SUPREME COURT OF QUEENSLAND

CITATION:	*WPA v MLX* [2011] QSC 315
PARTIES:	**WPA** **(applicant)** **v** **MLX as Administrator of the Estate of BSX** **(respondent)**
FILE NO:	BS7046 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	27 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20-22 July 2011, respondent's further written submissions received 26 July 2011, applicant's further written submissions received 1 August 2011
JUDGE:	Mullins J
ORDER:	**The application is dismissed**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – RELATIONSHIP – where the mother of two children died intestate – where the applicant who is the father of those children seeks a declaration that he and the deceased were in a de facto relationship for the purpose of the *Succession Act 1981* (Qld) – where there were periods of separation during the two years preceding the deceased's death – whether the applicant was the de facto partner of the deceased SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – ALTERATION AND REVOCATION OF GRANTS – where mother of infant children died intestate – where grandmother of the infants obtained grant of letters of administration as the litigation guardian of the infants until they become adults – where father of the infants applies to revoke the grant for alleged misconduct – whether there has been misconduct by the administrator *Acts Interpretation Act* 1954, s 32DA *Succession Act* 1981, s 5AA, s 35 *Uniform Civil Procedure Rules* 1999, r 610

FO v HAF [2007] 2 Qd R 138; [2006] QCA 555, considered
JJR v PH [2005] QSC 253, considered
KQ v HAE [2007] 2 Qd R 32; [2006] QCA 489, considered
S v B [2005] 1 Qd R 537; [2004] QCA 449, followed

COUNSEL: LA Stephens for the applicant
CC Heyworth-Smith and M Bannister for the respondent

SOLICITORS: Ryan Lawyers for the applicant
de Groots Wills & Estate Lawyers for the respondent

[1] Ms B who was born in 1984 died intestate in a motor vehicle accident on 30 June 2009. She was the mother of two children who were born in 2003 and 2004. The applicant is the father of those children. The respondent who is Ms B's mother obtained a grant of letters of administration of Ms B's estate on 9 September 2009.

[2] In this proceeding the applicant seeks a declaration that he was the de facto partner of the deceased at the time of her death. If that declaration is made in the applicant's favour, he seeks the revocation of the grant of letters of administration made to the respondent and that either he or the Public Trustee be substituted as the administrator and trustee of Ms B's estate. If the applicant is not successful in obtaining a declaration that he was in a de facto relationship with Ms B at the date of her death, he nevertheless seeks relief in relation to the administration of Ms B's estate primarily on the basis of alleged misconduct on the part of the respondent in administering the estate. The applicant claims that relief in his capacity as the surviving parent of Ms B's children.

[3] The respondent disputes that the applicant was the de facto partner of her daughter when she died and disputes the allegations of misconduct made by the applicant against her in respect of the administration of her daughter's estate.

[4] The threshold issue that affects how the other issues in the proceeding are dealt with is whether the applicant was Ms B's de facto partner for the purpose of the *Succession Act* 1981 (the Act).

Relevant legislation

[5] Under s 35 of the Act a spouse of an intestate is entitled to take an interest in the residuary estate of the intestate ascertained by reference to schedule 2 of the Act. Where the intestate is survived by one surviving spouse and by issue, the spouse is entitled to $150,000 and the household chattels and, where there is more than one child, one-third of the residuary estate. A spouse is defined in s 5AA(1)(b) of the Act to include "de facto partner, as defined in the *Acts Interpretation Act 1954* (the *AIA*), section 32DA". Section 5AA(2) of the Act relevantly provides:

> "(2) However, a person is a **spouse** of a deceased person only if, on the deceased's death--
>
> (a) the person was the deceased's husband or wife; or
>
> (b) the following applied to the person--
>
> (i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;
>
> (ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous

period of at least 2 years ending on the deceased's death; or."

[6] Section 32DA of the *Acts Interpretation Act* 1954 (*AIA*) relevantly provides:

"(1) In an Act, a reference to a **de facto partner** is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.

(2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances-

(a) the nature and extent of their common residence;
(b) the length of their relationship;
(c) whether or not a sexual relationship exists or existed;
(d) the degree of financial dependence or interdependence, and any arrangement for financial support;
(e) their ownership, use and acquisition of property;
(f) the degree of mutual commitment to a shared life, including the care and support of each other;
(g) the care and support of children;
(h) the performance of household tasks;
(i) the reputation and public aspects of their relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are riving 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.

(5) For subsection (1)--

(a) the gender of the persons is not relevant; and
(b) a person is related by family to another person if the person and the other person would be within a prohibited relationship within the meaning of the Marriage Act 1961 (Cwlth), section 23B, if they were parties to a marriage to which that section applies."

[7] The surviving spouse of an intestate is given priority under r 610 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*) to apply for the grant of letters of administration on intestacy.

