SUPREME COURT OF QUEENSLAND

CITATION:	*DA v KG & Anor* [2010] QSC 318
PARTIES:	**DA** (applicant) **v** **KG** (first respondent) **DG** (second respondent)
FILE NO/S:	S241 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	13 October 2010
DELIVERED AT:	Rockhampton
HEARING DATE:	27 September 2010
JUDGE:	McMeekin J
ORDER:	**The application to extend time is refused.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – APPLICATION – where de facto spouse sought leave to apply for a property adjustment order under Pt 19 of the *Property Law Act* 1974 (Qld) – where more than two years have elapsed since the relationship ceased – whether there is a primary facie case for some adjustment – whether the applicant would suffer hardship if denied leave to apply – whether the discretion to grant leave to apply should be exercised in favour of the applicant FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – APPLICATION – where applicant sought declaration that the second respondent holds his interest in the subject property as trustee for the first respondent by way of a resulting or constructive trust – whether the declaration should be made *Family Law Act* 1975 (Cth), s 44(4)(a) *Property Law Act* 1974 (Qld), s 258, s 286(1), s 288, s 291, s 292, s 301, s 309, s 341 *Baumgartner v Baumgartner* (1987) 164 CLR 137

D v D [2007] QSC 131
Deves v Porter [2003] NSWSC 625
HT v CS [2009] QSC 051
In the Marriage of Jacenko (1986) 11 Fam LR 341; (1986) FLC 91-776
In the Marriage of Mackenzie (1978) 34 FLR 56; [1978] FLC 90-496
In the Marriage of Neocleous (1993) 113 FLR 451; [1993] FLC 92-377
SAM v IDP [2006] QSC 344
In the Marriage of Whitford (1979) 35 FLR 445; [1979] FLC 90-612

COUNSEL: A. Arnold for the applicant
M. Willey for the respondents

SOLICITORS: Madden Solicitors for the applicant
Rees R & Sydney Jones for the respondents

[1] The applicant and the first respondent were in a de facto relationship for a period from about mid 2004 to February 2008 – three years and seven or eight months. The applicant seeks a property adjustment order pursuant to the provisions of Part 19 of the *Property Law Act* 1974 ("the Act").

[2] The Court's power to make a property adjustment order is governed by the provisions of s 288 of the Act which provides:

> "(1) A court may make a property adjustment order only if –
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> (a) the application was made within 2 years after the day on which the de facto relationship ended; or
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> (b) the court has given the applicant leave to apply.
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> (2) The court may give leave only if it is satisfied hardship would result to the applicant or a child of the de facto partners if leave were not given."

[3] The applicant seeks leave to proceed as he failed to commence his proceedings within the two year period provided for in s 288(1)(a) of the Act. Proceedings were commenced on 12 August 2010.

[4] Section 288 of the Act is based largely upon the equivalent provision in the *Family Law Act* 1975 (Cth) at s 44(4)(a). That suggests that the extensive case law that has developed under the *Family Law Act* can be of assistance in guiding the approach that ought to be taken to s 288. That has certainly been the approach taken in cases to date: see, for example, *SAM v IDP* [2006] QSC 344 per Mackenzie J; *D v D* [2007] QSC 131 per Ann Lyons J.

[5] I take the relevant principles to be as follows:

(a) On an application of this type the Court engages in a two stage process. First, the applicant must demonstrate that hardship would be caused to him if leave were not granted. That being demonstrated then the applicant must show that the discretion so enlivened should

be exercised in his favour: *SAM v IDP* (supra); *D v D* (supra); *HT v CS* [2009] QSC 051.

(b) To demonstrate hardship the applicant would need to demonstrate that he would probably succeed if the substantive application were heard on its merits. If he could not do so then a court could not be satisfied that hardship would be caused if leave were not granted: *In the Marriage of Whitford* (1979) 35 FLR 445; [1979] FLC 90-612;

(c) The concept of "hardship" requires the applicant to demonstrate that he would suffer a substantial detriment if leave is not granted: *In the Marriage of Whitford* (supra); *In the Marriage of Neocleous* (1993) 113 FLR 451; [1993] FLC 92-377; *Deves v Porter* [2003] NSWSC 625; *SAM v IDP* at [15] per Mackenzie J;

