De Facto Property Claims under Part 19 of the Property Law Act

The Honourable Justice Dutney
Bundaberg District Law Association conference
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One advantage of being the Central Judge is that when I am asked to speak at these conferences the organisers are always too timid to specify a topic. I seem to have this capacity to terrify others while always believing that I am one of the nicest and sweetest people you could ever meet. In the trial presently underway in Bundaberg the prosecutor complained to my associate that I was being mean to him. I thought I was being particularly gentle because I believe it is his first murder trial without a leader and I didn't want to make it any more difficult for him.

Anyway, it's always difficult to think up a topic about which I know enough to present a paper apart from bad backs, a topic which finally drove my predecessor into premature retirement. I knew next to nothing about bad backs when I took the appointment in Rockhampton. I think I know more about them now than almost any other current judge. I also now know why after 22 years of such cases Justice Demack chose premature retirement rather than face another one.

Fortunately, the Law Society staff is made of much sterner stuff than mere solicitors. At least their CPD organiser is tough. When I was last approached by her, she had no problem telling me exactly what I was going to talk about and then chased me up to make sure I had prepared it properly. Hence, having been told that I was to present a paper on de facto property claims at the recent Family Law residential conference at Twin Waters I did so. I know some of you were there but many of you weren't and since I was preparing that paper when Korin asked me to present something and because Justice Moynihan told me subsequently that there are more of such cases commenced in the Supreme Court than any other type, including personal injuries, I thought I would do a reprise. If you are going to get CPD points for a conference you have to expect some content in the papers. I can only apologise to those who were present at Twin Waters for inflicting substantially the same paper on you again.

De facto property is a jurisdiction we in the Supreme Court have been trying to get rid of ever since we first got it. Given a choice, most of us would rather have a tooth pulled without anaesthetic sit through and decide such a case. We have almost succeeded. At Twin Waters, the Commonwealth Attorney–General's representative told the conference that legislation returning the jurisdiction to the Family Court would be drafted late next year and in the scheme of things probably enacted early in 2007. That will leave us only with those cases involving same sex couples which the Commonwealth government apparently doesn't want to be seen to be acknowledging by enacting any laws covering them.

Despite their proliferation, there have been only a very limited number of cases that have progressed to trial either in the Supreme Court or the District Court. One reason for this might be the enormously complicated practice direction put out by the District Court under which that court even avoids giving a return date to the application in the hope that it will go away. For our part we have left the drafting of the practice direction in the hands of Justice Fryberg in the expectation it will be so draconian no one will be game to file an application. Get in quick while you still can.

Obviously, most cases settle fairly early. Where cases get to court the judges who have decided them so far have followed to a large extent the jurisprudence of the Family Court. There is very little difference between the factors relevant to a distribution of property under the Property Law Act and a distribution of property under the Family Law Act. For that reason, in the short time allotted, I don't propose to discuss the actual distribution of property. What I want to discuss is the issue of when a relationship is "a de facto relationship" for the purposes of the legislation. The limited experience of these claims so far has demonstrated that of those cases that don't settle, the dispute over whether the relationship is a de facto one to which the Act applies is often the reason.

When parties can be said to be in a de facto relationship is a matter which will in many cases be the subject of debate. A marriage either exists or does not exist. It commences when the parties sign the register and ends with a decree from the Family Court. It is not always obvious whether a relationship is such as to fall under Part 19. We have a statutory definition of a de facto relationship in s 32DA of the *Acts Interpretation Act* which is, in effect, that it is a relationship of 2 people who are living together as a couple on a genuine domestic basis but who are not married to each other. There is a list of matters set out in subsection (2) which can be considered in deciding this issue. These are the nature and extent of their common residence; the length of their relationship; whether or not a sexual relationship exists; the degree of financial dependence or interdependence, and any arrangement for financial support; their ownership, use and acquisition of property; the degree of mutual commitment to a shared life, including the care and support of each other; the care and support of children; the performance of household tasks; the reputation and public aspects of their relationship. These help, but in the end it is largely a matter of impression as I will try and demonstrate as we go. In the end it is a couple living together on a genuine domestic basis.

