FAMILY COURT OF AUSTRALIA

Jonah v White

[2011] FamCA 221

Murphy J

21 March, 4 April 2011

Family Law and Child Welfare — De facto relationships — Whether individuals living together as a couple — Whether on a genuine domestic basis — Long-term clandestine affair — One party remained married — Factors to be considered — Financial dependence but no financial merger — No contact with respondent's children — Family Law Act 1975 (Cth), s 4AA.

For 17 years, the applicant and respondent maintained a clandestine relationship in which they spent time together for several days every 2-3 weeks, had a sexual relationship, and expressed love and affection for each other. The respondent remained married for the duration of his relationship with the applicant, of which his wife remained unaware. There was no contact between the applicant and the respondent's children. The respondent provided substantial ad hoc and monthly financial assistance to the applicant, upon which she depended. However, the parties maintained their financial affairs independently.

The applicant sought a declaration pursuant to s 90RD of the *Family Law Act 1975* (Cth) (the Act) that she and the respondent had a "de facto relationship" within the meaning of s 4AA of the Act. Under s 4AA(1), a de facto relationship existed between two persons who were not legally married, not related by family and, having regard to all the circumstances of their relationship, had a relationship as a couple living together on a genuine domestic basis. A number of factors listed in s 4AA(2) indicated whether parties had a relationship as a couple, but s 4AA(4) stated that these factors were not the only matters to be considered.

Held: (1) The establishment of a de facto relationship rests on the question whether a couple manifested a relationship of "coupledom" involving the merger of two lives, and it is to this question that the factors in s 4AA(2) are directed. [60]

KQ v HAE [2007] 2 Qd R 32, applied.

(2) On the balance of the indicia, the relationship between the applicant and respondent was not of a de facto nature. [69], [71]

Cases Cited

Barnes v De Jesus [2001] NSWSC 19.

Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135.

Fagan, Re (1980) 23 SASR 454.

FO v HAF [2007] 2 Qd R 138.

Green v Green (1989) 17 NSWLR 343.
Hayes v Marquis [2008] DFC 95-415.
JJR v PH [2005] QSC 253.
K v H-J [2006] QSC 168.
KQ v HAE [2007] 2 Qd R 32.
Light v Anderson [1992] DFC 95-120.
Mao v Peddley [2002] DFC 95-249.
Moby v Schulter [2010] FLC 93-447.
Piras v Egan [2008] NSWCA 59.
PY v CY (2005) 34 Fam LR 245.
Roy v Sturgeon (1986) 11 NSWLR 454.
Simonis v Perpetual Trustee Co Ltd (1987) 21 NSWLR 677.
Thompson v Department of Social Welfare [1994] 2 NZLR 369.
Vaughan v Hoskovich [2010] NSWSC 706.

Application

R Galloway, for the applicant.

R Maurice, for the respondent.

Cur adv vult

4 April 2011

Murphy J.

1 During 1992, the applicant commenced employment at a business run by the respondent. They commenced an intimate relationship. That relationship continued, with some interruptions and with differing manifestations, until early 2009.

2 During the whole of that time, the respondent was married. His wife was, until the end of that period, unaware of the relationship between the applicant and the respondent. The respondent and his wife have three children. They were aged approximately six, three and two at the time the relationship with the respondent commenced.

3 During the course of the approximate 17 years during which the applicant and the respondent maintained a relationship, they spent time together at various times in various places, had a sexual relationship, and expressed love and affection for each other.

4 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). 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".

5 By a Registrar's directions made on 30 November 2010, the application comes before the Court "confined to the threshold issue of the making of a declaration pursuant to s 90RD, regarding the existence of a de facto relationship between the parties". It is solely to that issue that these reasons relate.

