SUPREME COURT OF QUEENSLAND

CITATION:	*A v C* [2006] QSC 060
PARTIES:	**A** (Applicant) **v** **C** (Respondent)
FILE NO/S:	S807 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	31 March 2006
DELIVERED AT:	Townsville
HEARING DATE:	27th and 28th February and 21st, 22nd and 23rd March
JUDGE:	Cullinane J
ORDER:	**For the purposes of Part 19 of the *Property Law Act 1974* (Qld) as amended, that the applicant and respondent were de facto partners between July 2001 and 16 October 2004.** **I order the respondent to pay the applicant's costs of and incidental to the litigation of this issue to be assessed.**
CATCHWORDS:	PROPERTY ADJUSTMENT - DE FACTO RELATIONSHIP - LEGISLATION - where order made that the issue of whether there was a de facto relationship between the applicant and the respondent be tried separately - by virtue of s260 *Property Law Act 1974* (Qld) which defines 'de facto partners' by reference to the meaning of s32DA *Acts Interpretation Act 1954*(Qld), and for the purposes of Part 19 *Property Law Act 1974* (Qld) whether the applicant and the respondent were de facto partners. *Acts Interpretation Act 1954* (Qld) *Property Law Act 1974* (Qld) *D v McA* (1986)11 Fam LR 214 cited
COUNSEL:	Mr Michael Fellows for the Applicant Mr Stuart Durward SC for the Respondent
SOLICITORS:	Boulton Cleary & Kern for the Applicant Wilson Ryan and Grose for the Respondent

[1] The applicant has applied to the court for an order by way of property adjustment under part 19 of the *Property Law Act 1974* (Qld) as amended.

[2] An order has been made that the issue of whether the applicant was at relevant times the de facto partner of the respondent be tried separately. The litigation of this issue occupied some five days.

[3] By virtue of s260 of the *Property Law Act 1974* (Qld) a reference to a de facto partner is a reference to a person who falls within the definition of s32DA of the *Acts Interpretation Act 1954* (Qld) as amended.

[4] Part 19 of the *Property Law Act* applies to all de facto relationships except a relationship that had ended prior to 21 December 1999 (see s257).

[5] The issue to be determined, then, is whether the applicant and the respondent were de facto partners between about July 2001 and 16 October 2004 when, it is common ground, the respondent moved out of a house in which he and the applicant resided.

[6] Section 32DA of the *Acts Interpretation Act 1954* (Qld) (as amended) provides so far as is relevant as follows:

> (1) In an Act, a reference to a "de facto partner" is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.
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> (2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances -
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> (a) the nature and extent of their common residence;
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> (b) the length of their relationship;
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> (c) whether or not a sexual relationship exists or existed;
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> (d) the degree of financial dependence or interdependence, and any arrangement for financial support;
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> (e) their ownership, use and acquisition of property;
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> (f) the degree of mutual commitment to a shared life, including the care and support of each other;
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> (g) the care and support of children;
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> (h) the performance of household tasks;
>
> (i) the reputation and public aspects of their relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.

(4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence."

[7] The applicant was born on 21 July 1979 and the respondent on 13 March 1956. There is thus a 23 year age difference between them.

[8] There is a good deal which is not in dispute and indeed which cannot be disputed. The following is a summary of what might be said to be common ground or not seriously in dispute;

