

# SUPREME COURT OF QUEENSLAND

CITATION: *Burton v Spencer* [2015] QSC 356

PARTIES: **DAPHNE BURTON**  
(applicant)  
v  
**KENT RICHARD SPENCER also known as KENNETH RICHARD SPENCER**  
(respondent)

FILE NO/S: No 820 of 2012

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 15 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 2, 3, 4, 5 November 2015

JUDGE: Atkinson J

ORDERS: **1. It is declared that the respondent was not a spouse or a de facto partner of Sharon Ann Burton (deceased) (as those terms are defined in the *Succession Act 1981 (Qld)* and the *Acts Interpretation Act 1954 (Qld)*).**  
**2. It is ordered that Letters of Administration on Intestacy be granted to the applicant.**

CATCHWORDS: SUCCESSION LAW – INTESTACY AND DISTRIBUTION ON INTESTACY – where the applicant and the deceased had been in a relationship for some years – where there was evidence that the applicant and the deceased had lived together for some of that period – where the nature of that relationship had changed over the years, including a breakdown in the de facto relationship during 2008 to 2011 – whether the applicant and the deceased had lived together as a couple in a genuine domestic relationship for a continuous period of two years prior to her death – whether letters of administration should be granted to the respondent, the mother of the deceased

*Acts Interpretation Act 1954 (Qld)* s 32DA  
*Succession Act 1981 (Qld)* s 5AA, s 35, sch 2  
*Uniform Civil Procedure Rules 1999 (Qld)* r 610(1), r 610(3)

*Burton v Spencer* [2015] QSC 187 cited  
*S v B* [2005] 1 Qd R 537 followed

*Spencer v Burton* [2015] QCA 104 cited and applied

COUNSEL: JA Greggery for the applicant  
 SJ Keim SC with RA Quirk for the respondent

SOLICITORS: Connolly Suthers for the applicant  
 Purcell Taylor for the respondent

- [1] **ATKINSON J:** Sharon Burton<sup>1</sup> died on 6 July 2012 after suffering from metastatic breast cancer. She was 56 years old, having been born on 19 June 1956. She left behind many devastated friends and relatives. Unfortunately, she had not made a Will so this case was necessary to determine who should administer her estate and who should be its beneficiaries.
- [2] The distribution of a person’s estate when the person dies without a Will is determined by s 35 of the *Succession Act* 1981 (Qld). That section refers to Schedule 2 of the *Succession Act* which provides that, if the intestate is not survived by issue but is survived by a spouse, and there is only one surviving spouse, the spouse is entitled to the whole of the residuary estate. If the intestate is not survived by any spouse or any issue but is survived by a parent, then the parent is entitled to the whole of the residuary estate.
- [3] Priority for the grant of letters of administration on intestacy is governed by r 610(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) (“UCPR”). Relevantly for this case, if the deceased has a surviving spouse, then the surviving spouse is generally entitled to the grant of letters of administration. If the deceased is not survived by a spouse, children or other issue, but is survived by a parent, then generally the parent is entitled to the grant of letters of administration. The court may, however, pursuant to UCPR r 610(3), grant letters of administration to any person, in priority to any person mentioned in r 610(1). The general rule to be followed is that entitlement to a grant of letters of administration follows interest. Accordingly, letters of administration in this case should be granted to the person who is entitled to the benefit of Miss Burton’s estate.
- [4] In this case Miss Burton was survived by the applicant, her mother Daphne Burton (“Mrs Burton”). However the respondent, Kent Spencer (also known as Kenneth or Ken Spencer), has asserted that he is the surviving spouse of Miss Burton. She was not survived by any children or other issue. It is necessary therefore for the court to determine whether Mr Spencer was in fact her spouse.
- [5] Section 5AA of the *Succession Act* relevantly 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; or
- ...

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<sup>1</sup> She referred to herself as “Miss” so that is the title used in this judgment.

- (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; ...
- (3) Subsection (2) applies—
  - (a) despite the AIA, section 32DA(6) and schedule 1, definition *spouse*; and
  - (b) whether the deceased died testate or intestate.

...”

[6] It is not disputed that the respondent and the deceased were not married. Section 32DA of the AIA relevantly provides as follows:

- “(1) In an Act, a reference to a *de facto partner* is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.
- (2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances—
  - (a) the nature and extent of their common residence;
  - (b) the length of their relationship;
  - (c) whether or not a sexual relationship exists or existed;
  - (d) the degree of financial dependence or interdependence, and any arrangement for financial support;
  - (e) their ownership, use and acquisition of property;
  - (f) the degree of mutual commitment to a shared life, including the care and support of each other;
  - (g) the care and support of children;
  - (h) the performance of household tasks;
  - (i) the reputation and public aspects of their relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are 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.

...”

- [7] The question to be determined in this case is whether or not Miss Burton and Mr Spencer were de facto partners, that is, living together as a couple on a genuine domestic basis, for a continuous period of at least two years ending when Miss Burton died on 6 July 2012.
- [8] The onus lies on Mr Spencer as the party asserting that the relationship so subsisted to prove on the balance of probabilities that it did.<sup>2</sup> He failed to satisfy that onus. While it appeared that Mr Spencer and Miss Burton were in a de facto relationship living at various addresses and then in her unit, unit 3 at Metro Quays,<sup>3</sup> until 2008, thereafter the de facto relationship broke down. It was only recommenced so that they could be said to be in a de facto relationship again some time in 2012. Mr Spencer and Miss Burton did not live together on a genuine domestic basis for a continuous period of at least two years ending on 6 July 2012. An analysis of the evidence will show how this conclusion was reached.
- [9] The evidence in the case before me consisted of affidavits, a transcript of the cross-examination of the deponents of those affidavits which took place during an earlier trial of this matter and oral cross-examination of some of those witnesses before me. In addition, there was a quantity of documentary evidence admitted.
- [10] Because of the unreliability of many, if not most, of the witnesses called by the applicant and the respondent it was particularly useful in this case to turn to contemporaneous documents. Many of them were written about Miss Burton and some of them were written or signed by her. The latter were particularly valuable in determining whether or not there was a de facto relationship between Mr Spencer and Miss Burton for a continuous period of at least two years prior to Miss Burton’s death. Where such evidence exists, I shall specifically refer to it.
- [11] Each of the parties to this action, being Mrs Burton and Mr Spencer, attempted to show the court through that evidence whether or not Miss Burton and Mr Spencer were, and had for a continuous period of at least two years prior to Miss Burton’s death been, de facto partners. Unfortunately, the emotional overlay caused by the death of a loved daughter, friend or partner, as well as the potential financial benefit to be gained from success in the case, had an inevitable effect on the reliability of much of the evidence led before me.
- [12] Friends of Miss Burton and Mr Spencer gave evidence that seemed to be almost entirely from a partisan viewpoint and therefore did little to elucidate the question before me, as their evidence was often tainted by the point of view they had adopted. Their evidence is relevant to the reputation or public aspects of the relationship. Otherwise, I shall only refer to it later in these reasons if I found myself able to rely on the evidence.
- [13] Carole Hart, Debra Thomas, Belva (Bobbie) and Allan Lena, Saskia Ten Dam, Kay and Geoffrey Tate, Sharon Harpin, Valerie Venturato and Janne Hartig were all friends of Miss Burton’s and gave relatively partisan evidence denying that the de facto relationship

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<sup>2</sup> *S v B* [2005] 1 Qd R 537 at [2], [9], [33] and [50]; *Spencer v Burton* [2015] QCA 104 at [16].

<sup>3</sup> 3/86 Ogden Street, Townsville.

existed continuously in the last two years of Miss Burton's life. Where I was able to rely on that evidence I shall specifically refer to it.

- [14] On the other hand, friends of Mr Spencer's, Colleen Weber, Lynette Parkinson, Errol Bartkowski, Mark Gannon, Richard Taylor, Peter Perkov and Adrian Hepi, gave relatively partisan evidence affirming that the de facto relationship had existed continuously in the last two years of Miss Burton's life.
- [15] Although called by Mr Spencer, Desleigh Lindberg was more Miss Burton's friend. However, her observation of the relationship between Miss Burton and Mr Spencer was limited by her own serious illness, her geographical distance from Townsville, and the fact that she never visited unit 3 at Metro Quays. The result was that her observations of them together were limited to when Mr Spencer and Miss Burton lived at Sooning Street in the 1990s, a single occasion in May 2008 when they had dinner together at a restaurant, and then an occasion in June 2012 not long before Miss Burton's death.
- [16] Robert Lillington is another witness who was more a friend of Miss Burton than Mr Spencer. He gave evidence that Mr Spencer and Miss Burton lived together at various times. His capacity to observe them as a couple was, however, limited by the fact that he left Townsville and has lived in Sydney for about the last twenty years. His evidence was not substantially challenged, so where it is useful to determining an issue in dispute I shall refer to it.
- [17] Hanne Secher was called by Mr Spencer but it appears she was more Miss Burton's friend than his. She and Mr Spencer were with Miss Burton when she died. It was a little surprising therefore that when giving her evidence, she appeared to be fiercely supportive of Mr Spencer's assertion of his continuous de facto relationship with Miss Burton. Ms Secher even went to the extent of denying the obvious closeness between Miss Burton and her family, asserting she was with Miss Burton whenever she was in hospital, including at her first chemotherapy treatment, and denying that she knew Mr or Mrs Lena. There are many other examples of partiality which led her to be inaccurate in her evidence. The reason was revealed in cross-examination before me. Some time before her death, Miss Burton had asked Ms Secher if she would be her executor. Ms Secher asserted that in her opinion, the case before the court should only have been about "what Sharon's wishes were with the will... Her wishes were what the will should've been about." That was not a question I was required to decide. Unfortunately, Ms Secher's evidence, like much of the oral and affidavit evidence in this case, was tailored to the outcome sought to be achieved, rather than being a truthful account of what the witnesses observed.
- [18] Mr Lillington gave evidence that Miss Burton told him that she would not be leaving a Will but told him in general what she wanted to happen to her estate. Again, that is not the question before the court; rather, it has some relevance to her degree of commitment to the relationship after she was diagnosed as having a terminal condition.
- [19] A number of Mr Spencer's friends were part of a group that would go drinking together and then occasionally go back to Miss Burton's unit to continue drinking and socialising in the early hours of the morning. Their evidence of seeing belongings of Mr Spencer's there at unspecified times, even if it were all true, was not of great assistance in determining the question that it was necessary to decide. In any event, much of the evidence was extremely unreliable.

