SUPREME COURT OF QUEENSLAND

CITATION:	*Collett & Anor v Knox & Anor* [2010] QSC 132
PARTIES:	**Frederick James Collett** First Applicant **And** **Karen Elizabeth Pountney** Second Applicant **And** **John George Knox** **And** **Margaret Evelyn Knox** as executors of the estate of Gladys Ellen Knox (deceased) Respondents
FILE NO/S:	S43/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	23 April 2010
DELIVERED AT:	Mackay
HEARING DATE:	16-18 February 2010
FINAL SUBMISSIONS:	10 March 2010
JUDGE:	McMeekin J
ORDER:	1. **I direct the respondents to file on or before 4pm on 7 May 2010 such further affidavits and submissions as they might be advised addressing the issues of what expenses the respondents can reasonably require be paid out of the estate; what costs, if any, the parties should be entitled to out of the estate; and the appropriate form of orders that are required to give effect to these reasons.** 2. **I direct the applicants to file such further affidavits and submissions as they might be**

advised in response to the respondents' material on or before 4 pm on 14 May 2010.

3. Liberty to apply on two days notice.

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRINCIPLES UPON WHICH RELIEF GRANTED – APPLICATION OF SURVIVING PARTNER – APPLICATION OF WIDOWER OR MALE PARTNER – where applicant's status as the de facto partner of the deceased is disputed – where cohabitation and other indicia of a de facto relationship between the deceased and the applicant persisted for over two decades – whether the applicant can claim a life interest in the property he shared with the deceased

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRINCIPLES UPON WHICH RELIEF GRANTED – APPLICATION OF CHILDREN – ADULT DAUGHTERS – where estrangement in the deceased's latter years – whether disentitling conduct – whether adequate and proper provision made from the estate

SUCCESSION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – OTHER CASES – where applicants sought further provision – where there is a greater obligation on executors to consider the impact of costs of litigation on an estate – whether the executors should receive their costs out of the estate

Acts Interpretation Act 1954 (Qld), s 32DA

Succession Act 1981 (Qld), s 5AA, s 41(1), 41(2)(c)

Cumming v Sands [2001] NSWSC 507

Dijkhuijs (Formerly Coney) v Barclay (1988) 13 NSWLR 639

Ford v Simes [2009] NSWCA 351

Hughes v National Trustees, Executors & Agency Co of Australasia Ltd (1979) 143 CLR 134

Jackson v Riley (unreported) – 3701/1987 – 24 February 1989 – BC8902497

Lathwell as Executrix of the Estate of Gilbert Thorley Lathwell (Dec) v Lathwell [2008] WASCA 256

Luciano v Rosenblum (1985) NSWLR 65

McCosker v McCosker (1957) 97 CLR 566

Nowell v Palmer (1993) 32 NSWLR 574

Re Beddoe (1893) 1 Ch 547

Re Coventry [1979] 3 All ER 815

Re Crowley [1949] St R Qd 189

Re Simpson [1950] Ch 38

S v B [2004] QCA 449

Singer v Berghouse (1994) 181 CLR 201

Underwood & Anor v Sheppard [2010] QCA 76

Vigolo v Bostin (2005) 221 CLR 191

COUNSEL: P. Cullinane for the first applicant

M. Steele for the second applicant

G. Crow for the respondents

SOLICITORS: SB Wright Wright & Condie for the first applicant

Slater & Gordon for the second applicant

Macrossan & Amiet for the respondents

[1] **McMeekin J:** This is an application made pursuant to s 41 of the *Succession Act* 1981 (Qld) ("the Act") by Frederick James Collett and Karen Elizabeth Pountney for further and better provision out of the estate of Gladys Ellen Knox (deceased).

[2] Mr Collett claims as de facto spouse of the deceased. By the time he came to give his evidence Mr Collett was wheelchair-bound and partially blind and deaf. He is aged 100 years having been born on 25 August 1909.

[3] Mrs Karen Pountney is the deceased's only daughter and one of her two surviving natural children. She is aged 51years having been born on 21 October 1958. She has some health problems which I detail below.

[4] The respondents are the executors of the estate of the deceased pursuant to the terms of her last will dated 1 October 2007. John George Knox is the second, and now the only surviving, natural son of the deceased.[1] Margaret Evelyn Knox is his wife.

The Terms of the Deceased's Will

[5] The deceased bequeathed a property located at 32 Mount Ossa-Seaforth Road, via Mackay, in which she held the freehold title, to the respondents. She left a legacy of $20,000 to her son Paul James Knox who died a little over two months after her on 26 March 2008. She left a motor vehicle and caravan to Mr Collett. The rest and residue of the estate was left to the respondent John George Knox.

[6] No provision was made for the applicant Karen Pountney.

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[1] The deceased was survived by an adopted son who has not played any part in the proceedings and seeks no entitlement.

The Issues

[7] The central issue litigated was whether Mr Collett was the de facto partner of the deceased within the meaning of the Act. Mr Collett contended that they had lived as husband and wife for a period approaching 34 years commencing from a time shortly after the deceased moved to Marian, near Mackay in 1974, up to the time of her death, on 8 January 2008, at the age of 88 years.[2]

[8] While there is no doubt that Mr Collett and the deceased shared a residence at Mt Ossa for two decades or more, the respondents contend that Mr Collett was merely a boarder in the deceased's home.

[9] Mr Collett seeks that he be given a life interest in the Mt Ossa property.

[10] A related issue litigated concerned the relationship between Karen Pountney and the deceased. It is common ground that Mrs Pountney and the deceased were on good, and even close, terms until a dispute arose over Mrs Pountney's father's estate. Mrs Pountney's father was James Robert Knox. He died on 5 November 2004 at the age of 83 years. He died without leaving a will. Mrs Pountney made application for further and better provision out of her father's estate. In those proceedings she filed an affidavit in which she claimed that her mother was living in a de facto relationship with Mr Collett. The deceased filed an affidavit denying the relationship. The mother and daughter fell out over the dispute and did not speak again.

[11] Mrs Pountney seeks that the provisions of the will be varied by allowing a life interest in the Mt Ossa property to Mr Collett, a legacy of $10,000 to her now deceased brother Paul, and an equal division of the residuary estate between she and the respondents.

The Estate

[12] The estate is a modest one. The total gross assets of the estate, as at the date of trial, were estimated to be between $191,180 and $231,180 consisting of $1,180 in cash and the balance being attributed to the Mount Ossa property where the deceased and Mr Collett used reside, and where Mr Collett continues to reside. That excludes the specific gifts to Mr Collett which seem to be of limited value.

[13] In an affidavit sworn on 7 August 2008, at the commencement of the proceedings, Mr Knox set out the assets of the estate as including a little over $52,000 in cash. That cash sum has been reduced to $1,180 principally through the expenditure by the respondents on legal costs and outlays in this litigation in the sum of $47,177. Thus the gross assets that the deceased had available to dispose were valued at around $240,000 to $280,000.

[14] The respondents claim that certain liabilities must be brought into account in order to assess the net assets of the estate. In addition to the monies already said to have been expended those liabilities include the bequest of $20,000 to Paul Knox, rates on the Mount Ossa property of $600 to $1200, further legal and accountancy fees to finalise the estate of between $1,320 and $2,200, an allowance for executors' commission estimated at $5,500, $8,000 in respect of costs to be incurred in the

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[2] Deceased born 23 October 1919.

disposal of the Mount Ossa property, and finally further legal costs associated with the hearing of this application in the sum of $25,000.

Mr Collett's Asset Position

[15] Mr Collett is in receipt of a veteran's pension in the sum of approximately $1,800 per fortnight.

[16] In April of 2008 he swore that he had approximately $8,000 on deposit in bank accounts.

[17] Because of his disabilities Mr Collett is assisted by one Fred Doss. Mr Doss has advised that as at the 12th February 2010 Mr Collett had $6,152.56 in bank accounts.

[18] Mr Collett is the registered permitee of a 5.23 hectare block of land at Mt Ossa. There are numerous conditions surrounding his use of that block.[3] He is not permitted to sublet, dispose or transfer the permit. The permit is determinable at any time by the relevant Minister, without compensation, and determines on Mr Collett's death. Mr Doss lives on a donga on the property and acts as a caretaker. It is not suitable as accommodation for Mr Collett.

Mrs Pountney's Financial Position and Health

[19] Mrs Pountney has a limited earning capacity. In the 2008 year her income tax assessment notice shows a taxable income of $3,807. In the 2009 year she says that she earned about $400. In an affidavit filed in February 2010 Mrs Pountney deposed that her total earnings in 2009/2010 were approximately $6,500 after tax. She had worked for about 2 months in that financial year as a machinist but had resigned her employment due to the onset of pain in her lower back and in her hands.

[20] Mrs Pountney finds that when she is seated for any length of time she suffers pain in her back, has intermittent pain and general weakness in both of her hands, right worse than left, and has difficulty breathing. She has been advised that she has a spur on her spine, has received a provisional diagnosis of carpel tunnel syndrome, and advised that she has emphysema.

[21] Mrs Pountney's husband is the registered proprietor of certain properties. The implication from Mrs Pountney's affidavits is that she is entitled to a beneficial interest in those properties. In her affidavit sworn 3 July 2008 Mrs Pountney referred to a property at Keysborough, the family home, purchased at an unidentified time for the sum of $82,000 which, by the time of the affidavit, was unencumbered. Mrs Pountney estimated its value at $350,000 at the time of trial.

[22] Mrs Pountney's husband owns 2 unit properties, one located at Noble Park in the state of Victoria and the other at Dandenong in the state of Victoria. As at July 2008 Mrs Pountney assessed their values at approximately $145,000 each. The units were encumbered by mortgages of approximately $50,000 and $70,000 respectively.

[3] See Ex 18

[23] Mrs Pountney received the sum of $100,000 from her deceased father's estate and after legal expenses received in the hand $64,000. This was applied to the purchase of a house at Andleon Way, Springvale in the state of Victoria in her husband's name. As at June 2008 Mrs Pountney deposed that the house was worth approximately $260,000. She said that the mortgage then encumbering the property was approximately $237,000. A real estate agent appraised the value of that property, as at February 2010, at between $300,000 and $320,000. Mrs Pountney said that the mortgage, at the time of trial, was about $260,000.

