# THE LEGAL RECOGNITION OF CLOSE PERSONAL RELATIONSHIPS IN NEW SOUTH WALES - A CASE FOR REFORM

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*The term 'non-conjugal' is often used to describe personal adult relationships that fall outside the marriage model. While the debate on whether or not legal rights and obligations should be extended to these other personal relationships has received some (albeit limited) attention in recent literature, the practical effect of an extension of rights and obligations to non-conjugal relationships has largely been overlooked. This article reviews the practical application of the little known presumptive legal category of non-conjugal relationship in NSW: the 'close personal relationship'. It includes a critique of the major cases decided under this regime over the last 11 years and, after identifying issues within the current regime, offers an alternative approach which links the legislative definition of the relationship to the social objectives underpinning the legislative regime.*

## I INTRODUCTION

Over 25 years ago, New South Wales embarked on a distinctive and rather innovative approach to relationship recognition. In 1984 the *De Facto Relationships Act* was introduced as a result of a NSW Law Reform Commission inquiry into financial consequences arising from the breakdown of heterosexual de facto relationships. Over the next decade and a half, heterosexual de facto relationships obtained recognition under a large number of NSW laws. In June

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1999, a newly re-elected NSW Labor government passed the *Property (Relationships) Legislation Amendment Act 1999* (NSW) (‘*Amendment Act’*), which changed the name of the *De Facto Relationships Act* to the *Property (Relationship) Act 1984* (‘PRA’), extended its scope to include same-sex partnerships and also introduced a new category of relationship called a ‘close personal relationship’ (‘CPR’).

I begin in Part I with a review of the legislation that governs CPRs, including an examination of the events that led to the introduction of this new category of relationship, and a brief assessment of the structure of that legislation and the statutory criteria that make up the definition of a CPR. In Part II, I review and examine the major judgments delivered over the last 11 years, with a focus on the judicial interpretation of the statutory definition of a CPR, and how this interpretation has varied and broadened over that time. In Part III, I draw on the findings from Part II and identify problems that stem from both the definition of CPR and the way that definition has been interpreted, and put forward a case for reform. In that regard I argue that for effective reform to take place, the government must adopt an approach to presumptive relationship definitions that focuses those definitions on the social objectives underpinning the legislation.

# II PART I

## A *Background*

For a long time, and with only minor exceptions, the only personal adult relationships that had any legal relevance were those between a man and a woman within the confines of marriage. And in many foreign jurisdictions this is still the case. In more recent times, due to the increased popularity, acceptance and the realisation that it is not only marital relationships that require attention and response from the law, the place of non-marital relationships within the legal system has changed. As such, several jurisdictions including

Australia have extended marital rights and obligations to non-marital, but still marriage-like[1] relationships, often through a presumptive relationship recognition regime. This means that, generally speaking, in order to ascertain whether a particular non-marital relationship will fall under the cover of a particular legislative regime, the courts will conduct an objective review of that relationship, usually retrospectively, with a focus on particular relational characteristics. These characteristics are analysed against certain statutory criteria. If the relationship is found to meet a certain (quite discretionary) threshold, then it is *presumed* to be one that is legally relevant. This process inherently involves a large amount of judicial discretion.

On the international stage however, very few jurisdictions have extended any rights and obligations to non-conjugal adult personal relationships: that is, relationships that are not marriage or considered to be marriage-like. Of the very few that have, four are within Australia and include the ACT,[2] Victoria,[3] Tasmania[4] and NSW. The focus of this paper is on the NSW legislative regime.

### B *The NSW Legislation*

In 1994, the Gay and Lesbian Rights Lobby of NSW ('GLRL') produced a discussion paper called *The Bride Wore Pink*.[5] This paper has been regarded as the key law reform document that guided the approach of the NSW government with respect to their 1999

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1 Referred to in Australia as de facto relationships.

2 *Domestic Relationships Act 1994* (ACT). The definition contained in s 3(1) was designed to be broad enough to include a domestic partnership (another term for de facto relationship) and extend to certain non-conjugal relationships (that satisfied the legislative requirements) but specifically excluded a legal marriage.

3 *Relationships (Amendment (Caring Relationships) Act 2009* (Vic). Through this legislation Victoria introduced a 'caring relationship', although registration of the relationship is required.

4 *Relationships Act 2003* (Tas). This legislation introduced a 'caring relationship' with an initial definition quite similar to the NSW definition.

5 Lesbian and Gay Rights Service, 'The Bride Wore Pink: Legal Recognition of Our Relationships, A Discussion Paper' (2nd ed, 1994).

amendments of the legislation governing relationship recognition.[6] Although the primary focus of this discussion paper was a call for the extension of the de facto relationship recognition regime to same-sex partnerships, it also proposed, through a dual recognition model, limited recognition of other interdependent relationships, referred to in the paper as 'significant relationships'. The idea behind this second type of relationship was to give individuals the right to 'benefit' a 'significant person' that the individual would be able to nominate. The report also suggested that in a crisis situation, such as death or incapacity, and when a person was not nominated, the court could consider a range of relationships and choose a 'significant person'. As these 'other' relationships were considered to be not so prevalent and the situations that may give rise to them not so predictable, the report recommended that they only be recognised for a limited number of purposes.[7]

Over the next few years, the GLRL and the Australian Democrats, in order to implement the recommendations of the GLRL report, developed the *De Facto Relationships Amendment Bill 1998* ('the Democrats' Bill').[8] This bill included a redefined de facto relationship using gender-neutral terms and also included a new category of relationship called a 'domestic relationship', which was to be defined as:

> A relationship between two persons, whether or not they live together or share a sexual relationship, where there is emotional and financial interdependence, and which may or may not be a de facto relationship.

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6 Reg Graycar and Jenni Millbank, 'From Functional Family to Spinster Sisters: Australia's Dictinctive Path to Relationship Recognition' (2007) 24 *Washington University Journal of Law & Policy* 44, 133.

7 See discussion on this point in Reg Graycar and Jenni Millbank, 'The Bride Wore Pink ... *To the Property (Relationships) Legislation Amendment Act 1999*: Relationships Law Reform in New South Wales' (2000) 17 *Canadian Journal of Family Law* 227, 260-261.

8 Jenni Millbank, 'The Property (Relationships) Legislation Amendment Act 1999 (NSW) versus the De Facto Relationships Amendment Bill 1998 (NSW)' (2000) 9 *Australasian Gay and Lesbian Law Journal* 1 at 1.

The Democrats' Bill also provided for a list of factors for the court to have regard to if there was doubt as to the existence of the relationship. However, the Democrats' Bill was immediately referred to the Legislative Council Standing Committee on Social Issues, and then lapsed on prorogation at the second reading stage in the NSW Legislative Council in February 1999.

In 1999, shortly after re-election, the NSW government introduced and passed its own *Amendment Act*, before the inquiry from the Standing Committee was completed, and with virtually no public and surprisingly little parliamentary debate. Reg Graycar and Jenni Millbank suggest this was due to the law being presented as about property rather than sexuality, religion or marriage and it was therefore viewed as just building on the property division regime already in existence under the *De Facto Relationships Act*.[9]

The *Amendment Act* created the umbrella term 'domestic relationship' which was defined to encapsulate two separately defined types of relationships – the newly redefined de facto relationship and the new category of 'close personal relationship'. The definition of a de facto relationship has become (s 4(1) PRA):

> 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.

In determining whether or not a de facto relationship exists, the legislation now also provides that all the circumstances of the relationship are to be taken into account and includes a non-exhaustive checklist of matters for the court to consider (s 4(2) PRA).

[9] Graycar and Millbank, above n 7, 251.

However, when this legislation was introduced it appeared that, for non-conjugal relationships, the definition contained in the *Amendment Act* was narrower than the unsuccessful Democrats' Bill. Rather than a broad definition of 'domestic relationship', the *Amendment Act* introduced a new sub-category of relationship called a 'close personal relationship' under a general banner of 'domestic relationship.' In contrast to the Democrats' Bill, the *Amendment Act* required the parties to a CPR to live together and rather than recognising relationships that displayed emotional and financial interdependence, the *Amendment Act* focused on the characteristics 'domestic support and personal care.' These new relationships were included in a smaller number of acts than for de facto relationships, but included the right to make a claim to property on relationship breakdown and the eligibility under family provision legislation. Section 5 of the PRA therefore provides:

> (1) For the purposes of this Act, a domestic relationship is:
>
> (a) a de facto relationship, or
>
> (b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.
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> (2) For the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
>
> (a) for fee or reward, or
>
> (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

Why the definition of a CPR was worded in this way is not immediately apparent. One can suggest that it was to target this legislation to a particular group, namely the category of 'unpaid carer'. Indeed, the Attorney-General, in his second reading speech for the *Amendment Act*, stated that the type of relationship that would easily fall within this definition of a CPR would be a daughter

caring for an elderly parent. And although he specifically excluded a relationship such as flatmates, where the sharing of accommodation was a matter of convenience, he was silent as to what other types of relationships might fall under this cover.[10] Other Members of Parliament were more explicit. Ian Cohen, for example, stated that this new category is intended 'mainly, if not exclusively to cover carers',[11] and numerous other members of the NSW Legislative Council and Assembly understood and supported this aspect of the legislation as extending rights to the 'relationship' of a daughter or child caring for an elderly parent.[12]

The principle behind recognising relationships that involve care-giving is laudable. In addition to helping lessen the collective burden,[13] relationships that involve care-giving help some of the most vulnerable members of our society, such as the elderly, the ill and the disadvantaged. But why this particular group was singled out for protection over and above other adult domestic relationships, and what injustice the legislation was designed to protect them from is far from clear, as this paper will demonstrate. Indeed, the following examination and subsequent analysis of the jurisprudence from the NSW Supreme Court and NSW Court of Appeal in this area will show that the attempt to limit the scope of this legislation and importantly, the lack of focus on why these relationships should be protected has resulted in a rather problematic extension in this area of law.