- [20] Ms Weber, for example, appeared to be giving evidence to persuade the court of the result she wanted, rather than giving honest evidence. In her efforts to be helpful to Mr Spencer, she inadvertently contradicted him by saying, for example, that she was sure that Miss Burton had told her that Mr Spencer went to her father's funeral, when on his own evidence he did not. I did not find myself able to rely on anything she said.
- [21] Ms Parkinson was also part of the drinking group, although she fairly conceded that most of the socialising with Mr Spencer and Miss Burton, together or alone, happened at the house she shared with Mr Gannon. Her evidence was so coloured by her strongly-held opinions about Mr Spencer's being attentive to Miss Burton after she was diagnosed with cancer that it was of no assistance in determining the question before me. So determined was she in court that she stayed in court after giving her evidence and provided an answer for another witness, Mr Taylor, in a loud stage whisper, further undermining her credibility. Mr Gannon gave evidence similar to Ms Parkinson's. I have, however, been able to draw from their evidence that Mr Spencer and Miss Burton were in a de facto relationship prior to 2008, that thereafter they continued to socialise together, and that they moved to Airlie Beach together in 2012, presumably with the intention of resuming their de facto relationship.
- [22] Mr Taylor was part of the same social drinking group. He appeared to be doing his best to give his evidence but was confused on occasions during it. He did remember staying the night at unit 3 one New Year's Eve because it was hard to get home. Miss Burton and Ms Hartig were there, but not Mr Spencer. He said he saw men's clothing and toiletries in Miss Burton's unit but no time frame was given on that. He then elaborated by agreeing that the cupboard doors in the bedroom were always open and that he "could always walk through the bedroom to the bathroom and check to make sure that there were men's clothes and shoes and jumpers there". As he had no reason to do so, that question in cross-examination and its answer undermined the reliability of his evidence, quite apart from the confusion that he demonstrated.
- [23] Mr Perkov was perhaps the most unhelpful witness called by Mr Spencer. Mr Perkov was called because he had provided an affidavit in which he swore, most relevantly for this case, that in February 2012 he was asked by Mr Spencer to fix some taps in the bathroom of unit 3 and he had to remove toiletries of both Mr Spencer and Miss Burton from the sink to do so. When asked about this at the first trial, the unreliability of his memory was exposed by the following exchange in cross-examination:
- "Yes. All right. But you say you have a recollection of them being there in early February 2012?---Early February – I wouldn't actually – I wouldn't say 100 per cent that it's the right February or any – any month, actually.
- Oh, the time is not something that is ---?---Well, I can't recall if it was a February. I can't even – yeah. I can see a February – around early February, I don't know how February came up to it but it could be a February, could be March, could be any month."
- [24] When questioned at the second trial he was uncertain of the year when it happened and quite bizarre in some of his other answers. I found I could place no weight on his evidence at all.
- [25] Mr Hepi was a long-time friend of Mr Spencer's who socialised with Mr Spencer and Miss Burton, but his work and studies very often took him away from Townsville. He

was most unresponsive in his answers in cross-examination and I was unable to assess the reliability of his evidence of having used Mr Spencer's aftershave at the unit at Metro Quays. Of course, while the questions of whether Mr Spencer kept some of his aftershave at Miss Burton's unit or whether, as Mr Hepi and others said, there were photos of Mr Spencer with Miss Burton there, are relevant to the issue of whether he and Miss Burton were in a de facto relationship it is not particularly telling. Such facts are equally consistent with their being in a boyfriend-girlfriend, rather than a spousal, relationship.

- [26] Similarly, the evidence of Mr Spencer's mother, Marion Hanslow, appeared to be so partial that I was not able to rely on it except as to the length of the relationship and her observations of a confrontation which occurred at her residence. Mrs Hanslow had died by the time of the second trial so was not able to be cross-examined before me.
- [27] There seemed little doubt that Mr Spencer and Miss Burton had been in a de facto relationship at some time in the past but there was a very real question as to whether that existed for a continuous period of at least two years prior to Miss Burton's death. One would usually expect that the two people in that relationship would be in the best position to give reliable evidence as to the nature of that relationship but in this case, Miss Burton had died and Mr Spencer was so dishonest in crucial parts of his evidence that it was very difficult to rely on any of it unless it was supported by other, reliable evidence, such as documentary evidence.
- [28] It was necessary in this case to examine all of the relevant evidence in order to reach a conclusion as to whether or not Mr Spencer and Miss Burton had lived together as a couple on a genuine domestic basis within the meaning of the AIA s 32DA for a continuous period of at least two years ending on her death. However, given my general conclusions as to the lack of honesty and reliability of the evidence given by Mr Spencer, I shall only refer to those parts about which I was able to make relevant findings.

### **Sharon Burton's family**

- [29] Miss Burton was born on 19 June 1956, one of two children born to Mrs Burton and her first husband. Miss Burton's older brother is Peter James Burton. Miss Burton's mother, Daphne Burton, was born on 12 April 1927 and so is now 88 years old. She lives in Toowoomba. Peter Burton lives in Jondaryan with his wife, Irene. Irene Burton kept notes over the years of telephone conversations she had. Where they are useful in determining the question to be decided in this case, I have specifically referred to them. What they show is a close family with concern for one another and particularly for Miss Burton's condition as she became more unwell.
- [30] Mrs Burton's first husband, the father of Peter and Sharon, died when they were children and the family moved to live with Mrs Burton's mother until she married her second husband, Allan. From then on, Allan, Daphne and the two children lived together as a family and the children treated Allan as their father.
- [31] Miss Burton worked as a teacher in Queensland for many years and, as is usual for someone working for the Education Department in Queensland, worked at a number of schools throughout the State. According to her mother, she worked as a teacher in Proserpine, Innisfail, Ayr and Killarney. She was eventually transferred to Townsville sometime in the late 1980s or early 1990s.

- [32] Mrs Burton gave evidence that she and her daughter, Sharon, maintained a close relationship, speaking on the telephone at least two or three times a week and invariably on a Sunday. This was confirmed by the limited number of Miss Burton's telephone records which were disclosed by Mr Spencer. Mr Spencer conceded that there was a close and loving relationship between mother and daughter.
- [33] Mrs Burton's husband, Miss Burton's step-father Allan, died on 6 December 2008.
- [34] Mrs Burton gave evidence that she met the man introduced to her as Kent Spencer "three or four or more years" before December 2012 when he and her daughter had come to Toowoomba. Mrs Burton's evidence was that Miss Burton stayed with her and Mr Spencer stayed at the Federal Motel. Miss Burton introduced Mr Spencer to her mother as a friend of hers. She never said to her mother that Mr Spencer was her de facto partner. They only stayed in Toowoomba for a couple of days. The three of them went for a meal at the Federal Hotel and Mrs Burton said that they appeared to be just friends. It appears that that occasion was the celebration of Mrs Burton's 80<sup>th</sup> birthday in 2007. A photograph was taken on that occasion. In that photograph is a baby who was the child of Peter Burton's son, Andrew.
- [35] Mrs Burton said that another occasion on which she met Mr Spencer was when Miss Burton came down to Toowoomba at Christmas time and stayed with her mother. Mrs Burton said Mr Spencer had friends in Laidley and stayed there. She said that Miss Burton and Mr Spencer drove from Townsville to Toowoomba and Toowoomba to Townsville together. Mr Spencer did not join Mrs Burton and Miss Burton on Christmas Day. Mrs Burton says those were the only two occasions on which she had seen Mr Spencer. It is however probable that there were some other occasions, to which I will refer in these reasons.
- [36] Miss Burton's brother, Peter, visited her on many occasions when he visited Townsville as part of his work as a truck driver. Unless specifically mentioned in this judgment his observations of the relationship between Miss Burton and Mr Spencer did not appear to me to be particularly useful in resolving the question to be determined in this case.
- [37] Mrs Burton gave evidence that on about 2 July 2012, four days before her daughter died, she and Miss Burton spoke by telephone. Miss Burton told her mother that she had left her unit locked up, had left everything in there and that no one was to go into it. She told her mother that she was just taking a couple of towels and personal items to the other unit with Mr Spencer as she would be returning to her unit one day. This was the last time they spoke to one another. Unfortunately, Mrs Burton had been too frail or unwell to visit Miss Burton in Townsville after her cancer diagnosis.