[24] She deposed to having savings and shares of about $19,360 in July 2008. Those savings have now been substantially depleted.

[25] In summary, as at the date of death,[4] Mrs Pountney and her husband owned their home unencumbered, had the savings I have mentioned, and the three properties that I have discussed valued at between $518,000 and $555,000 with mortgage encumbrances totalling approximately $355,000 – a net equity of $163,000 to $200,000. By the time of trial their net equity in these properties had increased, principally through inflation of the property values, to approximately $258,000 to $288,000. The mortgage payments exceed the rental income – presently by about $300 per month.

[26] They have two cars of an estimated value of $18,500.

[27] Mrs Pountney has a small entitlement to superannuation of about $2,000 and her husband an entitlement of about $30,000. There are no other significant savings. Mrs Pountney has credit card debts totalling approximately $27,700 and, with her husband, other debts, excluding the mortgage debts I have discussed, totalling about $40,000.

[28] Mrs Pountney has two children, a son Alan David born 25 March 1981 and a daughter Lisa Rose born 13 April 1984. As at July 2008 the children were still living with their parents and paying board in the sum of $300 per month each.

[29] Mrs Pountney's husband, David, had a net income after tax, in the year ended 30 June 2009 of $42,650 approximately or $820 per week. He works as a toolmaker. The household expenses deposed to in July 2008 equate to approximately $914 per week.

Financial position of the respondents

[30] Mr John Knox retired about five years ago when aged 55 years. He had previously worked for the Victorian railways for 38 years before being retrenched.

[31] Mrs Margaret Knox ceased working at age 52 years. She was born on 13 August 1950 and is now aged 59 years. They have three children, all now adults and independent of them. They deposed to having assets consisting of a two bedroom house in Melbourne and a vacant block of land at Mount Ossa, near Mackay. The home in Melbourne is their principal place of residence. Mr Knox estimates the value at $400,000. The vacant block of land at Mount Ossa was transferred by the deceased to Mr John Knox in her lifetime. The tenure was then State leasehold title.

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4 The relevant date for the determination of the asset positions of the applicants: *Blore v Lang* (1960) 104 CLR 124 at 128.

Mr Knox paid to freehold the title. He estimates that the value of the land was some $3,000 at the time of transfer and is now about $55,000.

[32] Mr and Mrs Knox have some $39,000 in savings in a bank account. They receive a pension from Mr Knox's superannuation fund of approximately $673 per fortnight.

The Law

[33] The applicants' entitlement to claim further provision from the deceased's estate is governed by s 41(1) of the *Succession Act* 1981 (Qld) ("the Act)") which provides:

> "If any person (the *deceased person*) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant."

[34] There is no contest about Mrs Pountney's eligibility as an applicant. To bring himself within s 41(1) of the Act Mr Collett must establish that he was the deceased's "spouse" as defined. Two provisions are relevant.

[35] Section 5AA of the Act provides:

> **"5AA Who is a person's *spouse***
>
> (1) Generally, a person's *spouse* is the person's—
>
> (a) husband or wife; or
>
> (b) de facto partner, as defined in the *Acts Interpretation Act* 1954 (the *AIA*), section 32DA.
>
> (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
>
> (c) for part 4, the person was—
>
> (i) a person mentioned in paragraph (a) or (b); or
>
> (ii) the deceased's dependant former husband or wife.
>
> (3) Subsection (2) applies—

(a) despite the AIA, section 32DA(6) and section 36, definition *spouse*; and

(b) whether the deceased died testate or intestate."

[36] The focus in this case is on s 5AA(2)(b)(ii).

[37] The term "de facto partner" is defined in s 32DA of the *Acts Interpretation Act* 1954 (Qld) in the following terms:

> "(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 two persons are living together as a couple on a genuine domestic basis.
>
> (4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.
>
> (5) For subsection (1) –
>
> (a) the gender of the persons is not relevant;

> (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…"[5]

[38] If Mr Collett can bring himself within this expanded definition of "spouse" then it is necessary to apply, to both applications, the two stage process described in *Singer v Berghouse* (1994) 181 CLR 201 at 208-210 where the majority (Mason CJ, Deane and McHugh JJ) held:

> "The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance… The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant.
>
> …
>
> The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
>
> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take,

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[5] Section 23B provides:

"(1) A marriage to which this Division applies that takes place after the commencement of section 13 of the Marriage Amendment Act 1985 is void where:

(a) ….

(b) the parties are within a prohibited relationship; …

(2) Marriages of parties within a prohibited relationship are marriages:

(a) between a person and an ancestor or descendant of the person; or

(b) between a brother and a sister (whether of the whole blood or the half blood

(6) …***ancestor***, in relation to a person, means any person from whom the first-mentioned person is descended including a parent of the first-mentioned person."

> for example, a case like *Ellis v Leeder* ((9) [1951] HCA 44; (1951) 82 CLR 645), where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors." [6]

Mr Collett's Claim

Complexities in Assessment

[39] I turn then to the principal issue debated in the case – was Mr Collett the "de facto" partner of the deceased?

[40] The assessment of the evidence is complicated by a number of factors. The first is that Mr Collett and the deceased were first cousins. Although first cousins can and do marry, it would not be an unusual attitude in our community for people to think that it was inappropriate for first cousins to live as man and wife. That has the potential to affect how the parties to such a relationship might wish to display it to friends and relatives.

[41] Secondly, the deceased was, throughout the period of her relationship with Mr Collett, a married woman. She married James Robert Knox on 23 December 1945 and never divorced. Again, for some, that factor might influence how they would wish to represent the state of their relationship with a de facto partner to third parties.

[42] Thirdly, the deceased was a full member of the Salvation Army church. She was placed on the Mackay role of that church on 17 May 1986 and that was by way of transfer, suggesting that she had joined as a full member some time earlier. Members are required to sign the Salvation Army's "Articles of War". One of those articles is in the following terms: "I will uphold the sanctity of marriage and of family life". If the deceased was in a de facto relationship with Mr Collett then she had strong reasons not to disclose that to members of the church.

[43] Fourthly, the deceased may have perceived that she had a financial interest in maintaining that her marriage to her husband continued and that she was not in a de facto relationship with Mr Collett. Mr Jim Knox died intestate in 2004. Mrs Pountney estimates that the estate was worth in the order of $250,000. Under the intestacy provisions the deceased, if entitled as spouse, would be entitled to a distribution of about $137,500 from that estate. Following a settlement of Mrs Pountney's family maintenance application in the Supreme Court of Victoria in respect of that estate the deceased received some $90,000 from the estate.

[44] Fifthly, matters are complicated by the lifestyle that the deceased adopted. Her immediate family were based in Melbourne and she clearly had a circle of friends there. Because of her closeness to her family the deceased travelled back to Melbourne. She returned there often. Mrs Pountney estimated that she returned as often as every three months. It appears to be common ground that when the deceased left Melbourne in 1974 and travelled to Queensland she intended to separate from her husband. After seven years or so she and her husband resumed friendly relations. After resuming friendly relations with her husband she stayed in

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[6] At pp 209-210; see also *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191.

his home from time to time. According to those most likely to know – her son and daughter – she never again shared a bedroom with him. Mrs Pountney says that her parents never again lived as husband and wife. Consistent with that characterisation the deceased also stayed with other members of the family when she visited Melbourne.

[45] Some witnesses were of the view that the deceased and her husband continued their marriage throughout and that the deceased travelled to Queensland merely because of the weather or because of arthritis. I am satisfied that, whilst plainly honest, they are mistaken in their understanding of the relationship that existed. But it demonstrates the capacity that the deceased had to represent her relationship with her husband in such a way as to make third parties believe that the marriage continued.

[46] Sixthly, a difficulty in assessing the true situation is that Mr Collett has achieved great age and the deceased lived to 88 years. On Mr Collett's case the relationship commenced when Mr Collett was already 65 years or more, and the deceased 54 years or more, approximately. Thus when witnesses describe something happening in 1990 one can overlook the fact that Mr Collett was then 80 years of age and the deceased 70 years. When witnesses are critical of Mr Collett in not providing a certain level of care for the deceased in the last years of her life it needs to be appreciated that he was over 95 years of age and she a somewhat frail person in her mid eighties. Similarly, comments relating to their living arrangements and having separate bedrooms must be assessed with their great ages in mind.

[47] The respondents do not believe that the deceased and Mr Collett lived in a de facto relationship and they called a number of witnesses who similarly did not believe that they were in a relationship of that type. These various matters that I have referred to significantly affected the capacity of the witnesses, who were undoubtedly honest, to assess the true nature of the relationship between the deceased and Mr Collett.

The Evidence Supports the Existence of a De Facto Relationship

[48] I am satisfied that Mr Collett has established that he was the de facto partner of the deceased within the meaning of s 5AA of the Act. I set out my reasons for so finding.

[49] Mr Collett himself was not unimpressive as a witness. At times he made concessions. I thought that it was apparent that he was doing his best to answer the questions asked of him. However he was given to generalisations and was at times confused, which was unsurprising given his age, and that he was being asked about things that, in some instances, had occurred long before. One example of that confusion was his assertion in his affidavit that he had commenced his relationship with the deceased in the 1950s. He plainly intended to assert that it started when the deceased moved to Queensland and it was agreed that occurred in 1974.

[50] Mr Collett maintained that the parties co-habitated, they enjoyed a sexual relationship, they mingled their finances, for at least a period they held a joint bank account, they purchased property together in the form of a car and caravan, he provided monies for the deceased's purchase of some real estate, and they shared

holidays. In my view, if all this was accepted, Mr Collett was plainly the "de facto partner", as defined, of the deceased.

[51] Mr Crow, who appeared for the respondents, contended that I should draw an adverse inference against Mr Collett because of certain answers that he gave in response to questions about the respondents and their relationship with him. I disagree. One line of questioning of Mrs Knox indicated that Mr Collett had been asked to quit the home on 21 days notice shortly after the deceased's funeral. It is hardly surprising that Mr Collett felt aggrieved by their conduct – they were endeavouring to deny him the home he had enjoyed for about twenty years.