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10 New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 1999, 229 (Jeffrey Shaw, Attorney-General).

11 New South Wales, *Parliamentary Debates*, Legislative Council, 25 May 1999, 296 (Ian Cohen).

12 Ibid 295 (James Samios), 298 (Janelle Saffin); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 1999, 736 (Sandra Nori), 736-737 (Andrew Fraser), 738 (Donald Page), 739 (Roy Smith), 740 (Ian Glachan, Russel Turner).

13 On that point compare the discussion of Susan Boyd and Claire Young, '"From Same-Sex to No Sex"?: Trends Towards Recognition of (Same-Sex) Relationships in Canada' (2003) 1 *Seattle Journal of Social Justice* 757, 776-777, in the context of same-sex marriage where they argue that the trend of privatising of welfare that is informed by neoliberal principles in many societies is highly flawed and increasing the ambit of relationships that fall within this is undesirable.

Since the legislation was passed, two government reports have been produced. In late 1999 the NSW Legislative Council Standing Committee on Social Issues produced their report: *Domestic Relationships: Issues for Reform*. Although, as noted above, the inquiry that resulted in this report was commissioned in response to the unsuccessful Democrats' Bill, its focus changed after the introduction and passage of the *Amendment Act.* Briefly, with respect to CPRs, the report recommended that the definition be broadened to encompass a wider range of interdependent personal relationships through the removal of the cohabiting requirement and the inclusion of a list of factors to be considered by the court when determining whether a domestic relationship exists or existed.[14] The government's response on this aspect of the report was to delay their response until the NSW Law Reform Commission's review of the PRA was completed and that report produced.[15] This second report was not finalised until 2006 and concluded that, as it was Parliament's intention to confine CPRs to relationships characterised by the provision of care, there should be no amendment to the definition of a CPR.[16]

## III PART II - CASE LAW

A CPR, under the banner of 'domestic relationship', is only recognised under a small number of acts for a small number of purposes. This includes the PRA itself, in which those found to be in

[14] NSW Legislative Council Standing Committee on Social Issues, 'Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)' (Report # 20, 1999), 55.

[15] Standing Committee on Social Issues, Parliament of New South Wales, Domestic Relationships: Issues for Reform Inquiry into De Facto Relationships Legislation (1999), <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/706684467F69D01BCA256CFD002A63BD>.

[16] New South Wales Law Reform Commission, 'Relationships' (Report #113, 2006), 68.

a CPR can, on the dissolution of the relationship, ask the court to exercise its power to make discretionary property adjustments (s 20 PRA). The 1999 amendments also had far reaching implications for wills and estate matters. In particular, until 1 March 2009, under the *Family Provision Act 1982* (NSW) ('FPA') 'eligible persons' could apply to the court for provision out of the estate of a deceased person, whether or not there was a will, or whether or not they were mentioned in the will. The *Amendment Act* increased the ambit of those who could apply to the court as an eligible person to include a person who was in a CPR with the deceased at the time of death.[17] From 1 March 2009 the FPA was repealed and the *Succession Act 2006* (NSW) was amended and now governs family provision orders. However, for the purposes of this paper the effect of these changes is minor. While a person in a CPR is still specified as an eligible person, the court's determination of the existence of a CPR does not automatically entitle that person to have their application considered by the court. The court must also be satisfied that, having regard to all the circumstances of the case (whether past or present), there are factors that warrant the making of the application.[18] The cases discussed below concern only the recognition of a CPR for the purpose of property adjustment orders or eligibility under family provision legislation.

It is also important to be aware that the jurisdiction governing financial matters on the breakdown of de facto relationships has recently changed. Due to constitutional limitations on the Commonwealth's legislative power, the Commonwealth did not have power to make laws with respect to financial matters on the breakdown of non-marital relationships and thus these matters fell under the State's jurisdiction. However, under s 51(xxxvii) of the Australian Constitution, the State Parliaments are able to refer their power on 'matters' to the Commonwealth government. All the States, with the exception of Western Australia, which has its own specialist family court exercising federal jurisdiction under the *Family Law Act 1975* (Cth) ('FLA'), have referred their power with

[17] The FPA specifically referred to the PRA's 'domestic relationship' which as stated above included a CPR.

[18] *Succession Act 2006* (NSW), s 59(1)(b).

respect to financial matters on the breakdown of de facto relationships.[19] In 2008 the Commonwealth amended the FLA[20] relying on this referral. This means that for de facto relationships and the distribution of property on relationship breakdown, applications now fall under the FLA, and are generally administered by specialist family law courts.[21] However, this referral did not include CPRs[22] and consequently they still fall under the State's jurisdiction.[23] This is relevant for the inquiry undertaken in this paper because, as will be seen, many of the cases evaluated below feature one party to the relationship arguing for the existence of a de facto relationship or in the alternative, a CPR. Due to the separate jurisdictions now governing these different types of non-marital relationships, this approach will no longer be available for property adjustments on the breakdown of a relationship.[24] What impact this development may have on this area of law is discussed at the end of this paper.

### A *Dridi v Fillmore and the meaning of 'personal care'*

One of the first cases to consider the new section in the PRA was the 2001 NSW Supreme Court case of *Dridi v Fillmore*,[25] decided by Master Macready. This case involved an application under s 20 of the PRA for the adjustment of parties' interests with respect to the property of the parties of the relationship. Master Macready stated that, as de facto relationships are separately defined, it is not a requirement that individuals in a CPR live together *as a couple*[26] and, that concepts relating to 'a couple' are not necessarily relevant

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19 See, eg, *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW).

20 The amending act was the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* (Cth).

21 Family Court of Australia, Federal Magistrates Court of Australia.

22 The referral is explicitly limited to marriage-like relationships, see eg, Commonwealth Powers (De Facto Relationships) Act 2003 (NSW), s 3 (definition of de facto relationship).

23 For relationships that dissolved after 1 March 2009.

24 Note though that family provision claims still fall under the State's legislative framework for de facto relationships and CPRs.

25 *Dridi v Fillmore* [2001] NSWSC 319 ('*Dridi'*).

26 *Dridi* [2001] NSWSC 319.

in determining the nature of a CPR for legal purposes.[27] He also noted that both domestic support and personal care must be provided and that one of them alone is not sufficient.[28]

Master Macready stated that for the requirement of 'living together', it may not be necessary for there to be a sharing of food or eating arrangements. All that is required is that the parties share accommodation, which was clearly present in this case. He also found that 'domestic support' was evident as the defendant provided the plaintiff free accommodation and meals, which were cooked for the plaintiff when they were both at home. His Honour also mentioned other matters that, although not present in this instance, may also qualify as 'domestic support', such as shopping for both parties and washing clothes.[29]

However, it was Master Macready's interpretation of 'personal care' that significantly narrowed the ambit of relationships to which s5 of the PRA could be applied. He referred to the definition of 'personal' and found that some of the primary meanings include:

> (a) Of or pertaining to concerning of affecting the individual person or self; individual; private; one's own.
>
> (b) Of or pertaining to one's person body or figure; bodily.[30]

He then stated that:

> Accordingly, personal care connotes care taken in connection with such matters. It could be provided by:
>
> (a) The person concerned.
> (b) An employed valet or lady in waiting,
> (c) A mother for her sick child or
> (d) A daughter for her elderly incapacitated mother.[31]

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27 *Dridi* [2001] NSWSC 319, [102].
28 Ibid [104].
29 Ibid [103]-[104].
30 Ibid [105].