The definition of de facto relationship

6 Section 4AA of the Act provides as follows:

> *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.
>
> (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
>
> (4) A court determining whether a de facto relationship exists 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.
>
> (5) For the purposes of this Act:
>
> (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
>
> (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.
>
> When 2 persons are related by family
>
> (6) For the purposes of subsection (1), 2 persons are *related by family* if:
>
> (a) one is the child (including an adopted child) of the other; or
>
> (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
>
> (c) they have a parent in common (who may be an adoptive parent of either or both of them).
>
> For this purpose, disregard whether an adoption is declared void or has ceased to have effect

Credibility

7 The evidence of each of the applicant and the respondent was, in my judgment, affected by the recollection of events and, in particular conversations, whose reliability has been affected by the passage of time.

8 I do not consider that either party was seeking to deliberately mislead the court through the giving of false evidence. However, I consider that the evidence of each of the parties was affected significantly by the fact that their

recollections now, in respect of events past, was refracted through the prism of their own perceptions of the relationship and the varying degrees of disappointment felt by each at its demise. I consider that the applicant's evidence was more affected by this factor and, as a result, is generally the less reliable.

9 However, as it seems to me, there are very few matters about which any variance in the reliability of the evidence of either the applicant or the respondent counts dramatically in the ultimate result. Indeed, much of the evidence sitting at the core of the question that needs to be answered here is uncontroversial, in particular when reference is had to the considerations set forth in s 4AA(2).

10 The issue here is, in my view, not so much the veracity or reliability of the parties' accounts of events, but, rather, the picture presented by the totality of them and the conclusion/s resulting therefrom.

The statutory "circumstances"

11 It is agreed that the parties maintained a relationship of approximately 17 years. The respondent asserts that the relationship commenced some time in 1993 (as distinct from 1992) and that, by 2007, the relationship had, to use his words, "run its course". Notwithstanding this assertion as to his feelings at that later time, the fact remains that, even on his case, the parties maintained a relationship until early 2009. For example, the applicant continued to visit the respondent's farm after 2007, the respondent visited the applicant's home at S and he agrees that he accompanied her when she went looking for a property to purchase.

12 It is also common ground that each of the parties maintained their own household, independent of the time that they spent together. For his part, the respondent continued to live with his wife and their children at their home in an eastern Sydney suburb. The relationship with the respondent remained secret and was intended by them to remain hidden from the respondent's wife and children. For her part, the applicant maintained a separate residence in Sydney and, after a move in 1996, Brisbane.

13 The parties travelled overseas together in what was, at least for the respondent, a trip with business components. They spent about two and a half weeks together visiting London, Germany, New York, New Orleans and Los Angeles.

14 In April 1997, the parties agree, they "broke up" and did not see each other for a period of about four or five months. Their relationship resumed in about August 1997. At that time, the applicant requested, and the respondent provided, about $24,000, which the applicant used to purchase a home in her own name at a north side suburb in Brisbane. Later that year, L Pty Ltd, a company of which the respondent was the sole shareholder, purchased a farm known as "H" at G.

15 It is agreed that, from early 1998 until about the middle of 1999, the applicant travelled to the respondent's farm. There is some dispute about the frequency with which that occurred. Subpoenaed documents that became Exhibit A2 in the proceedings show that travel between Brisbane (where the applicant then resided) and Sydney was relatively frequent. The applicant estimates (and I took the respondent to not seriously dispute) the amount of contact as every second or third week for two to three days each time. It is accepted by the applicant that these periods of time were taken when the respondent could absent himself from his wife and children.

16 There were two or three occasions when the parties were together for about two weeks. (The applicant asserts there was a period of three weeks, but the respondent says he does not remember any such period. In the end, I think little turns on the difference.) It is accepted by the applicant, however, that, during these longer periods of time, the respondent returned to Sydney on weekends so as to undertake various sporting and other commitments with his children.

17 The respondent booked the majority of, and paid for, the applicant's flights from Brisbane to Sydney so that the applicant could join him at the farm as earlier described. In her affidavit, the applicant describes she and the respondent being "like Darby and Joan" when at the farm. She describes various activities they each undertook whilst at the farm. The respondent takes no real issue with her description of that time together.