Don't be fooled though. The requirement that the relationship consist of two people living together does not necessarily mean that they live together as any quick reference to the authorities will reveal. More on that topic later.

In *S v B* [2005] 1 Qd R 537 at 549 I adopted Justice Mahoney's description of a de facto relationship which he set out in the New South Wales Court of Appeal judgment in *Hibberson v George* (1985) 12 Fam LR 725 at 739-740:

> *"There is, of course, more to the relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship of marriage, being based in law, continues notwithstanding that all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated, without children, and without the exchange of the incident which the relationship normally involves. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to 'live together' with the other and in that sense keeps apart, the relationship ceases, even though it be merely , as it was suggested in the present case, to enable the one party or the other to decide whether it should continue."*

I adopted this for two reasons. First, it seemed a pretty good summary. Second, the legislation in New South Wales was practically identical with ours and they had it first. Therefore, accepting that a uniform approach to essentially similar legislation was a desirable goal I

thought we should accept the best statement of the position from that state that I could find and that was it.

The next logical step is to point out that the onus of proving the existence of the de facto relationship lies on the party asserting its existence. This is to be contrasted with the position where, for example, a party to a marriage seeks to prove separation under the same roof. The position in relation to a marriage was described by the Full Court of the Family Court in *Pavey v Pavey* (1976) FLC 90-051 at 75,213-75,214 in these terms:

> *"In such cases, without a full explanation of the circumstances there is an inherent unlikelihood that the marriage is broken down, and common residence suggests a continuing cohabitation. Such cases therefore require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the Court about this by explaining why the parties continued to live under the one roof, and by showing that there has been a change in their relationship, gradual or sudden, constituting a separation."*

Of course, the position with a de facto relationship is exactly the opposite. The onus is not on the party saying it is over to demonstrate that fact. It is on the party asserting it exists to demonstrate that fact. This is one area in which the onus of proof actually matters.

Even with the small number of decided cases on Part 19, the burden of proof is assuming importance. The uncertainty surrounding it is recognised in the legislation which, by s 317, permits an application to be made solely for the purpose of having this issue determined in isolation. The examples given in the section illustrate that the purposes for seeking such a declaration can be much wider than merely as a preamble to an application to adjust property rights. Status as a de facto may be relevant in Workers' Compensation matters, estate matters, for insurance purposes and the like. Absent a certificate which attests to the status, as in the case of marriage, this is always a matter the party asserting the relationship must prove by evidence.

My researches disclosed 16 cases on the combined Supreme Court and District Court web sites relating to Part 19. 10 of those were primarily concerned with the actual distribution of the property but six were concerned either wholly or substantially with the separate question of whether the relationship of the parties was such as to fall within the statutory definition.

The inability of the applicant to overcome this hurdle of actually proving the existence of the de facto relationship at the relevant time was decisive in *S v B.* In that case there was evidence which satisfied the trial judge and the Court of Appeal that the relationship had ceased to exist by late January 2000. Part 19 of the *Property Law Act* applies only to relationships which existed on or after 21 December 1999. The evidence established that the relationship existed until a period described as "late 1999". There was a gap in the evidence between "late 1999" and Christmas 1999. In the end the applicant failed because she failed to establish positively that the relationship was still in existence on the relevant date.