Although the legislation specifically excluded the first two examples, it would include the second two. Master Macready elaborated, stating that the expression appears to be directed to 'assistance with mobility, personal hygiene and physical comfort' and specifically stated that he felt that 'emotional support' without a physical element would not, of itself, be sufficient to meet the requirement of 'personal care'. As this type of care was not present in this relationship, he found that no CPR existed between the parties.[32]

So although Master Macready appeared to adopt a textual approach to the interpretation of CPR, by focusing on the meaning of 'personal',[33] his understanding of 'personal care' meant that the interpretation of CPR conformed with what appeared to be the broad intentions of Parliament, that is, limiting the scope of the legislation to relationships characterised as a live-in unpaid carer.[34]

This high standard for 'personal care' was maintained by Master Macready in *Devonshire v Hyde,*[35] *Bogan v Macorig*[36] and *Piras v Egan*,[37] all family provision cases, where the Court failed to find a CPR on this element.[38] In *Bogan*, Master Macready found that

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31 *Dridi* [2001] NSWSC 319, [106].

32 Ibid [108] – [109].

33 Ibid [105], and indeed Macready M stated that he found little help from reading the speeches at [13].

34 Parliamentary debates can of course be used to assist in interpreting acts and statutory rules: *Interpretation Act 1987* (NSW), s 34(2)(h), although when looking at the purpose of any particular piece of legislation, 'parliamentary intention' has widely known problems: see David Lyons, 'Original Intent and Legal Interpretation ' (1999) 24 *Australian Journal of Legal Philosophy* 1, 17-22. Indeed in this instance the debate was quite reserved, with only a few members of the legislative council expressing their opinion as to the meaning of 'CPR', so the intentions of many those who voted for this Bill are to a large extent a mystery.

35 *Devonshire v Hyde* [2002] NSWSC 30.

36 *Bogan v Macorig* [2004] NSWSC 993 ('*Bogan*').

37 *Piras v Egan* [2006] NSWSC 328.

38 *Devonshire v Hyde* [2002] NSWSC 30, [43]; *Bogan v Macorig* [2004] NSWSC 993, [56]; *Piras v Egan* [2006] NSWSC 328, [112] (although this case also failed on the 'living together' requirement).

driving the deceased to doctors' appointments and keeping him company when he was not well were not sufficient.[39] Master Macready's reasoning was also followed in the 2002 family provision case of *Hinde v Bush*[40] in which the plaintiff was found to be a companion and carer.[41]

An example of a case that fell squarely into the understanding of CPR adopted by Master Macready in *Dridi* was the 2006 case of *Ye v Fung*.[42] Mr Ye, a student, boarded free of charge with Frances Lan Fong Fung until she died in 2001. Mr Ye and Ms Fung were not related by family and were not sexually involved. She was 37 years his senior. She provided financial assistance to Mr Ye by way of free board and meals and some contributions towards his tuition fees as well as providing some clothing and other necessities for him. Ms Fung required daily assistance with her day-to-day routine due to her age and medical condition. Mr Ye provided this assistance, which included administering insulin injections and topical medication, preparing food, accompanying her to the doctor, obtaining prescribed medicines and assistance with mobility. This is a clear example of a CPR as envisaged by Master Macready in *Dridi* and in this case Gzell J found that a CPR indeed existed.[43]

### B *Broadening the Scope*

The first departure from Master Macready's conception of a CPR in *Dridi* came some four years later in the 2005 NSW Supreme Court family provision case of *Przewoznik v Scott*.[44] In this case the Court was asked to consider whether a strong, sexually intimate relationship that involved intermittent cohabitation (the parties to the relationship each maintained their own residence), could be

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39 *Bogan* [2004] NSWSC 993, [52-57].
40 *Oliver William Hinde v Allen John Bush and Ors* [2002] NSWSC 828.
41 Ibid [9].
42 *Ye v Fung* [2006] NSWSC 243; *Ye v Fung* (No 3) [2006] NSWSC 635; see also, *Davis v Fordham* [2008] NSWSC 182 and *Blyth v Spencer* [2005] NSWSC 653.
43 *Ye v Fung* [2006] NSWSC 243, [53].
44 *Przewoznik v Scott* [2005] NSWSC 74 ('*Przewoznik*').

classified as a domestic relationship (as a de facto relationship and/or a CPR). In that respect, the presiding Justice, McDougall J, found that on the facts of the case, the relationship did not show the degree of interdependence and emotional commitment necessary to justify the conclusion that the plaintiff and the deceased lived together as a couple, proving fatal to the plaintiff's argument that she was in a de facto relationship with the deceased.[45] He then turned to the question of whether a CPR existed.

McDougall J focused the bulk of his reasoning on answering the question of whether the plaintiff and the deceased's living arrangements could be described as 'living together' for the purposes of s 5(1)(b) of the PRA. In that respect, his Honour stated that in meeting this requirement it is not necessary for cohabitation to be continuous or in the same premises. He found that, although the cohabitation was intermittent, in the latter part of the relationship the plaintiff and the deceased spent more time together, the deceased kept clothing and other possessions at the plaintiff's house, and the deceased was living at the plaintiff's house on the day of his death.[46] He therefore concluded that they were living together for the purposes of s 5(1)(b) of the PRA.[47]

In terms of whether or not the relationship met the requirements of 'domestic support and personal care', McDougall J's reasoning was limited to the following comments:

> There is no doubt that the plaintiff and the deceased were adult persons and there is no doubt, on the plaintiff's virtually unchallenged (and corroborated) evidence, that she provided the deceased with domestic support and personal care.[48]

Accordingly, McDougall J declared the existence of a CPR between the plaintiff and the deceased.[49]

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45 *Przewoznik v Scott* [2005] NSWSC 74 ('*Przewoznik*'), [17].
46 Ibid [22].
47 Ibid [23].
48 Ibid [19].
49 Ibid [24]-[25].

In this case there was no mention of the decision or reasoning in *Dridi*, or for that matter, any other previous judgments on the issue of what constitutes 'domestic support and personal care'. A review of the facts detailed in the judgment indicates the deceased had certain special dietary requirements and was often sick, requiring substantial quantities of medication. At these times the plaintiff would stay with the deceased and 'look after him'.[50] His Honour also noted that the plaintiff claimed that 'services' were provided to the deceased by the plaintiff, which included 'cleaning the kitchen and bathroom, vacuuming the floor and washing his clothes.'[51] One can only infer that this is the 'evidence' referred to by McDougall J above, as these facts were not directly linked to his Honour's reasoning with respect to the provision of 'domestic support and personal care' within the relationship, and therefore it is not clear whether they informed or influenced his decision. In any event, looking after someone when they are sick and cooking special meals (if indeed this is the 'personal care' that his Honour is referring to) would most likely not accord with Master Macready's conception of personal care in *Dridi*, namely, assistance with mobility, personal hygiene and physical comfort.[52]

In 2007, *Sharpless v McKibbin*[53] was heard in the NSW Supreme Court before Brereton J. It concerned an application for a property adjustment under s 20 PRA. This case involved a same-sex relationship that began in 1994 and continued to some extent until 2005. The Court found that a domestic relationship existed from 1994 to 2005 in the form of a de facto relationship from 1994 to 1998, and a CPR from 1998 to 2005. The primary reason for the change in the nature of the relationship was that the parties no longer 'lived together as a couple' (s 4(1)(a) PRA). Although they still lived under one roof, they occupied separate bedrooms.

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50 *Przewoznik v Scott* [2005] NSWSC 74 ('*Przewoznik*') [8].
51 Ibid [9].
52 See eg, *Bogan* [2004] NSWSC 993.
53 *Sharpless v McKibbin* [2007] NSWSC 1498.

As with *Przewoznik*, Brereton J's reasoning behind the finding of a CPR between the parties focused on their living arrangements[54] with little or no analysis of the second and third requirements of a CPR, namely 'domestic support and personal care'. Brereton J did quote from Master Macready's judgment in *Dridi*, stating:

> [Master Macready] provided useful guidance as to the essential elements of a 'close personal relationship' — namely living together, domestic support and personal care:
>
> It can be seen from the terms of s 5(1) that a domestic relationship can be either a de facto relationship or a close personal relationship.
> …
> I have earlier referred to aspects of what the Act describes as a 'close personal relationship'. It has to be between two adult persons who are 'living together'. Given that they may be members of the same family, such as a grandparent and grandchild and the different definition for a 'de facto relationship' concepts relating to a 'couple' are not relevant. Instead the definition calls for two different links. The first is that the parties are 'living together'. The second is that 'one or each of whom provides the other with domestic support and personal care'.
>
> So far as the first requirement is concerned we are not concerned with concepts applicable to couples; the requirement would be met if the parties shared accommodation together. For example, a border [sic] in an elderly widow's home would qualify. It may not be necessary for there to be sharing of food or eating arrangements together. In the present case this is not important as it seems that the parties ate together when they were both at home.
>
> The second requirement is cumulative. There must be both domestic support and personal care. In this case there is evidence of domestic support as the defendant provided for the plaintiff free accommodation and meals, which he cooked for the plaintiff when the plaintiff was at home. There are other matters, not present in this case, which could be domestic support, eg shopping for both parties, washing clothes etc.[55]

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[54] For an example of a case that did not meet the living together requirements for a close personal relationship see: *Piras v Egan* [2006] NSWSC 328, in particular [113].