18 In December 2006, the applicant sold her property in Brisbane. It should be observed that the property in Brisbane was in her sole name and no interest was recorded in favour of the respondent, despite him having paid $24,000 towards its acquisition. As will be seen below, regular monthly payments were made from the respondent to the applicant commencing in about the middle of 1999, some of which, at least, were, it would seem, used toward the mortgage on the Brisbane property.

19 In December 2006, when that property was sold, the applicant acquired a property in her own name in S, a small town on the northern New South Wales coast. Whilst this move facilitated less geographic separation between the applicant and the respondent, S is, nevertheless, about seven hours drive from the respondent's property at G. It is accepted that during the first four months of 2007, the parties saw less of each other. The respondent attributed this mostly to the pressures of business occasioned by a downturn in it.

20 As earlier referred to, it can be said that time spent between the parties thereafter was regular and likely to have been for about two to three days on each occasion every two to three weeks. Thus, the evidence satisfies me that the parties met with a regularity that might be seen as consistent both with their relationship being clandestine and the demands of the geographic distance which separated them.

21 The parties agree that they maintained a sexual relationship for the whole of their relationship, although each appeared to suggest that, in the last couple of years, the frequency of that sexual activity declined. In that respect, it should be noted that each of the parties accord to the relationship mutual love and affection. That love and affection had overt manifestations such as the use of "pet names" or "nicknames", a joint portrait (Exhibit A1), affectionate e-mail communications and very regular phone contact.

22 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. Conversely, they each maintained their own financial affairs independent of the other. The applicant said in evidence that, when she purchased her real property, she did so in her own name because she wanted to keep assets separate from the respondent — a reference, I gather, to the potential for them to be in jeopardy should there be litigation at the instigation of his wife.

23 There was, however, financial dependence on the part of the applicant, in the sense that, from about the middle of 1999 until early 2010, the respondent paid

to the applicant a significant monthly sum. Initially the payments were in the amount of $2000 per month, increasing in the year 2000 to $2500 per month, and, later, to $3000 per month.

24 It seems that these payments commenced at a time when the applicant expressed considerable upset at the treatment she had received by a then employer. The applicant deposes in her affidavit to a conversation at the time where she asserts the respondent said words to the effect "I am making these payments so that you can give up your job and you can come down to be with me at the farm"; a conversation not admitted, at least entirely, by the respondent. I accept that a conversation to this effect occurred. The up-shot of the matters on which the parties agree is that the monthly payments continued for about 11 years. It seems that the applicant did not work remuneratively from about the time that the payments commenced. It ought be noted that she continued to reside at the Brisbane property until that property was sold some seven years or so later.

25 I have already referred to the fact that the parties did not acquire together any property in joint names. Nor did either receive exclusive use of any property owned by the other. Each maintained property owned independent of the other and used that property, in the case of the respondent, with his wife and children (and his business assets, for business purposes) and, in the case of the applicant, as a residence for herself.

26 The evidence suggests that the visits by the respondent to the applicant's property — both at Brisbane and later, at S — were infrequent. The respondent recalls, and I accept, that he visited the latter on only three occasions. There is no evidence that the applicant was involved in the respondent's business affairs (even as an employee) subsequent to 1996 when she came to Brisbane.

27 There is little doubt on the evidence before me, that the parties had a significant degree of mutual commitment to the other expressed overtly in the manner earlier referred to. The applicant asserts that telephone contact occurred as much as ten times a day; the respondent denies this but accepts that he would telephone her daily. I think it likely that there were many occasions when it was more than once a day, but very few when it was as many as ten.

28 That the respondent would gift to the applicant a significant sum ($24,000) at a time when she was distressed in her then employment, is indicative of significant care and support of her by the respondent. So, too, there is little doubt that the applicant loved the respondent and was devoted to him. The applicant's unchallenged evidence is that her relationship with the respondent was exclusive of other relationships. The respondent, too, conceded that his relationship with the applicant was exclusive (save for "a few one night stands") and, of course, the not insignificant matter of the relationship with his wife.

