

SUPREME COURT OF QUEENSLAND

CITATION: *TKM v WRD* [2012] QSC 26

PARTIES: **TKM**
(applicant)
v
WRD
(respondent)

FILE NO/S: BS11527 of 2010

DIVISION: Trial Division

PROCEEDING: Civil – Miscellaneous Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 February 2012

DELIVERED AT: Brisbane

HEARING DATE: 7 and 8 November 2011

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – OTHER MATTERS – where the respondent seeks a property adjustment order pursuant to Part 19 of the *Property Law Act 1974* (Qld) – where the applicant seeks a declaration pursuant to s 317 of the *Property Law Act 1974* (Qld) that the relationship ended on or after 1 March 2009 – where the applicant contends that the Supreme Court of Queensland does not have jurisdiction to deal with the application – whether the de facto relationship ended on or after 1 March 2009

Acts Interpretation Act 1954 (Qld), s 32DA
Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008 (Cth)
Property Law Act 1974 (Qld), s 260, s 317

Davies v Richardson [2011] NSWSC 810, considered
Hibberson v George (1989) 12 Fam LR 725, considered
JJR v PH [2005] QSC 253, considered
Jonah & White (2011) 45 Fam LR 460, considered
KQ v HAE [2007] 2 Qd R 32, considered
PY v CY (2005) 34 Fam LR 245, considered
S v B [2005] 1 Qd R 537, applied

COUNSEL: P White for the applicant
J Peden for the respondent

SOLICITORS: ABA Lawyers for the applicant
Hirst & Co for the respondent

- [1] WRD and TKM were formerly in a de facto relationship (as defined in the *Property Law Act 1974 (Qld)* (“the Act”). That relationship has come to an end. WRD, in the substantive application, seeks a property adjustment order pursuant to Part 19 of the Act.
- [2] WRD contends that the relationship broke down in November 2008. TKM says that the relationship was ended by her on 30 June 2010.
- [3] The applicant, TKM, seeks a declaration pursuant to s 317 of the Act that the relationship ended on or after 1 March 2009 and that this Court does not have jurisdiction to deal with the application by WRD.
- [4] The case was argued on the basis that, for the purposes of establishing the jurisdiction of the Court, the question to be determined is whether the relationship ended on or after 1 March 2009. That was the commencement date of the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008 (Cth)*. As the law was understood at the time of the application, if the relationship did end after that date then the application for a property adjustment order would fall within the exclusive jurisdiction of the Federal Magistrates Court. Since the application was heard it has become apparent that the necessary proclamations were not made and that the relevant provisions of the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* did not commence on 1 March 2009. A proclamation has now been made under which that Act commenced operating on 11 February 2012. Announcements have been made by the Commonwealth Attorney General about retrospective legislation but nothing more has occurred at the time of this decision.
- [5] The parties have not made any submissions about the effect of the uncertainty concerning the jurisdictional question and so I have confined this decision to the issue of when the relationship came to an end.
- [6] The parties were both born in 1948; they are now 63 years of age. Both WRD and TKM were public servants and retired in or about late 2001.
- [7] WRD has three children from a prior marriage and TKM has two children from a prior marriage. There are no children from the relationship.

The relationship

- [8] The parties disagree on when the relationship started (WRD says late 2001, TKM says September 1999), but the commencement date is not of great moment for this application.

