship. Where there is a lack of such a certificate or ceremony, establishing whether there was a

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1 Property (Relationships) Act 1976, s 1M.

de facto relationship between the parties is much more difficult, and even problematic and controversial, in some circumstances.

Section 2D(1) of the Property (Relationships) Act 1976 defines a de facto relationship as a relationship between two persons who live together as a couple but the Act does not define "living together as a couple". Rather, section 2D(2) provides that "*all the circumstances* of the relationship" are to be taken into account in determining whether two people live together as a couple. Although a list of nine matters is provided, the list is non-exhaustive and *none* of these matters is to be regarded *necessary* and a court is "entitled to attach such weight to *any matter*, as may seem appropriate to the court in the circumstances of the case".[2]

Such a "definition" suggests that whether two persons live together as a couple is a matter of fact. As Chisholm J stated in *O'Shea v Rothstein*, "[t]here can be no hard and fast rule because all the circumstances of the particular case under consideration have to be taken into account".[3] The wording "all the circumstances", "none of these … is necessary", "to attach such weight to any matter as may seem appropriate …" seems to delegate an unlimited flexibility and an unfettered discretionary power to the Courts in deciding whether a "de facto relationship" exists in a particular case. While this flexibility and the court's discretion may be helpful in pursuing a fair and just outcome in specific cases, it also raises a great concern as to uncertainty.

This paper analyses some relevant cases and finds that courts tend to attach significant weight to "the degree of mutual commitment to a shared life", as listed in section 2D(2)(f), in determining whether two people are "living together as a couple", although this is not a substitute of the "evaluative"[4] and "common sense"[5] approach. It is arguable that "mutual commitment to a shared life" is at the "core" of the section 2D definition. It is therefore possible to find certainty to a large extent in determining whether a de facto relationship exists in a particular case. If this is so, amendments to the legislation to aid the interpretation and application of section 2D may be desirable.

II. The Uncertainty Illustrated

The starting point is section 2D of the Property (Relationships) Act 1976, which provides:

> (1) For the purposes of this Act, a *de facto relationship* is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—

2 At s 2D(2) (emphases added).
3 *O'Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [19].
4 *Scragg v Scott* [2006] NZFLR 1076 (HC) at [37].
5 At [64].

> (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.
>
> (2) In determining whether 2 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.
>
> (3) In determining whether 2 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.

A simple semantic analysis of section 2D, as shown in the above (in the Introduction), would readily find that section 2D provides the Courts with a great flexibility and a seemingly unfettered discretion in deciding whether there was a "de facto relationship" in a particular case, which inevitably raises a great concern as to uncertainty.

It seems that the uncertainty concern, initially raised by the simple semantic analysis of section 2D, is not illusory, but rather it *is* a real issue as illustrated by some judgments involving the determining of whether a de facto relationship exists. Some recent cases show how significantly different decisions can be made by judges based on the same, or materially similar, facts. In *Public Trust v C [Relationship property]*[6] the respondent and the appellant had resided together for nearly 21 years (1985-2006), although they had not had a sexual relationship since 1990. They had a daughter from the relationship. The respondent had a contemporaneous association with another woman with whom he had a son, and he was also involved in the upbringing of the son. The appellant and the respondent continued to reside in the same household, "cooperated in relation to the upbringing of their

6 *Public Trust v C [Relationship property]* [2009] NZFLR 514 (HC).

daughter, and entered into a business relationship whereby they farmed a property on a cooperative basis"[7] even after the appellant had found out about the respondent's relationship with another woman.

Judge Brown for the Family Court observed that the case did not involve "a simple either/or situation"[8] and "came to a *clear* conclusion"[9] that there was a relationship of living together as a couple (between the appellant and the respondent). On appeal, the High Court, in a different interpretation of those facts, reversed the decision and held that the parties were not in a de facto relationship.[10] Panckhurst J criticized the Family Court judge for not expressly considering the issue of *mutual commitment* and had been influenced too much in finding non-existence of a de facto relationship between the respondent and the third party woman. Panckhurst J was of the view that "the present case demonstrates why the evaluation of the existence of a de facto relationship must remain flexible and, most of all, case-specific".[11] While this statement is consistent with section 2D(3), it also shows how difficult it can be to achieve certainty in determining whether there was a de facto relationship in a particular case.