In *S v B* I made a statement which, on reflection, was perhaps not the most eloquent way of expressing what I wanted to convey. What I said was:

> *"Applying the passage of Mahoney JA in Hibberson v George, which I set out earlier, a de facto relationship ends when one party decides he or she no longer wishes to live in the required degree of mutuality with*

> *the other but to live apart. It does not seem to me that it is necessary to communicate this intention to the other party providing the party that is desirous of ending the relationship acts on his or her decision. I do not think it is necessary that the other party agree with or accept the decision. Once the parties cease to jointly wish to reside together in a genuine domestic relationship, a situation usually ascertained by looking objectively at the whole circumstances of the relationship, the de facto relationship ceases. The relationship ceases even though one party is still anxious to try to save it."*

The difficulty with this statement is that it leaves open the possible interpretation that a de facto relationship which was on foot at some point ceases to exist merely because of a subjective intention on the part of one partner that it should end and without the slightest hint to the other. That was not what I intended to say. What I intended by that passage was that one party doesn't have to tell the other of an intention to withdraw from a relationship if that intention is objectively apparent to anyone looking at the relationship from outside. If the new boyfriend settles into the connubial couch, the de facto wife is not obliged to tell the de facto husband that she has moved on from their relationship.

Luckily, the first judge with cause to look at what I said was Justice Byrne who either understood exactly what I was saying or else knew that no sane judge could mean what I actually said and thus he would infer that I did in fact intend to say something sensible. In *JJR v PH* [2005] QSC 253 at paragraph [35] he resolved the case this way:

> *"Soon after the cessation of sexual relations, R decided that the relationship with H was so miserable and unsatisfying that he must be able to do better: hence his increased internet activity to find someone new. The bitterness over the rejection of his marriage proposals and then H's evident unwillingness to sleep with him probably persuaded him that H bore him no affection, and that there was little, if any, hope that things might improve. But if that was his attitude, he did not communicate it to H, directly or indirectly. She continued buying his food, cooking the evening meal for both, washing, and performing the other household tasks that he had for years accepted were her lot. She still contributed money and services to the joint household; and she provided some care to him after his hip surgery. She was not just the lodger. His commitment to the relationship had diminished. But he did not altogether withdraw from it until the end of February this year with the solicitors' letter. In these circumstances, it is not surprising that it was not actually suggested for R that, if a de facto relationship subsisted at the beginning of 2004, it had finished before late February this year."*

What the husband was in fact doing was trawling the internet for another partner before giving the old one the bad news.

Interestingly, *JJR v PH* was an application for a declaration under s 317 of the Property Law Act. It offers a relatively inexpensive and quick way of litigating the issue of the existence or otherwise of the relationship and its duration if that is the only real obstacle to a settlement.

In contrast, in *S v B* the facts showed that around the period from November 1999 until the end of January 2000 the parties were reduced to communicating in writing by leaving notes in their respective letter boxes. The appellant had refused to attend relationship counselling, telling the

respondent, "You're the crazy one. A psychologist isn't good enough. You need a psychiatrist." He refused to see the respondent on Christmas day, preferring the company of his drinking buddy. He went out alone on New Year's Eve rejecting an invitation to go out with the respondent to celebrate the millennium. On his return the next day he told the respondent he had met someone who was neither as fat nor as ugly as the respondent so that it was useless her trying to rekindle their relationship. Shortly thereafter he told the respondent to *"piss off"* and she changed the locks not long after that. It is in that context that it was unnecessary for the appellant to communicate his intention to end the relationship. His intention was obvious to everyone from the steps he had taken put it into effect. It was also in that context, where the manifestation of the intention was spread over a relatively short period before and after the critical date, that the onus of proof became critical.

I like to think that even I, despite my notorious insensitivity, would suspect that something was amiss with my relationship if my wife behaved towards me like the appellant in *S v B*.

At this point I will digress. These conference presentations follow a fairly predictable pattern. It is conventional wisdom to start off with a joke. That creates the usually false expectation that the paper will be interesting. The presenter then settles down to either read some arid treatise on the law or turns around to admire his power point slides which he then reads, no doubt assuming his audience is illiterate. I have been a bit remiss because I even missed the joke at the start. That is because I am neither able to remember very many nor able to tell those I do remember very well. But let me try one of peripheral relevance to this point in the topic.