- [9] In November 2001 the parties purchased a joint property at Coorparoo and started cohabiting there. The household comprised the parties, WRD's daughter WE and TKM's daughter TS.
- [10] WRD did not get on with TS and this interfered with his relationship with TKM. Likewise, TKM had a conflictive relationship with WL, WRD's other daughter who came to live in the Coorparoo house in May 2004. WL suffered from anxiety and depression related conditions at that time.
- [11] The relationships between the parties and the child or children of their respective partners constituted a substantial part of the evidence before me. The rights and wrongs of those relationships need not be resolved at this point. It need only be said that the antipathies which developed contributed to the deterioration of the relationship between the parties.
- [12] WRD and TKM attended counselling in August 2004 and continued their relationship afterwards. The problems between WL and TS continued, as did the issues between WRD and TS, and TKM and WL.
- [13] In the period between 2004 and 2005, TS moved out of the house for about 18 months due to her strained relationships first with WRD and then with WL. She later returned in 2005.
- [14] In 2005 the parties holidayed in Bali with a friend, Mr D.
- [15] In 2006 the parties acknowledged that the presence of their children in the household was creating strains on their relationship. In 2007 they discussed the possibility of their children moving out of the household but did not reach an agreement.
- [16] The parties travelled to Europe in mid 2007, once again with Mr D.
- [17] In June to July 2008, the parties holidayed again in Bali. They also planned a holiday in Egypt for three weeks in November 2008 but, due to a dispute as to who was to care for WE, resulted in WRD paying for TS to go in his place.
- [18] In October 2008 the parties consulted solicitors due to the strains in their relationship.
- [19] TKM says at that stage their relationship "had reached a low ebb."
- [20] The parties again discussed the possibility of their children moving out of the household. In November 2008 WRD showed TKM a document (Ex MKT2) which set out an arrangement where he would move to Melbourne with WL and WE. Whilst there, he would renovate a property which he intended to give to his daughter WC. TKM would arrange for alternative accommodation for TS by the time WRD returned from Melbourne.
- [21] TKM says that they "did discuss a binding agreement but it was not a separation agreement that he was asking for. It related to what was to occur over the next two years."

- [22] The opening paragraph of the document states that “the purpose of this instrument is to establish an understanding between WRD and TKM.” The document sets out an arrangement where WRD would leave the residence and move to Melbourne on a temporary basis. The document later sets out that “these arrangements do not represent a separation, property settlement or any related rule or law but are intended to deal with current circumstances for everyone’s benefit.”
- [23] On 6 November 2008 WRD sent a letter to TKM’s solicitors. It states that “she seems also to believe that after a period apart... she would be keen to resume the relationship. However, after considering the many factors and facets of our situation, and the destructive nature of recent events, I am not of a mind to consider this a viable proposal.” WRD also concludes by stating: “I am not prepared to continue in a relationship with TKM without us entering into a binding agreement in which I can have confidence.”
- [24] WRD sent a second letter to TKM’s solicitors on 13 November 2008 stating that “the relationship between us has concluded.” TKM says that the relationship was still on foot and that it did not come to an end until she concluded it in the middle of 2010.

Relevant principles

- [25] Section 260 of the Act provides that reference to “de facto partner” for Part 19 of the Act is a reference, relevantly, to section 32DA of the *Acts Interpretation Act* 1954.
- [26] Section 32DA of the *Acts Interpretation Act* 1954 provides as follows:

“32DA Meaning of *de facto partner*

- (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.”

- [27] The determination of the existence of a de facto relationship is a matter of fact. As Murphy J said in *Jonah & White*¹:

¹ (2011) 45 Fam LR 460.

“The ultimate question is in the nature of a jurisdictional fact. In *Corporation of the City Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 148 the High Court held that “the term ‘jurisdictional fact’ (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision maker to exercise a discretion.”²

[28] The relevant approach in determining the cessation of a de facto relationship is set out in *S v B*³. At the outset, McPherson JA said:

“There is a temptation which must be resisted in cases like this to act or apply, some kind of presumption or inference of continuance by assuming that, if the relevant relationship is shown to have existed at a particular date, it continued thereafter.”⁴

[29] Dutney J (with whom McPherson and William JJA agreed) applied the principles stated in *Hibberson v George*⁵ and said:

“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.”⁶

[30] Dutney J emphasised that the onus of proof falls upon the party seeking to prove the continuation of the relationship:

“the party asserting the continuing relationship must prove the positive aspects of the relationship rather than the party asserting separation being required to prove the negatives.”⁷

[31] In *JJR v PH*⁸ Byrne J underlined the variations of de facto relationships in his remark that the applicant’s attitude “confuses an unsatisfying, often unhappy, de facto relationship with the absence of one.”⁹

[32] In *PY v CY* (2005) 34 Fam LR 245 Jerrard JA said that indicia such as the lack of intermingling of finances or the fact that the parties were not sharing one residence should not be isolated or divorced from the context in which they have been placed. Jerrard JA concluded that “the appellant’s argument accordingly gives too little

² At [39].

