

SUPREME COURT OF QUEENSLAND

CITATION: *LAB v AWH* [2009] QSC 310

PARTIES: ***LAB***
(applicant)
v
AWH
(respondent)

FILE NO: BS 1535 of 2008

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 29 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 13-15 July 2009

JUDGE: McMurdo J

ORDER: **It is declared that between December 1999 and July 2007 the applicant and respondent were in a de facto relationship for the purposes of Part 19 of the *Property Law Act 1974* (Qld).**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – RELATIONSHIP – where the parties had shared a common residence for over seven years – where the parties had shared a sexual relationship – where one party performed the housework and improved the house they shared – where the parties travelled and entertained together – where one party had made substantial provision for the other in his will – where the parties had joint medical insurance – where the parties held no property jointly – whether the parties were in a relationship for the purposes of pt 19 of the *Property Law Act 1974* (Qld)

Acts Interpretation Act 1954 (Qld), s 32DA
Property Law Act 1974 (Qld), s 261

FO v HAF [2007] 2 Qd R 138, applied
KQ v HAE [2007] 2 QD R 32, applied
Thompson v Department of Social Welfare [1994] 2 NZLR 369, cited

COUNSEL: R M Galloway for the applicant
A P J Collins for the respondent

SOLICITORS: DK Law for the applicant
Fitz-Walker Lawyers for the respondent

- [1] The question is whether these two people were in a de facto relationship, as the applicant alleges and the respondent denies. This question has been ordered to be tried separately from the balance of the proceedings, in which the applicant seeks relief under pt 19 of the *Property Law Act 1974* (Qld) (“the Act”).
- [2] Section 261 of the Act provides that a de facto relationship is the relationship between de facto partners. The term de facto partner is defined by s 32DA of the *Acts Interpretation Act 1954* (Qld) as “1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each or related by family.” Section 32DA(2) provides that in deciding whether two persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account including, relevantly for the present case, the following:
- “(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) ...
 - (h) the performance of household tasks;
 - (i) the reputation and public aspects of their relationship.”

No finding in relation to any circumstance is necessary for a relationship to be established.¹ Two persons are not to be regarded as living together as de facto partners only because they have a common residence.²

- [3] In *KQ v HAE*,³ the Court of Appeal held that a de facto relationship will not be established for the purposes of Part 19 “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’”.⁴ That was also the unanimous view of the Court of Appeal in *FO v HAF*.⁵
- [4] The applicant was born in 1939 and the respondent in 1938. They met in 1999, when she responded to an advertisement he had placed in a Gold Coast newspaper, which read something like “Tall company director looking to meet someone”. The applicant had recently separated from her husband of 39 years. The respondent had

¹ Section 32DA(3).

² Section 32DA(4).

³ [2007] 2 Qd R 32 (McMurdo P, Keane and Holmes JJA).

⁴ [2007] 2 Qd R 32 at 37-38 citing *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 at 374.

⁵ [2007] 2 Qd R 138.

recently ended his relationship with a woman I will call "JW". That was undoubtedly a de facto relationship and it ended badly, resulting in the present respondent bringing proceedings against JW in this Court which were determined in 2002. The respondent and JW had purchased what was intended to be their matrimonial home at Tallebudgera. JW was ordered to pay about \$165,000 and to deliver up an engagement ring to the present respondent and it was declared that he and JW held the Tallebudgera house in the proportions of 60 per cent and 40 per cent respectively. Subsequently he acquired JW's interest and became the sole owner of this house until it was sold in 2005. The applicant and the respondent then moved to a house on the Isle of Capri. Again this was in his name alone.