#### **Early years of the relationship between Miss Burton and Mr Spencer: 1999-2008**

- [38] It appears that the relationship between Miss Burton and Mr Spencer began in about 1999. He subsequently moved in to live with her in her unit at 4/10 Sooning Street, Hermit Park. He did not contribute financially to the unit but assisted with renovations to it. Miss Burton paid the deposit from her own moneys and all of the loan repayments. Mr Spencer swore that they purchased the unit together and put it in her name only for asset protection reasons for him. I do not accept that. It was her unit, purchased by her and put in her name as it was hers. They always kept their finances quite separate. It seems this was

deliberate on Miss Burton's part: while she was careful with her money, Mr Spencer was not a good money manager and was often unable to pay his debts.

- [39] After Miss Burton sold the unit at Sooning Street, they moved from there to the Quest Apartments for about three months and then to the Breakwater Villa Apartments for six months. At this time, they befriended Errol Bartkowski, a real estate agent.
- [40] Mr and Mrs Lena deposed that Mr Spencer and Miss Burton did not live together after moving from Sooning Street but I accept that it is more likely than not that they did. Allan and Bobbie Lena knew Miss Burton from 1983 when she was living in Ayr, where she worked fulltime as a teacher/librarian. At that time, Miss Burton worked part-time on the weekends as a bar attendant at the Royal Hotel in Townsville. Mr and Mrs Lena had known her for a long time but said that they took a parental role in her life, so perhaps she did not tell them everything about her relationship with Mr Spencer.
- [41] In 2002, Miss Burton purchased an apartment at 3/86 Ogden Street, Townsville. The apartment building is called Metro Quays. Mr Spencer initially lived with her there. Doing the best I can with the conflicting evidence before me, this seems to have been until about 2007 or 2008. The apartment was purchased in Miss Burton's name and regarded by her as hers. I do not accept Mr Spencer's evidence that it was regarded by them as jointly owned. All of the documentary evidence points the other way. Mr Bartkowski gave evidence that Miss Burton asked his opinion about whether the unit at Metro Quays was a good buy. He assumed that both she and Mr Spencer were buying the unit but was not sure about that.
- [42] Raymond and Eleanor Williams were Miss Burton's neighbours, living in 1/86 Ogden Street. Her unit was the closest unit to theirs but was separated by some six to eight steps so was on a slightly different level. The Williams' unit was on level 12, which otherwise was a car parking level. They had lived at that unit from a year or two before Miss Burton purchased unit 3. Each gave evidence of not being aware of Mr Spencer's residing in the unit with Miss Burton. However it is quite possible that such cohabitation occurred without them being aware of it. Certainly they were friendly with, and in the end, close to Miss Burton but not Mr Spencer. Their friendship with Miss Burton increased as time went on. However, they were away from time to time travelling in the early years when Miss Burton lived at Metro Quays.
- [43] Mr Williams saw Mr Spencer's Porsche parked in the car park bay which was reserved for tradespeople for a period. He particularly remembered that as Mr Spencer worked on his Porsche there and left the area untidy which annoyed Mr Williams. He also agreed in evidence that he had seen the Porsche parked in Miss Burton's car park on a few occasions.
- [44] On 2 September 2002, Mr Spencer (under the name Kent Richard Spencer) applied for a renewal of his Queensland driver licence. He was not required to give a residential address as he said the personal details on his existing licence were correct. He said the name "Kent" was a mistake made originally by the Department of Transport which he did not correct. Department of Transport and Main Roads documents show that he had held a "P" plate driver licence in Queensland from 9 November 1987. Because of various disqualifications, he did not obtain and keep an open licence until 7 August 1997. Before he had his Queensland driver licence, he had already acquired a traffic history for offences including driving under the influence of liquor.

- [45] On 4 June 2003, Mr Spencer submitted a “Driver Authorisation Renewal Application” for a period of one year. He gave his residential address as 3/86 Ogden Street, Townsville. He attached a medical certificate showing that he was applying for a taxi/limousine licence.
- [46] On 13 February 2004, Kent Richard Spencer completed and signed a “Driver Licence Renewal”. He gave his residential and postal address as 4 Willseal Court, Mt Louisa [*sic*], 4810. Mt Louisa is an outer suburb of Townsville. This was his mother’s address then. She resided there with Eric Beecham. Her evidence was that Mr Spencer stayed with her there for about a week.
- [47] On 17 February 2004, Mr Spencer was convicted as Kent Richard Spencer of 4 Willseal Court, Mt Louisa, of having a blood alcohol concentration (“BAC”) of 0.120 on 19 December 2003. He was fined and disqualified from driving for three months, i.e. until 16 May 2004. He was given a restricted licence enabling him to drive only between the hours of 4.00pm and 6.00am from Tuesday to Sunday for the purpose of earning a living. As mentioned earlier, this was not his first such conviction. His traffic history shows that he had been convicted on 13 May 1982 of having a BAC of 0.090; on 10 October 1988 of failing to supply a breath specimen; on 30 May 1991 of having a BAC of 0.090; and on 12 December 1995 of having a BAC of 0.122, as well as exceeding the speed limit by 30km per hour or more.
- [48] On 31 May 2004, after his period of disqualification was over, Kent Richard Spencer completed and signed a “Driver Authorisation Renewal Application” for another period of one year showing his address as 3/86 Ogden Street, Townsville. He said that that was because he had ceased residing with his mother and moved back to the unit at Metro Quays. The same details were filled out in similar forms on 4 February 2005, 30 May 2005, 16 February 2006, 6 February 2007 and 5 June 2007. He agreed in cross-examination at the first trial, however, that he had had regular opportunities to update his records with the Department of Transport so that they accurately reflected where he was living.
- [49] On 23 September 2004, Mr Spencer received a copy of his Certificate of Service with the Australian Army. It shows that Kenneth Richard Spencer served in the Australian Regular Army as a Private from June 1975 to June 1978. Relevantly for this matter, it was posted to the address “Unit 3/86 Ogden Street, Townsville”.
- [50] The first medical record for Miss Burton from the Townsville Hospital was on 27 March 2006, when she arrived just after four o’clock in the morning having strained her hip from lifting a box the previous day. The medical details are not relevant but the information given by Miss Burton is. She gave as her contact and next-of-kin her mother Daphne Burton, with the address of 71 High Street, Toowoomba. Miss Burton gave her own address as 3/86 Ogden Street, Townsville City. There is no mention of Mr Spencer.
- [51] However, Mr Lillington said in evidence that he attended Miss Burton’s 50<sup>th</sup> birthday party in 2006, and visited Mr Spencer and Miss Burton at the apartment at Metro Quays where they were both living.
- [52] On 30 August 2007, Kenneth Richard Spencer (who said on the form that he was known as Ken, Kenneth and Kent) made an application for conferral of Australian citizenship. It was signed by him under the following declaration, “*I declare that the information I*

*have supplied in this form is complete, truthful and correct in every detail.*” The signing page contained a note as to its being a criminal offence to deliberately make a false or misleading statement in the application. Mr Spencer gave his “present residential address” as 6/70 Stagpole Street, West End, Townsville. He could give no sensible explanation as to why he made a statutory declaration that that was his residential address at that time if he was not, in fact, living there.

- [53] His identity documents included a Medicare card on which his was the only name; a Driver Licence issued in February 2007, showing his address as “U 3 Metro Quays, 86 Ogden Street, Townsville City”; a copy of a Driver Authorisation card issued in June 2007 showing the same address; and a copy of his Certificate of Service from the Australian Army.
- [54] On 5 November 2007, Mr Spencer signed a contract to purchase a new Volkswagen cabriolet from Austral Volkswagen in Brisbane for \$51,000. He gave his address as Unit 3, 86 Ogden St, Townsville City. Apparently he used moneys received from a personal injury claim to make that purchase.
- [55] It appears from Irene Burton’s notes of telephone conversations that Miss Burton went to Airlie Beach in December 2007 and that Mr Spencer drove her there. From there, they went to Toowoomba for Christmas. Both Miss Burton and Mr Spencer are depicted in photos taken by Irene Burton at her home during Christmas lunch that year. Mr Spencer then went to visit friends in Laidley and Miss Burton made her own way back to Townsville. Mr Spencer’s evidence that he went south by himself at Christmas time to buy his Volkswagen while Miss Burton stayed in Townsville is not likely to be true.
- [56] Mr Spencer asserted that while Miss Burton paid for the mortgage on unit 3, he was responsible for body corporate fees and council rates, and they shared living expenses. In the absence of any documentary evidence to support these assertions, I am not prepared to accept his uncorroborated evidence as true. He was certainly responsible for buying and maintaining his motor vehicles. It appears that they kept their finances quite separate.