As illustrated by this case, different weighting of the same factors can result in opposing conclusions. Arguably, the Family Court judge placed a great weight on the respondent's long-term co-residence with the appellant whereas the High Court judge focussed more on the "lack of commitment to a shared life" indicated by the respondent's "shared loyalties" to another woman.

Another recent example which illustrates the uncertainty concern is *B v F [De facto relationship]*.[12] In this case, for the whole of the period between 1994 and 2004, Mr F spent many nights at Ms B's property but he often slept at his parents' home nearby. He showered, changed, and kept his clothes and personal possessions at his parents' home. His mother also did his washing and ironing. Mr F spent time cooking and socialising at Ms B's home and they were acknowledged by friends to be a couple. They did not have a joint bank account and there were no intertwined financial affairs between them, although Mr F provided significant financial support to Ms B and her children.

The Family Court held that the parties had not lived together as a couple. On appeal, the High Court reversed the judgment stating that the Family Court Judge had placed too much weight on occupation of the house. The High Court opined that:[13]

7 At [37].
8 At [56].
9 At [37] (emphasis added).
10 At [40]-[57].
11 At [37].
12 *B v F [De facto relationship]* [2010] NZFLR 67 (HC).
13 At [50].

> The final judgment [of the Family Court] on whether the parties were living together in a qualifying relationship was reached by an overly mechanical application of non-exhaustive statutory criteria.

The High Court attached much greater weight on the fact that "[they] presented themselves as a couple".[14] With no disrespect intended, it is hard to see how the High Court's approach is more convincing than the Family Court's.

The above cases show how uncertain it can be in weighing up particular facts. It is difficult to find consistency between the Family Court judgments and the High Court judgments, and between judgments by the High Court, in the above cases. If the parties in *Public Trust v C [Relationship property]*[15] were not living together as a couple, it is difficult to see how the parties in *B v F [De facto relationship]*[16] could be held as living together as a couple[17], as it is argued that the parties in *B v F [De facto relationship]* demonstrated less mutual commitment than the parties in *Public Trust v C*.[18]

The above cases show how flexible the wording of section 2D is, and hence how uncertain it is to determine whether there is a de facto relationship in a particular circumstance. Thus the question arises: is it possible for the Courts to develop some guidelines or tests to aid in the interpretation and application of section 2D to particular cases so that certainty can be achieved in determining whether a de facto relationship exists?

III. Guidelines Developed by Courts

Although *prima facie* Parliament seems to delegate to the Courts an "unfettered" discretionary power in concluding whether two people live together as a couple, it does not mean that the outcome of any relevant cases "varies with the length of the chancellor's foot".[19] The judicial system has tried and is still trying to develop guidelines to help judges make better decisions in cases where whether the parties lived together as a couple is an issue, although it is too early to say at this stage that the a systematic approach to cases has been introduced.

14 At [60].

15 *Public Trust v C [Relationship property]*, above n 6

16 *B v F [De facto relationship]*, above n 12.

17 Henaghan, Atkin, Clarkson & Caldwell *Family Law in New Zealand* (16th ed, LexisNexis, Wellington, 2013) at 7.309.

18 At 7.309.

19 F Pollock (ed) *Table Talk of John Selden* (Selden Society, London, 1927) at 43. John Selden, an eminent seventeenth century jurist, criticised that equity "varies with the length of the Chancellor's foot" to show his concern about the uncertainty and unpredictability of the outcomes of equitable claims as a result of the situation that equity at the early stage had no fixed rules of its own so that each Chancellor gave judgement according to his own conscience.