(d) The loss of a mere right to litigate is not the hardship to which the provision refers but rather it is the hardship consequent upon the loss of that right that is relevant: *SAM v IDP* at [16]; *In the Marriage of MacKenzie* (1978) 34 FLR 56; [1978] FLC 90-496 per Strauss J;

(e) Matters that will be relevant to the exercise of the discretion will include the length of any delay, the explanation for any delay, whether the respondent can point to any prejudice should the discretion be exercised in favour of the applicant and all this in the context of the relative strength or weakness of the applicant's case;

(f) For the purposes of the application I should assume that the evidence of the applicant ought to be accepted unless it is "inherently unbelievable or contradictory": *In the Marriage of Jacenko* (1986) 11 Fam LR 341; (1986) FLC 91-776.

A Prima Facie Case

[6] Section 286(1) of the Act provides:

> "A court may make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property."

[7] The property adjustment order that the applicant seeks relates to a property located at Pine Mountain Drive, Yeppoon ("the property"). That is the first respondent's only asset of significance and she owns it jointly with the second respondent, her father.

[8] While the Part 19 provisions plainly provide the power to adjust the interests of parties to a de facto relationship, it is not so clear that the jurisdiction extends to adjusting the interests of those who are not a party to the relationship. That has relevance here as the second respondent is not one of the "de facto partners".

[9] I have received no submissions on the point but I assume, without deciding the matter, that s 286 of the Act is wide enough in its terms to empower the court to adjust the interests of the first respondent in favour of the applicant in an asset that is jointly owned by her and the second respondent. There is no doubt that such an interest would fall within any usual definition of property: see s 36 *Acts Interpretation Act* 1954 (Qld). And it would have been a simple matter for the legislature to have excluded from the ambit of the legislation any impact on third party interests and it did not.

[10] Nonetheless such an impact might be significant and presumably can be brought into account in appropriate cases by the catch-all provision in s 309 of the Act.

[11] I note that the applicant seeks a declaration that the second respondent holds his interest in the property as trustee for the first respondent by way of a resulting or constructive trust. If such a declaration was made it would avoid the complications that I have been discussing and would increase the size of the potential pool of assets.

[12] However at this stage there is little evidence to support the applicant's assertion that the second respondent is not entitled to the full legal and beneficial interest that he holds in the property. At paragraph 12 of his affidavit the applicant asserts that that property was purchased by the respondents "immediately prior to the relationship commencing" but he qualifies that assertion by stating that he was not "absolutely privy to the financial circumstances surrounding the land". At paragraph 18 of his affidavit the applicant asserts that "although the land was owned with her father this was, as far as I understood, only an arrangement that enabled her to buy the land. That is, it was an ownership of convenience. I say this because throughout our relationship, [the second respondent] and [the first respondent] discussed the land and it was always said by them both that they considered the land to be hers alone."

[13] The first respondent denies these allegations. The applicant does not attest to any particular conversations to substantiate his claim that it was "an ownership of convenience". Nor is it explained why it would be necessary for the second respondent to be on the title deed to the land if indeed he made no contribution.

[14] If it be the case that the second respondent was a necessary owner in order to satisfy the lenders' requirement for sufficient security (which is one inference) then that itself is a significant contribution. By that means the second respondent has exposed himself to liability for the debt incurred in the purchase of the property.

[15] As well it is evident from the first respondent's affidavit that the relationship with her parents is more complex than the applicant has explained. According to the first respondent her parents have provided a home and financial support for the applicant and her two children over a period of some seven years and her parents reside and have always resided in the Pine Mountain Drive home. The first respondent says that the property "is as much their home as it is mine".

[16] Thus it is far from clear, on all the evidence, that any court would be minded to make the declaration sought.

[17] The only indication that I have as to the adjustment that the applicant says should be made is the claim contained in his originating application. By that application the applicant claims that there should be an adjustment of interest "in the property of the applicant and the first respondent to affect an overall entitlement to the applicant of 70% of the net assets of the applicant (including any beneficial interest to the applicant in the land held by the second respondent as trustee by way of resulting constructive trust)".

[18] It is not clear to me what is meant by the claim that the applicant seeks an adjustment of interest in the property so as to effect an overall entitlement to him "of 70% of the net assets of the applicant". If the intention is that he seeks an

adjustment of interest in the property of the parties so that he achieves 70% of that total then there is nothing in his material which would justify any confidence that a court would make any such order.