### **The breakdown in the relationship: 2008-2011**

- [57] It appears that Mr Spencer had an affair with Miss Burton’s next door neighbour during 2008. In his evidence during the first trial he said at first that the affair lasted for six to eight weeks from August 2008. In the trial before me he said the sexual relationship with Miss Burton’s neighbour began in about June/July 2008 and lasted for only four to six weeks. The relationship between Miss Burton and Mr Spencer was cooling at this time and, notwithstanding Mr Spencer’s assertion in court that the de facto relationship continued, it appears that at around this time, Miss Burton and he decided that he should move out of Miss Burton’s unit. When Miss Burton realised much later what had gone on with her next-door neighbour, there was a further cooling in the relationship. Later, Miss Burton and Mr Spencer did recommence socialising together, he slept with her in her apartment from time to time, and they occasionally went away together, but they nonetheless did not live in a de facto relationship again until near the end of Miss Burton’s life.
- [58] Later in cross-examination at the first trial, Mr Spencer said that the relationship between him and Miss Burton’s neighbour existed again (to use his words) for two or three weeks

in June/July 2009. He said in cross-examination before me that he had inadvertently left that out of his affidavit.

- [59] When he was cross-examined in the trial before me, Mr Spencer was at first uncertain whether the neighbour lived in unit 3 or unit 4, yet he purported to have been living in unit 3 with Miss Burton at that time. He said he first met the neighbour in 2003/2004 but did not know until Miss Burton told him that she lived next door to unit 3.
- [60] In spite of their lack of knowledge of Mr Spencer living in unit 3 with Miss Burton prior to 2008, I am prepared to accept Mr and Mrs Williams' observations that Mr Spencer did not live in unit 3 after that point. There are a number of reasons for this. One of those reasons is that I accept that neither Mr Williams (except on one occasion) nor Mrs Williams saw Mr Spencer's Volkswagen convertible parked in the car park for unit 3, although they did see Mr Spencer pick Miss Burton up from the front of Metro Quays or drop her off there in that car on more than one occasion.
- [61] Various other evidence supports the conclusion that Mr Spencer did not live at unit 3 after some time in 2008. On 15 October 2008, Ken Richard Spencer, who gave his address as 6/70 Stagpole Street, West End, swore a statutory declaration explaining how, despite his birth name being Kenneth Richard Somner, his family circumstances as a child had led to his being known as Ken Richard Spencer and by no other name. This statutory declaration was made as part of his proof of identification for his Australian citizenship application.
- [62] At some point, Miss Burton rang her brother Peter and told him that "Kent" had moved out to live with his mother. Miss Burton also told her friend Ms Hartig that she and Mr Spencer had had a problem in that Mr Spencer was working as a taxi driver and would arrive back at the apartment at 5.00am and turn on the television, which would disturb her sleep. This was solved, Miss Burton told Ms Hartig, by Mr Spencer's moving out and going to live with his mother.
- [63] I am satisfied that Mr Spencer lived with his mother at 6/70 Stagpole Street, West End from some time in 2008.
- [64] Mr Spencer received a carer's pension for looking after his mother for a number of years. In order to bolster his assertion that he lived at 3/86 Ogden Street while he was receiving this carer's pension, he exhibited a copy of a letter to him from Centrelink dated 17 December 2012 showing 3/86 Ogden Street as his address. The letter did not assist him. First, it showed that address not at a time when he said he was living there with Miss Burton caring for his mother at another address, but rather six months after Miss Burton had died when he was letting unit 3 and possibly living with his mother in the three-bedroom unit at Metro Quays which he had moved into with Miss Burton shortly before her death in 2012. Secondly, it showed that he had claimed a Centrelink allowance for being his mother's carer from 13 January 2009, a date which seems to be consistent with a period when he had moved from Miss Burton's unit to live with his mother.
- [65] Potentially more useful to his case were the documents he sought from Centrelink on 25 March 2013 when he showed his address as 64/86 Ogden Street, Townsville. The documents provided by Centrelink show that on 22 January 2009, he applied for a carer's pension as a person providing 39 hours a week of services to his mother but not living with her. However, the attached documents also show that he received that allowance

throughout periods in 2009 during which, on any view of the facts, he was living with his mother. In his oral evidence in the first trial of this matter, Mr Spencer gave evidence that his mother did not need a substantial amount of care in 2009 and was very independent. When questioned at the first trial about the Carer's Allowance Questionnaire comprising his application for the pension, which contained a declaration that the answers given were true and correct, his responses were very damaging to his credit. His attempts to explain himself were risible. When it was easily demonstrated that his assertions in the questionnaire were clearly incorrect, he responded that he had not wanted to "under exaggerate".

- [66] Other deponents' evidence supports a finding that Mr Spencer did not live with Miss Burton from some point in 2008. Miss Burton's friend Ms Hartig lived near Stagpole Street and often observed Mr Spencer's work van and his Volkswagen convertible there. Miss Burton's cousin, Katrina Johnson, invited Miss Burton to her wedding, which Miss Burton attended with Mr Spencer on 1 November 2008. Miss Burton told Mrs Johnson that Mr Spencer and she were good friends and that he lived with his mother. It appears that Miss Burton was already thinking of moving to Toowoomba at this point to help her mother, as her step-father was ill.
- [67] After Mrs Burton's husband, Allan, died on 6 December 2008, Mr Spencer says that he drove Miss Burton to Toowoomba for the funeral. He agreed in cross-examination that Miss Burton arrived in Toowoomba while her step-father was very unwell. She stayed for the funeral. Mr Spencer said he did not go to the funeral because it was not important, on the basis that Miss Burton was not very close to her step-father and Mr Spencer "particularly didn't want to go to the funeral." He said he stayed one night at the Federal Hotel and then went to stay with some friends at Laidley instead. He denied, when it was put to him, that Miss Burton flew to Toowoomba on this occasion and that he did not drive her. After he was shown Miss Burton's Queensland Teachers' Credit Union Limited ("QTCU") records, which showed that she had purchased Qantas tickets shortly before 6 December 2008 and had withdrawn cash from the ATM at the Qantas terminal at the Brisbane airport on that date, he prevaricated before saying he could not recollect.
- [68] Mrs Burton was admitted to hospital from 8 to 19 December 2008. Miss Burton was in Toowoomba for at least some of that period to look after her mother.
- [69] On 6 April 2009 Miss Burton applied for a loan from the QTCU. The purpose of the loan was the purchase of household goods and furniture; the amount was \$19,000. She described her marital status as single and gave her title as "Miss". She gave as her referee her mother, Mrs Daphne Burton. When she detailed her income and expenses on the application form there was no suggestion that Mr Spencer contributed any income or was responsible for any expenditure. Her marital status was also said to be single. That document was signed by Miss Burton.
- [70] Mr Spencer asserted in his evidence that the QTCU loan was used in part to establish his new Austar business, but could provide no documentary evidence to support that assertion which is inconsistent with the loan documentation.
- [71] In March 2009, Mrs Burton's general practitioner wrote a letter saying that she had a complex medical history and needed assistance to carry out activities of daily living. He said he would support, on medical grounds, an application by Miss Burton for leave to assist her mother. Miss Burton applied for, and was granted, leave from her position as

teacher librarian at Aitkenvale State School to look after her mother in Toowoomba from 25 May 2009 until 11 December 2009. Towards the end of 2009, that leave was extended to cover the period from 22 January 2010 to 25 June 2010.

- [72] Mr Spencer asserted in his evidence that his name was automatically entered on the electoral roll in May 2009 after he gained his Australian citizenship, at the address where his mother lived.
- [73] Mrs Burton's diary records that Miss Burton arrived in Toowoomba to care for her on 9 June 2009. Miss Burton locked up her apartment and required Mr Spencer to give back his key before she left Townsville. She told her friend Debra Thomas that she had done that. She told her friend Saskia Ten Dam that she had locked up her unit as no-one was living there and Mr Spencer did not have a key. She kept it locked up with all her "precious things" in it.
- [74] A further reason for accepting the evidence of Mr and Mrs Williams that Mr Spencer did not live with Miss Burton at this time is that Miss Burton asked Mrs Williams to collect her mail when she was away in Toowoomba. Mrs Williams did not see any mail addressed to Mr Spencer at that address during the period of many months while Miss Burton was in Toowoomba.
- [75] Mr Spencer's evidence confirmed that Miss Burton excluded him from the apartment at that time and that that was not what he had wanted. This was, of course, consistent and, it might be concluded, only consistent, with the unit's being regarded by both of them as hers. If the apartment had been understood by both of them to be jointly owned, then Miss Burton would not have been able to exclude Mr Spencer from it as she did. Further, it signalled conclusively the end of the de facto relationship which had existed between them before then. It was not a sudden break. The relationship had, as I have observed, been cooling for some time since 2008. After a time they resumed a boyfriend-girlfriend relationship but were not again de facto partners living together as a couple on a genuine domestic basis until after the diagnosis in January 2012 that Miss Burton's condition was terminal.
- [76] Mr Spencer gave evidence, to which I earlier referred, that he had recommenced his affair with Miss Burton's next door neighbour in June/July 2009, just after Miss Burton left for Toowoomba. Later in his evidence he said that the affair commenced again four to six weeks after Miss Burton left for Toowoomba in May. In fact, she did not go to Toowoomba until 9 June 2009. In the trial before me, he said that after Miss Burton left for Toowoomba, he started emailing and texting her neighbour. The affair recommenced, he said, and lasted about the same length of time as it had the previous year, i.e. a couple of months. He also said Miss Burton had been in Toowoomba for about two months when the sexual relationship with her neighbour started again and that he ended it in about August/September. His statements as to the timing and length of his affair in 2009 cannot all be true.
- [77] Mr Spencer was unable to say with certainty how Miss Burton got to Toowoomba in 2009.
- [78] In oral evidence at the first trial, Mr Spencer said Miss Burton returned to Townsville for her birthday on 19 June 2009, but that was not supported by any other evidence. He asserted close connections with Miss Burton by daily telephone calls and monthly return

visits by her to Townsville, but without any reliable other evidence to support those assertions, I am not prepared to accept his evidence. He said that she returned to Townsville and stayed with him at his mother's every month. The evidence of other witnesses supported his assertion that Miss Burton returned to Townsville and stayed with him at his mother's every month, but it was not evidence on which I could rely. It was not supported by any documentary evidence and is unlikely to be true.