The parties met in Sydney in 2000 and formed a relationship which (except for a brief period early in the relationship) was continuous until October 2004. The parties commence to live together in mid 2001 in the respondent's apartment in Sydney. Shortly before this they had decided to move to Townsville where the respondent owned a house he had bought some time previously. The applicant and the respondent had together travelled to Townsville before making the move so that the applicant could see the house and the city before deciding to move with the respondent to Townsville where he intended to pursue his business interests. The applicant had worked in a bank in Sydney and obtained work with the same bank in Townsville. After coming to Townsville the applicant and the respondent resided in the respondent's house until October 2004. During this time the applicant and the respondent each contributed to the expenses of the household and each performed tasks associated with the house. (There is some dispute as to the specifics of this). The applicant also paid monies which the parties referred to as rent. Throughout the relationship the parties engaged in sexual relations. The sexual relationship was (except for an occasion involving both parties and another person) exclusive. (There is a reference in the evidence to the applicant having described the relationship as an open one and I will refer to this in due course). The applicant fell pregnant on three occasions. The first two pregnancies were terminated, the second because of the applicant's medical condition. The applicant gave birth to a baby girl (Lily) born on 1 October 2003 in Sydney in what is described as a natural birth at which the respondent was present. The respondent supported the applicant when she had to cease work because of the pregnancy and supported both the applicant and the child after the birth. For some time prior to the birth the respondent paid the applicant $300 per week following which the same amount was paid through the respondent's business, the applicant performing as she had for some time, certain bookkeeping tasks for the business. There is some dispute as to whether there was a change in the extent of those tasks. The parties kept separate bank accounts and credit cards although there was one credit card which each was entitled to use. During the time the parties resided together they attended social functions as a couple, including functions associated with the applicant's work and social functions together with business associates of the respondent as well as other social functions with friends. For the financial year ended 30 June 2003 (the only year's return before the court) each of the parties showed the other as his/her spouse. When applying for a parenting benefit after the birth of the child the respondent is shown as the applicant's partner and as a person who resided at the same address as the applicant. Both parties signed the application. The parties had a joint pharmacy card, a joint Medicare card issued to

the parties and Lily and family private health insurance as well as other joint insurance.

[9] The above summary of facts constitutes what might be thought to be a reasonable starting point from which to contend that a de facto relationship existed.

[10] Since it is not contended that in this case there are any relevant considerations apart from those provided for in s32DA of the *Acts Interpretation Act* (except for one to which I will later refer) it will be convenient if I deal with the evidence and the arguments advanced on each side by reference to those factors. There is clearly a degree of overlapping between some of these

(a) The nature and extent of their common residence.

It is common ground that the dwelling had two bedrooms in one of which was a king size bed, the property of the respondent, and in the other, a queen size bed, the property of the applicant. The parties described the bedrooms as their respective bedrooms. These beds were owned by them prior to the commencement of the relationship. The applicant said that she frequently slept with the respondent in his bed but that from time to time she would occupy the other bedroom. The clothes of each were kept in a separate room. The respondent said that it was usually the case that the applicant slept in her own bed but acknowledged that occasionally they would occupy his bed, or for that matter, her bed. It is clear that when people visited, the parties occupied the respondent's bedroom. I accept the applicant's evidence that one important determinant in whether at any time they occupied separate bedrooms was the respondent's condition at the time. The respondent suffers from what is described as a type of bipolar condition which fluctuates. He has difficulty sleeping and places particular emphasis upon obtaining an uninterrupted sleep. The applicant would, in deference to this, often occupy the second bedroom, sometimes after sexual relations had occurred between them in the respondent's bedroom. The difference between the parties on this issue is substantially one of degree but I am satisfied that the applicant and the respondent often occupied the same bedroom and did so at all times when there was somebody visiting and staying with them and often when there was not. They also often occupied their own separate bedrooms. As I have said the parties each contributed to the expenses associated with the running of the household. Exhibit 3 is an exercise book in which the applicant kept a record of expenditures met by each of them. She said that frequently the respondent was slow in making payments of accounts and she had to make them and the purpose of the record was to ensure that there was a fair sharing of the expenses between them and it was necessary for some adjustments then to be made by payment of the respondent to the applicant. Some emphasis was placed upon this as being unusual and inconsistent with the existence of a de facto relationship. The applicant on the other hand said that she wished to be as independent as possible within the relationship and to pay her share of expenses. At the commencement of the relationship in Townsville the respondent and the applicant agreed that the applicant would pay $100 a week and this was described as rent. The respondent said that it was in fact a rental notwithstanding that it was not declared as such in his income tax returns. The applicant said on the other hand that she

described it for convenience as rent but that it was a contribution which she agreed to make to the maintenance and upkeep of the house. I accept her explanation in regard to this and also in relation to the payment by her of household expenses. The evidence satisfies me that each performed tasks in relation to the running of the household. There was some dispute as to the extent of the applicant's contribution in this regard but I am satisfied that she performed many of the domestic tasks and some of the cooking. The respondent also performed some of these tasks and cooked some meals and was responsible for the barbecue when that was used and for any tasks around the yard.