A husband and a wife were having dinner at a very fine restaurant when this absolutely stunning young woman comes over to their table, gives the husband a big open-mouthed kiss, then says she'll see him later and walks away.

The wife glares at her husband and says, "Who the hell was that?"

"Oh," replied the husband, "She's my mistress."

"Well, that's the last straw," says the wife. "I've had enough, I want a divorce!"

"I can understand that," replies her husband, "but remember, if we get a divorce it will mean no more shopping trips to Paris, no more wintering in Barbados, no more summers in Tuscany, no more Infiniti or Lexus in the garage and no more yacht club. But the decision is yours."

Just then a mutual friend enters the restaurant with a gorgeous young woman on his arm. "Who's that woman with Jim?" asks the wife.

"That's his mistress," says her husband.

"Ours is prettier," she replies.

If this was a de facto couple, apart from disabusing the man of any likelihood of his retaining more than the memory of his previous wealth after the Part 19 proceedings were concluded, one question for the court might well be whether the man's indiscretions, even though unknown to the woman, were sufficient to indicate objectively that the relationship was over. In some of the cases exclusivity of sexual relationship has been a factor to which judges have pointed as indicating the existence of a domestic relationship. Interestingly, the withdrawal of such privileges has not to date been used as an indicator of the end of a relationship. I avoided that in *S v B* because the man who was well over 70 had become impotent. Justice Williams, though, said in both the Court of Appeal judgments in which he has been involved that the

Court looks for what he describes as "concrete indicia" of the relationship. In this respect Justice Williams placed far more importance on the maintenance of the appearance of the continuing existence of the relationship to the outside world. This would suggest that mere infidelity is not, in itself, fatal to the relationship and that how the parties portray their relationship to others is likely to be of more importance than many other factors, including, in some cases, cohabitation. In relationships which depend to a degree on perception it is interesting how that perception changes. In the murder trial currently underway in Bundaberg, the last witness who gave evidence was the former partner of the accused. She now lives in Tasmania. He now lives in jail. But for two years they lived together with her three children in the Matilda Caravan Park in Gin Gin. More intimate living arrangements than a caravan are hard to imagine. When the prosecutor asked her what her relationship with the accused was at the relevant time there was an awkward silence after which she said they were seeing each other. It's no wonder the courts have trouble identifying when parties are living together as a de facto couple. Presumably, there was no property to fight over.

Logic suggests that if the end date of a de facto relationship can sometimes be uncertain, the commencement is likewise equally uncertain.

Whether a de facto relationship exists in any particular case is a question of fact. The factors set out in the definition as matters to consider are merely that, matters to be considered in deciding whether the ultimate fact, whether a de facto relationship exists, is established.

I have already suggested that only the most naïve of lawyers would suspect that a requirement that a couple live together in a genuine domestic relationship means that they should actually live together. We judges are cleverer than that. In *S v B,* Justice Williams identified the public acknowledgment of the relationship as one of the critical factors the court would look for. He repeated this on the next occasion he had to consider the question, in *PY v CY* [2005] QCA 247, where he wrote one of the three concurring judgments which agreed that a de facto relationship existed despite a separation from March 1997 until the relationship was conceded to have ended on 25 December 2000.

Even that decision does not mark limit of what courts have been prepared to accept as constituting living together in a genuine domestic relationship. That limit must surely have been set by a decision of Judge Dodds in the District Court in *J v S* [2003] QDC 436. That was the earliest example I could find of the issue being considered. The facts there were that the plaintiff lived in New Guinea and apart from the defendant from April 1997 until December 1997 and from March 1998 until the relationship ended. The parties visited each other on occasions. Judge Dodds found that the de facto relationship lasted for about three years. He also found that the relationship was what he described as a developing one during the first period the plaintiff was in New Guinea and became a de facto relationship on his return in December. It is not entirely clear from these findings whether the relationship was to be regarded as a de facto relationship prior to the parties residing together or not. That period was described as a developing relationship whatever that might mean. On the other hand the period of three years found by the judge to be the duration of the relationship would necessarily date back to a time prior to actual cohabitation.