- [79] Mrs Burton's diary records that Miss Burton went to Airlie Beach from 28 October to 2 November 2009, then returned to Toowoomba. Miss Burton left Toowoomba for Townsville on 20 November 2009 according to the same source.
- [80] On 24 and 25 November 2009, Miss Burton's brother Peter stayed with her at her unit. He saw no evidence of anyone else living there. Mr Spencer denied that that would have happened but I am satisfied that it probably did. The reason that Mr Spencer was unaware of it, if he was, is that he was not then living there.
- [81] Mr Spencer swore in his affidavit dated 28 February 2013 that he drove to Toowoomba to pick Miss Burton up because she said to him that her mother was becoming too dependent on her. He swore that he picked her up on 10 December 2009 and they had a holiday before returning to Townsville in early January 2010. It is most unlikely that this evidence is true. It is more likely that Irene Burton's contemporaneous notes are accurate.
- [82] Miss Burton returned to Toowoomba from Townsville in December. Irene Burton's notes show that Miss Burton and Mr Spencer stayed in Rockhampton on 21 December 2009. Mrs Burton's diary notes that on 24 December 2009, she went to Jondaryan where her son Peter lives and had Christmas Day there, while Miss Burton went to Laidley. On Boxing Day 2009, Miss Burton and Mr Spencer went to Peter Burton's home at Jondaryan.
- [83] In his affidavit sworn on 11 April 2013, Mr Spencer deposed that the evidence he had given about what had happened at the end of 2009 and the beginning of 2010 was "inadvertently" incorrect. This time, his version was that he did not drive down from Townsville to pick up Miss Burton but rather that he and Miss Burton drove down from Townsville together. He said that Miss Burton had earlier returned to Townsville by plane in around late November 2009. He referred to a paragraph of his earlier affidavit and said that those events happened at Christmas time 2009, that is, he dropped Miss Burton off at her mother's place and picked her up on Christmas Eve. He said that he and Miss Burton had stayed at Rockhampton on the drive down.
- [84] Mr Spencer said that on Christmas Eve 2009, he and Miss Burton went to a travel agent to book accommodation to stay at the Hilton Hotel in Brisbane for New Year's night. He said that after leaving Peter Burton's place on Boxing Day, he and Miss Burton drove to the Sunshine Coast where they stayed with his friends from Laidley and their friends. He said he believed they stayed on the Sunshine Coast and "perhaps somewhere else" before going to Brisbane. He said he had "initially inadvertently" thought that they had spent New Year on the Sunshine Coast when in fact they were in Brisbane at that time. He said that he and Miss Burton went to Brisbane on 30 December 2009 where they stayed at the Best Western Astor Metropole Hotel and then at the Hilton Hotel for New Year's night. He said they spent New Year's night together at the Treasury Casino.

- [85] In support of this evidence, he exhibited a guest account dated 12 July 2011, which showed that Mr Kent Spencer of Hamspee Pty Ltd (“Hamspee”) arrived at the Astor Metropole Hotel on 30 December 2009 and departed on 31 December 2009. The account gives the address of 3/86 Ogden Street, Townsville, and shows that there were two guests. Payment was by MasterCard “5353-8828”. It also shows that there was an EFT payment to ANZ Bank BSB 014195 Account 775478253. It showed only one main course for dinner. His explanation for why two people consumed only one dish was that Miss Burton was “starving”. This answer was not helpful to his credit.
- [86] In order to show his relationship to Hamspee, Mr Spencer exhibited to one of his affidavits a copy of an ASIC search for that company dated 10 April 2013. It showed that the company was deregistered and that a strike-off action had been in progress from February 2006. There had previously been a strike-off action commenced in May 2005.
- [87] The most recent registered office of Hamspee before deregistration was Metro Quays, Unit 3, Level 13, 86 Ogden Street, Townsville. The start date for the registration of the company at that address was 23 September 2002 and the date of cessation, 3 August 2008. Ken Richard Spencer, who gave his address as Unit 3, 86 Ogden Street, Townsville was the director of the company from 10 March 1992 to 3 August 2008. The company had two ordinary shares, the shareholders being Wendy Deborah Stuart and Ken Richard Spencer. The annual returns of the company are shown in the ASIC search as having been outstanding since 1999.
- [88] Wendy Deborah Stuart was said in the ASIC records to live at 10 Maryvale Street, West End, Townsville. In his oral evidence at the first trial of this matter, Mr Spencer said that in 1999, his mother was living at Maryvale Street, West End with a friend called Eric Beecham. Wendy Deborah Stuart was the secretary of Hamspee from 13 January 1993 until 20 May 2005.
- [89] Mr Spencer endeavoured to explain that the room was booked in the name of Kent Spencer and Hamspee, a company that was deregistered, by saying that, “We booked the room in my name but the tax invoice must have been based on my previous details as recorded in the hotel’s database.” He said he used to stay at that hotel when down in Brisbane on business related to the company. The company was, he said, behind his previous nightclub and hotel businesses. This does not explain the fact that the officer of the company on the ASIC records was Ken Spencer, while the name in which this booking was made was, according to the tax invoice, Kent Spencer.
- [90] Mr Spencer further said that on New Year’s Day 2010, he and Miss Burton drove to the Gold Coast and stayed at the Chateau Beachside Apartments at Surfers Paradise from 1 January 2010 to 3 January 2010. He exhibited a tax invoice to Mr Kent Spencer which supported those details. Mr Spencer said that he and Miss Burton then spent a couple of days staying with his daughter at her house and on their return trip to Townsville, they stayed at Airlie Beach overnight on 7 January 2010. He exhibited a tax invoice from Whitsunday Terraces at Airlie Beach which showed that they both stayed there on the night of 7 January 2010. It showed that payment was made by MasterCard, although it does not show to whom the MasterCard belonged or what the number was.
- [91] Contrary to Mr Spencer’s evidence, I am satisfied that Miss Burton went to Brisbane from Toowoomba on 31 December 2009 as is shown in Mrs Burton’s diary. The QTCU records show that cash was withdrawn from an ATM in Toowoomba on 28 December

2009. Irene Burton talked to Miss Burton about Miss Burton's New Year's Eve at the Hilton and the Casino, and her return to Toowoomba. Miss Burton returned to Toowoomba from the Gold Coast between 3 and 6 January 2010, when she left to return to Townsville. Although Mr Spencer denied it, I am satisfied on the basis of the QTCU records that Miss Burton purchased a Greyhound bus ticket and went back to Toowoomba, where she withdrew cash from an ATM on 4 January 2010. When asked, Mr Spencer said he could not "quite recall" if that was because they had had a fight, but then conceded that he knew that they had had an argument around this time on the Gold Coast. He said, however, that they later "met up again" at Airlie Beach.

- [92] Mr Spencer's evidence was that Miss Burton did not return to Toowoomba from the Gold Coast but rather went with him to Airlie Beach on 6 January 2010, staying there until 9 January 2010. It does appear true that she went to Airlie Beach, as her QTCU records show she withdrew cash from an ATM there on 7 January 2010. She was, however, back in Townsville by 8 January 2010, as her QTCU records show that she withdrew cash from an ATM in Townsville on that date.
- [93] Miss Burton stayed with her mother in Toowoomba for two periods in 2010, including in March and for a longer period during May, when Mrs Burton underwent an operation on 17 May. Miss Burton is noted in Mrs Burton's diary as returning to Townsville on 26 May 2010. There is an entry in the QTCU documents which supports that, showing a purchase at Flight Centre in Margaret Street, debited on 26 May 2010.<sup>4</sup>
- [94] Mr Spencer denied that Miss Burton made return visits to Toowoomba in the first half of 2010. As I said, the relationship between Mr Spencer and Miss Burton had cooled by then and they were no longer living together. He said in evidence that that he stayed with Miss Burton for two nights in January 2010 and then someone else told her about his affair with her neighbour which he said, when giving that particular evidence, had occurred in 2008. He said that they very quickly patched up their difficulties and he moved back into unit 3 about early to mid-February 2010. I do not accept that as true. His motive for saying that was that he was aware at that stage of the need to show that he and Miss Burton had been in a de facto relationship continuously for the two years prior to her death, rather than because it was true.
- [95] It appears that he found some, but not all, of the Education Department documentation about her requests for leave to care for her mother amongst Miss Burton's belongings after her death. He constructed what he said was a memory of Miss Burton's only being in Toowoomba in the second half of 2009 from the documents he found, unaware that the documents he had not found about her further leave in the first half of 2010 would suggest his memory was not entirely accurate. Some of the witnesses called by him made the same mistake, suggesting that they did not have an accurate independent memory.
- [96] Sometime in early 2010, Mr Spencer was, on his own version, living with his mother in Stagpole Street after spending only two or three days staying at unit 3 in Metro Quays. Miss Burton's neighbour, with whom Mr Spencer had the affair, had asked him to store some frozen food in the freezer at Stagpole Street. She rang wanting to pick it up and then turned up when Miss Burton was there. There was a confrontation and Mr Spencer denied that he had had an affair with Miss Burton's next door neighbour.