[55] *Sharpless v McKibbin* [2007] NSWSC 1498, [40].

Somewhat curiously though, Brereton J did not continue this extract to include the next three paragraphs, which specifically detail Master Macready's analysis of the element of 'personal care'. The judgment merely continued along the same lines as *Przewoznik*: although the relationship itself is described in some detail, the aspects of the relationship that constitute the CPR requirements of 'domestic support and personal care' are not separately identified. Brereton J then concluded:

> The nature of the parties' relationship changed in 1998. They ceased to live 'as a couple' when Mr Sharpless returned to Sydney in 1998. Although they subsequently 'lived together', in Annandale and then in Newington, they did so not 'as a couple', but in separate bedrooms, and even if there were occasional sexual encounters after 1998, they were rare. Nonetheless, during that period — particularly from 2001 until 2004 — they lived under the one roof, and Mr Sharpless provided domestic support and personal care for Mr McKibbin. In my view, there was a 'close personal relationship', within the meaning of the Act, until about April 2005.[56]

There is no doubt that these two cases have widened the scope of the types of relationships that may fall within the category of CPR, although I would argue that this expansion has been a relatively unprincipled one. The first, a family provision case, was a close, sexually intimate relationship which failed to meet the necessary characteristics of a de facto relationship, as the relationship as a whole was found to lack the necessary interdependence and emotional commitment. The second, an application for a s 20 PRA property adjustment, was a de facto relationship which changed its nature when the parties no longer shared a bedroom and therefore failed the de facto requirement of living together *as a couple.* For the finding of a CPR, both judgments focused on whether or not the relevant parties lived together with little or no analysis of the requirements of 'domestic support and personal care'. Indeed, both judgments adopt an extremely broad-brushed approach in that they seem to simply state that these requirements had been met. The next case, however, provides far more guidance.

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[56] *Sharpless v McKibbin* [2007] NSWSC 1498, [46].

### C *Has Close Personal Relationship been Redefined?*

In the 2008 case of *Hayes v Marquis*,[57] the NSW Court of Appeal was asked for the first time, since the 1999 amendments, to consider the meaning of 'personal care' in the definition of a CPR for the purposes of a s 20 PRA property adjustment order. By way of brief background, the appellant and the respondent were in a relationship, which began in 1993. During the first three years of the relationship, the appellant stayed with the respondent on average three times per week, then from October 1996 he stayed with her up to four nights a week, and then from 1999 the appellant moved in with the respondent for the next three years. They separated in May 2003. The first instance Judge found that a domestic relationship existed comprising a CPR between 1993 and 1999 and a de facto relationship between 1999 and 2003.

The appellant, amongst other matters not relevant here, challenged the conclusion that he and the respondent were in a domestic relationship. Although there were three Judges overseeing this appeal, only two, McColl JA and Einstein J, provided reasoning regarding the issue of whether or not a CPR existed between the parties. The third Judge, Beazley JA, opted to substantially agree with the reasons of McColl JA with regard to the existence of a CPR. (Her Honour did consider certain aspects of the case separately, but none of these related to the issue of determining whether or not a CPR existed.)[58]

McColl JA agreed with the primary Judge's findings that the phrase 'living together' did not require the parties to live together full time. Her Honour asserted that 'living together' for the purposes of s 5(1)(b) turns on the evaluation of the nature of their living arrangements and the extent to which they share a household. Although this interpretation is consistent with the previous judgments which discuss this issue, detailed above, McColl JA also

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[57] *Hayes v Marquis* [2008] NSWCA 10 ('*Hayes*').
[58] Ibid [1].

noted that 'living together' needs to be considered in terms of the relationship as a whole, especially as it is only one of the three indicia necessary for the finding of a CPR under s 5(1)(b).[59]

McColl JA then turned to the need for one party to the relationship to provide the other with domestic support and personal care sufficient to satisfy s 5(1)(b) and stated that this also turns on the nature and extent of that assistance. In that respect, she reviewed Master Macready's comments in *Dridi*, and specifically the conclusion that 'emotional support' would not, by itself, fall within the expression 'domestic support and personal care'. McColl JA stated:

> For my part I have difficulty with an argument that parties accepted to be in a loving sexual relationship, as the primary judge found here, are not providing each other with personal care. And there may be cases where emotional support of itself will suffice. Society recognises the importance emotional support can play in an individual's well being. Psyche is just as much a personal attribute requiring sustenance as one's physical self. The notion of 'personal care' should not be confined to matters relating to physicality.[60]

The point made by McColl JA in this extract is clear. Whereas Master Macready's judgment in *Dridi* found that emotional support is not by itself enough to satisfy the criteria of 'personal care', McColl JA explicitly stated that 'personal care' can be satisfied by emotional support without anything further, and also, importantly, her Honour recognised that this emotional support can be found in many, if not all, loving sexual relationships and therefore found that the parties were in a CPR for the first period of their relationship between 1993-1999.[61]

Einstein J's judgment was more restrained in that he avoided answering the question of whether emotional care could, of itself, constitute 'personal care'. Instead, his Honour fell back on the less

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[59] *Hayes* [2008] NSWCA 10, [78]-[80].
[60] Ibid [87].
[61] Ibid [102].

contentious finding (also noted by McColl JA in obiter dicta[62]) of the existence of a de facto relationship during the later period, which permitted contributions made during the earlier period of the relationship to be taken into account, regardless of whether or not, during this earlier period, the relationship could be classified as a CPR.[63]

He did, however, in obiter dicta, discuss the three indicia of a CPR. In terms of living together, he noted that '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 reasonably.'[64] His Honour found that the fact that the appellant would only sleep at the respondent's premises three or four nights per week did not mean that they were not living together for the purpose of a CPR and it was therefore open for the trial Judge to find as he did.[65]

Einstein J also commented that, while the expression of 'domestic support' does not involve any ambiguity,[66] 'personal care' might well result in differences of opinion. In that respect, he stated that he agreed with the views of Master Macready that '"personal care" seems to be directed at matters such as assistance with mobility, personal hygiene, physical comfort and emotional support', yet he also regarded this list as not necessarily exhaustive.[67] He did not take up the opportunity to determine in this instance whether, in the absence of the physical assistance outlined by Master Macready in *Dridi*, the giving of emotional support would itself qualify as 'personal care', although he did suggest that it 'may well be the case'.[68]

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62 *Hayes* [2008] NSWCA 10, [103].
63 Ibid [172].
64 Ibid [166].
65 Ibid [171].
66 Ibid [167].
67 Ibid [168].
68 Ibid.

In any event, the majority judgment of McColl JA (with Beazley JA substantially agreeing) redefined the meaning of 'personal care' for the purposes of s 5(1)(b) of the PRA, and as a result has, to a significant extent, widened the scope of the types of relationships that can now be classified as a CPR and therefore potentially be caught by this regime.

Later in that same year, Macready AsJ decided two cases that concerned, at least in part, whether or not a CPR existed. In the first, *Hughes v Charlton*,[69] a family provision case, the plaintiff lived with the deceased and acted as his housekeeper. Although the relationship started off as commercial, his Honour found that this developed into something more: a relationship that, although non-romantic, involved a substantial amount of sharing between the plaintiff and the deceased and clearly went beyond a bare commercial relationship.[70] Somewhat curiously, given Macready's AsJ's previous judgments, his Honour cited with approval McColl JA's reasoning supporting her finding of a CPR in *Hayes*, including the expanded ambit of 'personal care',[71] without so much as a comment on this fundamentally different interpretation, and then proceeded to highlight certain aspects of the relationship that would have satisfied the 'personal care' requirement as he had previously conceptualised in *Dridi*,[72] (although he made no direct reference to his reasoning in *Dridi*). He found that a CPR had existed between the plaintiff and the deceased.[73]

At the end of that same year, Macready AsJ heard another family provision case, that of *Marsh-Johnson v Hillcoat*.[74] Here the Court again had to consider, at least in part, whether the relationship between the plaintiff and the deceased was a de facto relationship or a CPR.

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69 *Hughes v Charlton* [2008] NSWSC 467.
70 Ibid [53]-[54].
71 Ibid [20].
72 Ibid [50]-[51], [55].
73 Ibid [56].
74 *Marsh-Johnson v Hillcoat* [2008] NSWSC 1337.

This relationship was of a sexual nature and lasted for a period of 11 years, ending with the death of the deceased. However, during the entire relationship both the plaintiff and the deceased had their own unit or house. The living arrangements altered during the course of the relationship. For very short periods they lived together full time; other than that, it was generally only on weekends. They were engaged to be married. However, the deceased died before this plan eventuated.