³ [2005] 1 Qd R 537.

⁴ At [2].

⁵ (1989) 12 Fam LR 725 at 739-740.

⁶ *S v B* [2005] 1 Qd R 537 at [48].

⁷ *Ibid* at [50].

⁸ [2005] QSC 253.

⁹ At [29].

weight to the sense and expectation of a shared life or lives, which is a significant part of “living together”, particularly which required by other circumstances to interrupt cohabitation.”¹⁰

- [33] In the same case, de Jersey CJ noted that “there is even statutory recognition that cohabitation in a “common residence” while plainly relevant and often significant, is not necessarily essential one way or the other.”¹¹
- [34] In *KQ v HAE*¹² the Court of Appeal said:

“It can be seen that the legislation does not provide a precise test for the existence of a de facto relationship. None of the matters listed in s 32DA(2) of the *Acts Interpretation Act* is necessarily of decisive significance. Nevertheless, to the extent that those matters are identified as relevant considerations, the ultimate issue to which they are directed 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.”¹³

- [35] While the criteria in s 32DA(2) of the *Acts Interpretation Act* 1954 (Qld) are not exclusive, they provide a useful set of headings under which the relationship can be examined.

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

- [36] The parties ceased to cohabit when WRD moved to Melbourne on 3 December 2008. WRD moved to Melbourne with his daughters WL and WE and moved into his property.
- [37] In weighing the importance of this factor, it is important to look at the circumstances under which the parties ceased to cohabit. In *PY v CY*, de Jersey CJ observed that:

“the respondent had moved from Rockhampton, not to leave the appellant, but because she felt constrained to look after her elderly parents. And substantial, regular, intimate and other contact continued thereafter, embracing their mutual interest in matters personal, property and financial.”¹⁴

- [38] WRD’s move to Melbourne was motivated by tensions in the house, principally between WL and TS, TKM and WL and WRD and TS. This can be seen in the discussion about the arrangement to move, and the final arrangements for the Egypt trip.
- [39] On TKM’s evidence WRD’s move to Melbourne was in accordance with a temporary agreement the parties had reached. TKM says she and WRD discussed a

¹⁰ At [46].

¹¹ At [22].

¹² [2007] 2 Qd R 32.

¹³ At [16].

¹⁴ At [19].

binding agreement which related to what was to occur for the next two years. TKM says it was not a separation agreement.

- [40] The document in question sets out that “the purpose of this Instrument is to establish an understanding between WRD and TKM”. It later says that “these arrangements do not represent a separation under any rule or law relating to marriage, de facto relationship, separation, property settlement or any related rule or law but are intended to deal with current circumstances for everyone’s benefit.” There was evidence that it was created by WRD and that he only showed it to TKM very briefly. However, the document is only evidence of the state of the relationship if it can be said to accurately represent the views of both WRD and TKM. I do not accept that it did reflect the true state of the relationship or the basis upon which WRD moved to Melbourne.
- [41] At the time when WRD moved to Melbourne, TKM went on a trip to Egypt which she had originally planned with WRD. TKM says that she and WRD had agreed that TS would look after WE while they were in Egypt; however, WL objected to this arrangement. TKM says WL wanted to be the carer despite her working full time. WRD decided not to go on the trip to Egypt as he could not leave due to the conflict over who would care for WE. She says that these arguments went on for three or four weeks at a time and that she and WRD were close to breaking up. TKM says that WRD was upset about moving to Melbourne but could not find any other way of solving the problem.
- [42] In November WRD sent a letter to TKM’s lawyers saying he was not prepared to continue in a relationship with TKM without entering into a binding agreement. In his letter dated 13 November 2008 he says the relationship between them was concluded.
- [43] On 18 November TKM’s lawyers sent a letter to WRD advising that TKM was not seeking a separation but instead wanted to deal with the situation with the temporary arrangement previously discussed. This was expressed as a temporary arrangement with the suggestion that the relationship could be reconsidered after certain family issues had been dealt with.
- [44] In December WRD replied to TKM’s lawyers, reiterating his desire for a separation. He expressed his disagreement with the idea of the relationship resuming in the future and said that the idea of the relationship “being “reconsidered” carries with it the idea that for the time being at least the relationship is defunct. Let this reality be properly taken account of in arrangements agreed between us.”
- [45] WRD’s evidence was to the effect that the move to Melbourne was not because of the temporary agreement but because he had decided to move on with his life in a different direction. Apart from matters concerning his change of address referred to below, he also registered to vote at his new address, and entered into two year contracts with Optus and an electricity provider for his new address. In his first tax return after October 2008 he described himself as not having a spouse. That is consistent with his other actions and demonstrates that there was no cohabitation after October 2008.