29 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.

30 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". So much is true. But, as will be clear from the overview just undertaken, those affirmative answers are not, for the most part, given without qualification and, in some cases, significant qualification.

31 As counsel properly concedes, however, s 4AA(3) provides that no particular finding is to be regarded as necessary in deciding whether persons have a de facto relationship and, importantly as it seems to me, subs (4) of the section makes it very clear that the circumstances outlined in subs (2) are not exclusive of the matters which can (or should) be taken into account by a court in determining the central question here.

32 Moreover, as will be seen, I consider that subs (4) is important in providing a key to the manner in which the question of whether parties "have a relationship as a couple living together on a genuine domestic basis" should be answered.

33 It should be mentioned for the sake of completeness, that two of the three statutory pre-conditions for the existence of a de facto relationship (that the persons are "not legally married to each other" and are not "related by family") are plainly met here.

The authorities

34 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 [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.

35 Each of the parties relied upon the decision of Mushin J in *Moby v Schulter* [2010] FLC 93-447. His Honour there referred to a number of decisions in State jurisdictions relating to what might be seen as similar provisions in relevant State legislation.

36 Before referring to that decision in more detail, it is necessary to refer to an argument apparently central to the submissions on behalf of the respondent.

37 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.

38 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.

39 In my view, the making of a declaration of the type contemplated by s 90RD of the Act does not involve the exercise of a judicial discretion. The question of whether a de facto relationship exists is a determination of fact (albeit based on findings in relation to a non-exclusive number of statutory considerations) which founds the jurisdiction to make orders of the type contemplated by that part of the Act. The ultimate question is in the nature of a jurisdictional fact. In *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 the High Court held:

> The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision maker to exercise a discretion.

40 Section 90RD can, in my view, be seen in that light. Determination of the question of whether there is a de facto relationship (which can be seen to

involve a "complex of elements") enlivens the power of the court to exercise the discretion to grant the remedies in the Act which depend upon that fact.

41 Further, the legislation provides no licence for an interpretation consistent with the purpose asserted by counsel. If a de facto relationship is found to exist, relief provided for in the Act may follow upon proof of the requisite matters founding that relief.

Relevant law

42 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. Whilst that is true, I nevertheless consider the provisions of Queensland legislation to be, in material particular, sufficiently similar such that decisions in this State in respect of that legislative definition to be instructive. Similar considerations apply to the relevant legislation in New South Wales.

43 "De facto partner" in Queensland is now defined by s 32DA of the *Acts Interpretation Act 1954* (Qld) (as amended). Relevantly, that section provides:

> 1. In an Act, a reference to a "de facto partner" is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each or related by family.
> 2. In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances:
> (a) The nature and extent of their common residence;
> (b) The length of their relationship;
> (c) Whether or not a sexual relationship exists or existed;
> (d) The degree of financial dependence or interdependence, and any arrangement for financial support;
> (e) Their ownership, use and acquisition of property;
> (f) The degree of mutual commitment to a shared life, including the care and support of each other;
> (g) The care and support of children;
> (h) The performance of household tasks;
> (i) The reputation and public aspects of their relationship;
> 3. No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.
> 4. Two persons are not to be regarding as living together as a couple on a genuine domestic basis only because they have a common residence…

44 In New South Wales, the expression "de facto relationship" is defined in the *Property (Relationships) Act 1984* (NSW). Section 4 of that Act provides:

> *De Facto Relationship*
>
> (1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:
> (a) Who live together as a couple, and
> (b) Who are not married to one another or related by family.
>
> (2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in the 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) No finding in respect of any of the matters mentioned in subsection (2)(a)-(i), or in respect of any combination of that, is to be regarded as necessary for the existence for the de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in the Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of the subsection was a party to such a relationship.