With respect to the question of whether or not a CPR existed, Macready AsJ reviewed the plaintiff and deceased's living arrangements, and the comments by McDougall J in *Przewoznik* and McColl JA and Einstein J in *Hayes* concerning the meaning of 'living together'. He found that the parties in this case did not see themselves as living in both places, and did not view both places as home, as they had the ability to retreat in the case of an argument or disagreement. This, he found, could not be described as 'living together'.[75]

So, although the finding of a CPR would fail on this element alone, and in contrast to his judgment in *Hughes* above, Macready AsJ took up this opportunity to revisit his reasoning on 'personal care' in *Dridi* in light of the judgments of McColl JA and Einstein J in *Hayes*. This aspect of the judgment is interesting in a number of respects. Macready AsJ asserted that Einstein J disagreed with McColl JA's reasoning in *Hayes* that emotional support would, of itself, qualify as 'personal care'.[76] I would respectfully disagree with his Honour's opinion on this. As the above analysis of *Hayes* demonstrates, although Einstein J indicated that he agreed with Macready AsJ's reasoning in *Dridi* on the nature of 'personal care', he qualified this position by stating that he felt this list was not exhaustive, and importantly, he stated that it 'may well be the case' that the giving of emotional support would qualify on its own as 'personal care', but declined to decide on that issue in this particular

[75] *Marsh-Johnson v Hillcoat* [2008] NSWSC 1337, [36].
[76] Ibid [44].

instance.[77] Rather than disagreeing with McColl JA, in my opinion, this aspect of Einstein J's judgment appears to be a qualified and tentative agreement.

Macready AsJ also stated that he had difficulty in deciding what the ratio of the decision in *Hayes* is, saying that, as the Court found a later de facto relationship, the matter was otherwise resolved.[78] However, McColl JA (with whom Beazley JA agreed) resolved the matter by finding a CPR between the parties. McColl JA commented in passing that the matter could have been otherwise resolved but this limb of the reasoning was not developed to any extent.[79] I would argue that the ratio of the decision in this respect is that emotional support is, by itself, sufficient to satisfy the requirement of 'personal care'.

Returning to *Marsh-Johnson*, it is also interesting to note that, although Macready AsJ found there was no evidence of any personal care in the sense he referred to in *Dridi*, he still went on to consider whether or not there was any emotional support or whether such support could be inferred from the fact that the parties were in a sexual relationship and spent part of their time together. He found that there was no direct evidence to sustain a finding of emotional support and that to infer such support would be inappropriate. He therefore concluded that no CPR existed at the date of death.[80]

So although this decision implicitly supports the reasoning of McColl JA in *Hayes*, with emotional care separately identified and considered, it is a more reserved judgment in one respect. McColl JA indicated that parties who are accepted by the court to be in a loving sexual relationship would, without anything more, meet the 'personal care' requirement. Macready AsJ raises this bar ever so slightly, as he requires direct observable evidence of either

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77 *Hayes v Marquis* [2008] NSWCA 10, [168].
78 *Marsh-Johnson v Hillcoat* [2008] NSWSC 1337, [45].
79 *Hayes v Marquis* [2008] NSWCA 10, [103].
80 *Marsh-Johnson v Hillcoat* [2008] NSWSC 1337, [46].

emotional or physical care; the finding of a loving sexual relationship is, of itself, not enough.

In sharp contrast to *Przewoznik* and *Sharpless* above, the rationale behind these cases, in particular, *Hayes*, is clear. The requirement of 'living together' is met even when it is not full time and even if separate residences are still maintained, so long as both parties to the relationship regard both residences as home. The requirement of 'domestic support' is uncontentious with a relatively low threshold. And significantly, the requirement of 'personal care' is satisfied by the provision of either physical *or* emotional care. The ambit of the category of CPR has therefore, through the interpretation of 'personal care', been considerably broadened.

### D *Recent Decisions*

Despite the more principled (although as I will argue below, still problematic) reasoning offered by *Hayes*, it seems, as evidenced by recent judicial decisions, that this area of law is far from settled. In May 2010, a judgment was delivered in the NSW Supreme Court of Appeal case of *Burgess v Moss*,[81] in which the Court refused leave for the appellant to challenge the trial Judge's[82] finding of the existence of a CPR between the parties (as part of a more expansive domestic relationship that also included a de facto relationship) for the purposes of a s 20 PRA property adjustment order.[83]

The trial Judge had found that the parties were in a de facto relationship from 1990 until sometime between 1996 and 2006, at which time the Court found the relationship changed into a CPR. The primary reason given for this change was that the parties to the relationship no longer occupied the same bedroom.[84] Notably, the

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81 *Burgess v Moss* [2010] NSWCA 139.

82 *Moss v Burgess* [2009] NSWDC 138.

83 The appeal was allowed with respect to the approach to the evaluation of contributions in a close personal relationship.

84 *Moss v Burgess* [2009] NSWDC 138, [57].

trial Judge did not refer to the reasoning in *Dridi* or *Hayes* at any stage (nor, incidentally, did the relationship display any *Dridi*-style personal care). Indeed, the judgment made no mention at all of the indicia required for the finding of a CPR, or even the relevant section of the PRA. Rather, the analysis of this case seems centred on whether, between 1996 and 2006, the parties were, as the plaintiff contended, still in a relationship (although what type of relationship the Court was looking for is not clear), or whether they merely occupied the same house and rarely spoke (as contended by the defendant). The trial Judge preferred the evidence of the plaintiff and found that the relationship was more than just sharing the same house. The trial Judge did not spell out the aspects of the relationship that characterised it as a CPR. However, one may be able to glean from the judgment the following rationale. The parties no longer shared the same bedroom, and as such they could no longer be regarded as living together *as a couple.* However, they still shared accommodation and the evidence suggested that they were more than just flatmates. How much more? The Court of Appeal shed some light on this, where Brereton J (with whom, on this point, Beazley and Tobias JJA agreed) stated:

> In light of the circumstances that it was uncontentious that both parties continued to reside in the same house, that Ms Moss continued to provide some meals for Mr Burgess, that Mr Burgess financially supported the two of them, that they attended on at least some social occasions together and that they had previously been in a de facto relationship, it appeared that there was no prospect that a challenge to the conclusion that at least a close personal relationship survived until 2006 could succeed.[85]

Interestingly, in the above extract (and as the appeal on this aspect was not allowed, this is the only part of the judgment that refers to the finding of a CPR), the Court of Appeal did not mention the indicia of 'domestic support and personal care' (although previous case law does suggest that reference to the provision of meals supports a finding of 'domestic support').

[85] *Burgess v Moss* [2010] NSWCA 139, [6].

The inconsistency in judicial approach as to what constitutes a CPR shows no sign of abating. In June 2010, a judgment was delivered by Slattery J in the NSW Supreme Court case of *Smith v Daniels*.[86] A family provision case, it was the fourth in a set of separate proceedings in which the estate had been involved since the deceased's death (with legal cost amounting to almost $850,000). This case concerned two women who established a friendship and business relationship in the early 1980s. Their relationship escalated into what was described by the plaintiff (and accepted by the Court) as 'close feelings of affection',[87] with the plaintiff moving into the deceased's home and the plaintiff and the deceased becoming business partners. The relationship lasted until the deceased died in 2005. The Court was asked to consider whether plaintiff and testator were in a de facto relationship or alternatively a CPR.

In his judgment, Slattery J referred to part of Master Macready's analysis of the indicia of a CPR in *Dridi.* However, he made the same omission observed in the reasoning of Brereton J in *Sharpless*, where only Master Macready's discussion of the first two indicia of a CPR were discussed with the analysis of 'personal care' truncated.[88] Slattery J also made no reference at all to *Hayes*, the case that overruled *Dridi*. In fact, although Slattery J quoted the relevant section the PRA in terms of the requirement of a CPR,[89] he then went on to create his own definition of what constitutes a CPR, stating:

> **[52]** I do accept that there was a domestic relationship between Ms Smith and Mrs Duarte…
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> **[53]** But I do not find that it was a de facto relationship. Ms Smith never claims especially to have had a sexual relationship with Mrs Duarte and I do not find such a relationship existed. Secondly, the relationship was not proclaimed publicly by Mrs Duarte in particular.

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86 *Smith v Daniels* [2010] NSWSC 604.
87 Ibid [9].
88 Ibid [42].
89 Ibid [39].

> **[54]** There was clearly the necessary *companionship* and living together and *mutual support* necessary for a close personal relationship under the Family Provision Act and I so find. This was especially true after Mr Duarte's death. But even before that Mrs Duarte spent most of her day and night time with Ms Smith although she never lost her connection with her husband and her home (emphasis added).