(b) The length of the relationship.

It is common ground that the relevant relationship which existed between the parties extended over the period from July 2001 when they commenced to live together until 16 October 2004 when the respondent left the house having formed another relationship.

(c) Sexual relationship.

This too, was common ground. I am satisfied on the evidence that this aspect of the relationship was not merely incidental or occasional but a significant and important part of the relationship overall until it ended. The applicant became pregnant on three occasions during the relationship. The first two pregnancies were terminated and the third resulted in the birth of their daughter, Lily. The first termination occurred during a break in the relationship before they commenced to live together. Both the applicant and the respondent described the sexual relationship as exclusive although there was an occasion during the visit to Townsville prior to the move there involving both parties and another person. The applicant at times described the relationship as an open one. I accept her explanation of this. She said that she told the respondent at the outset that she wanted them to be open with each other and that if either wished to have a relationship with another person this should be made clear between them and not be kept secret. This is the sense in which, I accept, she used the term on occasions when speaking to others.

(d) The degree of financial dependence or interdependence and any arrangement for financial support.

The applicant and the respondent each earned an income until the time the applicant had to cease work to give birth to the child. Up until that time the applicant and the respondent each contributed to joint expenses as I have said. There was thus a significant degree of financial independence within the relationship. In that regard the applicant contributed to the maintenance and upkeep of the house by the payment of $100 per week. The applicant said that she wished to be as independent as possible within the relationship and to make an appropriate contribution to costs. The respondent bought a vehicle through his business which was used by the applicant during the time they were together. When the applicant had to cease work the respondent paid her some $300 per week to meet expenses which she was no longer able to meet from an income. After some period this was paid

through the respondent's business and claimed as a tax deduction. The applicant had performed bookkeeping tasks for the respondent for some time without any recompense. I am not persuaded that there was any alteration in the tasks which she performed which led to these monies being paid by the respondent's business. Rather I think it was a case of it suiting the respondent to pay the monies through the business which had been paid directly by the respondent before. When the child was born the respondent supported the applicant and the child. There was thus in the period leading up to the birth of the child and following the birth of the child, substantial support provided by the respondent to the applicant. There was also a degree of inter-dependence. The applicant had the right to use the respondent's credit card, there was a joint pharmacy card and a family Medicare card. There was joint family private medical insurance and joint insurance was taken out in respect of a vehicle and the contents of the house. Items such as a refrigerator were bought in joint names.

(e) Ownership, use and acquisition of property

This is an area in which (so far as real property is concerned) the interests of the applicant and the respondent were kept quite separate. The respondent already owned the house in which they lived after coming to Townsville and also owned the unit in which they lived in Sydney for a short period prior to that. During their time together the respondent acquired a number of properties in his own name and the applicant acquired a property in her name. I accept the applicant's evidence that each discussed with the other the purchase of such properties and each offered advice to the other about the matter. However as I have said this is one aspect of the relationship where the parties kept their interests quite separate, something which no doubt has played a significant role in the institution of this litigation.

(f) The degree of mutual commitment to a shared life, including the care and support of each other

This aspect of the matter is the subject of some considerable dispute. It can, I think, readily be accepted that the level of commitment to the relationship and its future was greater throughout on the part of the applicant than on the part of the respondent who from time to time viewed the relationship negatively and spoke to others of ending it. The fact is however, that he took no steps to do so until he formed an association with another person in the latter part of 2004.

No doubt the respondent's mental condition placed strain upon the relationship from time to time as the applicant said. I accept the applicant's evidence that the respondent required a good deal of patience and understanding when suffering periodic bouts of illness and she provided this to him. Something was sought to be made of the fact that the applicant had described the relationship as being like "flatmates who have sex". However I am satisfied that she used this description only towards the end of the relationship when it was clear to her the respondent was distancing himself from her.