[19] I do not conclude that a prima facie case for some adjustment is not shown, assuming the applicant's facts, but the likely extent of any adjustment seems to me modest at best.

Hardship

[20] I turn then to the question of hardship.

[21] Firstly I note that the relationship was a relatively short one and that there was one child born to the applicant and the first respondent during that period. That child is nearly three years of age and is in the care of the first respondent. I note that the child of the relationship was born only six weeks prior to the separation of the parties.[1] The applicant pays child support of $130 per week.

[22] The property was purchased in 2003 for $150,000 by the respondents. At the time it was vacant land save for a shed. In September 2006 the respondents commenced construction of a house which is now completed or substantially so.

[23] In September 2009 the property was valued at $800,000. There is a registered mortgage over the property of approximately $217,000.

[24] The applicant here claims that he has made relevant contributions in three ways. Firstly he asserts that he has expended significant monies on the development of the site. He says that he has spent approximately $20,000 in purchasing the hardware for the completion of the house that has been erected on the site and had expended another $4,000 on tools but has retained those since separation. As well he contributed to the mortgage on the property from December 2006 to February 2008 in the sum of $600 per month.

[25] Secondly, the applicant says that he made non-financial contributions in that he undertook extensive work to develop the property. He says that he had worked in a building trade for about four years but did not finish an apprenticeship. The inference is that he had significant skills to offer. He asserts that he undertook extensive work on the development of the shed and house on the property.

[26] These contributions to the construction of the home are plainly relevant on a Part 19 application: see s 291 of the Act.

[27] Thirdly, the applicant asserts he made a contribution as a homemaker. He asserts that the first respondent undertook "the inside work" and he undertook "the outside work". Non-financial contributions of this type are relevant under a Part 19 application: see s 292 of the Act

[28] The applicant asserts that at the commencement of the relationship he had minimal assets consisting essentially of a second hand motor vehicle worth about $3000 and a few hundred dollars worth of shares. In addition the applicant had a negligible superannuation entitlement.

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1 Born 10 December 2008.

[29] The first respondent had her interest in the Pine Mountain Drive property which the applicant asserts was valued at about $130,000 and a Nissan Patrol motor vehicle worth about $30,000. Those are the applicant's contentions.

[30] The first respondent says that at the commencement of the relationship her interest in Pine Mountain Drive was worth approximately $75,000 and that there was a mortgage over that land of the same amount. It seems that the first respondent's evidence reflects the fact that the land was purchased in October 2003 for $150,000 and the entire purchase price was borrowed. The relationship between the parties commenced only seven or eight months after the purchase. Hence the first respondent's assessment of her asset situation is more likely to be accurate than the applicant's assertions. The first respondent describes the applicant's asset position as "nominal" at that time.

[31] The first respondent contests much of the claimed contributions made by the applicant, both financial and non-financial. She asserts that in order to carry out construction work on the property she borrowed $150,000, supplied a further $40,000 from the sale of her motor vehicle and her father, the second respondent, contributed a further $60,000. She asserts the applicant made no contribution at all save that he contributed $150 per week to a joint bank account which was used for the purchase of tools necessary for the construction of the house. The first respondent asserts that the applicant took with him at least "$4,000 worth of tools" when he separated from her and so received effectively all that he had put in.

[32] The resolution of the factual disputes between the parties is for another day.

[33] The substantial detriment that the applicant seeks to advance is the difference in result that he could expect between a property adjustment order made under Part 19 of the *Property Law Act* and any order that might be made should he be restricted to equitable remedies. His rights in equity are not removed by the Act: s 258 of the Act. In the circumstances the equitable remedies in question would be of the type considered by the High Court in *Baumgartner v Baumgartner* (1987) 164 CLR 137, where the Court imposed a constructive trust as a remedy to circumvent what was considered to be unconscionable conduct.

[34] The difference between what might be achieved under a Part 19 application and what might be achieved by resort to equitable remedies was considered by Mackenzie J to be a legitimate measure of the relevant detriment in *SAM v IDP* (supra). I agree that that is a proper approach.

[35] The significant difference, as I perceive it, between the approach of equity and the approach under Part 19 is in the range of factors that can be brought into account under a Part 19 application. In *Baumgartner* the majority spoke of "the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them" (at 149). Where, as here, the applicant asserts that his contributions were made in the expectation that he was creating a joint home for the parties then it is clear that the equitable principle is, prima face at least, enlivened. Thus refusal of leave to proceed with the Part 19 application would not mean the end of his potential rights.