[8] Both parties relied on a number of authorities which have applied s 32DA of the *AIA*. In *S v B* [2005] 1 Qd R 537, Dutney J (with whom the other members of the court agreed) stated at [33]:

"[33] De facto relationships are by nature fragile. The robust institution of marriage survives until formally dissolved by legal process, even though the parties are no longer a couple and exhibit none of the observable indicia of a domestic arrangement. It has been recognised, however, that the persistence of those indicia is fundamental to the continuance of a de facto relationship. In *Hibberson v. George* Mahoney J.A., with whom Hope and McHugh JJ.A. agreed, spoke of the de facto relationship as follows:

> '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 incidents 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'."

[9] Dutney J also stated at [48]:

> "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."

[10] That passage was applied in *JJR v PH* [2005] QSC 253 where one party had decided to withdraw from the de facto relationship with his long-term partner, but did not communicate that to the partner either directly or indirectly, so that most aspects of their mutual relationship continued as they had done for many years. It was held that the party did not withdraw from the relationship until his solicitors sent a letter to the partner requiring her to vacate the home. That letter was treated as the first distinct manifestation of the party's complete withdrawal from the relationship.

[11] The party who asserts that a de facto relationship existed as at a particular date bears the onus of proving that on the balance of probabilities: *S v B* at [1], [5] and [50].

[12] The definition of de facto partner in s 32DA of the *AIA* also applies for the purpose of applications under Pt 19 of the *Property Law Act* 1974. In *KQ v HAE* [2007] 2 Qd R 32, which is another Court of Appeal judgment concerned with Pt 19, the court observed at [19]:

> "[19] These considerations all lend support to the view taken in earlier cases that a 'de facto relationship' will not be established for the purposes of pt 19 of the PLA unless it can be seen that 'the

> parties have so merged their lives that they were, for all practical purposes, living together as a married couple'."

[13] One of the issues in *FO v HAF* [2007] 2 Qd R 138 was the point at which the parties' relationship had developed into a de facto relationship. Keane JA stated at [24]:

> "None of the matters listed in s 32DA(2) of the *Acts Interpretation Act* 1954 is necessarily of decisive significance in this regard: those matters are identified as relevant considerations. The ultimate issue to which they are relevant, however, is whether the parties 'are living together ... on a genuine domestic basis'. This phrase necessarily draws attention to whether the parties are living, or have lived, together to maintain a household in a relationship which exhibits the characteristics of the relationship of marriage, save for the solemnities involved in the formal exchange of wedding vows."

Evidence of the relationship between the applicant and Ms B

[14] In order to decide the issue of whether the applicant was Ms B's de facto partner when she died, it is necessary to make findings of fact in respect of their relationship, but focusing on the two years ending on Ms B's death. It is common ground that the characterisation of the relationship of the applicant and Ms B during the two years immediately preceding Ms B's death may be affected by the nature of their relationship prior to that period. Unlike most proceedings under Pt 19 of the *Property Law Act* 1974 where both parties to the relationship give evidence, the issue of whether the applicant and Ms B were in a de facto relationship has to be determined without direct evidence from both parties to the relationship.

[15] In order to put some of the incidents that occurred between the applicant and Ms B into context, it is relevant that the applicant was diagnosed with schizophrenia in or about 2001 and was prescribed several different types of medication from which he suffered a variety of side effects. He sometimes stopped taking his medication to allow the side effects to disappear. On other occasions, he had to adjust to changes in dosage.

[16] The applicant met Ms B when she was nearly 17 years old. The applicant claims that their de facto relationship commenced in June 2001 when Ms B commenced living with the applicant at his parents' address.

[17] After several months the applicant and Ms B moved into a house in Davey Road, Gatton. They left with rent unpaid and the applicant had a bad tenancy record as a result. He claims that is the reason why all subsequent tenancies were in Ms B's name solely.

[18] On 6 December 2004 Ms B notified Centrelink that she had separated from the applicant on 20 November 2004 which was shortly after the birth of their second child. From that time until her death, she received Centrelink benefits on the basis that she was a single person. The address Ms B gave Centrelink for the applicant was his parents' address at Gatton. Ms B nominated the applicant's mother as a person with whom Centrelink could confirm the separation. The applicant's mother completed a form for Centrelink on 8 December 2004 confirming the separation and giving as the reason "Constant fighting. Could not get along."

[19] The respondent recalled that Ms B and the applicant started going out together in 2001, but she described their relationship from what she observed as an "on again, off again" type of girlfriend/boyfriend relationship and, although they lived together at various times, most of the time the applicant lived with his parents at their address.

[20] In this early period until November 2004, it is common ground that the relationship was volatile and affected by drug and alcohol use and domestic violence.

[21] Although the respondent would not concede that Ms B and the applicant were in a de facto relationship at any period of time, Ms B's action in notifying Centrelink that she and the applicant had separated in November 2004 after the birth of their children, and the confirmation of that by the applicant's mother, supports the characterisation of their relationship prior to 20 November 2004 as a de facto relationship, at least for some period between June 2001 and November 2004.