One such attempt or effort can be found in *Scragg v Scott* [20] where the High Court gives useful general "guidelines" for determining whether a de facto relationship exists, such as:

(a) "[M]any types of associations may properly fall into the category of a de facto relationship … For there to be a relationship there must be an emotional association between two persons".[21] "Some associations will clearly be de facto relationships such as … and proclaiming that they are a de facto couple sharing their lives. At the other end of the scale two persons may simply be lovers … without special bond or affiliation or emotional association …".[22] "There will be cases which are finely balanced …".[23]

(b) "Generalisations are to be avoided because every case is fact specific".[24] "The test must be evaluative, with the Judge having to "weigh up … all the factors – not only those contained in s 2D, but also any others … and applying commonsense objective judgment to the particular case".[25]

(c) "Courts are often required to assess multiple pieces of circumstantial evidence"[26] and such evidence should be "viewed cumulatively, and through the application of common sense and proper reasoning".[27] "Weight to be given to individual pieces of circumstantial evidence may vary" and "[i]t is the cumulative weight of all factors whether specified in the Act or not…which is decisive".[28] "The approach must be broad, with various factors to be weighed up in an evaluative task, similar to those the Courts are frequently called upon to undertake when drawing conclusions form circumstantial evidence".[29]

Guidelines around procedure have also been developed by courts in other cases. One concerns the onus of proof. The person who claims that the parties live together as a couple has the onus of proof on the balance of probabilities

20 *Scragg v Scott*, above n 4.
21 At [31].
22 At [31].
23 At [36].
24 At [37].
25 At [37].
26 At [64].
27 At [64].
28 At [64].
29 At [64].

and the applicant has the benefit of producing independent evidence.[30] Another is about the proper approach of an appellate Court:[31]

> The appellate court should form its own opinion without undue deference to the lower Court … [but] on issues of credibility, an appellate court should give appropriate weight to the conclusion of the Judge at first instance who has had the advantage of seeing and hearing the witnesses.

Such guidelines developed by the Courts certainly offer some help to the judges and lawyers involving the task of determining whether a de facto relationship exists in a particular case. It is still quite uncertain, however, about what matters should to be taken into account and what weight should be attached to a particular matter in each case. Is it possible to find a test or yardstick for the determining of whether they parties were living together as a couple?

IV. Mutual Commitment as Yardstick?

This paper undertook an observation of some case judgements involving whether a de facto relationship exists as an issue. It is found that the Courts tend to emphasise the importance of, and to attach much greater weight to, the matter of the "degree of mutual commitment to a shared life" in determining whether the parties were living together as a couple. It is discovered that in some cases the Courts did not find a de facto relationship due to the lack of "mutual commitment to a shared life" notwithstanding many other factors seemingly pointing in favour of the existence of a de facto relationship; whereas in other cases the Courts found a de facto relationship mainly due to the finding of sufficient "mutual commitment to a shared life" nevertheless many other factors pointing against the existence of a de facto relationship. It is worthwhile to discuss these two groups of cases in more details to show how important, and how great the weight attached thereto, the factor of "mutual commitment to a shared life" is.

On one hand, the Courts have in some cases held that the parties did not live together as a couple mainly because there was *insufficient mutual commitment for a shared life*, notwithstanding many other factors pointing in favour of the finding of a de facto relationship. For example, in *PZ v JC* ,[32] no de facto relationship was found mainly due to the lack of *sufficient mutual*

30 *Clitherow v Parker* (High Court, Auckland, CIV-2006-404-000046, 23 November 2007) BC200762983; *Hiroki v Gilbert* (Family Court, Lower Hutt, FAM 2005-032-000527, 6 December 2006). Cited in Henaghan, et al, above n 17.

31 *WPH v ITP* [2009] NZFLR 745 (HC) at [17].

32 *PZ v JC* [2006] NZFLR 97 (FC).

commitment to a shared life, despite the existence of "an affectionate, mutually supportive, and close relationship"[33] which was considered in connection with the "degree of commitment to a shared life".

