FEDERAL CIRCUIT COURT OF AUSTRALIA

REGAN & WALSH *[2014] FCCA 2535*

Catchwords:
FAMILY LAW – De facto property – threshold consideration of whether a de facto relationship exists so as to afford jurisdiction – factors to be considered – influence and significance of financial considerations when little else is agreed – insufficient evidence to satisfy the Court that the parties were in a relationship as a couple – finding of no jurisdiction.

Legislation:
Family Law Act 1975 (Cth), ss.4AA(1), (2), 90RD
De Facto Relationships Act 1984 (NSW)

Cases cited:
S v B (No 2) (2004) 32 FamLR 429
Roy v Sturgeon (1986) 11 FamLR 271
Barry & Dalrymple [2010] FamCA 1271
Lynam v Director-General of Social Security (1983) 52 ALR 128
Truman & Clifton (2010) FCWA 91

Applicant:	MR REGAN
Respondent:	MR WALSH
File Number:	BRC 2755 of 2013
Judgment of:	Judge Coker
Hearing date:	12 June 2014
Date of Last Submission:	12 June 2014
Delivered at:	Townsville
Delivered on:	6 November 2014

REPRESENTATION

Counsel for the Applicant:	Mr Kronberg
Solicitors for the Applicant:	RD Martin & Co
Counsel for the Respondent:	Mr Creamer
Solicitors for the Respondent:	Australian Law Group

DECLARATION

(1) Pursuant to Section 90RD of the *Family Law Act 1975*, that a de facto relationship, as defined pursuant to the provisions of section 4AA, never existed between the Applicant and the Respondent.

ORDERS:

(2) That the Application of 12 April 2013 and Response of 2 August 2013 be dismissed.

(3) That should there be any application for costs, written submissions be filed and served by the Respondent within 21 days of the date of this Order and any submissions by the Applicant be filed and served within 35 days of the date of this Order.

IT IS NOTED that publication of this judgment under the pseudonym ***Regan & Walsh*** is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT TOWNSVILLE

BRC 2755 of 2013

MR REGAN
Applicant

And

MR WALSH
Respondent

REASONS FOR JUDGMENT

INTRODUCTION:

1. On 12 April 2013, Mr Regan, whom I shall refer to as the applicant, filed an initiating application seeking orders in relation to a de facto property settlement. As is required in relation to a determination of that nature, the first order that was sought was the making of a declaration that a de facto relationship existed between the applicant and the respondent to the application, Mr Walsh.

2. The applicant went on to note that subject to the declaration being made, then that there should be a property distribution between the applicant and the respondent, so as to effect a distribution to the applicant of 40 per cent and a distribution to the respondent of 60 per cent by way of final property settlement. Additionally, the applicant sought an order with regard to the respondent paying his costs of and incidental to the proceedings and any other orders that might otherwise be appropriate or proper.

3. The response to the initiating application was filed on 2 August 2013. The response is interesting in that it is in these terms:

> 1. (a) That the applicant retain all his assets, property, superannuation and liabilities currently in his name and/or possession.
>
> (b) That the respondent retain all of his assets, property, superannuation and liabilities currently in his name and/or possession.
>
> (c) That the applicant pay the respondent the amount of $50,000.00 within twenty-eight (28) days of the date of these orders.
>
> 2. That the applicant remove, at the applicant's cost, a caveat lodged by the applicant over the respondent's property located at Property C, Queensland, more properly described as Lot [omitted].
>
> 3. That the applicant pay the respondent's costs of and incidental to these proceedings.

THE FIRST QUESTION:

4. I say that the response is a little unusual in that it did not seek an order with regard to the dismissal of the application, relying upon what clearly became the position of the respondent, that there was not a de facto relationship between the applicant and the respondent. That was explained during evidence given in relation to the matter, primarily upon the basis that the legal representatives, then acting on behalf of the respondent, [omitted] Solicitors, refused to continue to act upon the behalf of the respondent, if a position was to be taken by him to the effect that a de facto relationship did not exist.