[52] Nonetheless, given his self interest in the matter, I would be hesitant to act on his assertions alone, but there are other independent pieces of evidence that support him.

[53] First, it seems common ground that the deceased and Mr Collett shared a dwelling for at least a period close to two decades, and, on Mr Collett's case, longer. One striking aspect of these living arrangements is that the deceased followed Mr Collett on two occasions. At first, following her move to Queensland from Melbourne, she went to live in Marian where he was then living. She then moved to Mount Ossa where he had a property. As I have said, Mr Collett was living in the deceased's dwelling at Mount Ossa at the time of her death. The fact that two people share a residence for decades is not conclusive of the existence of a de facto relationship, but it is undoubtedly a significant and supporting factor.

[54] Second, Mr Collett was supported by Mrs Lynette Zahra. She has no direct interest in the outcome of the matter and had known the deceased and Mr Collett for a very long time – since about 1975, she said, when she and her husband purchased a caravan park located at Marian, near Mackay, from Mr Collett. To her observation they had lived as a couple and acted as a couple since that time. They appeared to be happy in their relationship. Initially there was frequent contact but still, after the first few years, she visited them regularly – monthly to every second month. She observed them to spend all their time together. She explained in her affidavit that it was obvious at times when Mr Collett required hospitalisation that the deceased had strong feelings for him. There was no suggestion that she observed any change in their relationship in the latter years or that the deceased by word or deed ever indicated that there had been such a change.

[55] Third, Mr Collett is supported by Mrs Pountney. No-one contested Mrs Pountney's claim that she was very close to her mother before they fell out over the dispute concerning her father's estate. Mrs Pountney maintains that she observed her mother and Mr Collett to share a bed in the early 1980s, both in her mother's home at Clayton in Victoria and at two houses at Marian near Mackay on occasions when she stayed with them. Mrs Pountney maintains that Mr Collett sometimes travelled with her mother on her trips to Melbourne – she estimated that about every third visit he would do so.

[56] She says that she saw signs of affection normal for a couple including hugging, kissing hello and goodbye, and holding hands. This continued over a period of 25 years to her observation, sporadic though her observations were. To her observations they did not share a bedroom from the time that they moved to Mt Ossa in about 1983-84 but these signs of affection continued. As well, they cared

for each other in a daily sense as demonstrated by the following evidence of her observations on a visit in 1999:

> "So what sort of things – describe what they would do and how they would interact with each other? *Fred would make porridge for breakfast. They'd both sit down and eat it. They always watched the news together. And she'd help wash his feet and I think she used to shave him sometimes too. And they'd just talk and just do everyday things.*
>
> Okay. Did your mother ever tell you how she felt about Fred? *Yes.*
>
> What did she say? *She was in love with him.*"[7]

[57] Mrs Pountney's observations are strong confirmation of the existence of the relationship that Mr Collett contends existed. I am conscious that Mrs Pountney had some interest in the matter in the sense that establishing the relationship would vindicate the stand that she took in respect of her father's estate. Nonetheless I was impressed with the detail that she provided to support her claim that the relationship was consistent with that of de facto partners and impressed too in that her evidence did not seem overstated. Indeed she was extremely frank in the evidence dealing with her own failure to have any dealings with her mother in the last years of her life. I note that her observations about the sleeping arrangements are confirmed to some extent by the evidence of Mrs Heather Knox. As well, in a general way, her evidence is confirmed by Mrs Zahra's observations, the evidence of Ms Alderson, and the deceased's own diary entries to which I now turn.

[58] The fourth piece of evidence supporting Mr Collett, and it provides cogent support, are the diary entries made by the deceased. In my view the best indication of the nature of their relationship can be gathered from these diaries. There is no reason to think that they do not reflect the deceased's activities and feelings – as Mr Cullinane, who appeared for Mr Collett, submitted they were her private journals.

[59] I am conscious that each side maintains that there are many missing diaries. Apparently the deceased was in the habit of keeping a daily diary. Mr Collett has produced four volumes and the respondents one. They each say that is all that they have. The implication of the evidence given was that each side accused the other of taking and destroying diaries. There is no compelling evidence against either side that they did any such thing.

[60] The volumes produced by Mr Collett cover the periods from 28 October 1979 to 7 September 1980, September 1980 to 25 December 1981, 1 January 1987 to March 1988 and December 1991 to September 1992. The entries in the volume produced by the respondents are much more sporadic, the first entry being dated 17 November 2002 and the last 12 September 2007. The diary entries that have survived are instructive.

[61] A striking thing about the diaries is the number of entries that concern Mr Collett. Bearing in mind that on the one side the respondents contend that he was merely a boarder, albeit a cousin, and on the other it is contended that there was an

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[7] T2-11/10-20. As to expressions of affection see her affidavit filed 26 September 2008 at para 2.

affectionate and intimate relationship amounting to a de facto marriage, the focus on Mr Collett in the entries is far more consistent with the latter than the former.

[62] Further, not only do the diary entries make numerous references to Mr Collett ("Fred") but many make plain that the relationship went beyond mere landlady and lodger.

[63] There are many examples of apparent affection between the two and of the deceased's attachment to Mr Collett. An early entry of 2 July 1980 records: "Fred still away. Place seems dead without Fred". The entries relevant to a journey to Melbourne undertaken in September 1980 reflect too this attachment to Mr Collett. The first entry of September 1980 records: "Fred will stay at Marian while I go south". That is an odd entry to make if Mr Collett was merely a boarder in her home. Why would he not stay at Marian in those circumstances? The entry for the 8th of September 1980 records: "I left Fred at Mackay airport 11:45am on flight to Melbourne". Again why record that you have left your cousin or boarder behind on your trip to Melbourne? On Saturday 13 September 1980 the deceased recorded: "I rang Fred at Marian 7:30pm from a phone box. Fred seems well and okay". The entry for 20 September 1980 records: "Fred rang me at Johns at 7:30pm. He told me Bev and George Versica [?] had come to Marian and cleared up all the kitchen for him." Thus, even for a journey to Melbourne as short as two weeks, there is continuing contact between the two, and evident concern about Mr Collett's welfare.

[64] The deceased returned to Queensland from her Melbourne trip on 23 September 1980. Her diary entry of that day records her efforts to book a return trip north for the following Saturday (four days hence) and then records: "… and finally decided NOT to wait until Saturday to return but managed to get a booking on this afternoon's plane. I am really happy to be returning home. Everyone here has made me most welcome but there is no place for me like HOME. Boarded the plane at 1:45 and in Mackay at 7:35pm. Fred met me and I am really more than happy to be back. The house looks lovely, everything spick and span. Fred has a nasty cold" (emphasis in original).

[65] Similarly on 19 April 1981 the deceased records her return to Mackay from Melbourne: "…good flight home arriving 11am. Fred met me and gee its great to be HOME." (emphasis in original).

[66] On 6 September 1981 the deceased is again intending to travel to Melbourne and records: "It does not look as though Fred will be coming to Melb – Gee I miss him!!!"

[67] The submission made on behalf of the respondents was that the deceased spent about half the year in Melbourne and was forced to reside in Queensland because of her inability to stand the cold weather there. The implication of the submission was that Melbourne was her true home. These entries are directly contrary to that implication. They confirm Mrs Pountney's evidence that her mother regarded Queensland as her home.[8]

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[8] T1-108/20.

[68] Indeed there are a number of entries that suggest that the deceased and Mr Collett were working towards a joint home at this time. The entry for 25 September 1980 records amongst other things that Mr Collett "has the whole place looking great now". The implication is that it is their home that he has "looking great".

[69] The strong impression from the entries is that the parties at the time were living at Marian and travelling up to Mount Ossa to work on Mr Collett's property there. There is some evidence that the hard work Mr Collet was putting in to the Mt Ossa property was intended to create a home for the two of them. For example the entry for 6 October 1980 in full reads: "Fred and I took a load of timber and chain pipes to Mount Ossa. Stayed until 1:30pm. Had a good work day." At this stage Mr Collett is 70 years of age and the deceased 60 years of age.

[70] Over the ensuing months there are many entries recording that Mr Collett was either at Mount Ossa or working there for the day. The diary entries clearly evidence that Mr Collett put a great deal of work into the Mt Ossa property to make it liveable. The reference must be to his property as the deceased was yet to purchase her Mt Ossa property.

[71] On 10 November 1980 the deceased recorded: "Fred at Ossa all day. I don't feel happy here at Marian with Fred away most time at Ossa, so hope to sell here …"

[72] Two days later she recorded "had lunch then I went over to Mount Ossa. Missed Fred".

[73] The entry for Saturday 18 July 1981 in which the deceased records the burning down of Mr Collett's house at Mount Ossa suggests she felt the loss much more keenly than might be expected for the loss of a cousin's house. She records this as a "terrible shock" and notes that a neighbour had "shifted my little caravan and saved it". She then records: "I took sedative and slept for hours, then later Fred and I took a drive to Sarina. I'm still upset as I loved that little house in Ossa so much, now no house, no water (pump burnt), no electricity utter desolation – I'm just stunned still".

[74] On 21 July 1981 the deceased records "home all day – both of us".

[75] Other entries indicate that there was some intermingling of their finances and property.

[76] On 24 September 1980 the deceased records: "Fred seems to have made a bit of a muddle re: accounts paid some which I had already paid others there was insufficient funds to meet the cheques. I am glad I returned to straighten things out." One of the indicia of a de facto relationship can be the financial interdependence of the parties. Mr Collett claims that there was such interdependence and was able to point to a joint bank account that he and the deceased had at least at one time. This diary entry supports Mr Collett's position.

[77] Another example is the entry for 13 January 1981 which records "Mark and Jane have left, taking the keys to the van, also other of our belongings". While the reference to "our" could indicate a reference to some person other than Mr Collett and the deceased, the following day's entry strongly suggests that it is to Mr Collett that the "our" refers. It reads "into Mackay and paid all accounts. We are upset

regarding Marks car payments for which Fred is now responsible". In any case Mr Collett is mentioned in virtually every entry – it would be astounding if he was not the person intended by the plural reference.