45 Section 60EA of the Act provides:

Definition of de facto partner

For the purposes of this Subdivision, a person is the *de facto partner* of another person if:

(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; or

(b) the person is in a de facto relationship with the other person.

46 Section 90RD of the Act provides:

Declarations about existence of de facto relationships

(1) If:

(a) an application is made for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL; and

(b) a claim is made, in support of the application, that a de facto relationship existed between the applicant and another person;

the court may, for the purposes of those proceedings (the *primary proceedings*), declare that a de facto relationship existed, or never existed, between those 2 persons.

(2) A declaration under subsection (1) of the existence of a de facto relationship may also declare any or all of the following:

(a) the period, or periods, of the de facto relationship for the purposes of paragraph 90SB(a);
(b) whether there is a child of the de facto relationship;
(c) whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in paragraph 90SM(4)(a),
(b) or (c);
(d) when the de facto relationship ended;
(e) where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

Note: For *child of a de facto relationship*, see section 90RB.

47 In *Moby v Schulter*, Mushin J considered a number of authorities in State jurisdictions. His Honour agreed with the approach exemplified in earlier decisions in New South Wales, including *Roy v Sturgeon* (1986) 11 NSWLR 454; *Simonis v Perpetual Trustee Co Ltd* (1987) 21 NSWLR 677 and the decision of the NSW Court of Appeal in *Light v Anderson* [1992] DFC 95-120. His Honour went on to say (at [139]-[141]):

> While I respectfully agree with the approach of their Honours, before the definition may be considered as constituting "a single composite expression of a comprehensive notion or concept" there are two specific elements of that definition which require individual considerations. The first of those is the concept of "a couple". For the purposes of the definition, "a couple" is constituted by two people whether of the same or opposite sexes.
>
> 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. On the basis that one or both members of the couple may also be legally married or in another de facto relationship at the same time as they are in the subject relationship, it must follow that it is feasible that the subject relationship might involve the parties living together for no more than half of the time of that relationship. Further, there is nothing to suggest that it must be even as much as half of the time.
>
> Subject to the above, the question of whether the parties were in a de facto relationship must be considered on a case-by-case basis without circumscribing any particular factor.

48 His Honour's approach might be seen to embrace Powell J's approach in *Simonis v Perpetual Trustee Co Ltd* at 685 where Powell J held that the (then) definition of "living with … on a bona fide domestic basis" (in s 6 of the *Family Provision Act 1982* (NSW)) was "a single composite expression of a comprehensive notion or concept, and therefore has to be approached by considering the expression as a whole and not in several parts".

49 In *Hayes v Marquis* [2008] DFC 95-415, McColl JA held that the effect of earlier decisions of the New South Wales courts, including the Court of Appeal, meant that "practically, [it is] … necessary to consider the evidence as a whole, not under isolated headings" (citing *Barnes v De Jesus* [2001] NSWSC 19 at [26] per Windeyer J). Her Honour went on to hold that "the concept of 'living together' will always be something different from living together as a couple, one of the critical requirements for a de facto relationship". There, her Honour was distinguishing de facto relationship from a "close personal relationship", an expression which is separately defined in the *Property (Relationships) Act*.

50 In the same case, Einstein J held (albeit in the respect of the definition of the "close personal relationship" in s 5(1)(b) of that NSW Act) that (at [166]):

> Upon its proper construction the expression "living together" in the context of the instant legislation is to be understood as referring to the sharing of a home: that is to say to co-habit/to dwell together. The test is an objective one. It involves assessing the nature and extent of the claimed common residence. To live together requires that the two adult persons be seen as regarding the place or places in which they live as "their home". Both of them might not always be found in that home because from time to time family or business requirements or similar may require one or both to spend some time elsewhere cf: *Re Fagan deceased* [1980] 5 FamLR 813 where Jacobs J observed [at 822] that "there may be states of

> cohabitation where (the partners) see as much of each other as they can", to which I would add — "in the circumstances". But the dominant parameter will be whether or not the individuals concerned may be discerned to regard the premises in question as their home and in so doing to be acting reasonable.