5. Waiving privilege, obviously, the respondent indicated that their advice was to the effect that the best position to take, in relation to the application brought before the Court, was to concede a de facto relationship existed but to then argue that upon the significantly different contributions made by each party, that there should be no

adjustment by way of property settlement to the situation that actually existed, as a result of the ownership of property of each of the parties.

6. The respondent's evidence, in that regard, was, I thought, believable and his explanation, that an indication was given that [solicitors omitted] would not act on his behalf if he were to take a stance in relation to denying the existence of a de facto relationship, was communicated to him only a matter of days before the matter was to come before Court. The respondent, therefore, agreed to the filing of the response in the form prepared by his solicitors but within a matter of days, after that first appearance before the Court, he terminated their retainer and sought the representation of other solicitors.

7. It was clear from the material that was filed subsequently and, in particular, as detailed in the case outline filed on behalf of the respondent on 11 June 2014, that the first and primary argument to be put in relation to this matter was that there was no de facto relationship between the applicant and the respondent. Under the heading, "Statement of Evidence in Support of Section 4AA and Section 90SM of the *Family Law Act 1975*", the legal representatives for the respondent noted:

> *The respondent seeks such declaration as the parties relationship is not one within the meaning of section 4AA(1) of the Act and as such a 'de facto financial cause' pursuant to section 4(1) of the Act does not exist to enliven the Court's jurisdiction to hear the matter.*

8. That is the first determination to be made in relation to these proceedings. Was there was or was there not, in existence, a de facto relationship? The parties certainly acknowledge that they knew each other from early in 2005 and that they shared the same residence on various occasions, though each was adamant that the basis of the sharing of accommodation was entirely different.

9. The applicant's perspective was to say that it was a relationship of a mutually supportive nature he understood, to the exclusion of all others and that it was one of, therefore, a genuine domestic relationship. From the perspective of the respondent, however, it was, as he described it, on a number of occasions, a situation of friends with benefits. He described the applicant as a friend and as a friend with

whom he had a sexual relationship at different times. The respondent, however, was adamant that there was, at no times, a mutuality to their relationship or, if you like, a relationship which could be considered one of a genuine domestic character.

THE EVIDENCE:

10. The evidence called by each of the parties, respectively, supported their positions taken in relation to the matter. It is obvious that consideration needs to be given to that evidence and to then determine whether or not the Court is satisfied that a de facto relationship exists. It is noteworthy that the onus of satisfying the Court that a de facto relationship exists rests with the applicant.

11. In *S v B (No 2)* (2004) 32 FamLR 429, Dutney J, sitting as a member of the Court of Appeal of the Supreme Court of Queensland said at paragraph 49:

> *In a de facto situation, it is the party asserting the relationship that must prove cohabitation of the required quality.*

12. His Honour went on in paragraph 50 of that judgment to note that:

> *The party asserting a de facto relationship must prove the "positive aspects" of the relationship rather than the party denying it being required to prove the negative.*

13. McPherson and Williams JJ agreed with the observations of Dutney J in that appeal decision. In other words, it is not necessary to successfully resist the applicant's claim that the respondent has to establish that the relationship was one of another character, but rather it is the obligation of the applicant to satisfy the Court of the existence of the de facto relationship.

14. Of course, if the Court is not satisfied that a de facto relationship, within the meaning of section 4AA of the Act, existed at the times suggested by the applicant, then the jurisdiction of the Court is not enlivened and the application is unable to proceed. In that case, the evidence of the parties and the credit of the parties becomes of particular significance.

15. The primary evidence of the relationship comes from the parties themselves and I will comment upon their evidence in relation to this matter in some detail. However, before turning to their evidence, it is noteworthy that both the applicant and the respondent respectively called a witness in support of their contentions with regard to the existence of a relationship between the parties.

16. On behalf of the applicant, evidence was called from a friend, Ms S. Ms S swore an affidavit in these proceedings, which affidavit was filed on 21 May 2014. In her evidence, she indicated that she had known both the applicant and respondent since about 2008, having met the applicant when both she and the applicant were employed as [omitted]. She indicated that that period of employment was from June 2008 to January 2009.