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<sup>4</sup> It may be inferred that this was at Margaret Street in Toowoomba, as Ms Burton made ATM withdrawals in Toowoomba on 24 May 2010 and then did the same in Townsville on 28 May 2010.

- [97] After that, the neighbour put copies of the loving emails that Mr Spencer had sent to her under the door of Miss Burton's unit. This led to a "big argument" between Mr Spencer and Miss Burton. He said that they nonetheless quickly realised they were "kindred spirits" and reaffirmed their commitment to one another. He then he said, "We slowly started going through the healing process of putting our lives back together." I accept that that was a very slow process which took place over a long period of time. It marked a further real break in a relationship which had been cooling in any event and explains why Miss Burton referred to him at later times as her ex-partner.
- [98] Thereafter, Mr Spencer continued to nominate Stagpole Street as his residential address. On his "Driver Authorisation Renewal Application", which was stamped as received on 11 March 2010, Kent Richard Spencer gave his residential and postal address as 6/70 Stagpole St, West End. He said in that form that he had never had his driver licence modified, suspended or cancelled and that he had never been disqualified from holding a driver licence. He applied for a licence to drive a taxi, limousine and general and scheduled services for a period of three years. His evidence was that his taxi licence was "automatically registered my mother's address" but, as can be seen by the form he filled in, he nominated that address to register the licence and that address was different from the address he had used in the past. In oral evidence at the first trial he said that he would have moved back to Ogden Street "mid-March – late February, early March".
- [99] Mr Spencer continued to have his Commonwealth Bank MasterCard accounts sent to 6/70 Stagpole Street until June 2012, whereupon he changed his address to 64/86 Ogden Street, where he was living after that date.
- [100] As mentioned earlier in these reasons, Mr Spencer said at first that Miss Burton had not been back to Toowoomba in the first half of 2010. He went on to say that she started work at the Central State School at North Ward when she came back from Toowoomba at the beginning of 2010. However, Miss Burton started work on a part time basis at the Central State School on 12 July 2010. Mr Spencer was unaware of those details. He was not at that time living with her. Their relationship was no longer that of de facto partners living together on a genuine domestic basis.
- [101] If he were to demonstrate that they had been living together as de facto partners on a genuine domestic basis for a continuous period of at least two years ending on Miss Burton's death on 6 July 2012, Mr Spencer would have to have shown on the balance of probabilities that the de facto relationship continued or restarted from 7 July 2010. He did not do so.

### **Miss Burton treated for breast cancer: December 2010 – December 2011**

- [102] Miss Burton confided in her friend, Debra Thomas, in November 2010 that she had detected a lump in her breast.
- [103] Townsville Hospital documents show that Miss Burton detected a mass in her left axilla during the end of the school term in 2010. She underwent investigations on 17 December 2010. A core biopsy undertaken on 23 December 2010 showed metastatic carcinoma. Miss Burton began chemotherapy under Dr Sabe Sabesan at the Mater Hospital. She was referred to Dr Susan Hewitt by her oncologist Dr Sally Meade for radiotherapy.
- [104] Mr Spencer said he was with Miss Burton every day after her diagnosis, "24/7".

- [105] In the consultation record dated 4 January 2011, Miss Burton's oncologist Dr Meade noted with regard to Miss Burton's social circumstances that she was a school teacher who lived alone, her long-time partner was "Ken" and she had a mother and brother in Toowoomba. Dr Meade noted that Miss Burton's mother had recently been unwell and that Miss Burton had been her carer, but that she was well now and very switched on, albeit frailer. Dr Meade observed that Miss Burton's mother lived near St Vincent's Hospital in Toowoomba and Miss Burton would like to have radiotherapy there.
- [106] Mr Spencer at first said that he was not with Miss Burton during this consultation but then said that he was with her. He did not recall her saying that she lived alone. His evidence was that, whenever it was recorded that she said that, it was wrong, because "she'd never been living alone." However, I am satisfied that she did say she lived alone. Her saying that she lived alone indicated that she was not using the word "partner" as it is used in the definition of "de facto partner" in the AIA, that is, as a member of a couple who are living together on a genuine domestic basis.
- [107] Miss Burton's first admission for chemotherapy at the Mater Health Services ("Mater") occurred on 13 January 2011. There were a large number of admissions of this type, the relevance of which for this case is how her relationships and her social circumstances are described on the admission forms.
- [108] In the first form, dated 13 January 2011, her marital status is described as married/de facto and her religion as Church of England. Her next-of-kin was given as her mother, Daphne Burton, from Toowoomba, and her emergency contact as Bobbie Lena, a friend. Mr Spencer conceded that, despite saying he was with Miss Burton "24/7", he was not present for her first chemotherapy treatment; rather, Mrs Lena had taken her to that treatment. It also tended to show that, contrary to her evidence, Ms Secher was not present for Miss Burton's first chemotherapy treatment.
- [109] There was no change to those details on her next admission forms, dated 14 January, and 2 and 23 February 2011. Mr Spencer agreed that he had not taken Miss Burton to the second chemotherapy treatment on 14 January. He said that that was because he had been working in the mornings. When he was reminded that the appointment was in the afternoon, he said he had been working in the afternoons at the time of the second appointment and that it was about a year later or, in another answer, about a year before Miss Burton's death, that he was only working in the mornings. He then said that was only a guess.
- [110] The treatment on 2 February 2011 was apparently brought forward to that date because Cyclone Yasi was expected to cross the coast on 3 February 2011 and the hospitals were closing. Mr Lena gave detailed evidence of taking her to that treatment which was brought forward to 8.00am and lasted until 12 noon. I accept his evidence about that event, which showed his intimate knowledge of what had occurred on that date.
- [111] Mr Spencer asserted in his affidavit and oral evidence that he had spent the whole day before the cyclone with Miss Burton at unit 3 before going to spend the night with his mother at her unit. However, when faced with the factual situation that Miss Burton had been at the Mater for chemotherapy the day before the cyclone with Mr and Mrs Lena and could not therefore have been at her unit with him all day, he admitted, after resorting to apparent confusion, that that could well have been correct. This was but one example of many of an untrue statement sworn to in affidavit and oral evidence which, when

challenged by questions tending to demonstrate that his evidence was not true, led to prevarication and then ultimately to an admission that the opposite of what he had said was probably correct. There were several phone calls from Miss Burton's mobile phone number to Mr Spencer's mobile phone number during the afternoon and night of 2 and 3 February 2011, suggesting, of course, that they were not together.

- [112] Because of the number of times that Mrs Lena is recorded as having attended chemotherapy treatment with Miss Burton and the way in which Miss Burton referred to her in the admission forms, I was able to place somewhat more reliance on Mrs Lena's oral and written evidence. Mr and/or Mrs Lena often drove Miss Burton to and from chemotherapy treatments during 2011 and some of 2012, as Miss Burton did not have a car of her own and the treatments made her quite ill. Mr Lena stopped taking Miss Burton from July 2011 when he contracted pseudomonas. Thereafter for the rest of 2011, Mrs Lena accompanied Miss Burton to her chemotherapy appointments. Mrs Lena also took her to see Dr Sabesan and Dr Meade on a number of occasions. Mr Spencer's assertion that Mr and Mrs Lena took Miss Burton to chemotherapy on no more than two occasions is refuted by the contemporaneous documentary evidence.
- [113] On 22 February 2011, Dr Hewitt made extensive clinical notes and also wrote to Dr Meade. Dr Hewitt reported, "I know that she does also have family in Toowoomba, and I have certainly said to her that there is a good Radiation Oncology Unit in Toowoomba, at St Andrews Hospital, and she could certainly have any adjuvant therapy there, if she would prefer". Dr Hewitt said that, at that point, Miss Burton appeared to be keen to have the treatment in Townsville. In the clinic note Dr Hewitt observed: "patient has very supportive family in Toowoomba" and under the heading "Social History" she recorded: "Lives alone, but has a partner in Townsville. No family members in Townsville, her relatives live in Toowoomba".
- [114] On 1 March 2011, Miss Burton presented in the emergency department at the Townsville Hospital at about 7.30pm complaining of having been unwell all day. The emergency department clinical record shows that her next-of-kin were Daphne, her mother, and "Ken", described as her partner, who was present. The hospital notes, under "social history", record that Miss Burton "lives on her own in Townsville city", that she was a teacher and was a social cigarette smoker. The progress notes on 2 March 2011 record under social history that she "lives alone". Her nursing discharge summary on 3 March 2011 records that she was discharged at 10.30am and that she was not discharged into the company of any other person.
- [115] Another document relating to this admission is the patient admission form, which shows the date she was admitted as 1 March and the date she was discharged as 3 March. It has a handwritten diagnosis by a medical officer dated 7 March 2011, shows her next of kin as her mother, and names the person to contact as Ken Spencer, who is described as her de facto and whose address is given as 3/86 Ogden Street, Townsville. This document and the reference to her marital status as "married/de facto" support Mr Spencer's case that he was living at that address with Miss Burton but is overshadowed and, in the end, overwhelmed by the volume of evidence showing she was living on her own.
- [116] On 16 March 2011, Miss Burton's Mater patient admission form shows the same details as in the earlier Mater forms: her marital status was married/de facto, her religion was Church of England, her next-of-kin was her mother Daphne Burton, and her emergency

contact was Bobbie Lena. The same was true of the patient admission forms for 6 and 27 April 2011.