[22] I had before me six affidavits of the applicant and he was cross-examined for almost an entire day. There were many inconsistencies and implausible explanations in his evidence. I am cautious about accepting some aspects of the applicant's evidence where it is contradicted by objective facts or documents and reliable observations made by other persons. It was unhelpful that the applicant resorted to general assertions which clearly did not apply at all times to his relationship with Ms B. It was the applicant's claim that they may have spent a couple of nights apart on occasions, but that they remained in a de facto relationship between June 2001 and Ms B's death. As I recite relevant evidence of the relationship between the applicant and Ms B, I will indicate, where necessary, where I have rejected the applicant's evidence.

[23] The respondent separated from her husband in 2005. She moved to Gatton to live in December 2005. The respondent saw Ms B on most days between December 2005 and December 2007 and was a frequent visitor to Ms B's various homes throughout that period. The respondent saw the applicant at Ms B's home on a couple of occasions during this period. Although I found the respondent's evidence generally to be reliable, she was careful to limit her evidence to what she had observed. There is other evidence, however, to show that the applicant was in fact living in the same residence as Ms B for at least some of the time during this period. This is illustrated by the fact that on 23 April 2006 Ms B attended at the Gatton Police Station to report that she wanted police to evict the respondent after they had an argument.

[24] In July 2006 the applicant applied for a disability pension due to his schizophrenia which he claimed on the basis that he was single. The applicant stated that he was entitled to describe himself as single when he applied for the disability pension, as he was having trouble with his medications and they were "having a break" (at Transcript 1-28). He never notified Centrelink of any change in his status while Ms B was alive.

[25] Ms B reported to the police on 18 August 2006 that the respondent had moved out earlier that day, but had returned intoxicated and was attempting to get into the house.

[26] The applicant has exhibited to his affidavit filed on 1 December 2010 a copy of the Medibank Private card for private health insurance issued on 15 August 2006 which lists Ms B as number 1, the applicant as number 2 and the children as numbers 3

and 4. There was no other evidence adduced to show that private health insurance as a family group that included the applicant was maintained.

[27] The applicant's tax returns for 2006, 2007 and 2008 (exhibits 3 to 5) were prepared by Gatton accountants and show the applicant's home address as his parents' address. In relation to the Medicare surcharge for each of these tax years, it is only for the year 2007 that the applicant shows two dependent children.

[28] Ms B organised a 50th birthday party for the applicant's mother that was held in March 2007. A video of the party that was mainly recorded by the applicant was shown in the course of the applicant's evidence. The speech that Ms B made on the occasion was as follows:

> "I am not really good at speeches, and I don't usually say anything, but I thought I probably better. I love you [C] and I am so glad to be part of your life, part of your family. I met [C] six years ago when I was 16 and I was a little bit troubled and a little bit wild. She helped tame me and rein me in a little bit so I thank her for that. I thank you for helping me through my life and the problems that happen, we have dealt with them together and [C] has been wonderful to me. She has been an inspiration to me and kept me going at times I felt like giving up and didn't want to go on any more. She has been in the delivery room for [the children], she held my hand for hours and I love you. You are like a mum to me and you are my mum so thank you.

There was a small portion of the video of the party that showed the applicant dancing with Ms B. Ms B remained close to the applicant's mother, despite the difficulties that she and the applicant had in their relationship. Ms B and the applicant's mother were employed at the same [place] in Gatton.

[29] As a result of an application made by Ms B on 5 October 2007, a protection order under the *Domestic and Family Violence Protection Act* 1989 was made in the Gatton Magistrates Court against the applicant on 10 October 2007. The first condition of that order required the applicant to be of good behaviour towards Ms B and not to commit domestic violence. The second condition of that order prohibited the applicant from going to, entering or remaining in premises where Ms B resided or worked, except for the purpose of contact with their children as set out in a written agreement between the parties or as permitted by an order made under the *Family Law Act* 1975 (Cth). The applicant describes the violence as verbal and that Ms B would call the police after they had been arguing (at Transcript 1-43). The material that was tendered from the Queensland Police Service file (exhibit 26) supports that description of the domestic violence, subsequent to 2006, as emotional abuse.

[30] Shortly after the protection order was made against him, the applicant set up a "Myspace" page (exhibit 6) on 15 October 2007 in which he referred to his children, but did not refer to a partner. He described his status as single and that he was on Myspace for "Dating, Serious Relationships, Friends." It does not appear that the applicant used his Myspace page after that, apart from adding a song on 21 September 2008.