17. Ms S suggested that she and the applicant were not just work colleagues, but had become friends, and that therefore through the development of that friendship, she had had the opportunity to meet the respondent in or about the latter part of 2008. She goes on to indicate that between 2008 and 2013, she visited residences in which the applicant and the respondent lived, and interacted with them socially on occasions, including taking meals with them in their homes, and noting that she assisted them in painting "their [Property C] house". She also indicated that she accompanied the applicant and the respondent on trips to nurseries to select plants for their gardens, as well as for her gardens.

18. Of particular significance, at least from the perspective of the applicant, was the evidence of Ms S as detailed in paragraph 13 of her affidavit. There she says:

> *When I first met [Mr Walsh], [Mr Regan] introduced him to me as his 'partner'. [Mr Walsh] did not contradict [Mr Regan] when he described him to me as his partner.*

19. Ms S was challenged in relation to that particular statement, noting that her reference is to the applicant referring to the respondent as his partner, but not suggesting that the respondent referred to the applicant as a partner. Her response was words to the effect, "I did not say that, but he did." It does not appear that that particular aspect of the matter

was further explored in relation to the determination of this matter, and Ms S then went on to describe in both her evidence contained within her affidavit, and in oral evidence, the basis upon which she assumed or considered that they were partners. She said in her affidavit at paragraph 16, the following:

> *I recall [Mr Regan] and [Mr Walsh] discussing with me that they wanted to paint their room blue.*

20. She indicated in her oral evidence that she understood that they "shared a sexual relationship and shared bills together" and that they "bought stuff together and made plans for the future together." When challenged, particularly with regard to the statement relating to whether they made plans for the future together, Ms S indicated that she had been shown a contract for the purchase of a property. However, it was clear that that contract did not involve the applicant as a purchaser, but only the respondent.

21. I accept the evidence given by Ms S in relation to this matter, however, that I was not overly influenced or convinced by the statements that she made in relation to the relationship between the applicant and the respondent. Her statements and opinions appear drawn primarily from what she was told by the applicant, or what she surmised was the situation between the parties, as a result of her observations of various attendances at their residence. By the same token, she was not a permanent part of their household, and whilst I accept the genuineness of her beliefs expressed in relation to the parties living in a genuine domestic relationship, I am not overly assisted in the determination of this matter, considering her evidence.

22. On the part of the respondent, evidence was called form Mr O. Mr O filed an affidavit on 17 March 2014 indicating that he had known the respondent since 2007, and that they had, at least in the early part of their friendship, a sexual relationship. But as their friendship deepened, it became less of a sexual relationship, and more platonic. In fact, Mr O at paragraph 16 of his affidavit indicated that he refers to the respondent as his best friend, and notes that he is an extremely generous and compassionate person, always demonstrating a willingness to help people wherever possible.

23. Mr O in some detail discussed the conversations that he had had with the respondent in respect of his relationship with the applicant. From 2007 onward, Mr O's evidence was that the respondent made it clearly known to him that the applicant was his "mate" and sex buddy. He noted also that they had casual sex, but that there was no more extensive relationship than one of as the respondent repeatedly described it, friends with benefits.

24. Mr O was cross-examined about a number of the statements, and acknowledged that in some instances dates quoted may not be an accurate reflection of when the statements were made, either by the respondent, or on occasion, allegedly by the applicant. But Mr O was adamant that whilst the dates may be incorrect, the nature or tenor of the discussions were accurate and reflected the position of the parties.

25. Mr O was also cross-examined at some length about his financial relationship or interaction with the respondent, nothing that they had purchased a property in Property F together, but that subsequently, the respondent had purchased Mr O's half interest in that property. It was then the subject of inquiry as to what arrangements were made with payment of rent. There appeared to be, with respect, some language or understanding difficulties experienced by Mr O, but it eventually became clear that when the respondent and Mr O jointly owned the property, and Mr O was living there, he paid one half of a market rental, and was responsible otherwise for his expenses attaching to the property. Subsequent to the respondent's purchase of his interest in the property, his continued residence at that property has been subject to the payment of a proper market rent.

26. I found Mr O to be a convincing witness. He gave me the distinct impression that he was attending to provide evidence in relation to this matter, not out of any malice toward the applicant, though he acknowledged eventually that he did not like the applicant, describing him as "not a nice person", but my impression was that Mr O was there to provide truthful and honest evidence of conversations he had had, particularly with the respondent, as well as of his observations of the interactions between the applicant and the respondent.