- [5] Prior to his relationship with JW, the respondent appears to have had several unsuccessful relationships including two marriages, from which he has adult children. The respondent is a co-owner of a business which he had founded before the commencement of his relationship with the applicant and which at all times was conducted from premises in Brisbane.
- [6] In 1999 the applicant was working as a part-time sales assistant, working approximately 30 hours per week. She had about \$18,000 in savings, a car, some furniture and a small amount invested in superannuation. She lived in a rented apartment at the Gold Coast. She had adult children who did not live with her.
- [7] A sexual relationship developed very soon after the parties met. He began to stay at her apartment. When her lease expired in early 2000, she moved to his house at Tallebudgera. According to the respondent's affidavit, this was simply to assist her financially and the arrangement was that she would move in as his unpaid housekeeper and gardener. According to the applicant, the respondent said that it was silly for her to continue to pay rent and that they should live together. It is common ground that at this time there was the sexual relationship as there had been almost from the outset. I am satisfied that she moved to his house essentially because of the romantic and sexual relationship which had developed, and not, as he claimed at least in his affidavit, so that she could have somewhere to live and so that she could act as a housekeeper.
- [8] For more than a year after she moved to Tallebudgera, the applicant continued to work as she had before they met. In May 2001 she gave up work and successfully applied for an age pension. That application required her to disclose whether she was married or had a partner. She accurately disclosed her divorce, which had occurred in July 2000. But she represented that she had no partner. She says that this was untrue because she was in a de facto relationship with the respondent. She has since said that to Centrelink. The respondent was aware that she was making this application. Consistently with his case, he says that there was nothing untrue in what she had represented in applying for the pension. Until May 2001, her income was of the order of \$500 to \$650 net per week. After she ceased work, her income, (from the pension) was about \$400 per fortnight, and it was increased by indexation in the following years. She received a payout of her superannuation of about \$9,000 in February 2003. She inherited about \$54,000 in August 2005 and at about the same time, she received \$25,000 as a property settlement from her marriage. I accept her evidence that the money from the property settlement was lent to her son. Some of that money was repaid. It is common ground that her inheritance was lent to the company which conducted the business in which the respondent worked and of which he was, by then, a one-half owner.

- [9] There was no common bank account held by the parties, but she received financial support from him in several ways. The respondent paid the applicant usually about \$150 per week for groceries and other household needs, although he also did some of the grocery shopping. She had no housing expenses. She also had the use of a new car, which cost about \$30,000, which belonged to his company. In turn he used the car that she owned and brought to Tallebudgera in his almost daily commute to his business in Brisbane. She used the company's car on a few occasions to deliver some items on the Gold Coast for the company. But on no view was she doing any substantial work for the company. The company's car was effectively his to drive and the arrangement between the applicant and the respondent was that, for the most part, it was the applicant who would drive it. That was a substantial benefit which he provided to her, and his use of her car on effectively a daily basis is also a significant indication that the nature of their relationship was something different from that of a housekeeper and client.
- [10] She did much work in the garden at Tallebudgera and purchased landscaping supplies and other relatively small items for the house. Very often she was not reimbursed for these outlays and apparently did not ask to be. I have not totalled the invoices and other records of these outlays but counsel for the respondent conceded that they would be of the order of thousands of dollars over the years. Additionally, she did more of the housework. She also developed an interest in golf and played several times a week.
- [11] When she moved to Tallebudgera, neither party had private medical insurance. Subsequently, they became insured as a "family". He paid the premiums.
- [12] On several days a week, he would commute between Tallebudgera and Brisbane, leaving before 7 am and returning at about 7 pm or perhaps later. At least often they would dine together. On some nights he would stay in Brisbane, either at an apartment he owned in North Quay or in residential accommodation attached to his business premises. Sometimes he would work on Saturday but he would spend Sunday at Tallebudgera.
- [13] They often went out to dinner together and invariably he paid. I have the impression that they did not have a busy social life together, in the sense of frequently entertaining or being entertained manifestly as a couple. But there were occurrences of this kind from time to time. They each had their own friends whom one would see without the other being present, such as her friends at the golf club. Much of his social life occurred without the applicant's involvement. There is evidence that in those circumstances, he was happy to be regarded as a single man, rather than being in a de facto relationship.
- [14] Unknown to the applicant, the respondent had at least one sexual relationship with a woman in Brisbane. But the applicant became suspicious of him close to the end of their relationship in mid 2007 and she says that her suspicions were confirmed when, shortly before he left for China on a business trip, she noticed in his suitcase several packets of condoms. When cross-examined in these proceedings, the respondent said that he took these items to China as gifts for a business associate because, as he put it, "Chinese pharmaceuticals are known to be either fake or very inferior". I reject that as evidence of why he had packed these items. It is inconsistent with evidence from the respondent's business partner that the respondent was making that visit to China not only for business but "to see how

he'd go with the girls". The falsity of the evidence affects his credibility, but otherwise it is immaterial.