(b) the length of their relationship;

- [46] The parties had been in a de facto relationship for about seven years. A court should be slow to infer that a relationship of this duration might end in a single instant¹⁵ but should not presume or infer continuance by the length of the relationship alone.

(c) whether or not a sexual relationship exists or existed;

- [47] The parties had some sexual relations after November 2008. Whereas WRD accepts they had sexual relations whilst on holiday in Bali in September 2009, TKM argues they had sexual relations on each of the eight occasions they saw each other between December 2008 and June 2010. I do not accept that. While WRD did stay at the Coorparoo house on his trips to Brisbane that was because, as he put it, he was paying for the house. The photographs taken by TKM of WRD in bed during one of those trips are redolent of evidence-making on her behalf.

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

- [48] After November 2008 the parties were financially independent of each other apart from WRD continuing to pay for a small number of things. This was mostly, I find, because it was more convenient to do that than to go through the process of severing financial commitments.

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

- [49] The Coorparoo property was purchased in 2001 and was held by the parties as tenants in common. Nothing of any great substance was purchased after November 2008.

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

- [50] On TKM's best case there was an option being kept open to recommence cohabitation in several years' time, if and when WRD moved back to Queensland. But WRD's actions are consistent with a permanent move to Victoria; for example, he redirected his mail, he changed his address with banks and other institutions, he obtained a Victorian driver's licence, and he registered his vehicle in that State. In March 2010 WRD did not inform TKM about his impending heart operation and rejected any proposal by her that she come to Melbourne to care for him.
- [51] In February and March 2009 a child of TKM and a child of WRD had weddings. The absence of any congratulatory message by either party is, notwithstanding TKM's rather strained explanation, consistent with the case put by WRD.
- [52] WRD entered into a new relationship with a woman in Melbourne in February 2010.

(g) the care and support of children;

- [53] There were no children from the relationship.

¹⁵ *Davies v Richardson* [2011] NSWSC 810.

The parties were not engaged to any significant extent in looking after each other's children.

(h) the performance of household tasks;

- [54] WRD engaged in house repair work to the Coorparoo property in June/July 2009. WRD has a half ownership of the property so it is understandable that he would want to undertake this task.
- [55] There is evidence of sharing of household work – the parties shared the responsibility of cleaning the home and doing the laundry. WRD was responsible for gardening and maintenance, while TKM cooked most meals for the family. But this occurred only during the period up to WRD leaving for Melbourne.

(i) the reputation and public aspects of their relationship

- [56] TKM points to the instances such as the dinner parties and the meeting with friends at Buderim where there were public representations of the parties as still being in a relationship. There was evidence about the parties attending dinners and a wedding at which other people formed a view that they were still in a relationship. But that evidence, and the conduct of the parties, was equivocal. The assumptions made by third parties were based on a limited exposure to the nature of the parties' relationship.

Conclusion

- [57] After consideration of the matters set out above and the other issues advanced by the parties it is, I find, clear that WRD had decided that the relationship was over at some time before he moved to Melbourne. TKM did not accept that, but that is not the test. WRD wanted the relationship to end and he acted upon that. That is sufficient to demonstrate that the de facto relationship came to an end in about November 2008 and before 1 March 2009.
- [58] The application by TKM is dismissed.