[78] On the following day there is an entry that reads "Later, Fred saw the finance company for advice re: Mark's car. I discussed the problem re: Mark's finance with Kevin. Later we both visited Kev & Jan…"

[79] Some entries suggest that the deceased had a detailed knowledge of Mr Collett's financial affairs. For example the entry for 5 February 1981 records a trip to Mackay, with a payment into an ANZ cheque account "for Fred's first mortgage" and the comment "that now finishes". Again on 12 February 1981 the deceased has recorded "Fred's first mortgage now fully paid". On 26 October 1981 the deceased records them having "a terrible row… mainly over selling up here and over the financial position".

[80] It is plain enough that the deceased and Mr Collett at one time contemplated the purchase of a house and did so jointly. On Friday 13 February 1981 there is a reference to "we saw ad in paper for house in Mackay (Cremorne) $13,000. We looked at it…" The "we" seems plainly enough to be a reference to the deceased and Mr Collett as he is mentioned on the last line of the entry. The following day there is a reference as follows: "We drove into Mackay at 7:00am to have another look at that house for sale. We then saw the owner… and paid $500 cheque".

[81] Two days later the diary reads: "We looked at another house along the other side of the road costing $10, 000 we did not like it …"

[82] The entry of 20 April 1981, Easter Monday, records:

> "Fred and I drove to Slade Point for our usual Easter morning drive at sunrise – lovely morning – we went again to see the house at Cremorne – we have decided to skip buying and selling Marian".

[83] The strong inference to be drawn from these references is that the deceased and Mr Collett were jointly considering the purchase.

[84] The Easter morning ritual is not insignificant either.

[85] There are other examples of joint outings. In the weeks following the deceased's return from Melbourne in 1980, to which I have earlier referred, it is a rare entry where Mr Collett is not mentioned by name and, often, joint activities described. An example is contained in the 14 July 1981 entry where the deceased records "thinking of us both going to Cairns in the mini van for warmer weather".

[86] Mr Collett claimed in his evidence that they did enjoy outings and led some photographic evidence. These entries provide some confirmation of his claims.

[87] There are hints at the intimacy of their relationship too. The entry for 29 January 1981 records Mr Collett taking a mini caravan to Mount Ossa (the deceased's van, it would seem from the entry of 18 July 1981 that I have mentioned) and then reads: "He has put the van under the mango tree and it really is great – we can now sleep at Ossa without the mosquitoes troubling us." The following day's entry records Mr Collett taking a refrigerator to Mount Ossa and then "late afternoon we both drive to

Ossa to sleep in the van, but a storm developed about 10:30pm so we headed back to Marian". While these entries do not expressly state that the parties were in a sexual relationship, the strong inference is that the two were sleeping together in the deceased's mini caravan that Mr Collett took to the block.

[88] There are other entries consistent with that inference. For example, the entry of 7 March 1981: "We planned to spend the weekend at Mount Ossa… then we went back to Mount Ossa but the insects were so bad in the caravan that we went back to Marian to sleep". There are references too to "Fred" leaving early for Mount Ossa, for example on 9 and 10 March 1981. Such knowledge and observation is consistent with the two sharing their lives and, probably, a bed.

[89] To my mind these entries make it perfectly plain that the relationship between the deceased and Mr Collett was not merely that of landlady and boarder, nor was it that normally associated with cousins. The many entries that record Mr Collett's activities, the deceased's evident concern for his welfare, their involvement with the Mount Ossa property, their interdependence in financial and property matters, their joint outings, and their apparently shared sleeping arrangements all seem to me to make plain that the relationship was not as the respondents would have it. Each of the entries supports Mr Collett's claim to have enjoyed a de facto relationship with the deceased.

[90] The entries in the third of the volumes produced by Mr Collett covering 1987-88 evidence the continuing of that relationship. The opening entry seems to be a summary of 1986 and has the deceased in Melbourne in the August. She records: "Then to find such complete understanding with Jim [ie her husband] and my family regarding the whole situation" and "…then Fred came to Melbourne in his Toyota to take me back". Plainly whatever understanding was reached in 1986, Mr Collett remained attentive – at the age of 77 years he has undertaken a journey of nearly 4,700 kilometres to bring the deceased home.

[91] In January 1987 the deceased is again in Melbourne and again maintains her contact with Mr Collett while away: "I am at Highett ringing Fred from time to time mostly while on my morning walk at Spring Road phone box". "Highett" I understand to be the home of her husband, Jim Knox. Mr Collett continues to meet the deceased when she returns from her Melbourne trip. The entry for 19 January 1987: "Taxi from Highett house 6.45am for Mackay and Mt Ossa. Fred at Mackay airport to meet me. …Great to be back at Meadow St N. Mky"

[92] Again the bulk of the entries in this volume make mention of Mr Collett. Again they are consistent with a joint life together. Again there are entries detailing financial matters in which they appear to share an interest – see, for example, 22nd April 1987: "Fred and self saw bank accountant at Westpac bank 2.30pm re loan for Fred to get deposit to purchase house at Holy Side Bay (?) but no go until a contract is drawn up for sale of either his own or my own Mt Ossa property". Again there are many joint outings recorded, significantly in February 1988 a voyage jointly taken aboard a Russian cruise ship. The deceased records "we had cabin lower deck".[9] It is plain that the de facto relationship continues.

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[9] See p57 of Ex 16 (1987-1988) – the entries (or the photocopies) are not in date order.

[93] The fourth volume of the diaries produced by Mr Collett is consistent with that continuation four years later. There are references to day trips together, to the intermingling of finances, and to inspecting prospective property purchases together. After a trip to Melbourne she records on 31 March 1992 that it is "good to be back". When apart on trips they appear to keep in frequent contact. Indeed the deceased records writing two letters to Mr Collett on the one day whilst he is on a trip to Hong Kong. On one occasion she rings Mr Collett from her husband's Melbourne home. They perform tasks for each other – in June, Mr Collett travels to Melbourne to pick up the deceased's car to drive it back to Mackay, a journey that took him five days at the age of nearly 83 years. Again Mr Collett is mentioned in the bulk of the entries.

[94] The last diary, produced by the respondents, opening nearly 11 years later in 2003, also contains relevant entries which refer to Mr Collett. His "unexpected" arrival in Melbourne, apparently recovering from an operation on his right foot, is recorded in April 2003. An entry reads: "Arr. back with Fred from Melb late April" – an entry apparently made sometime subsequent to the event. There are seven entries dealing with this visit. Again entries dated in July mention Mr Collett – "Fred's toe infection very bad…cancer in bone" and a reference to "Fred & Lou" on 7 July apparently escorting the deceased to the airport as the deceased headed back to Melbourne. The deceased underwent an operation, according to her diary and returned to Mt Ossa on 26 October 2003: "Fred & Peter at airport to meet me 5.30pm…" The next entry is dated 12 December 2003 and again Mr Collett is mentioned: "Fred's sight far worse since I left here July".

[95] There are only two short entries for 2004 and then entries commence in March 2005 with the recording of the death of her husband the previous November and "since then Karen [ie Mrs Pountney] & David & family against me…". On Easter Saturday 2005, the deceased recorded: "Very quiet. Fred & self only here…." There are five more entries for 2005 and then two entries for 2006 without mention of Mr Collett before the following:

> "April 3rd Monday
>
> Fred been unwell for several weeks. I have had no heart writing in this dairy since Karen abused me in mater hosp Jan 2005. A long time lots of happenings – none of them good. <u>But</u> we are getting wonderful help from council & vet affairs & meals on wheels."

[96] Again there are entries concerning Mr Collett on April 5th ("no nurse for Fred today"), May 6th ("Fred & self here alone" and "Fred & self reasonably OK") and June 1st ("Yesterday last day of May 06 Fred became confused in his mind and ended up booking himself into a nursing home called Home field in Mackay on a permanent basis… We don't know what Fred will do…") He is not mentioned again in the five further entries for 2006.

[97] The first entry for 2007 simply records "In Mt Ossa Fred & self" apparently for January. The third entry for 2007 records for 23rd February: "Fred's old friends Annie & cousin came to Ossa to see Fred after many years as children". The next entry for March 11th records Mr Collett's hospitalisation: "Fred in hosp during this period of 7 weeks". The next and second last entry was apparently made on July 7th 2007 and records the deceased fracturing her hip in March and includes "Fred not

well". That is the last mention he receives. The final entry is in September 2007 and records that her son Paul is to receive treatment for brain cancer. Four of the six entries refer to Mr Collett. The deceased died about four months later.

[98] I have set out these entries in the final diary fairly fully not because they demonstrate any matters of great significance but because they do not – nowhere does it appear that there is any change in the relationship or in the deceased's attitude towards Mr Collett. The deceased's interest in his health continues. His attentiveness in attending at the airport to greet her continued until at least his 94th year. She enjoyed the assistance provided by "vet affairs" to which Mr Collett was entitled being a returned serviceman. Their joint lives continued despite illness and failing health.

[99] To my mind these pieces of evidence make a compelling case for the existence and continuance of the relationship of de facto partners. In my view the deceased and Mr Collett were plainly "living together as a couple on genuine domestic basis", as required by the legislation.

[100] The respondents' case depended on their observations of the extent of intimacy between the deceased and Mr Collett, the deceased's statements concerning their relationship following the dispute over her late husband's estate, the separate sleeping arrangements that they observed, and events such as the celebration of the deceased's 50th wedding anniversary with her husband in 1995. As well they called several witnesses who assisted with their observations of the deceased and Mr Collett.

[101] Those witnesses report disagreements and that Mr Collett may have been less attentive and patient with the deceased than he might have been. Similarly the respondents point to entries in the deceased's diaries dated 26 and 30 January 1991[10] as supporting their case. Those entries evidence a disagreement between Mr Collett and the deceased and a period of separation. There would be few relationships indeed where disagreements did not exist. But the evidence of such disagreements if anything points to the relationship between the two people as being anything but boarder and landlady. Even those diary entries conclude with the deceased and Mr Collett having an evening meal together and planting trees that Mr Collett had purchased at the deceased's Meadow St house. And it is plain from Mrs Pountney's evidence, as well as later diary entries, that the separation did not last.