27. I turn now to the evidence of the applicant and the respondent. Obviously, as I indicated earlier in these reasons, issues of credit are

significant in relation to the determination of whether or not a de facto relationship existed, and as it is necessary to consider various criteria, as detailed in section 4AA(2).

28. The evidence of each of the parties relating to those various criteria is of particular importance. Insofar as the applicant was concerned, I must, frankly, indicate that I was troubled by his evidence in a number of regards. Firstly, I was not at all satisfied that the applicant was not aware of the extent of the respondent's sexual relations outside of their friendship. The evidence that was given by the applicant was that he knew various of the persons that the respondent detailed in his affidavit as being men with whom he had shared sexual relations but that the applicant had no idea of the activities of the respondent.

29. Quite simply, it would be almost impossible to accept that if, as suggested by the applicant, he and the respondent were in what he considered a mutually exclusive relationship, he would not have been aware of the extra sexual liaisons that the respondent was involving himself in. It is difficult to accept that there was no knowledge or, at least, suspicion on the part of the applicant in respect of the respondent's other relationships.

30. I am inclined to the view, unfortunately, that the applicant had a far greater knowledge of the respondent's intention to have additional sexual liaisons with other friends as well as with the applicant and that the applicant's stated lack of knowledge is more a reflection of his determination to assert that there was a genuine domestic relationship between he and the respondent, than an actual and genuinely held perception of their relationship.

31. Additionally, I was unimpressed and unconvinced with the applicant's statements with regard to his contributions to the household and to the expenses of the household. The applicant's assertion that for significant early parts of the relationship he put money in a glass jar for the purposes of rent did not ring true. There appeared to be no real intent on the part of the applicant, nor convincing evidence to suggest that regular and appropriate contributions were made, in relation to the expenses associated with the residence.

32. The suggestion that those payments or contributions were made and then, additionally, other payments were made in relation to groceries and household expenses simply struck me as unbelievable, particularly when it was noted that for a number of months and perhaps even years during the asserted relationship, the only source of income available to the applicant was social security benefits of one kind or another. The ability to contribute, therefore, would be limited.

33. Flowing from that, and perhaps of considerable significance here, is the fact that, if the parties were in a genuine domestic relationship, then some indication would properly have been expected to have been given in relation to support of a financial nature being provided by the respondent to the applicant and, perhaps more specifically, a determination on the part of a couple that they would not seek social security benefits when they were a genuine domestic couple, providing nurture and support for each other.

34. The applicant, it would appear, on all occasions that he was able to do so, sought to obtain and did obtain social security benefits and support, and whilst I accept that it may not have been necessary or required for there to be any declaration as to there being a same-sex de facto relationship, the fact that it was not relied upon by the applicant does his case no assistance in relation to this matter.

35. Those matters troubled me in relation to the applicant's evidence generally in relation to these proceedings. I should note also that I was concerned by two particular statements made by the applicant during cross-examination. The first related to the suggestion that a document had been prepared by him which was, to all intents and purposes, to reflect an agreement between the applicant and the respondent, that the respondent would not seek the payment of any rental or contribution from the applicant. The respondent noted in his material that such a document existed, but that it was unable to be produced.

36. I was troubled by the applicant's insistence that there was no evidence of such an agreement. When counsel for the respondent pointed out that there was evidence in that there was the sworn statement of the respondent with regard to the document, the applicant's response was troubling when he suggested that there was no document that could be produced and, therefore, no proof.

37. I gained the impression that the applicant was not contending that a request or demand had never been made by him, but rather that the document could not be produced. When it was suggested that it could not be produced because it was in the applicant's possession and he refused to make it available, he denied that. However, in my assessment, the denial rang hollow.

38. Further, I was troubled by the applicant's suggestion that there was a joint bank account operated by he and the respondent. A fundamental requirement in relation to satisfying the Court of the onus with regard to there being a genuine domestic relationship between the applicant and the respondent is to provide evidence relating to the public aspects of the relationship. Evidence of a jointly opened bank account would be a significant matter there.