In *L v P [Division of property]*,[34] the parties had an association for 15 years and had had a child from the relationship. They also had shared accommodation from 1998 until 2006. The High Court reversed the Family Court decision that the parties were living together as a couple. The High Court commented that the lower court Judge should have been influenced by the facts showing the parties physically assumed a common residence and *commenced a shared life* rather than the "arrangement".[35] The fact that the woman had been a prostitute and a lesbian contributed to the Court's view that "[h]er various relationships and liaisons are consistent with her view that she did not want to *commit herself to a relationship with another party* and live with that party as a couple".[36] The lack of mutual commitment, again, was the main reason why the High Court held that there was no de facto relationship between the parties.

An extreme example in this group of cases is *Public Trust v C [Relationship property]*,[37] where the High Court held that the parties who had resided together for 21 years and had a child together were not living together as a couple. It is suggested that the High Court had "no particular reason … except that the *degree of commitment* had not reached a sufficient stage … *insufficient commitment* for a Court to conclude that a de facto relationship had existed" (emphasis added).[38]

Ruka v Department of Social Welfare,[39] may also be relevant. In that case, the issue was whether the parties were living together in a relationship "in the nature of marriage" for the purpose of Social Welfare legislation. Thomas J, as part of the majority at the Court of Appeal, stated that "the relationship would not be in the nature of marriage … *unless it exhibited a mutual commitment* and an assumption of responsibility …".[40] This was referred to with support in *Scragg v Scott*.[41]

On the other hand, the Courts in other cases held that the parties were living together as a couple mainly because sufficient mutual commitment to a shared life had been shown, despite many other pieces of evidence pointing against the existence of a de facto relationship. For example, in *H v Y*,[42] the parties, who were not residing together, were held to be living together as a couple as, "living together as a couple is concerned with the intent of the

33 At [47].
34 *L v P [Division of property]* [2008] NZFLR 401 (HC).
35 At [48].
36 At [77] (emphasis added).
37 *Public Trust v C [Relationship property]*, above n 6.
38 Henaghan et al, above n 17.
39 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).
40 *Scragg v Scott*, above n 4, at [32] (emphasis added).
41 At [25]-[32].
42 *H v Y* (Family Court, Dunedin, FP 012/287/98, 11 August 2004).

couple to be partners, having a *commitment to a shared life* and demonstrating that by their conduct".[43]

In *Scragg v Scott*,[44] a de facto relationship was found by the Family Court (and upheld by the High Court) and the relationship continued even after the appellant commenced another relationship with another woman. In discussing whether sexual fidelity may be a factor to be taken into account, the High Court stated that it depends on whether it indicates "a lack of *commitment*" (emphasis added), [45] which shows that, in assessing other factors, courts tend to consider their effects on "the degree of commitment to a shared life". The High Court in this case referred to *Horsfield v Giltrap* [46] (a constructive and express trust case) and pointed out that: [47]

> [I]t might be thought that if a man and woman do not live together, nor have a sexual relationship, nor even plan to live together, nor have children, then they could not be in a de facto relationship.

But in that case:[48]

> [T]he parties regarded themselves as a close and devoted couple *who had committed themselves to each other*…and were a partnership between a man and a woman, who professed love for each other and were prepared to *commit to each other* their emotional and financial resources" (emphases added).

The High Court went on to add that: [49]

> [a]lthough it was said that was 'not a de facto union' we have no doubt that it would have qualified as a 'de facto relationship' under the present legislation if such had been in force.