[36] The court can bring into account a very wide range of matters in a Part 19 application, matters which include those relevant to any equitable claim. They include the age and state of health of the de facto partners (s 297), the income property and financial resources of each of the de facto partners and their physical and mental capacity for appropriate gainful employment (s 298), whether either de facto partner has the care of a child who is under 18 years (s 299), any necessary commitments that either de facto partner has to enable that de facto partner to support himself or herself or a child or other person to whom the de facto partner has a duty to maintain (s 300), the responsibility of either de facto partner to support another (s 301), what standard of living is reasonable for each of the defacto partners and in all of the circumstances (s 303), the contributions made by either of the de facto partners to the income and earning capacity of the other (s 304), the length of the de facto relationship (s 305), the extent to which the de facto relationship has affected the earning capacity of each of the de facto partners (s 306), the financial circumstances of any co-habitation with another (s 307), the provision of child maintenance by either de facto partner (s 308) and "any fact or circumstance the court considers the justice of the case requires to be taken into account" (s 309).

[37] The issue then is to identify what additional factors the court would bring into account under a Part 19 application here when compared with the matters that would be brought into account in the application of any equitable remedy and determine what likely difference there would be in the result.

[38] Contributions made by the applicant to the construction of the residence which improved the value of the land, whether through direct financial contributions or through manual labour, would undoubtedly be brought into account in application of any equitable remedy.

[39] Those wider range of factors relevant under a Part 19 application are of some significance here but not necessarily to the advantage of the applicant. The first respondent is not only the mother of the child of the relationship, whom she must support, but has two other children from a previous relationship, aged 19 and 14, whom she has some responsibility to maintain.

[40] The de facto relationship was of relatively short duration and has had no apparent impact on the earning capacity of the applicant.

[41] The applicant is aged 41 years and in good health. He appears to have an excellent earning capacity, his gross earnings being in the order of about $100,000 per annum. He is the registered proprietor of certain land which he values at about $174,000 but which has a mortgage registered over it of about the same amount.

[42] The first respondent has returned to her employment and is in good health. However her capacity to maintain her employment will no doubt depend on her ability to properly care for her three year old child, a child of the de facto relationship.

[43] Finally the property is the home of the first respondent's parents. It appears that the first respondent accepts an obligation to provide support to her parents given their long support of her and her children. That is a relevant consideration: s 301 of the Act.

[44] Despite the width of the factors that can be brought into account under Part 19 there are no particular factors that stand out as justifying an adjustment in favour of the applicant. There are some factors that would favour the first respondent, for example her very much greater financial contribution to the acquisition of the property, the impact on her having the care of a three year old child and the responsibilities she has to provide a home for her children and her parents..

[45] The only matter that the applicant points to, as I understand his case, that cannot be brought into account in pursuing his equitable remedies and that can be brought into account in this application is the contribution he made as a homemaker by the carrying out of yard work over a period of a little less than four years. He concedes a contribution by the first respondent as a home maker. It was not shown that the one contribution outweighed the other in the applicant's favour.

[46] No attempt was made to identify what difference in result there might be with this additional factor, but in my view the first respondent's submission that any adjustment could only be "minimal" is accurate. Certainly if one brought into the scales the costs likely to be incurred in a contested proceeding it is doubtful that the proceedings would be worthwhile.

[47] The comments of White J (as her Honour then was) in *HT v CS* (supra) at [26] are apposite here:

> "Nonetheless there is the prejudice of needing to deal with these issues after the expiration of the limitation period. In order to give effect to the legislative intention that there is a distinct bar to bringing an application for a property adjustment order after two years from the end of the de facto relationship it is essential that an applicant produce appropriate evidence to allow the court to comprehend in some clear fashion the nature of the hardship if the opportunity to litigate to a successful order is not granted. It is the applicant who must satisfy the onus of proof …"

[48] In my view the applicant has not demonstrated that he would suffer hardship in the relevant sense if leave was not granted.

[49] In the circumstances it is not necessary to go on and consider the discretionary matters.

[50] The application to extend time is refused.

[51] I will hear from counsel as to costs but I note the express legislative intention that parties to proceedings under Part 19 should bear their own costs: s 341.