- [117] The patient admission form for 19 May 2011 contained different details. The emergency contact remained Bobbie Lena but under marital status, Miss Burton indicated that she was never married, her next-of-kin was Kenneth Spencer of 6/10 [sic] Stagpole Street, North Ward, and he was her partner. The admission form shows that on this occasion, she was not discharged until 21 May 2011. The patient discharge summary shows that she was discharged to the care of “Ken Spencer”, whose relationship to her is described there as “partner”.
- [118] On 21 June 2011, Irene Burton’s diary notes that Miss Burton told her, *inter alia*, that she had had a nice birthday and that Mr Spencer had taken her out for lunch
- [119] The information on her Mater patient admission form of 23 June 2011, which shows that she was discharged on the following day, 24 June 2011, contains the same information as the last patient admission form: that is, that she was never married, that her next-of-kin was her “partner”, named as “Kenneth James Spencer” of 6/70 Stagpole Street (apparently corrected from 6/10 as previously shown), North Ward, and that her emergency contact was Bobbie Lena. The discharge summary notes that she was discharged to the care of her “husband”.
- [120] Miss Burton’s Townsville hospital notes of 29 June 2011 note that she lived alone but had a partner in Townsville; that she had previously worked as a primary teacher; and that she had family in Toowoomba.
- [121] Mrs Tate gave evidence that she and her husband met up with Miss Burton in Townsville for a meal in August 2011. They initially met for breakfast with Miss Burton alone, as Mr Spencer “did not sleep over that night”. Mrs Tate said he turned up later, after Miss Burton made a number of telephone calls to him. Mrs Tate said she specifically recalled it as they celebrated Miss Burton having been given the “medical ‘all-clear’ on her cancer.” As the “all clear” was not given until later, it is not possible to give any weight this evidence.
- [122] Mrs Williams gave evidence, which I accept, that in late 2011, Miss Burton showed her a diamond ring that Mr Spencer had given her. Miss Burton told Mrs Williams that Mr Spencer said to her to wear it on any finger she liked. Miss Burton told Mrs Williams that she did not want to wear it because she did not feel close enough to Mr Spencer. Mrs Williams never saw her wearing the ring in spite of the fact that she saw her almost every day in the last six months of her life, at least when Miss Burton was at unit 3, Metro Quays. Mrs Williams never saw Mr Spencer in Miss Burton’s unit, although she would occasionally see him in the lift. As Mr Spencer gave internally contradictory evidence about his knowledge of Mrs Williams, it would be difficult to accept anything he said that contradicted her evidence.
- [123] In November 2011, Mrs Lena accompanied Miss Spencer when she saw Dr Meade, who gave Miss Spencer the “all clear”. Mrs Lena said that when they got to the street, they were so happy they “danced all the way to the car.” Mr Spencer did not attend the consultation.

- [124] Miss Burton attended Mr Lillington's birthday party in Sydney during that month on her own. Mr Lillington's evidence was that he was in telephone contact with Miss Burton on an almost weekly basis from when she was diagnosed with cancer. She told Mr Lillington that Mr Spencer was a wonderful partner and support during her illness. He said that Miss Burton made it clear to him that she "was living with Ken at the Metro Quays apartment." However, no timing was put on that comment so it does not assist in elucidating whether they were living together as at July 2010 before she was diagnosed and for a continuous two year period thereafter.

### **Miss Burton's condition diagnosed as terminal January – July 2012**

- [125] However in January 2012, as Mrs Lena said in her evidence, Miss Burton was re-diagnosed, with "its grim prospects".
- [126] Mr Spencer, as Kent Richard Spencer, completed and signed a "Driver Licence Renewal" form, which he dated 3 February 2011 but which must have been signed on 3 February 2012. On that document, he said that his residential and postal address was 6/70 Stagpole Street, West End. On the "Personal Identification and Shared Secrets Application" form, he again gave his residential address as 6/70 Stagpole Street, West End. His explanation for using that address was that he and Miss Burton had been intending to move to Airlie Beach permanently, he had no fixed address at Airlie Beach at that time and he wanted documents sent to his mother's address. He was unable to give any explanation as to why he gave what he described as his mother's address as his residential address as well as his postal address, when he could merely have nominated his mother's address as his postal address.
- [127] On 5 February 2012, Miss Burton talked to Irene Burton by telephone to tell her of the seriousness of her situation in great detail. She explained that her prognosis was that she had three months to a year to live. She said that Mr Spencer had been to his boss and asked for two months in Airlie Beach. She was back in Townsville for treatment. Miss Burton said she was going to resign soon, and take her superannuation and spend it. She said she was going to keep her unit. She said that Mr Spencer was happy to look after her. On 6 February 2012, Miss Burton emailed Irene saying that she was at Airlie Beach "at the moment" and Mr Spencer had started work that day.
- [128] Miss Burton attended the Mater Health Services for chemotherapy again on 7 February 2012. On this occasion, her patient admission form shows her marital status as "never married"; her next-of-kin as her "partner" Kenneth James Spencer at 6/70 Stagpole Street, North Ward; her emergency contact as Bobbie Lena; and her religion as Anglican. The same information was repeated on her patient admission form on 15 February 2012. It appears that she travelled by bus from Airlie Beach for these appointments. However, her health deteriorated and the Proserpine hospital, which she attended on 18 February 2012, could not manage her condition, so she returned to Townsville permanently.
- [129] On 16 February 2012, Miss Burton signed a notice to cease employment from the Education Department on the ground that she was suffering from a terminal illness. She gave her address as 3/86 Ogden Street, Townsville, on that document.
- [130] It appears that Miss Burton was admitted again to the Mater Health Services in Townsville on 21 February 2012. Her discharge date was 23 February 2012. In her discharge form dated 23 February 2012, she was shown as having been discharged to the

care of Kent Spencer, whose relationship to her was described as “partner”. A note on the admission form said, “She is moving to Toowoomba to live and spend the last few months”.

- [131] Miss Burton’s patient admission form at the Mater on 23 February 2012 contains similar information to the earlier ones: that is, that her marital status was “never married”; that her address was 3/86 Ogden Street, Townsville; that her next-of-kin was Kenneth James [*sic*] Spencer, who lived at 6/70 Stagpole Street, North Ward and was her partner; and that her emergency contact was Bobbie Lena.
- [132] Miss Burton attended at the emergency department at the Townsville Hospital late in the evening of 25 February 2012. Under “social circumstances” it was noted, “Has a partner. Lives alone. Retired teacher. No children.” The notes appear amongst other information given to the hospital that night by Miss Burton as to the conditions which had caused her to come to the hospital. It was said that her next-of-kin was “Ken”, his relationship was described as “friend”, and his contact number was given. Mrs Lena said she rang Miss Burton to see how she was and, when she found out that Miss Burton was at Accident and Emergency at Townsville Hospital, having arrived by ambulance, she went up to be with her, as she was alone. Mr Spencer denied that Miss Burton went by ambulance without him but the form confirms Mrs Lena’s evidence that Miss Burton arrived by ambulance and was alone. Mr Spencer said that he followed in his car. I prefer Mrs Lena’s versions which is supported by the documentation: the Emergency Department Clinical Record completed on her admission notes that no relative/friend was present. Mr Spencer did attend but that was on the next day.
- [133] His attendance on the following day is shown by a note made on 26 February 2012 at 15.40 in her hospital chart, saying that she had stated she was “over it” and “wanted to die” to her partner upon his leaving. Subsequently at 16.25 it is noted that she said she “wants to go home”, “look after myself”. She was encouraged to remain at the hospital.
- [134] The hospital progress notes on 27 February 2012 note “Social Hx: family in Toowoomba, lives on own.” A social worker entry on her hospital chart on 1 March 2012 notes that the social worker met with Miss Burton and that she had said she did not have any immediate needs or requests for social worker involvement at that stage. She said she had been in the hospital since Saturday and she just wanted to get well and go home. She also said she might need some help later on when she returned home to Toowoomba. On 6 March 2012 at 10.45pm, the hospital notes record “visited by husband”.
- [135] On 7 March 2012 under the heading “physiotherapy”, her Townsville Hospital notes report in relation to her social history that she “lives alone, family in Toowoomba.” She was discharged on 9 March 2012 after some 13 days in hospital “in company of self”. Mr Spencer said that the record was wrong, he was definitely there and he took her home.
- [136] The patient admission form which was completed on 12 March 2012 (after Miss Burton had been discharged) shows her next of kin as Ken Spencer, who is described as her de facto and whose address is given as 3/86 Ogden Street. The person to contact is her mother.
- [137] Miss Burton’s patient admission form for chemotherapy at the Mater on 14 March 2012 shows her marital status as never married; her next-of-kin as Daphne Burton at 71 High Street, Toowoomba City; and her emergency contact as Ken Spencer of 6/70 Stagpole

Street, whose relationship to her was said to be “partner”. It is of some significance that her next-of-kin had changed from Mr Spencer to Mrs Burton and that Mr Spencer’s address was shown as 6/70 Stagpole Street rather than 3/86 Ogden Street. Mr Spencer said he was present for that chemotherapy treatment, which seems likely given that he was shown as the emergency contact, but was unable to explain why his address was shown as it was if he was not living at Stagpole Street.