The respondent had made it clear to the applicant at the beginning of the relationship that he was not interested in marriage and also at that time indicated that he did not wish to have children. The termination of the second pregnancy arose as a result of serious illness which the applicant suffered as a result of her pregnancy. After this the applicant and the respondent together, attended two obstetricians. It was the respondent's case that he accompanied the applicant to support her at a time when she wished to be reassured about her capacity to have children in the future but said that it was in no way connected with any desire on his part to have a child with the applicant. The applicant on the other hand said that at this time she and the respondent, after having discussed the matter, agreed that they would have a child and that it was important to her to obtain advice as to the best way of managing any pregnancy so as to avoid the serious difficulties that had arisen following her second pregnancy. It is common ground that at the time the applicant fell pregnant the respondent was suffering serious problems as a result of his condition and was unhappy about the pregnancy. The applicant said that it had occurred somewhat earlier than they had planned but said that as time went on and the respondent overcame his problems he became much more positive about the birth of the child.

The applicant and the respondent attended a yoga class for parents to be and there is a photograph of them in a group at such a class.

Whatever might be said about the negative views which the respondent had expressed about the relationship to others at different times it is plain on my assessment of the evidence that during this period he and the applicant were close and that he was looking forward to the birth of the child. There are photographs which show a high level of intimacy between the applicant as an expectant mother and the respondent as the father of the child. He participated in the birth of the child in Sydney as I have said and there are photographs showing the applicant and the respondent at this time.

There are cards sent from the respondent to the applicant in the early part of the relationship which can only be read, notwithstanding some attempt on the part of the respondent to suggest otherwise, as expressing a level of affection and commitment on his part to the applicant. In one of these he thanks the applicant for her "maturity, patience and lovingness". This is, in my view, consistent with the applicant's evidence that she provided the understanding and patience necessary when the respondent was going through a difficult period with his illness. The applicant and the respondent were members of a spiritual group (Sannyasins) and referred to each other by the names which they had been given within the group.

I accept the applicant's evidence that the third pregnancy was planned by the parties.

The fact that the degree of mutual commitment of parties to a relationship varies as between them and fluctuates from time to time does not, in my view, preclude the conclusion that a de facto relationship existed. There was during the time that the relationship existed, although not at all times, a significant degree of mutual commitment to the care and support of each

other although this was greater on the part of the applicant than of the respondent throughout.

One area that was the subject of a substantial dispute is whether the respondent asked the applicant to marry him. She said that this occurred on 3 June 2003. This was at a time when she was about half way through her pregnancy and she describes the circumstances in which the respondent proposed and she accepted. She said that a little later he gave her a ring which had belonged to his mother as a sign of his commitment to her and that she still has this. The respondent strongly denies that he ever proposed to the applicant and said that he only became aware that his mother's ring was missing after the separation. He said that he recalls an occasion on which the applicant asked him if she could wear it and he agreed.

A good deal was made of the failure of the applicant to tell people who it was said would be expected to have been told of such a proposal. These include friends and workmates of the applicant. Particular emphasis was placed upon the evidence of one Nicole Dewing, a neighbour, who was close to the parties at this time. She said that she had never heard of such a proposal and so do a number of other deponents including former workmates and friends with whom they were associated or people like Dirk Currie who was their massage therapist.

The applicant gave explanations as to why some of those persons may not have been told but in the case of Nicole Dewing and Dirk Currie, she thought that she had in fact told the former and was rather more certain that she had told the latter. Whilst I thought that both Nicole Dewing and Dirk Currie gave the impression of being anxious to help the respondent, there is no reason not to accept this aspect of their evidence. Neither were cross-examined on this subject. The failure to tell persons who it might be expected would be told is certainly a matter of concern and raises the real possibility that the applicant has sought to bolster her case by falsely making a claim that the respondent proposed marriage to her. On the other hand there is evidence from the applicant's mother and sister that she told them and more importantly there is the evidence of a neighbour, one Faye Roberts who said that she was told by the applicant of the respondent's proposal. She said she was told this during the applicant's pregnancy and was given some detail of what occurred at the relevant time which is consistent with what the applicant herself said. Any inference arising from the applicant's failure to tell those persons who it could be expected she would have told if the proposal had occurred must be substantially offset by the evidence of Roberts whose evidence I accept that she was told by the applicant of the proposal during the applicant's pregnancy. Roberts' evidence in this regard was not directly challenged in cross-examination. If the applicant has falsely claimed that the respondent proposed to her it was a claim that she falsely advanced at the relevant time and well before the parties separated.