[102] The celebration of the 50th wedding anniversary would certainly have been of considerable significance in the assessment of the likelihood of the deceased simultaneously conducting a long term de facto relationship with Mr Collett and a marriage, save that Mrs Margaret Evelyn Knox conceded that the deceased and Mr Jim Knox had ceased to live as man and wife in 1974, twenty-one years before.[11] Mr John Knox, somewhat hesitantly, advanced the notion that the marriage continued but his evidence on the point was far from convincing[12] and contradicted by his sister and wife. The true reason for the gathering, I infer, is that the deceased wished to have a party at which the family would gather. That she did so on the pretence that they were celebrating 50 years of marriage, which all the immediate

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10 Ex 8.
11 T3-7/5.
12 See T2-86/40 – 88/30.

family knew to be a sham, says a deal about the deceased and her determination to present publicly a false state of affairs.

[103] Some idea of the depth of the initial schism between the deceased and her husband can be gained from the entry in her diary nearly seven years after their separation, on 25 March 1981, where she records the birth of Mrs Pountney's child, Alan. The entry deals with the deceased's relationship with her husband in these terms:

> "I am so very sad that Jim was not there. It seems to me he has severed all connection with his family. I hoped we could be friendly and welcome baby into the family together. It seems I was mistaken. I remember how about four weeks ago I rang Jim from Marian for the very first time in almost 7 years. I was abused by Jim for 10 minutes on the phone. I am beginning to realise just how utterly hopeless it is for me or anyone of his family to get through to him. He must have a heart of stone at times. I have tried so hard to bring the family together."

[104] This entry puts into perspective the evidence of Mrs Jacqueline Duncan who thought that the deceased had never separated from Mr Jim Knox. I am sure that Mrs Duncan was honest but the deceased completely misled her. Given such a grave misconception little weight can be afforded to Mrs Duncan's views.

[105] The fact that those closest to the deceased knew perfectly well that the marriage between the deceased and her husband had long since ceased throws light too on the evidence led from Ms Eileen Evans and Mrs Beale that the marriage continued. Again there is no question about their honesty, but they failed to perceive what was truly going on.

[106] The respondents relied strongly on the evidence of Ms Edge, a neighbour of the deceased and Mr Collett. She believed that the two were housemates and said that she had never seen any sign of affection between them.

[107] It is not apparent as to when Ms Edge first met the deceased but she observed her to move into her Mt Ossa home in the early part of 1985 and, she says, alone. Mr Collett, she said, did not join the deceased until several years later. If this evidence was led to suggest that it was not until the late 1980s and possibly the early 1990s that the parties first lived together, as was submitted, then I observe that it is evident from the first available diary entries following January 1985 – those of 1987-88 – that in early 1987 the deceased and Mr Collett are together a great deal. There are a number of entries that record the deceased going back to Mt Ossa with Mr Collett. They also appear to be residing together at the Meadow St home.

[108] Ms Edge gave evidence that Mr Collett did not join the deceased on social outings. The diaries record many outings together, and after the time that Ms Edge says that she knew the deceased.

[109] Ms Edge recalls that the deceased and Mr Collett had many disagreements and this caused the deceased to become upset. Mr Collett, she thought, was of an argumentative disposition. The diaries do record some disagreements. I do not apprehend that the existence of disharmony from time to time necessarily indicates that a de facto relationship does not exist.

[110] I am conscious that Ms Edge's evidence indicates that there was not a complete intermingling of finances. That is evident from many diary entries also and not contested, as I understood his evidence, by Mr Collett. But complete intermingling is not necessary to establish that "two persons are living together as a couple on genuine domestic basis" – indeed not one of the factors mentioned in s 32DA is essential to establishing a de facto partnership, as is made explicit in the legislation.[13] That is so, no doubt, because such relationships can take so many forms.

[111] The respondents tendered an affidavit sworn by the deceased in the Supreme Court of Victoria in the proceedings related to her husband's estate. The affidavit was filed in response to an affidavit by Mrs Pountney in which she swore that her mother was in a de facto relationship with Mr Collett. At paragraphs 43 and 44 of her affidavit the deceased asserts that she re-established her relationship with her husband "no later than 1980". She effectively asserts that thereafter they lived together alternately in Queensland and Melbourne. She denies having any new partner or ever having a relationship with Mr Collett. It is plain that the inference that the deceased wanted drawn, if indeed it is not said explicitly, is that the marriage of herself and her husband continued. No mention is made of their never again sharing a bedroom. No mention is made of her staying with other family members at times on her trips to Melbourne. The diary entries demonstrate that the true nature of her relationships was very different to that portrayed in the affidavit. I am quite satisfied that the deceased perjured herself.

[112] Mr Crow, who appeared for the respondents, emphasised that the question for the court was restricted to whether a de facto relationship existed in the two years leading up to the death of the deceased, ie. between 8 January 2006 and 8 January 2008. He submitted that there was a paucity of evidence of any such relationship then subsisting. He pointed out, accurately enough, that Mrs Pountney could not speak of this crucial period.

[113] This approach, which seeks to minimise, if not ignore entirely, the evidence of their relationship in the prior decades misses two important points. First, the reliability of the observations of the witnesses who gave evidence to the effect that there was never a de facto marriage relationship is called seriously into question. When these witnesses then say that they saw nothing in the latter years to support the existence of the relationship for which Mr Collett contends, the weight to be given to their evidence is correspondingly diminished. Their evidence is more likely to be consistent with the observation that for her own purposes the deceased wished them to believe there was no relationship. Conversely, Mr Collett is vindicated in his claims that such a relationship existed and hence his credibility enhanced on this crucial question.

[114] Second, rather than looking to see if a de facto relationship existed at all, the focus is on looking for evidence that such a long-standing relationship came to an end. If it is clear from the evidence that such a relationship had subsisted for a very long time prior to the final two years of the deceased's life then, with the passing of the years, a stronger inference can be drawn from the undeniable fact of their continued co-habitation until the deceased's death.

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[13] See *Acts Interpretation Act* 1954 (Qld), s 32DA(3).

[115] I am conscious of the stricture contained in s 32DA(4) of the *Acts Interpretation Act* 1954 (Qld). I do not draw the inference of the existence of the relationship solely from the fact of co-habitation. Rather I draw it from the fact that, in addition, there was a de facto relationship in existence for decades prior to 2006, and that there is no evidence that I find persuasive of it having come to an end, and some evidence that it did continue. That the two people in question had reached an age and state of health where their sexual lives had ceased, and their capacity to care for one another and perform household tasks had largely ended, does not provide evidence of such a cessation nor preclude such a finding.

[116] I am conscious too of the comments of McPherson JA in *S v B* [2004] QCA 449, in the context of a dispute as to whether a de facto relationship, previously found to subsist, continues in existence, that there is no presumption or inference of continuance of such a relationship.[14] The persuasive onus rests throughout on the person asserting the relationship to establish that continuance. Dutney J said in the same case:

> "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 are fundamental to the continuance of a de facto relationship. In *Hibberson v George* Mahoney JA, with whom Hope and McHugh JJA 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." [15]

[117] This is a very different case to *S v B*. There the relationship was of short duration, had plainly ended because one had excluded the other from the previous joint residence, and the question for the court was simply: when had it ended? In the context of many facts demonstrating their separate lives Williams JA suggested that "[i]n the circumstances outlined less was needed to establish a cessation of the relationship"[16], his comment reflecting, no doubt, the shifting evidentiary burden. Here it is legitimate to assert that once it is accepted that there was a long subsisting de facto relationship more is needed to establish the cessation.

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14 At [2].

15 At [33].

16 *S v B* [2004] QCA 449 at [9].

[118] Was there a persistence of indicia in this case? To answer that there needs to be an examination of what indicia one can expect. Here the parties to this relationship were aged 96 and 86 years respectively at the commencement of the relevant two year period. Their sexual lives had ended. Their capacity to socialise was extremely limited. They could no longer go on holidays. The deceased had been in the habit for decades of representing to some members of her family and to some acquaintances and friends that she and Mr Collett were merely cousins. She did not change her habits.

[119] The deceased was in very poor health and had been so for many years. She was described by one witness as "very, very frail" in her latter years.[17] Mrs Knox indicated that the deceased's ill health dated back to 2001-02.[18] Mrs Knox spoke of coming to Mt Ossa to assist the deceased in 2006 and gave the following evidence:

> "That was the year she was diagnosed with cancer and we took Glady [ie the deceased] backwards and forwards to the hospital quite a lot for her treatment. And then she had - I had to take her to the eye specialist, the dentist up in Proserpine…"[19]

[120] The deceased became very ill at some point in 2007 from which illness she died in January 2008.

[121] What more then is there for Mr Collett to prove? He continued to reside, as he had done for at least close to two decades, and probably significantly longer, in the same residence. For some considerable time it would appear they had occupied separate bedrooms. But there is no evidence that was because of any fundamental change in the relationship, indeed the diary entries suggest the contrary. There is no evidence that the deceased told him that the relationship was at an end. It was her home and she had the right to require Mr Collett to quit her residence. The fact is that she did not. There is evidence that she spoke of returning to Melbourne to live but, again, the fact is she did not. If she said such things the question remains as to whether she was expressing a desire to be with her family or an intention to cease her relationship with Mr Collett. I observe that there is no diary entry consistent with these allegations or with any such intention.

[122] As Dutney J observed in *S v B,* "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 <u>providing the party that is desirous of ending the relationship acts on his or her decision</u>."[20] Even if I was persuaded that the deceased had determined to end the relationship, and I am not, I see no evidence of any action consistent with such a decision.

[123] All that could remain of their outward, observable relationship was companionship. And that, it seems, did remain. Mrs Knox said as much.[21]

[124] I am satisfied that Mr Collett is an eligible applicant.

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17 Mrs Beale: T3-84/35.
18 T3-11/50-60.
19 T3-8/20.
20 [2004] QCA 449 at [48] - underlining added.
21 T3-22/30: "They were more companions, talking and things like that."