39. In that respect, whilst the applicant insisted that there was a [omitted] Bank account held in the joint names of the parties, he did not consider that it was in any way relevant. It flies in the face of common-sense, particularly so when the applicant was adamant that he had mentioned the account to his legal representatives and that he had not been requested to produce the statement or other information in relation to the account.

40. It simply beggars belief that such a significant piece of information could not be and was not produced, if it were available. And, of course, noting, as I have, that the onus rests upon the applicant to satisfy the Court of the existence of the domestic relationship, such a failure to produce information is troubling in the extreme.

41. The applicant acknowledged that he did not have access to passwords to the respondent's computer, his mobile telephone or passwords to his bank accounts. He indicated that he did not want access to them, that he trusted the respondent in their relationship, but again I thought the statements rang hollow in relation to the matter, particularly with regard to respondent's computer, as it would seem fundamental in relationships that if there were a computer in a residence, that it would be used by the members of the household, particularly if they were in a domestic relationship.

42. I was, therefore, not overly convinced by the applicant of his position in relation to this matter.

43. On the other hand, I had the opportunity to see the respondent give evidence in relation to this matter. I was impressed by the respondent. He struck me as being genuine in the evidence that he gave, even when some of that evidence must have been, to some degree, disturbing for him to give. He had been, he noted, in a heterosexual relationship with his wife for a period of 25 years. He then came out later in life as a gay man, and as he indicated in his material, intended to experience all of the aspects of living as a gay man, including to involve himself in multiple sexual relationships with other men.

44. He gave me the impression of being honest and open in that evidence, and, as was noted by Mr O, being a man who would be open to providing assistance and support to those that he considered his friends. It was clear from his evidence, but also, I thought, from his demeanour, that at the time that he came out, he was in need of friendship, that he was in need of support, and that he believed that he was gaining that friendship and support from the applicant.

45. I accept his statements that the applicant was a friend, and that he had hoped him to become a very good friend, but that in fact, over time, he assessed him to be not a good friend, but a "predator". The distinct impression that I gained was that the respondent was exactly as he contended, a person who was willing to give all, but particularly in this instance, the applicant, as many chances and as many forms of assistance as he could.

46. I accept that he found the behaviours of the applicant disturbing. I accept that there was little contribution made by the applicant to the relationship, but that was not because of a genuine domestic relationship between the applicant and the respondent, but rather that it was a situation where the applicant was able, by various means, including manipulative behaviours, to have the respondent meet his expenses, and, of course, in particular, to provide a home for him to reside in.

47. The number of occasions that the respondent appears to have moved on from one place to another, and to then find that the applicant had

followed, seeking the opportunity to resume living at his residence, smacked far more of one person manipulating and using another, than a de facto relationship which was ended and resumed on a number of occasions. The overriding impression that I gained in relation to this matter was that the applicant was manipulative and controlling of the respondent, particularly in circumstances where he had recently come out as a gay person, and was less than comfortable and secure in his own sexuality, and therefore, of course, was seeking the support of friends.

48. Whilst I accept that the respondent did, on one occasion, at least, seek to formalise some form of financial arrangements between he and the applicant, I accept without hesitation that the document which was subsequently produced by his then-solicitors as a reflection of what they understood to be the relationship existing between the applicant and the respondent was not in fact a reflection of what the respondent said was the relationship that existed.

49. I am more than satisfied, that what the respondent was seeking in approaching those solicitors, was some form of financial security in relation to the applicant's continued attendances at the respondent's properties, and that it was a way, the respondent hoped, to ensure proper and regular contribution by the applicant to the household expenses, and in particular, to the liabilities attaching to various properties, or alternatively, to be a means by which the respondent could see the applicant leaving his residence or residences, because of an inability or unwillingness to contribute financially to the arrangements.

50. It should also be noted, as I recognised earlier in these reasons, that the response, particularly referring to a de facto relationship ending after 1 March 2009, or being a de facto relationship of at least two years in length, was not a reflection at all of the respondent's view as to what the relationship might be, but far more a reflection of a document signed in haste, and perhaps more particularly, a document signed in circumstances where the respondent felt there was no alternative if he were to have representation in court only a matter of days after the document was filed.