I am inclined to think that the applicant was telling the truth on this subject. This occurred at a time when the respondent's attitude to the coming birth of the child was much more positive. The applicant gives an account of a discussion at a social function with another person who asked the parties in

a somewhat challenging way whether they would marry given the approaching birth of the child. The applicant said that the respondent later told her that this conversation had lead to him reconsidering his attitude to marriage.

At about this time the parties attended a financial advisor seeking advice primarily about how the future of the child might be best provided for.

Although not without some hesitation, I accept that the respondent proposed to the applicant and she accepted.

I should add that my conclusion on the issue to be determined on this hearing would have been the same had I come to a different conclusion on this subject. Important though it is to the consideration now being discussed I do not think it is critical to the resolution of the issue of a de facto relationship.

(g) The care and support of children.

It is noteworthy that the definition in the Queensland legislation does not refer to the procreation of children. This is referred to in the legislation of other states and was referred to by Powell J in *D v McA* (1986)11 Fam LR 214, a decision which is regarded as of significance in the development of the legislation in the various states on this subject.

Though it is not expressed to be a relevant consideration I think that a decision by parties to a relationship to commit themselves to children has to be of relevance to the consideration of whether a de facto relationship existed.

Turning to (g) in the terms in which it is expressed I have already pointed out that there were three pregnancies during the relationship. I am satisfied the birth of the child was planned. The respondent supported the child and the applicant following the child's birth and has at all times recognised the child as his. It is obvious from some of the photographs that the arrival of the child was the cause of some pride and pleasure to him.

(h) The performance of household tasks.

It is unnecessary to say anything further under this subject.

(i) The reputation and public aspects of their relationship.

There were a number of affidavits filed in relation to this aspect of the matter on both sides. Some of the affidavits contain assertions and opinions which are clearly not admissible. The contents of the affidavits, at least in some cases, appear to be expressed in terms which reflect the argument of the parties on whose side the affidavits were filed. Although some attempt was made to suggest otherwise, the evidence in my view clearly establishes that the parties presented to others as a couple and were recognised as such. There is evidence from workmates of the applicant that the parties attended social functions associated with the applicant's work and evidence of the applicant introducing the respondent as her partner. There is evidence from

one Linda Hebbard who was engaged by the parties as a cleaner that the applicant introduced the respondent to her as her partner. One deponent, Ruth C is the widow of a half brother of the respondent. It is clear that she regarded the applicant and the respondent as a couple and visited them and they visited her as such. She gave evidence of an occasion when she and other members of her family went to a club and the applicant the respondent joined them there where the applicant met the family members. I found this evidence helpful and convincing. Even some of those who filed affidavits on behalf of the respondent and spoke of what they saw as a lack of any overt signs of affection between the parties did so in the context of their attending social functions with the parties being present as a couple. (I should add that the respondent accepted that he was not prone to overt expressions of affection.) I have already referred to the attendance at the pre-natal yoga classes and the presence of the respondent at the birth of the child. There are a significant number of cards from persons addressed to the applicant and the respondent together congratulating them on the birth of the child. There are photographs of the applicant and the respondent at home and socialising together and also with others.

I have also earlier referred to the fact that the respondent showed the applicant as his spouse in the tax return which is before the court. His accountant said that she prepared this without any specific instructions from him and the respondent said that it is likely he had not noticed this in the return when he signed it. It is difficult to accept this given the prominent position that it occupies in the form. Similarly he said that he signed the parenting benefit as the partner of the applicant so as to enable the applicant to obtain the entitlement the subject of the application. In my view the proper conclusion to draw is that the statement in both documents reflected the position as the respondent knew it to be and his signature should be regarded as carrying with it his affirmation of these matters.

[11] In my view the applicant and the respondent substantially shared their lives during the relevant period. To the extent that there were any unusual features of the relationship this could be said of many, indeed most relationships, which nonetheless constitute de facto relations within the meaning of the relevant legislation. There is no standard model of a de facto relationship.

[12] In my view looking at the matter over all, there is little difficulty in the circumstances of this case in reaching the conclusion that such a relationship existed here.

[13] I declare that the applicant and the respondent were de facto partners for the purposes of Part 19 of the *Property Law Act 1974* (Qld) (as amended), between July 2001 and 16 October 2004.

[14] I order the respondent to pay the applicant's costs of and incidental to the litigation of this issue to be assessed.