- [15] There was a contest in this hearing as to the existence and nature of their sexual relationship. The applicant claimed that usually they had intercourse several times a night. The respondent swore an affidavit in which he said: "While [the applicant] had sex initially, this stopped quite early into our friendship". In the same affidavit, the respondent also said that at Tallebudgera "we slept together a few times at first but this stopped soon afterwards and our friendship was virtually sex-free after that." But his oral evidence was somewhat different. It was that at first there was sexual contact between them about twice a week but that not long after she moved to Tallebudgera, there was sexual contact every four to six weeks and this remained the case until July 2007. Further, he agreed that on their many trips together overseas, they would stay in the same room and "occasionally" there would be sexual contact. In cross-examination he agreed that throughout the years they lived together, there was a sexual relationship between them which at one point he described as "more friendship than romantic" before conceding that "there was a romantic attachment" between them. The applicant had no other sexual partners. Although he did, it is significant that he did not disclose this to her because, I infer, he knew that she would have considered this to be inconsistent with the nature of their relationship. Ultimately, I am not persuaded that their sexual relationship was as active as the applicant claims. But I find that there was sexual activity at least to the extent that the respondent was prepared to concede in his oral evidence. The fact that he claimed otherwise in his affidavit evidence reflects upon his credit.
- [16] There was also an issue about a ring. I mentioned that the respondent obtained an order against JW for the return of her engagement ring. He kept it at the house until the applicant used it to have a ring made for her own use. She said that this was a gift from him. He said that she took it without his concurrence. I am unable to resolve that contest. But assuming his version is correct, nevertheless she felt confident enough to wear the remade ring when this would have been obvious to him. If anything, there is, even from his version, an indication of a relationship as she alleges.
- [17] In 2005 they moved to the Isle of Capri at the Gold Coast. Together they had inspected this house when it was for sale but it was purchased in his name alone and solely with his funds.
- [18] Their relationship ended in July 2007 on the occasion of that visit to China. On his return a few weeks later, he found himself locked out of the house and his clothes packed in a suitcase.
- [19] Shortly before that visit to China, he made a new will, which provided for a gift of \$400,000 to her upon the condition that she not make a claim against his estate, together with a 20 per cent share of his residuary estate. She appears to have been the principal beneficiary under that will. He says that he was concerned that if he died, she would have nowhere to live if he did not make provision for her by this will. I accept that evidence, which of itself neither proves nor disproves the existence of a de facto relationship. But it is an indication of his recognition of her financial dependence upon him. Absent the use of his houses, his company's car, some weekly allowance for housekeeping and many other benefits such as dining

out and travelling overseas (all at his expense), her life as a pensioner would have been much different.

- [20] This hearing extended over three days. Several witnesses were called by each side on matters such as whether the applicant and the respondent appeared to be sharing the same bedroom and whether they acted in public as a “couple”. As to that last matter, to a substantial extent I accept that they did so because it is supported by other evidence, as well as his own evidence that, for example, they travelled together, dined out together and that they had a “romantic” relationship although, as already discussed, each also had a social life in which the other did not participate. As to whether they shared a bedroom, I am unable to reach a conclusion. The question became relatively unimportant once he agreed, in his oral evidence, that they had regular sexual contact and always shared a room in their extensive travels.
- [21] I am left with the impression that they may have had different perspectives of their relationship. Undoubtedly she believed that they were living together in all respects as effectively a married couple. He may well believe that he had stopped short of a relationship of the kind he had previously experienced with JW in that he held no property jointly with the applicant and had not become engaged to marry her. However, in my conclusion, he did not explain to the applicant that they were not a de facto couple, and I reject his claims that he did. Had he done so, she would not have responded as she did in 2007 to evidence of his having other sexual partners. That response was from an apprehension that she would lose the substantial financial support which she had enjoyed during their seven years of living together and which she believed would continue consistently with a happy and stable relationship.
- [22] As was said by Keane JA in *FO v HAF*, “[t]he circumstances of human affairs are so various that the courts should refrain from attempts to define more precisely than the legislature the kind of relationship regulated by pt 19 of the PLA”.⁶ The circumstances of this relationship do not include those which are often, but not always, present in de facto relationships, such as the pooling of funds within a joint account or the co-ownership of property. But overall the circumstances of this relationship, in my conclusion, well prove that they were de facto partners. They lived together, running their household as one for more than seven years. She performed most of the housework and set about improving the garden and the house at Tallebudgera. They extensively travelled together. They went out as a couple and throughout had a sexual relationship. He provided very substantial financial support and felt a moral obligation towards her as his will, made in 2007, demonstrated. They effected medical insurance as a family. In short, they sufficiently merged their lives such that they were, for all practical purposes, living together as a married couple. Not all married partners hold their property jointly or have no social life absent the other.
- [23] Accordingly, the question should be answered by a declaration that between December 1999 and July 2007 the applicant and respondent were in a de facto relationship for the purposes of Part 19 of the *Property Law Act 1974* (Qld). I will hear the parties as to other orders, including costs.

⁶ [2007] 2 Qd R 138 at 149.