[31] Ms B moved with the children to Charleville in January 2008 intending to relocate permanently. She hired a removal truck and packed up the contents of her home for removal to Charleville. She was born in Charleville and many of her extended family resided there. She rented a house in Edward Street. Because of the floods that immediately occurred in Charleville, the applicant went to Charleville to assist Ms B evacuate her home and return to Gatton with the children for a couple of weeks. As the elder child was enrolled for school at Charleville, Ms B returned to Charleville with the children for the start of the 2008 school year. The respondent also returned to Charleville from Gatton in February 2008 to live in the house she bought which was near Ms B's home.

[32] It appears that Ms B had the Child Support Agency do an assessment in respect of the applicant, when Ms B first went to Charleville, but there was no further evidence as to whether any action was taken in respect of that assessment.

[33] In the applicant's affidavit filed on 14 July 2009 in proceeding 7292 of 2009, he estimated that it was six weeks before he followed Ms B to Charleville:

> "13. Although [Ms B] and I had a sometimes volatile relationship which resulted in domestic violence orders being taken out against me, we never actually 'ended' our relationship at any stage. Our longest periods of separation occurred when [Ms B] decided that she wanted to move to Charleville at the beginning of 2008. I did not want to move there. [Ms B] was determined to go so she left. I was hoping she would come back and for a period of a few weeks we effectively were calling each other's bluff. After about six weeks it became clear that she was not returning to Gatton so I moved to Charleville and started living with [Ms B] and the children at … Edward St."

[34] In his oral evidence the applicant seeks to qualify paragraph 13 (as set out in the preceding paragraph), as he suggests that he was referring to a separation by distance, rather then a relationship separation. He did concede, however, that Ms B was not planning to come back to Gatton when she left Charleville at that time, but denies that the relationship had ended because Ms B had moved away (at Transcript 1-38).

[35] In other evidence (such as the applicant's affidavit filed on 20 Sept 2010), the applicant claims to have followed Ms B to Charleville soon after she returned there with the children and stayed with her at the Edward Street house for five months. That is contrary to the observations made by other witnesses who visited Ms B and were familiar with her activities in Charleville. Upon the respondent's return to Charleville, she had daily contact with Ms B. She refers to visits by the applicant on three occasions, one of which she states was around June 2008 and for the best part of one month.

[36] The applicant's 2008 tax return (exhibit 5) shows that he received wages from three employers in the Charleville region. He worked for one day only at [one] meatworks, as he injured his shoulder on his first day of work there. He worked at another meatworks and received a gross wage of $1,549 which suggests two or three weeks' work. He then worked for a produce store and received gross wages of $3,361 which was about four weeks' work.

[37] Ms B's 2008 tax return was prepared by a different tax agent to the applicant's tax agent. It showed that Ms B claimed to be a sole parent with two dependent children.

[38] Ms H travelled with Ms B's sister and others to Charleville for four days in March 2008 and visited Ms B and the applicant and their children at the Edward Street house for about one hour. That indicates that the applicant was in Charleville by some time in March 2008.

[39] Mr P was the partner of Ms B's sister between January 2005 and June 2008 and they lived in Gatton from June 2005. Mr P asserted that the applicant and Ms B "were always living together" in the time that he knew them and that on occasion they would fight and the applicant would spend one or two nights at his parents. Mr P also said that he and his partner visited the applicant and Ms B three or four times per week at various addresses in Gatton. Mr P's evidence did not cover the period when Ms B was in Charleville. There was a lack of detail about Mr P's evidence. He also conceded (at Transcript 1-89) that when he saw the applicant at Ms B's home in Gatton, he did not know whether the applicant was living there or at his parents' place.

[40] The respondent's brother, Mr H, was living in Charleville near the Edward Street house. He has a child of a similar age to Ms B's elder child. Mr H would take his child around to play with Ms B's children most afternoons. He saw the applicant on no more than half a dozen times at the Edward Street house.

[41] Mr SMC met Ms B of Charleville in early 2008 through her younger sister. He visited Ms B between 5 and 10 times at her house over a month or two. When he first visited Ms B, he asked if she were single and said that she responded that she had "split up with the kids' father" and did not want to get into another relationship. He was present on a couple of occasions when someone telephoned, Ms B told him it was the children's father, and she handed the telephone to the children to speak to the caller.

[42] The respondent's sister, Ms C, lived in Charleville and was in the habit of visiting her sister daily. When Ms B moved to Charleville in 2008, Ms C regularly saw Ms B and her children at the respondent's house, but did not see the applicant. The respondent's cousin, Ms S had a daughter who played with Ms B's elder child. Ms S visited Ms B at the Edward Street house two to three times each week, so the children could play together. Although Ms S accepted that the applicant did visit Ms B in Charleville, she recalled that he was there only for about two weeks or a bit longer. Ms S never saw the applicant at a barbecue at the respondent's place.

[43] The respondent held family barbecues in Charleville. The respondent was firm in her evidence that the applicant never attended a barbecue at her home in Charleville. The respondent conceded that the applicant cooked at a barbecue at her home in Gatton for his elder child's birthday in January 2008. The evidence against the applicant's assertion that he did attend a barbecue at the respondent's place in Charleville is overwhelming and, in view of the strained relationship he had with the respondent, even at that time, it is unlikely that he visited the respondent's home while he was in Charleville.