Such a statement clearly shows how important the mutual commitment to each other could be in the finding of a de facto relationship, although "[t]he test must inevitably be evaluative, with the Judge having to weigh up as best her or she can all of the factors …".[50]

Similarly, in *G v B*,[51] the High Court upheld the Family Court's finding that the parties continued the de facto relationship "whilst remaining totally *committed to a long-term relationship"*, even after they ceased cohabitation for a very long time, as "the living arrangements reached by the parties were their

43 At [25] (emphasis added).
44 *Scragg v Scott*, above n 4.
45 At [44].
46 *Horsfield v Giltrap* [2000] NZFLR 1047 (HC).
47 *Scragg v Scott*, above n 4, at [37].
48 At [37].
49 At [37].
50 At [37].
51 *G v B* [2006] NZFLR 1047 (HC).

way of maintaining *a fully committed relationship* without spending every night together" (emphases added).[52]

An extreme example in this group of cases, sharply in contrast to *Public Trust v C [Relationship property]*,[53] is *B v F [De facto relationship]*[54] where the Mr F (who often slept, and showered, changed clothes and kept his clothes and personal possessions at his parents' home) and Ms B, without any child from the relationship, were held by the High Court to be living together as a couple. The fact that "they were known to friends as a couple", among other things, showed a "mutual commitment to a shared life",[55] which justified the Court's conclusion.[56]

The above two groups of judgements show how important the "mutual commitment to a shared life" could be in the finding of the existence of a de facto relationship. It seems that courts tend to give this factor significant weight in their exercise of the "unfettered" discretion under section 2D. If this is so, some seemingly conflicting judgments could be reconcilable and hence certainty could be found to a large extent. For example, *Public Trust v C [Relationship property]*[57] and *B v F [De facto relationship]*[58] may be reconciled on the basis that, in the former case, the lack of sufficient mutual commitment between the parties strongly influenced the High Court in the finding of no de facto relationship; whereas in the latter the sufficient mutual commitment was found which significantly influenced the High Court in finding a de facto relationship. In this sense, it seems that the "the degree of mutual commitment to a shared life"[59] does provide some certainty in determining whether a de facto relationship exists in a particular case.

The importance of "mutual commitment" has also been emphasized by academics, one of which, for example, stated "what needs to be present is a measure of mutual commitment by the parties to the relationship" or "a commitment to a long term relationship".[60] It is argued that for a de facto relationship, "one factor that is essential is the parties' mutual commitment to a shared life".[61]

52 At [32], [36] and [37].
53 *Public Trust v C [Relationship property]*, above n 6.
54 *B v F [De facto relationship]*, above n 12.
55 It is conceivable that the Court attached significant weight to the fact that the parties were known to friends as a couple. The outward appearance of the relationship matters as showing friends that they were a couple indicates their mutual commitment to a shared life. Arguably, representing themselves as a couple to friends and family members has similar effects, to some extent, to a civil union ceremony in respective of signifying their mutual commitment.
56 *B v F [De facto relationship],* above n 12, at [51] and [68].
57 *Public Trust v C [Relationship property]*, above n 6.
58 *B v F [De facto relationship],* above n 12.
59 As listed in section 2D(2)(f) of the Property (Relationships) Act 1976.
60 Simon Jefferson "De facto or 'friends with benefits'?" (2007) 5 NZFLJ 304 at 305.
61 Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2009) 39 VUWLR 813 at 823.

Most significantly, Miller J stated in the very recent case of *DM v MP*: [62]

> [I]t has been suggested that one of them, mutual commitment to a shared life, lies at the core of the definition.[63] I take that to mean that *a mental commitment to sharing life is normally required of a de facto relationship*. The other indicia establish, however, that such commitment may be evidenced by conduct. (Emphasis added)

From this statement by Miller J at the High Court, a mutual commitment to a share life is *normally required* for a de facto relationship notwithstanding section 2D(3) provides none of the nine matters listed in section 2D(2) is "necessary". If this is so, it is arguable that "the degree of mutual commitment to a share life" can be a "test" in most circumstances hence provides certainty to a large extent in determining whether a de facto relationship exists in a particular case.