The Jurisdictional Issue

[125] To enliven the jurisdiction I must be satisfied that adequate provision has not been made for the applicant's "proper maintenance and support". Dixon CJ and Williams J had this to say of the word "proper" in *McCosker v McCosker*:

> "As the Privy Council said in *Bosch v Perpetual Trustees Co (Ltd)* the word 'proper' in this collocation of words is of considerable importance. It means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency… If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance, education or advancement of life of the applicant, having regard to all the circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent".[22]

[126] I turn then to the relevant factors mentioned in *Singer v Berghouse*.[23]

[127] If Mr Collett is precluded from obtaining a life interest then he has no home. Mr Collett said that the home at Mt Ossa had been adapted to some degree for his needs. There was no evidence that it was not suitable for him as was submitted by the respondents.

[128] Mr Collett is in receipt of a veteran's pension. He has limited assets. The caravan and car left to Mr Collett are of no significant value. It is evident from the diary entries that he contributed to the deceased's welfare in her lifetime as he claimed. The probability is that she likewise contributed to his welfare. The evidence does not permit any more precise finding.

[129] The deceased's estate, putting to one side the controversial issue relating to litigation costs, consists of the Mt Ossa residence and a sum of cash – sufficient to provide Mr Collett with a home. The respondents, who are the principal beneficiaries favoured by the will, are themselves in secure circumstances and in no immediate need of assistance. The remaining beneficiary, Paul Knox, passed away a few months after the deceased. It was known to the deceased that he had cancer.

[130] I accept that Mr and Mrs Knox provided care to the deceased, particularly in her last years, and that is a relevant factor.

[131] A person aged 100 years has a life expectancy of 2.5 years according to the Australian Bureau of Statistics published tables based on 2003-05 data.[24] If the interest allowed is limited to a life interest in the Mt Ossa property, as claimed, then the expected postponement of the beneficiaries' interest in the estate is probably of short duration.

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22 (1957) 97 CLR 566 at 571-2

23 (1994) 181 CLR 201.at 208; 209-210; see at [36] above.

24 Table 7.34 at http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/FF4D0275EFAC806FCA2573D2001101CE?opendocument.

[132] In my view the jurisdiction to make a claim is enlivened.

Conclusion re Mr Collett's Claim

[133] A finding that Mr Collett was the spouse of the deceased for the purposes of the legislation is of significant importance to this issue. I envisage that it would be a very rare case where the first obligation of a spouse of 20 to 30 years is not to ensure that their partner is provided with a home, if able to do so. I note Powell J's dictum in *Luciano v Rosenblum*[25] to the effect that as a "broad general rule" the duty of a testator to a widow is "to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseeable contingencies". Whilst I am dealing with a putative widower I see no reason why the "broad general rule" should not apply here.

[134] In my view the minimum required is that Mr Collett be granted a life interest in the Mt Ossa property.

[135] The only remaining matter to determine is whether the estate should be diminished, as the respondents claim, by litigation costs incurred so that effect cannot be given to this life interest. I return to that problem later.

Mrs Pountney's Claim – the Jurisdictional Issue

[136] The respondents contend that the following factors militate against the enlivenment of the jurisdiction:

(a) the size of the estate;

(b) Mrs Pountney is relatively well off;

(c) Mrs Pountney fell out with the deceased and had no communication with her in the last three years of her life, a time when the deceased was in poor health and in need of assistance;

(d) Conversely the executors are not so well off and had an excellent relationship with the deceased, particularly in her later years, and provided her with considerable care and assistance when most needed.

[137] Significantly the respondents contend that Mrs Pountney's conduct towards the deceased was such that, irrespective of any other factor, it disqualified her from succeeding in her claim. The relationship between the deceased and Mrs Pountney was very close until the falling out over the estate of Jim Knox. There is no question but that to that time she had behaved in every way as a dutiful daughter should. The respondents are critical of Mrs Pountney for suing her mother as administratrix of her husband's estate and for her lack of contact thereafter.

[138] Section 41(2)(c) of the Act provides that the court may:

> "refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable."

[25] (1985) 2 NSWLR 65 at 69-70.

[139] Mr Crow, for the respondents, has drawn my attention to the comments of Bergin CJ in Equity in *Ford v Simes*:

> "However in my view it is very important for the maintenance of the integrity of the process in these types of applications that this Court acknowledge once again the entitlement of testators, in certain circumstances, to make no provision for children: *The Pontifical Society for the Propagation of the Faith and Saint Charles Seminary, Perth v Scales* (1961) 107 CLR 9. This is particularly so in respect of children who treat their parents callously, by withholding without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility."[26]

[140] The reason for the estrangement appears to lie in the deceased's wish to maximise her entitlement to her deceased husband's assets, with scant regard for the truth. She appears to have rejected her daughter for seeking to increase her inheritance and for doing so by revealing the long separation of the deceased from her husband and the true nature of her relationship with Mr Collett. To some extent these are inferences drawn from the competing affidavits filed in the Victorian proceedings but also from Mrs Pountney's evidence where she claimed that the estrangement commenced when her mother told her: "Bugger off. I want your father's house. Don't need you any more."[27] Nonetheless these inferences seem to me to be soundly based.

[141] Whilst I am not ideally positioned to judge the merits of Mrs Pountney's suit in her father's estate, I can observe that generally I was impressed with her evidence and thought her reliable. She claims that following the separation of her parents she cared for her father well beyond what would normally be expected of a 15 year old and continued to do so for the rest of his life. She claimed to have done considerably more than her siblings in that regard. The notes provided by the deceased to her Victorian solicitors confirm the provision of support in the early years to some considerable degree.[28] If Mrs Pountney's contentions were accurate then she probably had a good moral claim on her father's bounty. Whether a court would have altered the intestacy provisions would depend on other factors, principally financial ones, about which I have no sufficient evidence. In the end a compromise was reached and an amount paid to Mrs Pountney of $100,000 and after legal costs $69,000 – a net gain of about $35,000 on her entitlement.[29] But the compromise was not reached before the deceased filed an affidavit effectively accusing her daughter, falsely as I have found, of deliberately misleading the court in relation to her relationships with the two men.

[142] If the deceased took exception to her daughter seeking to increase her inheritance in these circumstances, as it seems that she did, then I do not consider that it was Mrs Pountney who was treating her mother callously. Her mother had publicly made false allegations against her, and, thereafter, withheld from her the affection and regard that a parent normally holds for their child.

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[26] [2009] NSWCA 351 at [71].

[27] T1-114/20

[28] Affidavit of Ian Alexander Moffatt filed 9 March 2010 at p5 of handwritten notes dated 26 July 2005.

[29] Mrs Pountney swears to having paid debts of her father's estate totalling $7,399 thereby further reducing her net gain from the litigation.

[143] The respondents also rely on a threat made by Mrs Poutney concerning the deceased to her friend Mrs Beale. The precise terms of the statement are in dispute and probably do not matter. It is plain that Mrs Pountney was very upset at her mother's conduct at the time. There is no suggestion that she made the threat direct to her mother. It reflects the degree of hurt that Mrs Pountney had suffered. It does not seem to me to weigh significantly in the scales

[144] The respondents point out that the deceased did extend an olive branch at one stage – she sent to Mrs Pountney a letter on her birthday in October 2005 and a recipe a month later. Mrs Pountney's wounds were too deep to permit her to respond. Her evidence in this regard was as follows:

> "Okay. I think you said you got some ginger beer recipe or something; is that right?-- Oh, yes, yes, she did mail me a ginger beer recipe.
>
> All right. Did you contact her after that?-- No.
>
> Why?-- I don't know, I just didn't. I was frightened of being told, "Bugger off." I didn't want to hear it, so I didn't.
>
> All right. And before that your relationship had been what with your mother? How - what sort of relationship had you had before that?-- Close, very close".

[145] There is an interrelationship between the conduct said to disentitle an applicant to relief and the strength of the need for provision from the estate. The stronger the applicant's case for relief, the more reprehensible must have been that person's conduct to disentitle them to the benefit of any provision*: Hughes v National Trustees, Executors & Agency Co of Australasia Ltd.*[30]

[146] In *Lathwell as Executrix of the Estate of Gilbert Thorley Lathwell (Dec) v Lathwell* it was said: "Conduct amounting to disentitling conduct must refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claims on the testator."[31]

[147] In my view Mrs Pountney's conduct should not be so characterised. As was observed in *Lathwell*, "[i]f the estrangement is entirely caused by the unreasonable conduct or attitudes of the testator and sustained by the unreasonable conduct of the testator, then the estrangement alone could not amount to disentitling conduct on the part of the applicant."

[148] The deceased could have picked up the phone and called her daughter. She did not. Neither did the daughter contact her mother. I accept that Mrs Pountney could have done more to repair the ties with her mother although that might be the counsel of perfection.[32] In my view her conduct was sufficiently justified such that Mrs Pountney ought not to be disqualified from any possible claim. The estrangement was due to the conduct of both but principally of the deceased and was maintained by both, almost in equal degree.

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30 (1979) 143 CLR 134, 156 per Gibbs J.

31 [2008] WASCA 256 at [33].

32 Her account of the attempts at making contact in December 2004-January 2005 suggest that the deceased actively sought to exclude her: see her affidavit filed 9 July 2008 at paras 53-54.

[149] It is relevant that for most of her life Mrs Pountney was on good terms with her mother and, after the birth of her children, they were close. That close period of their relationship covered nearly a quarter century. And it is relevant too that as a young teenager Mrs Pountney was deprived of her mother's attention as a result of the separation of her parents. They kept in touch through letters and cards and eventually Mrs Pountney was able to travel to Queensland and did so, travelling to Queensland for Christmas holidays frequently. Mrs Pountney provided care for her mother over some three months as she recovered from a broken femur following a fall in 1998 and again for a short time in 2000 after another fall. Until the falling out over her father's estate, Mrs Pountney's behaviour towards her mother was unimpeachable.

[150] I turn now to the other relevant factors. It is true that the estate is a modest one – but at the time of death it exceeded $225,000 in value. It was not so small as to be incapable of accommodating the just demands of the potential beneficiaries. There are certainly many cases of awards being made in much more modest estates. The point is that whilst the courts endeavour to discourage applications in small estates that does not mean that applications cannot be made or that, when made, they will not be considered on their merits: *Re Coventry* [1979] 3 All ER 815 at 820 per Lord Goff.