[44] As a result of the applicant and Ms B arguing after he had lost his job at the produce store which the applicant described as "a pretty big argument," the applicant went to

the RSL to cool down. Ms B called the police and the applicant was charged with breach of the protection order because he was living in the same residence as Ms B between 13 May and 1 June 2008. He was dealt with for that breach in the Gatton Magistrates Court in August 2008.

[45] The applicant recorded videos of a couple of events while he was in Charleville. The first event was the Reading Bug Parade that showed the applicant's children and Ms B. Ms B talked to the applicant while he was recording and asked whether he was getting good footage. Mr H's wife was shown in the video when she come up to speak to the applicant. The next footage was of the backyard at the Edward Street home and showed the children playing on the motorbike. That was followed by footage of the elder child's first cross-country. The applicant's mother visited Charleville while the applicant was living there with Ms B and took her grandchildren to the Charleville Show.

[46] The applicant had returned to Gatton by 7 July 2008 as that was the date of his application for a job at a plumbing services company which he obtained. On all the documents that he completed for the purpose of that employment, he showed his address as his parents' address and his next of kin as his father.

[47] The making of the protection order on 10 October 2007 followed by Ms B's relocation to Charleville in early January 2008 indicates that, if the applicant and Ms B had been in a de facto relationship until then, Ms B clearly intended to separate from the applicant by taking all her belongings and furniture with her and moving away. That is supported by the applicant's lack of reference to Ms B as his partner, when he set up his "MySpace" page. Ms B's relocation to Charleville was complicated by the floods which involved the applicant in assisting her to evacuate and return to Gatton for a short time, but Ms B did return to Charleville. It must have been some weeks before the applicant came out to Charleville to stay, as the various witnesses called by the respondent clearly observed Ms B's involvement with the respondent and her extended family and friends in ways that did not include the applicant. The applicant's first affidavit which suggests that there was six weeks before the applicant moved out to Charleville is consistent with the other evidence on this aspect rather than the applicant's subsequent contrary assertions. It is likely that the applicant returned to Charleville soon after being breached by the police on 1 June 2008. I find, therefore, that the applicant was in Charleville living with Ms B at the Edward Street house for about three months.

[48] Ms B returned with the children to Gatton to live in late August or early September 2008. Ms B had the offer of a full time job from her former employer. The children were enrolled in a local school. The protection order was varied in the Gatton Magistrates Court on 17 September 2008 on Ms B's application to remove the second condition. After staying at the applicant's parents' address for a few days, Ms B and the children together with the applicant moved into the house rented by her in Maitland Street. There was therefore some sort of reconciliation.

[49] The application for school enrolment of the elder child that was completed by Ms B on 6 October 2008 showed that the applicant was also residing at Maitland Street.

[50] The applicant found a post by Ms B on an internet forum dated 25 January 2009 on the subject of "my life is horrible". He exhibits a print out of the post which included statements to the effect that her "partner" drank too much, had been

unemployed for 10 weeks and had a serious mental illness, that her son needed an operation and that they had to move in six weeks. It also included the complaint "I am sick of working all the time while my partner gets to stay at home with the kids."

[51] In February 2009 Ms B and the children moved to another residence which she rented at W Road. Ms K (whose evidence was not challenged and I accept) was a friend of the respondent who saw Ms B in the supermarket carpark at Gatton around February 2009. During their conversation Ms B said she was living at W Road and that she was not living with the applicant and was enjoying living by herself with the children. Although the applicant relies on the online post by Ms B on 25 January 2009 which refers to him as her partner, the contents of that post suggest that it was an unsurprising development for Ms B to separate from the applicant when she moved to W Road.

[52] The applicant signed a form on March 2009 for the purpose of obtaining outpatient treatment at Gatton from the Toowoomba Health Service (exhibit 16). Although the applicant did not admit to providing the information to the person who filled out the form on his behalf, he signed the form which showed his current address as that of his parents. The applicant's mother conceded that she had completed the form and that she would not have put down her home address as the applicant's address, if he had been living elsewhere (Transcript 1-81), although she did suggest he might have been at her address "overnight".

[53] The applicant asserts that in August 2008 he and Ms B planned to marry in April 2009, but that the wedding was postponed because their younger child underwent surgery. The applicant's mother supports that assertion, but little was done to carry out the plan. The respondent recalled that Ms B talked about marriage to the applicant over a brief period and not later than 2005.

[54] The applicant, Ms B and the children went to the Gold Coast for a short holiday around 24 April 2009. There is a photograph of the four of them together taken at Seaworld (exhibit 20). The respondent said that Ms B had won the holiday at a charity auction.