51. I was impressed by the respondent in relation to this matter. I thought him an honest witness, and exactly as described by Mr O, a man willing to help people wherever possible, and perhaps, on occasion, beyond what might reasonably have been expected. I find the respondent to be a particularly honest witness, and in that regard, would specifically note that where there is conflict or divergence between the evidence of the applicant and the respondent, I am far more inclined to accept the evidence of the respondent in all circumstances.

THE LAW:

52. I turn, then, to the relevant law in relation to these proceedings. In that respect, section 4AA of the Act is relevant. Subsection (1) defines the meaning of a de facto relationship, and in particular, subsection (1)(c), which is in these terms:

> *(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis -*

as being the starting point in determining whether or not a de facto relationship exists.

53. Section 4AA(1)(c) indicates that there must be evidence sufficient to satisfy the court, that there is a genuine domestic relationship between the parties, before any other considerations with regard to a property distribution can be looked at. It is noteworthy that section 4AA(2), headed, "Working out if persons have a relationship as a couple", provides a number of considerations which must be looked at, but that they cannot, of themselves, be determinative of whether or not a relationship exists.

54. The meaning of the expression "a genuine domestic basis" is a difficult concept to consider. In *Roy v Sturgeon* (1986) 11 FamLR 271, a decision of Powell J of the New South Wales Supreme Court, an attempt was made to dissect the phrase as it arose in the *De Facto Relationships Act 1984* in New South Wales. There his Honour said:

> *…"living together as a husband and wife on a bona fide domestic basis" into discrete "elements", and then testing the facts of a*

> *particular case by reference to a set of a priori rules in order to establish whether a particular "element" is, or is not, present, is to ignore the fact that just as human personalities and needs vary markedly, so, too, will the various aspects of their relationship which lead one to hold that a man and woman are living together as husband and wife on a bona fide domestic basis vary from case to case.*

55. Quite simply, Powell J was noting the extreme difficulty in determining, on a general basis, what constitutes a relationship between either a man and a woman, or of course a same-sex relationship. The fact is that every relationship is different, and what constitutes that relationship may, in different circumstances, be very different from other relationships.

56. In attempting to set out the basis upon which such proceedings are determined, Coleman J in *Barry & Dalrymple* [2010] FamCA 1271 noted under the heading "Relevant Law", the reference to *Lynam v Director-General of Social Security* (1983) 52 ALR 128, a determination of the Full Federal Court. Such decision was referred to by Thackray CJ of the Family Court of Western Australia in *Truman & Clifton* (2010) FCWA 91 with approval.

57. In *Lynam v Director-General of Social Security* (supra), the court said:

> *Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.*

58. Coleman J noted, of course, that the legislation now contained within the Family Law Act notes that a de facto relationship can exist between two persons of different sexes, and two persons of the same sex, and that there is:

no reason to suggest that the task is materially different in the context of a same-sex relationship.

59. Accordingly, it is necessary to consider those matters set out in 4AA(2). Section 4AA(2) is in these terms:

4AA(2) Those circumstances may include any or all of the following:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

(h) the care and support of children;

(i) the reputation and public aspects of the relationship.

60. Section 4AA(3), unsurprisingly, notes that:

No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

But rather, as detailed in subsection (4):

A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

DISCUSSION:

61. One could not imagine that such a statement is reflective of anything other than the obvious indications that every relationship is different, and that every relationship must be looked at in terms of its own set of

circumstances, rather than any predetermined set of rules or material considerations. What is required here, therefore, is to consider each of the matters detailed in section 4AA(2) and determine, in the end, whether, on the evidence in this case, there is on the balance of probabilities, a de facto relationship, or, to use the terminology contained with section 4AA(1)(c), a relationship as a couple living together on a genuine domestic basis.

(a) The duration of the relationship

62. The respondent does not concede that there was ever a de facto relationship between the parties. He says that they were friends, having met in or about March of 2005, and the applicant agrees that that was the time that they met. But thereafter, the applicant's position is to say that they were a couple virtually from the first time that they met, and that their relationship was then one of a mutually-supportive character.