51 That passage was cited with approval by White J in the NSW Supreme Court in *Vaughan v Hoskovich* [2010] NSWSC 706. His Honour said in respect of the definition of de facto relationship within the NSW legislation that (at [51]):

> What is clear from ss 4(3) is that satisfaction of the requirement that the persons live together as a couple does not require that they share a common residence on a full time basis. There are of course many examples of people who can be said to live together, although one or the other is away for long periods. A partner who takes an overseas posting, or who goes to sea in the course of his or her occupation for long periods, will not cease to live with his or her partner because of extended absences …

52 The approach just referred to is consistent with decisions of the Queensland Court of Appeal: see eg *PY v CY* (2005) 34 Fam LR 245; *KQ v HAE* [2007] 2 Qd R 32; *FO v HAF* [2007] 2 Qd R 138.

53 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".

54 Nevertheless, as has been observed in respect of that specific consideration in the NSW legislation (*Vaughan v Hoskovich* at [50]):

> One of the circumstances of the relationship to be taken into account under s 4(2) is para (b), namely the nature and extent of common residence. Subsection 4(3) provides that no finding in respect of any of the matters mentioned in subss (2)(a)-(i) is to be regarded as necessary for the existence of a de facto relationship. That is curious as it seems difficult to see how parties could be said to be living together as a couple if they never had a common residence. However, in *Piras v Egan* [2008] NSWCA 59, Campbell J said (at [146]) that:
>
> [146] … 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).

55 Again, the approach there exemplified can be seen to be consistent with authorities in Queensland where a very similar legislative regime has been considered. Underlying those authorities is a necessity to establish the existence of "a relationship as a couple living together on a genuine domestic basis" informed by, but not necessarily determined solely by, the individual findings with respect to the list of circumstances.

56 In *KQ v HAE* the Queensland Court of Appeal (McMurdo P, Keane and Holmes JJA) held in a joint judgment (at [19]):

> These considerations all lend support to the view taken in earlier cases that a "de facto relationship" will not be established for the purposes of Pt 19 of the *Property Law Act* [1974] [PLA] unless it can be seen that "the parties have so merged their

lives that they were, for all practical purposes, living together as a married couple". (Citing *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 at 374; *Mao v Peddley* [2002] DFC 77,515 at 77,522 [[2002] DFC 95-249] and *K v H-J* [2006] QSC 168 at [67].)

57 The Court also held in that case (at [18], [20]):

> Obviously, the scope of the expression "de facto relationship" in Pt 19 of the PLA is not strictly limited by the genesis of the expression in popular speech. For example, the provisions of Pt 19 are not confined to relationships between men and women. Nevertheless, the nature of the association involved in the marriage relationship is instructive in this context. It is clear from s 32DA(4) of the *Acts Interpretation Act* that Pt 19 of the PLA is not concerned with the relationship between people who merely live in the same household and share living expenses; the PLA is not concerned with the relationship between friends who share a household, or with that between carer and patient. Further, the fact that two people have a sexual relationship will not suffice to establish that they are "de facto partners". This is clearly so, by reason of the fundamental requirement that the parties must be "living together as a couple on a genuine domestic basis".
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> …
>
> It may also be accepted that a continuing cohabitation in a common residence is not necessary to establish the continuation of a "de facto relationship", at least where the parties have lived together and have not effected a permanent separation. Nevertheless, the definition of "de facto relationship" suggests that, usually, the parties should have, at some stage, been "living together as a couple on a genuine domestic basis". The fact that the parties have never lived together in a common abode must be acknowledged to be an indicator that they have not "lived together as a couple on a genuine domestic basis". This indication will be especially significant where the parties have not shared the common burden of maintaining a household. It would be a wholly exceptional case in which one could conclude that a man and a woman, who have never lived together as husband and wife in a common residence, and who have never made provision for their mutual support, have been "living together as a couple on a genuine domestic basis". That conclusion is not justified by the mere circumstance that the parties, or one of them, at some stage, intended eventually to marry. Such a case is one where friendship, or even courtship, has not matured into the commitment whereby the parties have so merged their lives that they were, for all practical purposes, living together as a married couple.