Paragraph 54 is quite surprising in its reference to 'companionship and living together and mutual support'. The CPR requirements of 'domestic support and personal care' are not the same as 'companionship' and 'mutual support'. For one, the indicia of 'domestic support and personal care' need only be given from one member of the relationship to the other, whereas companionship and mutual support implicitly require a reciprocal arrangement (which could, incidentally, exclude the live-in carer relationship). Secondly, the terms 'companionship' and 'mutual support' have somewhat different and far broader connotations than the existing indicia. 'Companionship' implies friendship (which is not necessary under the current definition), and 'mutual support' is a far more encompassing term that would include, but not be limited to, domestic support and personal care.[90]

This is not to say that the relationship between the plaintiff and the deceased did not display domestic support and personal care as understood in *Hayes* (or for that matter even in *Dridi*, particularly when the deceased became ill). Therefore I am not saying that the plaintiff and deceased should not have been found to be in a CPR

[90] See also the more recent decision in *Thompson v Public Trustee of New South Wales* [2010] NSWSC 1137, [100], in which Hallen AsJ, in addition to adopting a broad-brushed approach to the domestic support and personal care requirements identified in many of the judgments already discussed, found that the relationship also displayed '*companionship* living together and *support* necessary for a close personal relationship' (emphasis added) (although what this 'support' is and how it is different to 'domestic support' is not illuminated in the reasons).

and in fact, I would suggest that the Court's reasoning for not finding a de facto relationship could also be open to challenge.[91]

Furthermore, I believe that a convincing case can be made that supports the assertion that the indicia of a CPR should at least include the characteristics of companionship and mutual support (and I address this below). However, the legislation as it currently stands has three requirements, that of living together and the provision of domestic support and personal care.

# IV PART III ANALYSIS – A CASE FOR REFORM

## A *The Problem*

*(a) CPR: A Broad Category of Relationships*

The analysis above clearly illustrates the vast range of relationships that now attract legal consequences. At the time of writing, the scope of what constitutes a CPR includes:

(i) the unpaid live-in carer (*Ye v Fung*);
(ii) the intimate sexual relationship that does not quite meet the criteria of a de facto couple as it does not display the requisite interdependence and emotional commitment (*Przewoznik*);
(iii) the relationship that once was a de facto relationship but is no longer because, although they still live together, they don't do so as a couple (*Sharpless, Burgess v Moss*);
(iv) the recently established intimate sexual relationship that does not meet the living together as a couple requirement (*Hayes*);
(v) the close non-sexual cohabiting relationship (*Smith v Daniels*);
(vi) combination of (i) and (v) (*Hinde v Bush*, *Hughes*).

[91] See [53] from the judgment extracted above: Lack of sexual relationship is not of itself fatal to the finding of a de facto relationship (merely one of the characteristics that the court may take into consideration) and 'public proclamation of the relationship' is not only not one of the characteristics, but the lack of it is quite understandable in these circumstances, as the relationship between the plaintiff and the deceased was the subject of 'public comment' and much disapproval by the family of the deceased: *Smith v Daniels* [2010] NSWSC 604, [9]-[10].

The range of relationships that now fall within the ambit of this legislative regime is clearly much broader than what seemed to be the target of this reform, the relationship of a 'live-in unpaid carer'. It is also clearly much broader than the 'significant person' the courts could have presumed to exist as suggested by the GLRL's report, detailed in Part I.[92] I would also suggest that it is broader than the unsuccessful Democrats' Bill. To take one example, consider the relationship in *Przewoznik*, which failed to meet the de facto relationship threshold due to a lack of interdependence and emotional commitment. Logic would suggest that this relationship would also fail to meet the requirements of a 'domestic relationship' in the Democrats' Bill, which was defined in terms of emotional and financial interdependence. This is somewhat ironic given that, as we have seen, the wording of the *Amendment Act* was most likely intended to limit the scope of relationships that fall under its cover.

There are, in my opinion, two main reasons for this breadth. The first is the amorphous, broad-brushed and unprincipled reasoning provided in many of the judgments detailed above. Undoubtedly, the narrowest interpretation of what constituted a CPR was set in 2001, in the case of *Dridi*, through Master Macready's interpretation of 'personal care'. The decisions in *Przewoznik* and *Sharpless* represented a retreat from this position, as these relationships, that were found to be CPRs, would most likely have failed the *Dridi* test for 'personal care'.[93] However, as the analysis in Part II identified, the basis for this retreat is not spelt out in the judgments. There was also a distinct lack of reasoning in the first instance decision in *Burgess*, and in *Smith v Daniels* completely different indicia from those listed in the legislation were used to support the finding of a CPR.

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[92] In the case of an emergency. Although the current ambit of relationships falling under this cover can also be seen to be narrower than the 'significant person' in the GLRL report in that, according to the report, a person should be able to nominate anyone they choose.

[93] Refer to the analysis of these cases in Part II above.

The second and possibly more significant reason the category of CPR has become so broad is that the three indicia of a CPR have each been interpreted with very low thresholds. The requirement of 'domestic support' has shown itself to be unproblematic, with no relationship failing on this element: it can be met by providing things such as cooking, cleaning and shopping. The requirement of 'living together' does not mean living together full time,[94] and in *Hayes* it was met by 'staying over' just three nights a week, with the parties to the relationship still maintaining separate residences. And while the requirement of 'personal care' initially appeared to limit the ambit of CPR to only those relationships that incorporated the provision of physical support, namely 'assistance with mobility, personal hygiene and physical comfort',[95] the decision in *Hayes* has widened this so it can now be met by the provision of emotional *or* physical support, lowering the threshold and opening up this category quite significantly.

This breadth of relationships that now fall under the cover of a CPR is not, in itself, problematic, provided there are clear policy reasons supporting this. However, it appears to me that, while the broad objective of extending legal recognition to a category of relationships characterised by the provision of care may, in certain circumstances, be justifiable, the attempt by the NSW government to implement this objective, combined with the subsequent case-law, has had the effect of extending rights to relationships on a basis that is void of principle as to who should or should not be included within the regime. To illustrate this, consider the cases in Part II in which the courts were asked to determine whether the relationship was a de facto relationship, or in the alternative, a CPR. A CPR was often found to exist where the relationship (often just at some point) had failed the 'de facto relationship test'. The dividing line in *Przewoznik* was the degree of interdependence and emotional commitment and in *Sharpless* and *Burgess* the parties failed the de facto requirement of living together *as a couple*. So, although the finding of a CPR was undertaken as a separate exercise, the

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94 *Przewoznik v Scott* [2005] NSWSC 74, [21]; *Hayes v Marquis* [2008] NSWCA 10, [78].

95 *Dridi v Fillmore* [2001] NSWSC 319, [108].

unprincipled and broad-brushed reasoning present in the vast majority of cases discussed above, and the very low threshold applied for all three indicia of a CPR, have meant that the ambit as to what is a CPR is indeed very wide and the boundary is especially ill-defined, and includes relationships that can only be described by reference to what they are not, that is: diluted de facto relationships. This is not to say that individuals in 'diluted de facto relationships', or for that matter, any relationship found by the courts under the existing regime to be a CPR, should *necessarily be excluded* from legal recognition. What I am suggesting is that there needs to be a coherent, consistent and principled basis *for including them*. As the more recent decisions (in particular *Przewoznik*, *Sharpless, Burgess* and *Hayes*) demonstrate, the extremely low threshold for 'domestic support and personal care' mean that once the 'living together' requirement has been met, there is very little impediment to the finding of a CPR.

*(b) Definitional Issues*

In my opinion, the source of this problem is within the definition itself. The characteristics of 'living together', 'domestic support' and 'personal care' are inappropriate indicia in determining the protection of the law for a number of reasons. As explained above, these characteristics, in particular 'domestic support and personal care', are inappropriate due to their somewhat vague and broad meaning, which has the (now realised) potential for extremely broad judicial interpretation. These characteristics' vague and inherently broad nature inevitably must contribute to a lack of focus in the exercising of judicial discretion, which would, at least in part, explain some of the less principled reasoning identified in Part II. Under this current definition it is very difficult for the judiciary to determine whether any particular relationship should or should not be included in the regime. As noted above, once the 'living together' criterion has been met, the definition provides very little guidance as to what else might be required.