[55] Ms B reported to the school on 8 May 2009 that she had recently separated from the applicant (exhibit 18). The applicant denied they separated at that time and suggested that the school fees were in arrears and that Ms B may have been trying to get cheaper school fees. The applicant's mother conceded that the applicant moved back to his parents' place in early May 2000, although she said it was only for two nights. The applicant also conceded that on 8 May 2009 Ms B had reported to the police that she had separated from the applicant (at Transcript 1-42). The notification by Ms B both to the school and the police that she and the applicant had recently separated is consistent with the parties having resumed living together after the separation in February 2009.

[56] There was concern at the school about the elder child's state in May 2009 following Ms B's report about her separation from the applicant. The guidance counsellor recorded a telephone conversation with Ms B on 27 May 2009 who reported that things in the household had been stressed recently with separation of the parents and with the younger child needing surgery (exhibit 18). The notes of the guidance counsellor for May 2009 support the genuineness of Ms B's contact with the school

over the effect of the separation and related events on the elder child, rather than the ulterior purpose suggested by the applicant to avoid paying school fees. Ms B reported to the guidance counsellor on 27 May 2009 that she would talk to the applicant on the weekend "to discuss setting up a schedule (eg visitation) to assist with consistency and stability for children." That is consistent with the applicant having access to the children at this time rather than living with them.

[57] On 18 June 2009 Ms B telephoned Ms Maria Bowater who is a nurse who was working in the Mental Health Unit at Toowoomba Hospital, and expressed concern about the applicant's deteriorating mental state, after he stopped taking the medication that had been prescribed for treating his schizophrenia. Ms Bowater made a note of the telephone call. After being given information by Ms B, Ms B handed the phone to the applicant who then spoke to the applicant. Ms Bowater made a written record of what the applicant told her. That included a statement "He does not live together with Sherry. He lives with his parents." The applicant denies that he made those statements to Ms Bowater. Ms Bowater could not remember the particular telephone call, but she recorded the telephone call in the same way she recorded many others. Ms Bowater was adamant that the part of the note that followed the words "Spoke to [the applicant]" recorded what she was told by the applicant. In view of the problems that the applicant was experiencing with his medication at the time of the call, I prefer the note made by Ms Bowater, rather than the applicant's evidence, as a reliable record of what the applicant said to Ms Bowater on that occasion.

[58] There were a series of photographs shown during the course of the applicant's evidence which assisted him in recalling events in which he said he was involved with Ms B and their children as a family. There was a photograph on 6 May 2009 of the children and the elder child's best friend at the W Road home. There were photographs taken at a school assembly at which the elder child received a student of the week award. There were photographs of the children dressed up for a school disco on 17 June 2009. There was a bike-a-thon on 19 June 2009 which showed the children with Ms B that was taken by the applicant. On 23 June 2009 the applicant stood out the front of the W Road home at photographed the sunset.

[59] There was another weekend away at Gold Coast for the applicant, Ms B and the children on 25 June 2009. The respondent described it as a "three-day theme park thing." There was a photograph shown during the course of the applicant's evidence of the applicant and the two children and the applicant's brother that was taken by Ms B on this outing.

[60] Ms B had taken a week off work in order to travel to Charleville on 30 June 2009 to visit her ill grandmother. The applicant organised for Ms B's car to be serviced on 29 June 2009 and spent that evening with Ms B and the children at the W Road house. He assisted Ms B to pack the car and saw them leave for the journey on which Ms B died.

[61] Ms B and the applicant did not have any joint bank accounts. The applicant asserted that he had a card that allowed him to operate Ms B's account "in case of emergencies" (at Transcript 1-15) and Ms B had a card that allowed her to operate his account. There were no bank statements produced or purchases or transactions identified which supported the applicant's assertion that he and Ms B operated each other's accounts while Ms B was alive.

[62] The respondent cannot controvert the applicant's evidence that a sexual relationship existed between the applicant and Ms B when they lived together and when the applicant stayed with Ms B.

Burial proceeding

[63] In proceeding 7292 of 2009 that was commenced on 8 July 2009 in this Court the respondent applied for orders enabling her to arrange the burial of Ms B's body at Charleville Cemetery. The applicant responded to that application and was represented by Mr McDougall of Caxton Legal Service. Although the applicant described himself as the de facto partner of Ms B in the affidavit that he swore for the purpose of that proceeding, he abandoned reliance on that allegation in the course of that proceeding after receiving advice from Mr McDougall that if he responded to the application that he was Ms B's de facto partner, he risked criminal prosecution for claiming Centrelink benefits as a single person. Instead, the applicant sought to rely on the fact that as the father of Ms B's children, he was entitled to arrange the funeral of Ms B.