58 It is in my opinion instructive that the Commonwealth legislature did not provide for relief of the type contemplated by Pt VIIIAB of the Act in circumstances where one party has, by their words or actions, provided care, love or support to another or, indeed, in circumstances where one party has induced in the other an expectation of a relationship of greater commitment than that which transpired. Rather, the legislature has made provision for that relief upon satisfaction of the jurisdictional fact that a relationship of a particular, statutorily-defined, type exists.

59 In that respect it seems to me also instructive that the Commonwealth legislature did not provide for relief of that type in circumstances where two people were parties to, for example, a "domestic relationship", or, as in New South Wales, a "close personal relationship" but, rather, only where parties were in a "de facto relationship" as defined.

60 In my opinion, the key to that definition is the manifestation of a relationship where "the parties have so merged their lives that they were, for all practical purposes, 'living together' as a couple on a genuine domestic basis". It is the

manifestation of "coupledom", which involves the merger of two lives as just described, that is the core of a de facto relationship as defined and to which each of the statutory factors (and others that might apply to a particular relationship) are directed.

61 Differences in nomenclature tend to confuse the picture rather than illuminate it. For example, counsel for the applicant submitted — in my view correctly — that a relationship which one party regards as "an affair" might in fact be a de facto relationship as defined. So, too, a woman who might be described as "a kept woman" (an expression accepted by the respondent upon suggestion from counsel for the applicant) might, similarly, describe one party's perception of the relationship but, when all factors and the circumstances are considered, the relationship might nevertheless meet the definition of a "de facto relationship".

62 It is submitted by the respondent that "exclusivity is reinforced by s 4AA(1)(c)" and it is submitted further that, "without doubt this sub-section describes an exclusive relationship between two people". The argument refers to marriage analogously. I reject that submission. Marriage has exclusivity as an element because the *Marriage Act 1961* (Cth) definition demands it. It is, however, in my view in any event clear, by reference to the terms of s 4AA(5)(b) that exclusivity is not a necessary element of a de facto relationship.

63 The respondent, in written submissions, further contends that:

> … in every common law or statutory context a unifying principle for a finding that there was a de facto relationship was its exclusivity. In fact many defences to such applications for a declaration were based on a party claiming they had been in an exclusive relationship with another person at the time, were married or conversely leading a polygamist lifestyle.

64 No authority is cited for that proposition. The proposition seems to me to be, with respect, erroneous. An example of the contrary position can be seen in *Vaughan v Hoskovic*e, where reference is made to s 61B(3A) of the *Probate and Administration Act 1898* (NSW). The section envisages an intestate dying and leaving "a spouse and a de facto spouse". Moreover, as pointed out in that case, in *Green v Green* (1989) 17 NSWLR 343, Gleeson CJ said (at 346) that "the deceased was married, had two de facto wives, and maintained simultaneous domestic relationships with all three women and their respective children".

65 It seems to me to be clearly established by authority that the fact that, for example, the parties live in the same residence, for only a small part of each week does not exclude the possibility that they are "living together as a couple on a genuine domestic basis" or that the maintenance of separate residences is necessarily inconsistent with parties having a de facto relationship. So much is, in my view, clear from the statutory recognition that parties to a relationship can be married but also be in a de facto relationship.

66 The issue, as it seems to me, is the nature of the union rather than how it manifests itself in quantities of joint time. It is the nature of the union — the merger of two individual lives into life as a couple — that lies at the heart of the statutory considerations and the non-exhaustive nature of them and, in turn, a finding that there is a "de facto relationship".