[151] I do not accept that Mrs Pountney is relatively well off. Her personal income is extremely modest – in the 2008 year her income tax assessment notice shows a taxable income of $3,807. She is, and was at the time of death, supported by her husband but his income too is modest – about $820 net per week in 2008-09. Their living expenses take most of what they have. They take no holidays. She and her husband have debts of some $67,000 apart from the mortgage debts. She deposed to having savings and shares of about $19,360 in July 2008. Otherwise their savings are principally in superannuation funds and they are modest. Their children remain dependant to some degree.

[152] The respondents point to the unencumbered home and the three investment properties owned by Mr David Pountney as a sign of wealth, and compare that to their own circumstances. After accounting for the mortgage encumbrances the net equity in those investment properties was only of the order of $160,000 to $200,000 at the time of death. The mortgage payments exceed the rental income.

[153] As at the time of death Mrs Poutney was entering an age where it is not uncommon for health issues to impact on earning capacity. She is a manual worker. Her residual earning capacity is limited. In July 2008 she deposed to having anxiety and breathing problems.

[154] Effectively if her husband died, became incapacitated, or if they divorced, Mrs Pountney would have only limited assets and resources to fall back on. At the time of death she had a life expectancy of over 35 years.

[155] The respondents are not wealthy either but they are in comparable circumstances – they have an unencumbered home and live modestly, with few frills, on their pension. They have a small amount of savings and the Mt Ossa land. They have the advantage of no debt. They can legitimately claim to have provided the significant care for the deceased in her latter years.

[156] In my view balancing out these various considerations leads to the conclusion that adequate provision for Mrs Pountney's proper maintenance and support was not made by the deceased. Given the size of the estate, the long period of excellent relations, the dutifulness of Mrs Pountney over that time, the reasons for the falling out, Mrs Pountney's health, her modest asset base, her limited earning capacity, and the relatively limited claim on the deceased's bounty that the respondents can demonstrate, it was appropriate that some provision be made.

Conclusion re Mrs Pountney's Claim

[157] Again matters are complicated by the disbursement of the estate on legal fees. If all legal fees were met from the estate, and all expenses met for which the respondents contend, then the net amount left for distribution would be between approximately $70,000 and $107,000. Matters are further complicated by Mr Collett's claim, which this applicant supports.

[158] Again putting Mr Collett's position to one side, a comparison between those competing for the testatrix's benefit suggests that there is not a great difference in their positions. Very little is known about the son Paul's circumstances at the time of death save that he had cancer, said to be of the brain, from which he died two months after the deceased. It does not appear that he had any great claim on her affections, they having been estranged for many years, nor any need of her assistance. He has children but I know nothing of their circumstances.

[159] So far as Mrs Pountney and the respondents are concerned, both are in modest circumstances. Both are not necessitous in the sense that they cannot survive without assistance. Both could do with a little more, particularly to assist in their retirements, and the potential for unforseen expenses to arise. Neither based their lives on any testamentary gift. Both assisted the deceased at times in her life when she needed it. The deceased could legitimately have considered that Mrs Pountney had been favoured over and above Mr John Knox in the eventual distribution from their father's estate, although Mrs Pountney maintains, with some apparent justification, that she had earned some additional consideration there, and her net gain was not great.

[160] Mr and Mrs Pountney have the greater asset base, no doubt acquired at considerable sacrifice over the years given their modest incomes, but which presumably also reflects the distribution from the father's estate. The testatrix could not assume that Mr Pountney's support of his wife would necessarily last. Ill health, accident and divorce (albeit an apparently remote risk here) can intervene. Absent that support she has relatively limited means.

[161] Ignoring Mr Collett's claim for the moment, I can draw no great distinction between Mrs Pountney and the respondents, save that the deceased favoured the respondents – though the events of the last four years of her life seemed to have loomed large in that regard. That favouring was justified to the extent that it reflected the care provided by them in the last few years, and the greater asset base available to Mrs Pountney.

[162] Whilst I retain a discretion to order that no provision be made, in my view a "wise and just" testatrix would have allowed a roughly equal division between her son and daughter. Acknowledging that the deceased wished to benefit the respondents to a

greater degree, and the justification for that approach, subject to the appropriate treatment of Mr Collett's claim, I would allow 55% of the assets of the estate to the respondents and 35% to this applicant whilst allowing for a legacy to Paul of 10%, roughly in line with deceased's treatment of him in her will.

The Executors' Conduct

[163] I have referred earlier to the legal fees said to have been incurred by the executors totalling over $70,000. Mr Collett estimated his legal fees at $25,000 to $30,000. Presumably Mrs Pountney's are not greatly different. In respect to $25,000 of the respondents' legal fees, Mr Knox indicated in an affidavit filed a few days before trial that the executors had granted a mortgage over the Mount Ossa property in order to secure those fees. He says: "Irrespective of the outcome of these proceedings the property at Mount Ossa – Seaforth Road will have to be sold to meet the estate's legal costs and outlays".[33]

[164] Underlying that statement by Mr Knox is an assumption that it is the executor's right to tie the court's hands by the incurring of whatever costs the executors desire. Mr Collett claims a life interest in the Mount Ossa property. That claim would necessarily be defeated if Mr Knox's assertion is accurate. The applicants contend that this assertion does not accurately represent the law.

[165] First, I observe that it has long been recognised that where executors receive notice of such a claim then they are under a duty to preserve the trust estate until the claim is resolved: *Re Simpson* [1950] Ch 38 at 42; *Re Crowley* [1949] St R Qd 189 at 192.

[166] Second, the assumption that Mr Knox makes is that the court has no power to supervise or limit the executors in their expenditure of estate funds on litigation of this type. That assumption I examine more closely below. As a general proposition I consider it accurate to assert that before embarking on expensive litigation the executors need to give careful consideration to what amounts they will expend and how best they should discharge their duties. Resort to generalisations that executors are entitled or obligated to uphold the will may provide no guidance at all in some cases. In my view this is such a case. Consistent with that view is the observation of Holmes JA in *Underwood & Anor v Sheppard*, a case involving family provision claims:

> "The learned judge's observation that the obligation to consider the impact of costs on the estate applied with greater force to the executors than to the beneficiaries is unimpeachable. Executors bear a fiduciary duty to which they must have regard in conducting litigation affecting the estate; beneficiaries do not."[34]

[167] Third, it seems to me that Mr Knox's statement overlooks a matter of significance. The effect of s 41 of the Act is to impose on every testator or testatrix an obligation to make "adequate and proper" provision for their spouse and children. If they fail to do so the court not only has the power, but the obligation, to ensure that is done, upon application being made. Notions that an executor can effectively determine the fate of an application by vigorously contesting it, irrespective of the sense or merits in doing so, are in my view misguided and wrong. Executors cannot ignore the duty

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[33] Paragraph 7 of the affidavit filed 10 February 2010.

[34] [2010] QCA 76 at [16].

that lay on the testator. Thus when an application is made or notified the executor's obligation is to objectively assess the evidence, impartially assess the merits of that application, and if necessary compromise the suit. That there is this obligation is consistent with the Practice Direction governing applications of this type.[35] Paragraph 2(b) describes one of the objects of the Practice Direction as "encouraging the early consensual resolution of applications" and para 8(b) requires that the standard directions "contain a dispute resolution plan designed to exhaust the prospects of a consensual resolution of the application".

[168] Turning to the facts here there are four significant features of note – first, so far as Mr Collett's claim is concerned this is not what I might call the more "normal" type of claim where there is no doubt about the eligibility of the applicant to claim but doubt about what might be considered "adequate and proper" provision. The converse is the case here. The factual issue to be resolved, Mr Collett's right to claim, was one that effectively determined the outcome of his claim. On any view of the facts Mr Collett has lived at the Mt Ossa property for some decades. He seeks to be allowed to see out what are likely to be his few remaining years in that home. He is a pensioner in poor health and with virtually no savings. He is partially blind. The home has been, in some ways, adapted to his disabilities. If he is accepted in his claim that he was the de facto husband of the deceased, not only within the last two years of her life but for decades beforehand, then it seems to me clear beyond argument that he would be entitled to that life interest. His claim on the deceased's bounty far exceeded that of any other beneficiary.

[169] Secondly, it would have been apparent from the outset that the cash reserves available to the estate were such that the effect of the executors' conduct, if their contentions are accepted, is to determine the fate of the application – to take away from the court the power to award the applicant the life interest that he seeks in the Mt Ossa Property. The executors would no doubt have realised that if Mr Collett's claims were established then he would clearly be entitled to have his costs paid. It is the executors who would have needlessly caused him expense. His costs are estimated at $30,000. He is a pensioner without significant assets. It would have been evident that to force him to litigation would almost certainly result in a need to sell the principal asset in the estate, if the executors too were to get their costs.

[170] Thirdly, the executors were not disinterested bystanders. By the terms of the will the property at Mount Ossa was left to the respondents. Thus they had a direct personal interest in opposing Mr Collett's claims. The real issue in this case, at least so far as Mr Collett's claim is concerned, was the determination of whose interest should take priority – the life interest that Mr Collett claims or the respondents' interest in realising the Mt Ossa asset? Similarly in respect of Mrs Pountney's claim. What the executors seek to do, under the guise of their upholding the will, is advance their own interest, but using the estate funds to do so. That is not an unusual feature of claims of this type. But where self interest and duty potentially conflict then there needs to be careful consideration of the options available and the wisdom of pursuing litigation regardless of the impact on the estate, and if it is to be pursued, how it is to be pursued.