V. The Core Meaning of Living Together as a Couple

A legal concept must have its core. What is the core of a de facto relationship? Borrowing Hart's idea about "core" and "penumbra" of concepts,[64] arguably the "mutual commitment to a shared life" is the core meaning of "living together as a couple". A core case would be one that the statute is intended to cover, whereas a penumbra case would be one not considered by the statute maker.[65] A judge may consider whether the particular case at hand is intended to be included by the Parliament as a de facto relationship. The Property (Relationships) Act 1976 treats marriage, civil union and de facto partnership equally as partnerships. The core meaning of de facto partnership must be a fundamental aspect which justifies such a treatment by the Parliament. Arguably the most fundamental aspect of a de facto partnership is the partners' sufficient mutual commitment to a shared life, by which a de facto partnership shares the important similarity or common characteristic with a marriage partnership or a civil union partnership and is distinguished from other relationships such as "cohabited friends with benefits". The Justice and Electoral Select Committee Report on the Matrimonial Property Bill and Supplementary Order Paper No 25 specifically refers to "mutual commitment to a shared life" as being at the core of the definition of section 2D.[66]

62 *DM v MP* [2012] NZFLR 385 (HC) Miller J at [27].

63 *Scragg v Scott*, above n 4, at [32]; see also Peart above n 61 at 822; and the Justice and Electoral Select Committee Report on the Matrimonial Property Bill and Supplementary Order Paper No 25 at 7.

64 H L A Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593.

65 H L A Hart, above n 64.

66 Justice and Electoral Select Committee Report, above n 63, at 7.

It could be observed that the core meaning of the de facto relationship concept exists and has been upheld by the judges, notwithstanding the different approaches taken and the emphases of different indicia in the judgments discussed above. In the majority of the decided cases, judges have consensus as to whether a "de facto relationship" exists or not. If, as Miller J stated in *DM v MP*,[67] a mutual commitment to a shared life is *normally required*, then the absence of such a mutual commitment would indicate the relationship at issue does not fall within the contemplation of the Parliament in enacting the Property (Relationships) Act 1976. Even if disagreement (or uncertainty) exists in some borderline cases, at least judges could still agree as to whether a particular case is a borderline case. In this sense, family lawyers are in a much better and more certain position than their counterparts who deal with tax avoidance cases. In many instances where tax avoidance is an issue, judges cannot even reach an agreement as to whether a particular case is a borderline case but judges on both sides often declare with strong confidence that the particular case *clearly* is, or is not, a case of tax avoidance.[68]

From the above analysis of the case judgements, and with the support from the academic comments and the Justice and Electoral Select Committee Report, it seems the "degree of mutual commitment to a shared life" could be the core meaning (or at least one of the core meanings) of the phrase "living together as a couple". This research has not found a case to date where the Court found no de facto relationship in circumstances where "sufficient mutual commitment to a shared life" had been found; and vice versa. However, in order to ascertain whether such a preliminary finding based on the analysis of a limited number of cases can be proved, further research may be required. Ideally, an empirical study on all cases where a de facto relationship was an issue under the Act could be worthwhile.

VI. Conclusion

Case authorities show that to a large extent other factors are considered in assessing the "degree of commitment to a shared life", which has been given a significant weight in determining whether a de facto relationship exists in particular circumstances. As a "commitment to a shared life" is "normally required of a de facto relationship",[69] arguably it should be a test, or the most important factor to be considered to allow for certainty when determining whether a de facto relationship exists.

If this is so, it may be desirable to make an amendment to section 2D of the Act, to the effect that, in determining whether two persons live together as a couple, the court should "normally consider, and attach greater weight

67 *DM v MP*, above n 62, at [27].

68 This has been observed by many academics. See, for example, Michael Littlewood "The Privy Council and the Australian Anti-Avoidance Rules" [2007] 2 BTR 175.

69 *DM v MP*, above n 62, at [27] per Miller J.

(than other factors) to, the degree of commitment to a shared life". Such an amendment will not significantly change the existing law, but it could provide judges and legal practitioners much greater certainty in determining whether a de facto relationship exists.