The present case

67 In my judgment, the evidence as a whole, sees here two people who each sought to, and did in fact, maintain separate lives — the respondent living with

his wife and children in their matrimonial home and the applicant living by herself in her own residence — 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, in my judgment, was the "merger of two lives into one", or the "coupledom" as earlier referred to.

68 I accept that the long-standing nature of the relationship is a pointer toward the relationship being a de facto relationship. So, too, the fact that the parties maintained a consistent sexual relationship, and that, for each of them, the sexual relationship was exclusive of other partners (noting that the respondent maintained a relationship with his wife and had "a few one night stands"). Similarly, the financial support provided to the applicant by the respondent for a number of years and the contribution by him to the applicant's home are factors pointing toward that conclusion.

69 But, a number of other indicia point, in my view, to the opposite conclusion:

- Each of the parties kept and maintained a household distinct from the other;
- In the respondent's case, that household involved the maintenance of family relationships, including the support of children;
- The evidence does not reveal any relationship, or any intended relationship, between the applicant and the respondent's children who, it ought be observed, were relatively young when the relationship commenced;
- The relationship between the applicant and the respondent was clandestine and the time spent between the parties was spent (on either party's case) very much together, as distinct from time spent socialising as a couple;
- I accept the respondent's evidence that he continued to emphasise the limits of the relationship with the applicant and, in particular, I accept his evidence to the effect that, he told the applicant that, if circumstances ever required him to "make a choice", he would "choose" his wife and family over the applicant;
- Despite the regular monthly payments and the payment of $24,000 earlier referred to, the parties maintained no joint bank account; engaged in no joint investments together; and acquired, or maintained, property in their own individual names;
- The parties rarely mixed with each other's friends. In that respect the evidence of the applicant's witnesses — Ms R, Ms H and Ms W — is indicative of very little contact between the respondent and each of them. Ms R said she had never met the respondent, but had spoken to him on the phone. Ms H said her dealings with the respondent were "very limited". Ms W said she met the respondent "only once";
- The respondent ran what seems to have been a successful business, in which for some (early) years, the applicant was employed, but the parties did not mix with the respondent's business associates. After the applicant's employment with that business had ceased she had no involvement with it at all;
- There was virtually no involvement by the respondent in the applicant's life in Brisbane (where she lived between about 1996 and 2006), and

virtually no involvement by the respondent in the applicant's life in S where she has resided since 2006. (I accept the respondent's evidence that he has visited S on only three occasions.);

- The respondent accepted that he hoped that the relationship with the applicant was permanent, but, I accept, he made plain its nature as he perceived it. It was put by Mr Galloway to the respondent that the parties were in a long-term relationship to which the respondent replied "we *were* in a relationship; we were having an affair";
- There was very little time spent by the applicant and the respondent with the applicant's family. I regard the evidence of the respondent, when he said to the applicant's mother that their relationship "was not an adventure" as being more reliable than the evidence contained at paras 36 and 37 of the applicant's affidavit. But, in any event, I do not consider that the evidence contained in those paragraphs is indicative of the "coupledom" or "merger" to which I have earlier referred;
- Despite (or, perhaps, because of) the evidence filed by friends of the applicant in support of her case, I do not accept that the applicant and respondent had a "reputation" as a couple; indeed, there was, on the evidence before me, very few public aspects to their relationship.

70 The respondent readily accepts that, upon the cessation of the parties' relationship, he intended to "pay out [the applicant's] mortgage, her credit card and give her a lump sum". Whilst this may be indicative of his love and affection for the applicant (or, indeed, indicative of other emotions, for example, guilt) I do not consider that it is persuasive in characterising the nature of the parties' relationship prior to its cessation.

71 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.

72 I dismiss the application for a declaration. I order accordingly.

Orders accordingly

Solicitors for the applicant: *MBT Lawyers of Coffs Harbour*.

Solicitors for the respondent: *MH Peoples & Co of Bondi Junction*.

RACHEL MANSTED