However, in my opinion, the main reason the characteristics of 'living together', 'domestic support' and 'personal care' are inappropriate indicia and probably the primary cause of the lack

coherence and consistency in the judicial decision making identified above, is that these characteristics do not necessarily correlate with, or reflect, the social objectives at issue. The presence of the qualitative characteristics of living together, domestic support and personal care in any particular relationship do not necessarily mean that when the relationship ends through dissolution or death, injustice will ensue. For example, the purpose of the right to apply to the court for a property adjustment order is to remedy financial injustice caused on the breakdown of a relationship. This injustice is caused when the relationship incorporates some level of financial dependency or interdependency. However, financial interdependency is not necessarily present in a domestic relationship that incorporates domestic support and personal care.[96]

What this demonstrates is that, while there may have been an (what has proved to be unsuccessful) attempt to focus this legislation on *who* should receive the benefits of legislative reform, it remains unclear *why* relationships characterised this way should be assigned *these particular rights and responsibilities*. Indeed I am not convinced that many of the Members of Parliament, who voted in favour of the *Amendment Act* when it was debated back in 1999, understood what they were trying to achieve in regard to this extension of the law. The predominant focus for the Members of Parliament who commented on this aspect of the *Amendment Act* in the parliamentary debates was in the context of the extension to family provision legislation, in which they focused on the plight of carers, overwhelmingly represented as a 'daughter' who selflessly looked after an elderly parent, and they commended the government for increasing the 'daughter's' rights to claim on the estate when the parent she cared for died.[97] However, these amendments did nothing to increase the rights of the 'daughter'. The *Amendment Act* merely

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[96] See eg, *Przewoznik v Scott* [2005] NSWSC 74.

[97] New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 1999, 229 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 25 May 1999, 295 (James Samios), 298 (Janelle Saffin); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 1999, 736 (Sandra Nori), 736-737 (Andrew Fraser), at 738 (Donald Page - reference to child rather than daughter), 739 (Roy Smith), 740 (Ian Glachan , Russel Turner).

expanded the ambit of who was eligible to make a claim on the deceased's estate and the daughter's pre-existing status as 'a child' was already captured by the FPA's eligibility provisions, care-giver or not.

Thus I would suggest that the *Amendment Act's* purpose, with respect to CPRs, was unclear when it was drafted, and the processes of judicial interpretation have done little, if anything, to clarify this issue. Indeed, as I have already argued, the poor drafting of the legislation in this area has contributed significantly to the unbound judicial discretion and unprincipled judicial reasoning that I have identified in this paper.

## B *Does it Matter?*

Having established that the legal regime governing CPRs is problematic, it is important, in considering the question of whether reform is necessary, to determine the consequences of these problems, and, importantly, if it is something we should be concerned about. It is also important to consider whether there are any mitigating factors at play that may help to minimise the problems identified above. It is to this that I now turn.

### *(a) The Value of Autonomy and Testamentary Freedom*

In the context of personal relationships, the concept of individual autonomy incorporates the freedom to choose whether or with whom to form close relationships, and the freedom to define your own arrangements within those relationships. Theorist Joseph Raz defends the importance of autonomy when he explains that:

> [t]he ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.[98]

[98] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 369.

Personal autonomy is constrained when the state imposes relational consequences on those who have not voluntarily assumed them. Indeed, the Law Commission of Canada ('LCC') in its extensive 2001 report entitled *Beyond Conjugality: Recognising and Supporting Close Personal Relationships ('Beyond Conjugality')*[99] (discussed in more detail below) recommended against a presumptive[100] method for the recognition of non-conjugal relationships largely due to its infringement on the value of personal autonomy.[101] However, even as Raz contends, 'the completely autonomous person is an impossibility';[102] autonomy is only possible against a background of constraints imposed to 'fix some of [the autonomous person's] human needs.'[103] It follows that not all constraints on freedom are an unjustifiable invasion of autonomy. Such constraints on freedom may well be justified and even desirable where, for example, there is a social need, such as protection from the risk of exploitation, or where a distribution of resources from one party to another will promote the personal autonomy of the more vulnerable party. However, it is imperative that any constraint on personal autonomy be made on a coherent, consistent and principled basis so that individuals can arrange their affairs to take these constraints into account. Therefore, in the context of personal autonomy, we should be concerned about a relationship recognition regime based on presumptive relational definitions where those definitions lack coherence and underlying principle.

The unprincipled and incoherent broadening of the category of CPR also has negative implications for the area of inheritance law. Family provision legislation is in direct tension with testamentary freedom, as it allows individuals to make a claim on the deceased's estate against the express wishes of the testator. In recent times, there has been a significant extension of the categories of those

[99] Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (2001).
[100] Referred to in the report as 'ascription'.
[101] Law Commission of Canada, above n 99, 113 and 118.
[102] Raz, above n 98, 155.
[103] Ibid 155-6.

eligible to apply to the court under this regime. Whilst this is not a problem in itself, there is a distinct lack of logic behind who should or should not be eligible to make a claim on a deceased's estate in family provision law generally.[104] This is a problem as an increase in the number of claimants leads to growing expense (including sometimes quite significant legal expenses – see *Smith v Daniels* for example) and delays in administering an estate.[105] As one prominent scholar in this field has commented: family provision is 'right out of hand' and on a 'slippery slope where adults are concerned'.[106] Without a doubt the lack of coherence and principle behind the increasing number of relationships falling under the cover of CPR is reflective of, and contributing to, this problem.

*(b) Mitigating Factors?*

Any legislative regime that recognises relationships based on presumptive relational definitions is, by its very nature, imprecise. Personal relationships come in many shapes and sizes and the determination of whether any particular relationship is covered by the law inherently involves a significant level of judicial discretion. Against this backdrop problems occur, including uncertainty driven in part by an over- or under-inclusion of relationships into the legislative scheme.

As I have argued above, the broad nature of the legal regime governing CPRs means it is likely to be over-inclusive. However, it may well be argued that an over-inclusive relationship recognition regime, particularly one that is designed (at least in part) to remedy injustice, is, although still problematic, better than one that is under-inclusive (whether by design or effect), in which individuals are excluded from access to statutory remedies because the relationship they were in was not marital, conjugal or heterosexual, for example. Further, this over-inclusiveness is potentially tempered by the

[104] Rosalind Croucher, 'Conflicting Narratives in Succession Law - A Review of Recent Cases' (2007) 14 *Australian Property Law Journal* 179, 189.

[105] Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inherintance Law: Tyrannical Testators vs Greying Heirs?' (2009) 17(1) *Australian Property Law Journal* 62, 85.

[106] Croucher, above n 104, 200.

inherent structure of the NSW legislative regimes in question, which provide additional gate-keeping provisions that must be overcome before access is granted to statutory remedies. For example, consider an application under s 20 of the PRA for the adjustment of property interests. Once the status of the relationship has been established, the party claiming its existence must also show that the relationship has been in existence for at least two years, or that there is a child to the relationship, or other special circumstances that would justify their entitlement to seek redress from the court. The court must then ensure the making of an order is 'just and equitable' having regard to the financial and non-financial contributions of the parties to the relationship and to the property of the relationship, before any order will be granted. Similarly, under recent amendments to the family provision regime, the existence of a CPR does not automatically entitle the applicant to have their application considered by the court. The court must also be satisfied, having regard to all the circumstances of the case (whether past or present), that there are factors that warrant the making of the application,[107] and that the person claiming has been left without proper provision for their maintenance, education and advancement in life.[108]

Unfortunately, the thresholds for these gate-keeping provisions are also quite low as some of the judgments from Part II in this paper illustrate. In *Sharpless,* the plaintiff received unemployment benefits for virtually the entire duration of the relationship and lived in the defendant's home rent-free. The Court found his domestic contributions to be 'unremarkable'[109] and any modest contribution he did make was 'offset if not outweighed by the benefits he received from [the defendant].'[110] The Court also stated:

> [The plaintiff's] stewardship of [the defendant's] affairs not only failed to enhance but significantly reduced [the defendant's] property. … [The plaintiff] derived substantial rewards from the relationship during the same period and before, through

[107] *Succession Act 2006* (NSW), s 59(1)(b).
[108] Ibid s 59(2).
[109] *Sharpless v Mckibbin* [2007] NSWSC 1498, [100].
[110] Ibid [102].

> expenditure which benefited him. … [The relationship] was not always beneficial to [the defendant's] recovery.[111]

Despite all this, the Court still found the plaintiff was entitled to recognition under s 20 of the PRA and awarded an (albeit small) share of the property pool to the value of $60,000.

In the family provision case of *Ye v Fung*, the 'deservingness' of Mr Ye has also been questioned, with the large payment awarded prompting one prominent legal commentator to question whether this decision is in fact supporting a career in 'bludging'.[112] A review of the family provision cases in Part II of this paper reveals that once the existence of a CPR had been established, there was essentially no impediment to an award being granted out of the estate.[113]

It is clear, therefore, that we cannot rely on these secondary gate-keeping provisions of the relevant legislative schemes to curtail the rights attracting to the broad range of relationships now potentially caught by the CPR definition.

### C *Reform – A Purpose Focused Approach to Relationship Definitions*

In this paper I have argued that the legal regime governing the recognition of close personal relationships is problematic and I have argued that the primary cause of this is the definition of CPR itself, with indicia that are too vague, broad and do not correlate with or

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111 *Sharpless v Mckibbin* [2007] NSWSC 1498, [102].