In finding that a de facto relationship existed, Judge Dodds relied on the loving nature of the relationship, the expectation and fact of sexual exclusivity and the financial support of the defendant by the plaintiff as being more important than actual co-habitation. His Honour found that:

> *"I think the concept of living together as it is used in the Act where from time to time the parties are physically in different places is a question of degree. The Act does not require both to be physically in the one place for a total of two years. It rather requires the parties satisfy the description of living together as a couple on a genuine domestic basis based on intimacy, trust and personal commitment even though from time to time, work commitments, for instance, may require one party to be physically elsewhere."*

This was decided prior to either of the cases in which Justice Williams made the general comments I have attributed to him and suggests that Justice Wiliams is not alone in his view that even long separations are not necessarily fatal to the finding of a de facto relationship. I think that Justice Williams might baulk, however, at finding the necessary relationship where the parties have cohabited for a total of only 3 months out of a total relationship of three years.

Thus far, the Courts have looked to identify a starting date and a finishing date for the relationship. Of course, it is entirely likely that given the ephemeral nature of a de facto relationship, many couples might well slide in and out of that state. So far, no litigant has sought to advance such a case in the courts. One practical reason for this is that one side usually asserts the existence of the relevant relationship and the other denies it. No attention is given to the third possibility that the relationship might exist for periods and disappear for periods as the indicia of the relationship wax and wane. There is no reason in law why such a finding might not be appropriate in many cases. The concept of a relationship which comes and goes is foreign to the Family Law Act. It is equally foreign to claims made under the law of trusts which preceded the provisions of the Property Law Act but where the actual characterisation of the relationship as a de facto one within a statutory definition or not is very largely irrelevant. If such cases are pursued the approach to property adjustments might be very interesting.

I'd like to finish with this thought. This is still a very new jurisdiction. It shows signs of being a very large jurisdiction given the numbers who now choose not to marry. Despite the referral of state powers to the Commonwealth to enable the Family Court to take over the heterosexual part of the jurisdiction, we in the State Courts will have it for some time yet. We are still settling into it so it may be some time before there enough decided cases for lawyers to have a definite feel for the approach to follow. In cases where the relationship is not an issue, outcomes in the State courts are likely to be close enough to what you are used to for you to be able to settle most of those cases. The critical issue in the cases that come before the court is likely in many cases to remain the proof of the existence or otherwise of the necessary relationship. Those are the cases where there will be no real assistance derived from cases decided in the Family Court.

I should not finish without asking a question to see how much attention you paid. Assuming this to be the evidence, is this in favour of or against a de facto relationship? Assume the man and the woman are unmarried. This is the scenario.

A woman stopped by unannounced at her recently married son's house. She rang the doorbell and walked in.

She was shocked to see her daughter-in-law lying on the couch, totally naked. Soft music was playing, and the aroma of perfume filled the air.

"What are you doing?" she asked.

“I’m waiting for my husband to come home from work,” the daughter-in –law answered.

“But you’re naked!” the mother-in-law exclaimed.

“This is my love dress,” the daughter-in-law explained.

“Love dress? But you’re naked!”

“My husband loves me to wear this dress,” she explained. “It excites him no end. Every time he sees me in this dress, he instantly becomes romantic and ravages me for hours on end. He can’t get enough of me.”

The mother-in–law left. When she got home, she undressed, showered, put on her best perfume, dimmed the lights, put on a romantic CD, and lay on the couch waiting for her husband to arrive. Finally, her partner came home. He walked in and saw her lying there so provocatively.

“What are you doing?” he asked.

“This is my love dress,” she whispered, sensually.

“Needs ironing,” he said. “What’s for dinner?”