63. The determination necessary in relation to this matter is of course the nature of the relationship, rather than the duration of the relationship, with both parties acknowledging that they met at or about the same time. Certainly the relationship as friends, or as a couple, appears to have continued from March of 2005 until January of 2013. It is necessary, however, to consider those other circumstances before it is able to be determined what was the nature of the relationship between the parties.

(b) The nature and extent of their common residence

64. In this instance, again there appears to be considerable divergence between the evidence of the applicant and the evidence of the respondent. Both acknowledge that they shared the same residence on occasion, but that on other occasions, and in some instances for significant periods, for example, when the respondent was residing at [omitted] for a period of over one year, they did not occupy the same residence. The applicant says that this was simply a reflection of commitments that each had with regard to work, as well as study, and that therefore it was in no way reflective of a breakdown in the

relationship, but rather, simply a reflection of the need for them to be in two different places at the same time.

65. From the respondent's perspective, however, it is a significant consideration in relation to the determination of whether a genuine domestic relationship existed, because it reflected the less than formal nature of their relationship, with the applicant coming into the residence of the respondent at different times as chosen by him, rather than on the basis of a continuing common residence punctuated with periods of separation due to factors of work or other calls upon one or other of the parties.

66. It is clear that during the period March 2005 until about January 2013, the parties lived under the same roof for more than six years. There were, as I indicated, periods where they were separate and apart, but residence appears clearly to have existed for a significant period of time.

67. The nature of the common residence is, however, more difficult to assess. As indicated, the applicant was clearly of the mind to say that the residence constituted a de facto relationship, whist the respondent indicated that it was more of a shared house, with there being the benefits of sexual interaction between the applicant and the respondent. The determination of whether the common residence may be of significance in relation to this matter is not of great import, in light of other findings yet to be made.

(c) Whether a sexual relationship exists

68. This is perhaps the only point upon which the parties are in absolute agreement. They were in a sexual relationship, though the emotional attachment of the applicant in respect of that relationship appears to be far more than any emotional attachment existing on the part of the respondent.

(d) The degree of financial dependence or interdependence, and any arrangements for financial support, between them

69. More significant here is the consideration of the degree of financial dependence or interdependence, and any arrangements for financial support between the applicant and the respondent. The applicant contends that they were a couple, and each contributed, to the extent that they were able financially, to the household expenses. The evidence of the respondent is entirely different, and that, if anything, it was a situation of the applicant using the respondent's greater financial stability to his own interests.

70. I am far more inclined to that view in relation to this matter. The evidence of the applicant in relation to contributions made during the relationship was unconvincing in the extreme. There was little that could be gathered from the applicant's evidence, other than that he made some minimal payments, perhaps in relation to groceries, but as was emphasised by counsel for the respondent, any such payments were probably, in most instances, outweighed by the applicant's own use of grocery items or household items otherwise purchased.

71. More particularly, it was not a case of dependence by the applicant upon the good grace and support of the respondent, but far more a situation of the applicant being able to use the respondent's stronger financial position to his own interest. I am not at all convinced that there were arrangements or agreements between the parties for financial support but rather, simply and unfortunately, circumstances where the respondent was unable or unwilling, because of concerns as to reactions by the applicant, to resist the calls or demands placed upon him by the applicant.

(e) The ownership, use and acquisition of their property

72. This consideration, in particular, is a significant matter for two reasons. Firstly because of the fact that during the period following the applicant and respondent meeting in March 2005, the respondent did on a number of occasions enter into contracts for the further acquisition of property and yet on no occasions would it appear that the applicant was involved in any such acquisitions.

73. That may of itself not be of great significance in relation to this matter, but what is of particular significance, is that during the period that the applicant contends that the parties were in a genuine domestic relationship, the respondent entered into financial dealings with Mr O to purchase the property at Property F without inclusion, it would seem, in any way of the applicant.

74. To purchase property jointly with another, without any inclusion or consideration of inclusion of a party who genuinely contends that there is a mutually exclusive relationship is difficult to accept, and no explanation was ever given in relation to that particular aspect of the matter. I am satisfied, therefore, that there is particular significance in the fact that there was no joint ownership or acquisition of property between the applicant and the respondent.