[64] The application in proceeding 7292 of 2009 was heard by Douglas J on 15 July 2009. Douglas J asked Mr McDougall to confirm that the applicant did not now contend that there was a de facto relationship that subsisted at the time of Ms B's death. The following exchange occurred:

> "MR McDOUGALL: We don't rely on that as the basis for the entitlement, your Honour.
> HIS HONOUR: No, your written outline said you 'don't now seek to proceed on the basis of his entitlement as a de facto" -----
> MR McDOUGALL: No.
> HIS HONOUR: -----'and does not rely on the portions of his affidavit deposing to a de facto relationship with deceased.'
> MR McDOUGALL: That's correct, your Honour.
> HIS HONOUR: So do I conclude from that that there wasn't a de facto relationship at the time of death, although there may have been in the past?
> MR McDOUGALL: I think that is the only conclusion that we can make in the circumstances."

[65] On the basis of the material that was put before the court in relation to that application, Douglas J concluded that it was preferable that the respondent be granted the relief that she sought, so that Ms B could be buried with other members of her family in Charleville. Douglas J referred in his reasons to the fact that the applicant appeared to have been in a de facto relationship with Ms B "but which has terminated perhaps in about January this year."

[66] Mr McDougall explains and, I accept, that the applicant never altered his instructions that he was in a de facto relationship with Ms B at the time she died and that his abandonment of that ground in the proceeding before Douglas J was done solely for the purpose of not placing the applicant in jeopardy of prosecution for obtaining Centrelink benefits on an erroneous basis.

Subsequent events

[67] After the respondent obtained the grant of letters of administration, she demanded the applicant return to her all the furniture, goods and personal belongings of Ms B.

[68] The respondent also commenced a proceeding in the Federal Magistrates Court on 2 October 2009 seeking orders that the applicant's children live with her. Court orders have been made allowing the children to spend increasing periods of time with the respondent including overnight visits. Final orders were made in the Federal Magistrates Court on 16 June 2011, in the respondent's absence, ordering that the children live with the applicant and setting out a regime of weekend visits four times per year for the children with the respondent in Toowoomba and allowing the children to stay with the respondent in Charleville for parts of the school holidays.

Was the applicant the de facto partner of Ms B for the purpose of the Act?

[69] The applicant concedes that there were periods of separation during the two years that preceded the death of Ms B, but asserts that there was never any period of permanent separation, as the separations occurred to enable him to deal with the medication for his schizophrenia without affecting his ongoing relationship with Ms B. The applicant submits that the public aspects of their relationship were "clouded" by Ms B's receipt of the single parenting payment from Centrelink.

[70] The respondent submits that even if the applicant and Ms B were still in a de facto relationship two years prior to her death, that relationship had ceased permanently in early 2008 when Ms B moved to Charleville or when the parties separated in early 2009. The respondent submits that the evidence of communications between the applicant and Ms B in the two years prior to her death have to be considered in the context that Ms B was facilitating contact between the applicant and their children.

[71] The parties have made submissions by reference to each of the circumstances set out in s 32DA(2) of the *AIA*. I will set out my findings in relation to each of these circumstances to the extent that they are relevant in determining the issue in this matter.

[72] There was not a common residence for the applicant and Ms B for at least the period of six weeks when she relocated to Charleville after the floods in January 2008 and from the time they separated in early May 2009. Although there was evidence of increasing contact between the applicant and Ms B in June 2009, in the absence of evidence of reversal by Ms B of her public notification of their separation which was confirmed in the telephone call with Ms Bowater as late as 18 June 2009, I am not satisfied that the applicant has shown that the parties had resumed living together before her death. The fact that the applicant stayed overnight with the applicant and the children on 29 June 2009 is equivocal, as he was helping them prepare for the journey on 30 June 2009.

[73] Their relationship covered the period from June 2001 until 30 June 2009 with periods of separation.

[74] A sexual relationship existed throughout that period when the parties were staying in the same residence.

[75] After November 2004, the applicant and Ms B maintained separate finances. It is a relevant, though not a decisive circumstance, that their respective communications with Centrelink and the Taxation Office were on the basis that each maintained a single status.

[76] Ms B rented solely each property in which she resided after November 2004 and the applicant maintained his parents' address as his address. The applicant had the use of Ms B's household goods when he resided with her.

[77] The degree of commitment to a shared life with Ms B was affected by the applicant's medical and associated personal problems. I accept that during the two years' preceding the death of Ms B the applicant was involved in his children's activities and shared with the applicant the joys of their experiences, as shown by the photographs and videos. In view of my finding, however, that there were two periods of separation during that period of two years, the key to determining whether the applicant and Ms B remained in a de facto relationship, despite the separations, is whether the separations had the quality of permanence in the sense referred to in *S v B* at [48].

[78] The effect of a separation of parties who were in a de facto relationship must be judged objectively by the parties' conduct at the time of the separation in the context of their relationship. A subsequent reconciliation of the parties does not necessarily mean that the separation was not intended by at least one of the parties to be permanent when it occurred. A repeated pattern of separation followed by reconciliation, however, might affect how the separation should be viewed.