[171] Finally, a worrying aspect is the way in which the litigation was conducted. Despite this being a modest estate a three day trial was undertaken, principally on the issue

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[35] Practice Direction No 8 of 2001.

of Mr Collett's status to apply. Twenty years ago Cohen J of the NSW Supreme Court expressed this view in relation to family provision litigation in small estates, with which I agree:

> "In my opinion the legal profession in both branches has an obligation to reduce the costs of litigation as much as possible when the amounts in dispute are so small. If the parties cannot reach a compromise then it seems to me that by consultation their legal advisers, both solicitors and counsel, should seek to find all means of defining the real issues and confining the evidence in relation to them. Where cross-examination will be unlikely to alter the substance of a witnesses' evidence it should be dispensed with. The heavy expense of bringing those witnesses from distant places should be actively avoided... it requires everyone in all cases to look somewhat further than [fighting for one's client's interests] and to look at what the final issue will be. Because everybody has stood by their respective clients so well there is practically nothing to be argued about. The plaintiff and the principal beneficiary will have to bear the heavy expense of the litigation with little left for them at the end. It is most regrettable and I think it shows up the need for early consultation and early advice to clients as to what at the end they will be facing."[36]

[172] Despite the obligation that Cohen J identified, so long ago, this litigation was pursued vigorously. That over $70,000 has been expended by one side principally on this issue of the de facto relationship I find disturbing. As well, some odd things were done here. While it can be said that witnesses such as Mrs Jacqueline Duncan, Ms Eileen Evans and Mrs Beale had some relevant evidence to give, it seems to me inescapable that the respondents ought to have realised that the weight that could be afforded their evidence was slight. Mrs Duncan believed that the deceased and her husband had never separated. Ms Eileen Evans and Mrs Beale believed that the marriage between the deceased and Jim Knox had continued after they again became friendly. I am quite satisfied that the respondents knew those beliefs to be wrong. The respondents knew perfectly well that the deceased and her husband had separated and in the relevant and critical sense had remained separated. If these witnesses were so little in touch with the deceased's relationships to be oblivious of these matters then, in so modest an estate, what real purpose was to be gained by advancing them as witnesses of any weight on the issue of her relationship with Mr Collett?

[173] And it was of some significance that the respondents' submission made only passing and, with respect, incomplete and inaccurate reference to the deceased's diaries.[37] This, the most compelling of the available evidence, was simply ignored.

[174] The respondents rely on the principle that ordinarily a trustee or executor is entitled as of right to be indemnified for expenses incurred before paying out the trust funds to anyone else: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691 at [50]; *Nick Kritharis Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 at [9] to [11]. However, there is a qualification to that rule. The true principle is that the

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36 *Jackson v Riley* (unreported) - 3701/1987 – 24 February 1989 – BC8902497.

37 Although not made explicit the reference made seems to be to Ex 8 which covers a period of three days out of the 34 years in question.

trustee or executor is so protected where the costs have been properly and reasonably incurred.

[175] *Re Beddoe* (1893) 1 Ch 547 is often cited in this regard. There a trustee was not allowed to retain out of the trust funds certain costs of defending an action. It was held that there was no reasonable cause for defending it. He had neglected to ask the opinion of the court before embarking on the defence. Lindley LJ explained:

> "But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestui que trust* unless under very exceptional circumstances. If indeed the judge comes to the conclusion that he would have authorised the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate…"[38]

[176] Bowen LJ in the same case stressed: "If there be one consideration more than any other which ought to be in the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk would be incurred."[39]

[177] *Nowell v Palmer*[40] and *Cumming v Sands*[41] are each examples of cases where executors were required to pay the costs personally in an unsuccessful defence of the estate against claims brought. Both cases share with this case the fact that in truth the executor was defending his or her own personal interest.

[178] Mahoney JA in *Nowell v Palmer* put the principle in this way[42]:

> "Mr Anderson, in his submission, had in mind, I think, the attitude which the courts have traditionally taken to the costs of legal personal representatives in defending proceedings brought against an estate. If the legal personal representative acts in accordance with proper principles, she will be safeguarded as to costs; in an appropriate case, her costs and/or the costs which she is ordered to pay in an unsuccessful defence of the estate may be ordered to be paid out of the estate: see *Re Estate of Paul Francis Hodges Deceased*; *Shorter v Hodges* (1988) 14 NSWLR 698 at 709-710; see generally Halsbury's Laws of England, 4th ed, vol 17, pars 917-919, vol 37, par 721.
>
> However, in the present case, the appellant, in defending the proceeding, was not acting as, or merely as, the executrix of the estate. She was, in a real sense, defending her own interests. She was the sole beneficiary of the estate. In addition, she had purported to distribute the estate to herself and, to an extent, the proceeding brought against her was a proceeding by way

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38 At 557.
39 At 562.
40 (1993) 32 NSWLR 574.
41 [2001] NSWSC 507.
42 At 581 – 582.

> of tracing the assets in the estate to which the respondent was entitled and to secure an accounting in respect of them: see, eg, *Re Diplock; Diplock v Wintle* [1948] Ch 465; affirmed sub nom *Minister of Health v Simpson* [1951] AC 251. I do not think that in these circumstances the principle to which I have referred should apply. The proceeding was essentially a defence by the appellant of her own interests."

[179] The complicating feature of family provision cases is that for a very long time the courts have held that it is the executor's duty to place all relevant evidence before the court, both positive and negative: *Dijkhuijs (Formerly Coney) v Barclay* (1988) 13 NSWLR 639, 654 (Kirby P, Hope & Mahoney JJA agreeing). In my view that does not mean that the traditional requirement that the executors act properly and reasonably is discarded. In *Gwenythe Muriel Lathwell As Executrix Of The Estate Of Gilbert Thorley Lathwell (Dec) v Lathwell*[43] the Court of Appeal in Western Australia held in relation to the costs of an appeal in a family provision case:

> "However, as the general principle makes clear, a trustee may not be permitted to indemnity out of the estate if costs are not properly or reasonably incurred. It is not enough that trustees (or executors) honestly believe that they should engage in litigation; they must also act reasonably (*Talbot v NRMA Ltd* [2000] NSWSC 608; (2000) 50 NSWLR 300 [24]) and see *McGregor v McGregor (No 2)* [1919] NZLR 286; *Mead v Watson* (2005) 23 ACLC 718 [12] (Sheller, Ipp and Tobias JJA); *Jacobs' Law of Trusts in Australia*, (7th ed, 2006) [2110]."

[180] Here there was no impartial placing before the court of all the competing evidence. That would have required little in the way of costs. Rather the respondents were actively and aggressively advancing their own interests. By reason of the four factors that I have earlier mentioned I consider that the respondents have not acted reasonably in incurring the substantial costs that they have in unsuccessfully defending Mr Collett's suit. I should mention that very little time at all was spent on any other aspect of the claims. I do not conceive that executors in the position of those here are entitled to hide behind their appointment and claim that they have no choice but to litigate as hard as they can, incurring whatever expense they desire, and force their opponent to do the same, in an effort to defeat his claim and preserve their own interest.

[181] In my view the circumstances cried out for responsible executors to seek the direction of the court as to the appropriate course to take. There were alternatives open to the court. A case appraisal may have been ordered with the cost consequences to the challenger to be borne personally if the dispute continued and the result was less favourable to their view than the appraiser's decision.[44] Alternatively the Public Trustee may have been appointed and, given the modest size of the estate, the probable effect on it of litigation, and the matters in issue, the executor might well have been directed to preserve the estate, agree to abide the order of the court, and let the parties litigate with their own funds if so minded, with the usual costs orders protecting the successful party.

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43 [2008] WASCA 256 (S) at [4]

44 See *Uniform Civil Procedure Rules* 1999, r 344.

[182] I do not accept the respondents' argument that their expenditure has the result that the Mt Ossa property must necessarily be sold to satisfy their claim for an indemnity before the justice of Mr Collett's claim be met.

Conclusion

[183] Before expressing a final conclusion it will, regrettably, be necessary to hear again from the parties. Mr Crow, for the respondents, has submitted that I cannot accede to the applicants' arguments unless and until I am aware of any offers made. I agree. He submits, as well, that this is not a claim on notice under s 8 of the *Trusts Act* 1973 (Qld) for the executors to account for their conduct.[45] The respondents may wish to place material before me relevant to the matters I have discussed. Again I agree that they should be given the opportunity to do so.

[184] Thus to the extent that I express a conclusion it is subject to the further submissions that the parties might be advised to make.

[185] It seems to me that I have two possible courses open. One is to first allow the parties their reasonable costs and expenses out of the estate. I would limit Mrs Pountney's costs to $30,000.[46] That will mean that the Mt Ossa home will be sold and the estate will be greatly reduced as I have indicated. Mr Collett's claim on the testatrix's bounty far exceeded that of the children. He will need sufficient funds to provide himself with a home over the next few years. Assuming that the estate is reduced in this way, I would allow him the whole of it to assist him in obtaining adequate accommodation.

[186] The alternative course is to limit the executors to expenses that they can demonstrate were reasonably required, require them to discharge or otherwise satisfactorily deal with the mortgage over the Mt Ossa property, pay Mr Collett's costs from the estate, grant him the life interest in the Mt Ossa estate that he seeks, and delay the payment of the residuary benefits until after his death. Effectively the parties can at that time then recover their costs out of their entitlement, albeit limited to that entitlement.

[187] I observe that in assessing the reasonableness of any expense two things are relevant: the reasonableness of the step taken and the reasonableness of the cost incurred in the taking of that step.

[188] I direct that the parties to file such further affidavits and submissions that they might be advised addressing the issues of what expenses the respondents can reasonably require be paid out of the estate; what costs, if any, the parties should be entitled to out of the estate; and the appropriate form of orders that are required to give effect to these reasons. The respondents are to do so within 14 days and the applicants to reply within 7 further days. In giving those directions I do not mean to discourage the parties from exploring a consensual resolution of the outstanding issues and so

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[45] That lack of notice may be due to the late notice of the expenditure of all the estate's cash funds – the affidavit was filed late but I am not privy to any prior communications that may have passed between the parties.

[46] Contrary to the Practice Direction, Mrs Pountney has not indicated her probable costs. She has filed considerably more affidavit material than Mr Collett but I limit her to the range that he has indicated. As well see the approach of Young CJ in Eq in *Carroll v Cowburn* [2003] NSWSC 248 where he limits the costs awarded to the entitlement obtained.

minimising the expense that will inevitably result if formal proof and further contest is required. In case it transpires that further time is needed I give liberty to apply to the parties.