75. Similarly, as I commented earlier in these reasons, there is some relevance in the fact that there is no evidence whatsoever of any joint bank accounts, other than the generalised and almost offhanded statement by the applicant that such an account existed, without any evidence whatsoever being produced in that regard.

(f) The degree of mutual commitment to a shared life

76. Insofar as the matters contained in section 4AA(2)(f) are concerned, the degree of mutual commitment to a shared life is again significant. It is, of course, relevant that there must be mutuality in the actions of the parties, and there is not a skerrick of evidence to suggest that that was the case, at least from the perspective of the respondent.

77. The respondent allowed the applicant to live at his residence. They shared sexual relations and, no doubt on occasions, social outings together. However, the respondent in his own evidence appears clearly to have pursued other friendships and sexual liaisons during the entirety of the period following the applicant and the respondent meeting in March of 2005.

78. Additionally and perhaps, again, significantly in relation to the determination of this matter, it appears clear that the respondent travelled extensively for the purposes of work as well as holidays, and there is no evidence whatsoever that the applicant on any occasion

travelled with the respondent. As suggested by the applicant, it may be that he had other commitments or was unable to obtain leave at a time that corresponded with such travel, but it is certainly difficult to imagine that, during a period of nearly eight years, that there was never an occasion where the applicant was able to travel with the respondent, particularly when it is noted, and it was unchallenged, that the respondent indicated that during his marriage, his wife travelled with him for business purposes on many occasions.

79. I am satisfied that there is little evidence to support a conclusion that there was a mutual commitment to a shared life. There appears to be no suggestion of the parties having planned a future together or to have taken steps consistent with a future together, for example, purchasing property together or establishing bank accounts or other arrangements of a joint nature. In that respect, again, it was unchallenged that the respondent had prepared a will which he said did not include any provision for the applicant or at all. There appears little, if any, evidence which would satisfy the Court of there being a mutual commitment to a shared life.

(g) Whether the relationship is or was registered under a prescribed law of a state or territory as a prescribed kind of relationship

80. There is no evidence of such a relationship being registered in any way.

(h) The care and support of children

81. This provision has no application, as there are no children of the relationship.

(i) The reputation and public aspects of the relationship

82. As I noted, the applicant and the respondent each called one witness in relation to satisfying this particular aspect of section 4AA(2). As indicated, I accept the evidence of Ms S in relation to this matter but did not find it in any way convincing or conclusive in asserting that there was, to the outside world, an easily perceived relationship between the applicant and the respondent.

83. Rather, it seemed more to be a reflection of her opinions or assessments based primarily upon statements made to her by the applicant. Whilst I acknowledge that there may have been indicators that she took to be reflective of a relationship from the respondent, I am not at all satisfied that her evidence would convince the court of the existence of an external perception of a relationship of a genuine domestic basis.

84. On the other hand, the respondent called the evidence of Mr O in relation to this matter and, in particular, to his indications of statements made by the respondent during the entirety of the relationship of the nature of that relationship and of the respondent's position within that relationship. I am far more inclined, as I indicated previously, to accept that as a more genuine and appropriate perception of the relationship between the applicant and the respondent than that suggested by Ms S or, of course, reflected in the evidence of the applicant.

85. I am not satisfied on the evidence provided that there was an outward perception available to the world at large of a relationship of a genuine domestic nature existing between the applicant and the respondent.

86. It is necessary then to consider all of the evidence in relation to this matter and to determine what weight should be given to the various findings that have been made, in relation to determining whether or not the parties were a couple living together on a genuine domestic basis. As I would expect is obvious from the comments that have been made, particularly with regard to each of those circumstances detailed in section 4AA(2), I am not persuaded on the balance of probabilities that the circumstances of the relationship between the applicant and the respondent were such as to lead to a finding that they were a couple living together on a genuine domestic basis.

87. In the circumstances, therefore, the only finding that can properly be made is that the application should be dismissed, and to make orders in terms of those detailed at the commencement of these reasons.

I certify that the preceding eighty-seven (87) paragraphs are a true copy of the reasons for judgment of Judge Coker

Associate:

Date: 6 November 2014