[79] While Ms B remained in Gatton between 2005 and October 2007, there was a pattern of conflict between the applicant and Ms B, the applicant leaving the home in which Ms B resided and staying with his parents, and then returning to live with Ms B.

[80] The move by Ms B from Gatton to Charleville in January 2008 after obtaining the protection order on 10 October 2007 broke that pattern. At the time Ms B intended that relocation to be a permanent break and communicated that to the applicant by her unequivocal actions at the time. The break lasted at least six weeks. I am satisfied that in the circumstances of the history of their relationship, it brought any de facto relationship to an end. It does not affect this conclusion that the applicant may have wanted the relationship to continue. The subsequent reconciliation did not obliterate the effect of this permanent separation.

[81] The separation that was notified in May 2009 by Ms B also broke the pattern of the earlier Gatton separations. It was publicly notified at the time it occurred and subsequently confirmed to Ms Bowater. Ms B also attempted to deal with the consequences of the separation for their children. Any de facto relationship that still subsisted by May 2009 was brought to an end by the uncompromising position taken by Ms B in May 2009 and that position did not change before her death.

[82] The applicant has failed to show that he and Ms B had lived together as a couple on a genuine domestic basis within the meaning of s 32DA(2) of the *AIA* for a continuous period of two years ending on Ms B's death.

Whether the respondent should be removed as the administrator and trustee of Ms B's estate

[83] The estate is not completely administered, as there is the getting in of a superannuation policy where the superannuation trustee is awaiting the outcome of this proceeding.

[84] The grant of letters of administration to the respondent describes her as the "Litigation Guardian" of Ms B's children and that the grant is "for the use and benefit of the said children and until they shall become adults." The applicant impugns the grant on the technical ground that it should have been made to him as the parent of the children. The respondent was prepared to take on the role of litigation guardian for her grandchildren in relation to the administration of their mother's estate and to apply for the grant. While the applicant contended that he was the de facto partner of Ms B, his interests did not coincide with those of his children in relation to the estate and it was not appropriate for him to seek the grant on behalf of his children. It does not follow from the fact that the applicant is the parent of the beneficiaries that the grant should now be revoked without cause or that the applicant should be substituted as litigation guardian.

[85] The misconduct alleged by the applicant against the respondent has been particularised as:

(a) use of estate funds to payment claim for petrol to visit the grandchildren;
(b) purchase of a block of land in Charleville;
(c) purchase of a ride on mower when the respondent had her own mowing business and her own mower.

[86] The applicant asserts that the respondent has used estate funds for her travel and related expenses in visiting the children in accordance with orders that facilitated the respondent's contact with them there were made by the Federal Magistrates Court. Exhibit 1 contains the bank statements for the estate to October 2010 and a schedule of estate expenses. Some of the petrol and motel expenses were for trips to visit the grandchildren and others were for trips made by the respondent for the purpose of this proceeding. It appears that the respondent was confused about what expense should be paid from the estate initially, because her visits to her grandchildren were court ordered. She pointed out that there were three amounts for which the estate paid where she acknowledges that she should have borne the expenses. She explains that all of the other visits to her grandchildren (which she estimates at 50) have been paid for by her.

[87] This proceeding is not for the purpose of taking an account in relation to the respondent's administration. Any expenses that have not been incurred for the administration on the estate must be reimbursed by the respondent to the estate. The respondent conveyed in the course of her evidence that she better understands her role now as administrator and has obtained advice for that purpose.

[88] In April 2010 the respondent as trustee purchased a block of land at Charleville for $48,000. She intends using the estate funds to build a house on the property to generate income. The applicant is critical of that investment and relies on monthly median house price figures for Charleville that he found on a site on the internet to assert that the purchase was made in a falling market. Those figures did not support that assertion. The respondent will need to keep the investment under review, as it may not be prudent to retain it as an investment, if it does not become income producing, unless capital accretion is assured.

[89] The respondent purchased the ride on mower for $6,600 to keep the property that she had purchased as trustee maintained. She personally attends to the maintenance of the property for which she does not charge. She proposes that when the house has been built to sell the lawnmower and pay the proceeds back to the estate. The

respondent acknowledged that she does have her own mowing business, but she does not use the estate ride on mower in that business.

[90] It seems that the applicant's complaints against the respondent have partly arisen as a result of communication problems between them. Although other trustees may not have made the same investments that the respondent has chosen to do so at this stage, the applicant's allegations do not amount to actionable misconduct.

[91] The applicant was also critical of the legal fees paid by the respondent in respect of the estate to date. This proceeding is not the forum for scrutinising fees.

[92] I am not satisfied that the applicant has shown that there are grounds for removing the respondent from her role as the administrator and trustee of Ms B's estate.

Orders

[93] It follows that the application must be dismissed.

[94] It will be necessary to receive submissions from the parties on the question of costs, before making any order in relation to the costs of the proceeding.