112 Croucher, above n 104, 180-183.

113 *Ye v Fung (No 3)* [2006] NSWSC 635, [47] in which a legacy of $425,000 and a forgiveness of debt of $22,000 was awarded; *Przewoznik v Scott* [2005] NSWSC 74, [40], in which a legacy of $150,000 was awarded; *Smith v Daniels* [2010] NSW 604, [88], in which a legacy of $100,000 was awarded. The only exception is *Hughes v Charlton* [2008] NSWSC 467, where the plaintiff had already been given a legacy under the Will, consisting of a life estate in the deceased's home, a motor vehicle and a small cash legacy and the Court felt this was sufficient provision.

reflect the social objectives at issue. I have also argued that this is a problem we must be concerned about. Therefore I would strongly recommend that to improve this area of law, the definition of a CPR needs to change. The question then becomes how can we define these relationships better? Given that relationships within a presumptive relationship recognition regime are defined in terms of specially selected characteristics, it seems logical to me that the characteristics should be selected to at least include those characteristics which, if present in any particular relationship, may give rise to the injustice that the law is designed to respond to. By that I mean: the best way to focus the legislation on the relevant social objectives is to define the relationships (at a minimum) in terms of those social objectives. This idea is reflected, although in different contexts, in the work of feminist scholar Nancy Polikoff and the LCC.

Polikoff supports the law's recognition of close adult relationships including those outside of marriage and marriage-like, as it is these relationships, she suggests, that contribute to the health, happiness, well-being, identity and security of individuals. However, she does not hold the view that all relationships should be recognised for all purposes. In the context of an 'opt-in' relationship registration system, she suggests that definitions of relationships that matter ought to be tailored to meet a law's specific objectives. So for example, she suggests that relationships characterised as primarily emotional, rather than financial in nature, might be entitled to make healthcare and burial decisions and potentially have some status under intestacy laws, whereas relationships that involve care-giving and/or financial support may, in addition to the above, be treated as a single economic unit for taxation purposes. Furthermore, relationships that are economically interdependent, in which there is an expectation of permanency, should have access to property adjustment orders in the event the relationship dissolves.[114]

[114] Nancy Polikoff, 'Ending Marriage as We Know It' (2003-2004) 32 *Hofstra Law Review* 201, 223-224.

This approach to relationship recognition is also present in the LCC's report *Beyond Conjugality* which focused on:

> [T]hose personal relationships that are distinguished by mutual care and concern, the expectation of some form of an enduring bond, sometimes a deep commitment, and a range of interdependencies – emotional and economic – that arise from these features. *A focus on relationships defined by these functions* rather than status *is more consonant with the objectives pursued by governments*[115] (emphasis added).

Although in the Canadian context, this is a particularly useful report because its fundamental premise is an express rejection of the legal privileging of conjugal relationships.[116] Unshackled by preconceived notions of which relationships *should* be recognised, it was able to adopt a critical approach throughout the report that questioned, not only the range of personal relationships that might be relevant or important to legislative objectives, but also the legitimacy of the legislative objectives themselves.[117] Although the report advocates an opt-in approach to relationship recognition, where this is not possible it suggests that legislators should develop 'relational definitions that would be more carefully tailored to the *objectives of particular statutes*' (emphasis added). As with Polikoff above, the LCC report advocates a clear and direct link between relationship recognition and legislative objectives, a link that, as I have argued above, is clearly absent in the NSW legal regime governing CPRs.

In essence, what I am advocating is a relationship recognition regime that is purpose focused, with the kinds of relationships recognised depending on the purpose or objective of the legislative regime that grants the rights or imposes the obligations. A purpose focused approach to relational definitions has a number of advantages. Importantly, this approach will mean that the relational definitions would more accurately reflect the characteristics of relationships that are directly relevant to the purpose of a particular

[115] Polikoff, above n 114, xxiv-xxv.
[116] On this point see Nicola Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality' (2006) 16 *Feminist Legal Studies* 241, 245.
[117] Law Commission of Canada, above n 99, 29-30.

legislative regime. This would result in increased consistency and certainty in this area of law. It will also mean that judicial statutory interpretation and discretion would be better focused. As Part II of this paper has illustrated, the lack of focus in judicial decision-making has, at least in part, contributed to the vast array of relationships that now fall under the cover of CPR. Given that every relationship is different, an area of law such as this will always involve some level of judicial lee-way. A purpose focused approach to relationship definitions would provide the judiciary with a far more consistent, principled and coherent approach when determining the relevance of the respective legislative regimes to the disputes that are presented before them, thus also restraining the legislative regimes' capacity to (unjustifiably) encroach on individuals' privacy, autonomy and testamentary freedom.

Applying this approach to CPRs, I would submit that the definition of CPR would need to be changed to more accurately reflect the respective legislative objectives that are at issue. As we recognise relationships for a variety of legal purposes, a purpose focused approach would dictate that more than one definition of CPR would be required (clearly with different names to avoid confusion). So, for example, as Polikoff suggests, access to property adjustment orders is appropriate in circumstances where there is a level of financial dependency or interdependency and an expectation of permanence and where injustice would result without the courts' intervention. We really just need to look to the definition contained in the unsuccessful Democrats' Bill and the guidance offered from the LCC, which support the recognition of relationships with characteristics such as emotional and financial or economic interdependence. However, to ensure the court looks for evidence of an expectation of permanence, and depending on other qualitative characteristics that may be seen as important, the definition may also include a reference to 'mutual support' and 'commitment' as referred to by Slattery J in *Smith v Daniels.*

In the area of family provision, the answer may not be so straightforward. As I briefly noted above, legal commentators regard as a problem the ever-expanding range of individuals who are now

able to claim on a deceased's estate, primarily as the expansion is perpetuated by a lack of coherent focus and underlying principle. The category of CPR within this regime is no exception to this. Serious consideration should be given to *why* these relationships are to be included in the family provision regime (that is, if they should be included at all). Is emotional interdependence sufficient, as suggested above by Polikoff, or should those granted eligibility to claim on a deceased's estate be limited to dependants, as postulated in a recent article by McGregor-Lowndes and Hannah?[118] (If the latter is adopted, there may be no place for eligibility based on a CPR at all). Or perhaps claims should be limited to those to whom the deceased is perceived to have a moral obligation or responsibility (the approach currently adopted in Victoria[119]).

While there is not room here to fully evaluate which approach may be the best approach, what is clear, and of the utmost importance, is that the extension of the selected rights and duties to certain relationships should be based on coherent and consistent principle. The best way to achieve this is to focus the relational definitions on the characteristics relevant to the social objectives of the legislative regimes that actually provide the rights and duties.

## CONCLUSION

Recognition and support of relationships that involve care-giving not only lessen the collective burden, but these relationships are intrinsically valuable, as they help individual members of society and contribute to the personal well-being of those involved. However, any extension of the rights to individuals, caregivers or not, where that extension is based on presumptive relational definitions must be made in a coherent and principled manner. In this paper I have argued that, in the case of CPRs, this has not happened. The analysis of the case law has demonstrated that the category of CPR is very broad and especially ill-defined and lacks

[118] McGregor-Lowndes and Hannah, above n 105, 82.
[119] *Administration and Probate Act 1951* (Vic), s 91(1).

underlying coherence and principle. I have argued that the primary cause of this lies in the definition of a CPR characterised in terms of the three indicia of 'living together' 'domestic support' and 'personal care'. I have suggested that these characteristics are inappropriate indicia to determine the reach of the law, as they are too vague and broad in meaning and they do not enable focus in judicial decision-making. This, I have argued, is because they do not focus on or reflect the social objectives at issue. Thus, I argue that the statutory relational definitions need to be reassessed. In that respect, I have suggested a purpose focused approach to relational definitions. This approach I argue will help to minimise problems inherently associated with a presumptive relationship recognition regime and will focus the legislation, the statutory interpretation and the judicial discretion on the relevant legislative objectives.

On a final note, it will be interesting to observe future judicial decisions in this area. As I noted in Part I of this paper, the power to determine financial matters on the breakdown of a de facto relationship no longer rests with the NSW courts exercising state jurisdiction and now falls under Part VIIIAB of the FLA.[120] Therefore, it will no longer be possible to frame property adjustment applications under s 20 of the PRA in terms of asking the (NSW) courts to find a de facto relationship *or in the alternative* a CPR. It will be interesting to observe whether the use of the category of a CPR increases or decreases as a result; whether, if an individual fails in the Family Court or Federal Magistrates Court to establish that a de facto relationship exists as defined under s 4AA of the FLA, they will then institute proceedings in a NSW court, under the PRA for the finding of a CPR; or whether, in cases in which the existence of a de facto relationship is in dispute, the individual claiming its existence will go straight to the PRA and argue the relationship is a CPR, given its lower threshold. Or will s 20 PRA property applications disappear altogether with the cases concerning CPRs limited to questions of eligibility under the family provision legislation? Only time will tell.

[120] For relationships that dissolved after 1 March 2009.