- [138] Miss Burton’s patient admission form for 15 March 2012 shows her marital status as never married, her next-of-kin as Kenneth James Spencer, who lived at 6/70 Stagpole Street, North Ward, and whose relationship to her was “partner”, and her emergency contact as Bobbie Lena. Her religion was described as usual as Anglican.<sup>5</sup>
- [139] The next document is particularly significant as it was signed by Miss Burton. It was a longer admission form for the Mater at Pimlico and where there are handwritten details, they appear to have been filled in by Miss Burton. It shows her admission date as 22 March 2012 and the doctor caring for her as Dr Meade. She ticked “Miss” as her title and “never married” as her marital status, rather than de facto. Her religion is given as Anglican. Her next-of-kin was Mrs Daphne Burton, identified as the patient’s mother, whose address in Toowoomba was given. Miss Burton’s Townsville-based emergency contact was given as Ken Spencer, whose relationship was shown as “partner”. Under the health insurance section, her Medibank Private cover was detailed and identified as single cover. Under the declaration as to who was responsible for her account, she nominated herself. Miss Burton signed and dated the form 20 March 2012. Her use of the word “partner” does not determine that she means de facto partner as defined in the AIA, particularly as she nominated that her marital status was “never married”, rather than de facto.
- [140] On 31 March 2012, Miss Burton spoke to Irene Burton on the telephone. Irene recorded that she said, “DON’T TELL ANYONE SHE’S TERMINAL – TRYING HARD TO BEAT IT.”
- [141] Thereafter, several patient admission forms to the Mater for day treatment between 22 March 2012 and 11 April 2012 contain the same information. They show that she received treatment on 22, 23, 28 and 29 March, and 4 and 11 April 2012. The details recorded in those admission forms are that her marital status was “never married”, that her next-of-kin was Daphne Burton, whose Toowoomba address was given, and that her emergency contact was Ken Spencer, with the address of 6/70 Stagpole Street, his mobile phone number, and his relationship to her described as partner. Her religion is shown as Anglican.
- [142] Miss Burton received \$39,206.30 from Education Queensland on 3 April 2012 and \$683,735.88 in superannuation from QSuper on 5 April 2012. Her weekly superannuation benefits had stopped about two weeks earlier. Mr Spencer asserted that he had particularly supported Miss Burton at Airlie Beach between the cessation of her weekly benefits and the point of sufficient accumulation of interest from her superannuation payment. However, when requested, he refused to provide the MasterCard statements which he said would confirm that this was the case. He denied that his refusal was because the disclosure would show his extensive use of sex sites. He said his use of sex sites was mostly on the web rather than by telephone and meant that

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<sup>5</sup> Sometimes her religion was described as Church of England.

he could chat about anything to people “in Russia and Ukraine and wherever”. Another problem with his version of financial support was that, by this time, Miss Burton and Mr Spencer were no longer in Airlie Beach, Miss Burton having returned to Townsville for appropriate treatment shortly on or shortly after 18 February 2012.

- [143] An examination of Miss Burton’s bank and credit union records shows that she maintained complete financial separation from Mr Spencer. He was, on his own admission, a very poor financial manager, whereas she was very careful with her finances. I am satisfied that he did not produce the MasterCard statements because, contrary to his assertion, they would not assist his case.
- [144] Miss Burton told Irene Burton by email on 16 April 2012 that she had been to Cairns, Palm Cove and Port Douglas with Mr Spencer at Easter and had a lovely time but by Monday had been really exhausted.
- [145] The details in Miss Burton’s patient admission form to the Mater on 23 April 2012 changed slightly from the previous admission forms. Again, she is shown as never married; her religion as Church of England; her next-of-kin as her mother, Daphne Burton, at her Toowoomba address; and her emergency contact as Bobbie Lena, who was described as a “friend”. The same information is repeated on a patient admission form dated 24 April 2012. I conclude that it was Mrs Lena and, contrary to his assertions, not Mr Spencer who took Miss Burton to those treatments.
- [146] Also amongst the documents is a patient discharge summary from the Mater Health Services relating to the period 24 to 30 April 2012. It appears that she was hospitalised on 24 April 2012 feeling febrile and unwell. She was eventually discharged to the care of herself. Mr Spencer said that that was incorrect, as she was discharged into his care.
- [147] Miss Burton’s patient admission form to the Mater Health Services on 3 May 2012 shows her marital status as never married, her next-of-kin as her mother Daphne Burton, and her emergency contact as Bobbie Lena, described as a friend. The same information was repeated on her patient admission forms on 4, 15, 16, 22, 23 and 29 May 2012.
- [148] A Townsville Hospital Admission Form shows her date of admission as 29 May 2012 and her date of discharge as 30 May 2012. The person to contact is shown as her mother, Mrs Burton, and her next of kin as Mr Spencer, described as her de facto, and his address as 3/86 Ogden Street, Townsville.
- [149] The nursing notes from the Townsville Cancer Centre for 1 June 2012 by Nurse Claire Smith record that she had met with Miss Burton briefly on the previous day and again on 1 June. The notes say, “Most important discussions covered were Sharon’s immediate plans.” Nurse Smith said that Miss Burton was “caught between wanting to remain in Townsville under the care of the medical teams she feels so confident in, and wanting to move to Toowoomba to see out her last days”. Dr Joshi had explained that Miss Burton should move to Toowoomba as soon as possible due to having metastases in her brain.
- [150] After the appointment with Dr Joshi, Nurse Smith spoke to Miss Burton and her “partner Ken”. They agreed that referrals to Toowoomba would be arranged and that the week after next, Miss Burton would pack up her most personal items from her unit and travel with Mr Spencer to Toowoomba. She planned to be in Toowoomba to celebrate her birthday on 19 June 2012. Nurse Smith made a note that Miss Burton would “move in

and live with her mother with whom she has a great relationship”. Daphne Burton confirmed that Miss Burton had spoken to her about her desire to move back to Toowoomba. Mr Spencer denied that there had been any discussion of her moving back to Toowoomba after early 2011, when Miss Burton was first diagnosed. However, it is clear that Miss Burton was thinking about a move to Toowoomba much later as well, although her plans changed quite often, and that Mr Spencer knew that.

- [151] On 4 June 2012, Nurse Vanessa Evans recorded that she was present for a patient consultation with Dr Hewitt. Dr Hewitt discussed how long Miss Burton may live which she thought could be months to years but was unpredictable. The notes record that Miss Burton had decided she did not want to move permanently to Toowoomba but rather wanted to stay in Townsville. She assured Dr Hewitt that she had a support network in Townsville.
- [152] On 6 June 2012, Dr Sabesan wrote to Dr Cairns and Dr Ofra Fried referring Miss Burton to them for palliative care. Dr Sabesan said “Sharon lives with her partner (Ken) and I think they will benefit from your input and domiciliary service.”
- [153] On 7 June 2012, Nurse Karen Hockings wrote that Miss Burton was planning to go to Toowoomba to “sort out her affairs”. Miss Burton had been planning to move back there but had changed her mind and wanted to stay in Townsville. She had said that she had no Will but wanted to be buried in Toowoomba.
- [154] Miss Burton told her mother that she was arranging a burial plot in Toowoomba where she and Mrs Burton could be buried beside one another. She asked her mother to go to the particular cemetery to choose a site for them. Mrs Burton did so and the manager sent photographs of the site to Miss Burton, who paid for the double plot and arranged the headstone on her grave and the wording on it. The wording chosen by Miss Burton has her name, and dates of birth and death, and describes her as the “loving daughter of Daphne”. No other person is mentioned on the headstone. That is a telling insight as to Miss Burton’s state of mind at this time.
- [155] On 8 June 2012, Miss Burton’s admission form to the Mater Hospital for chemotherapy again shows her marital status as never married, her religion as Church of England, her next-of-kin as her mother Daphne Burton at her Toowoomba address, and her emergency contact as Bobbie Lena, who was described as a “friend”.
- [156] On 12 June 2012, Nurse Smith wrote in her notes that “Sharon had planned the week before last to move to Toowoomba to live with her mother” but that “last week she changed that to going to visit her mother”. A note on 12 June 2012 by Nurse Polly Adams reported that Miss Burton said she was going to Toowoomba.
- [157] On 13 June 2012, Nurse Adams made a note that Miss Burton had told her that she was in the middle of changing residence and moving in with her partner. Miss Burton understood that her disease was progressing and had been planning her funeral in Toowoomba. According to the notes, her plan had been to go to Toowoomba soon but she now said that she was very fatigued currently and might not.
- [158] On 14, 15 and 21 June 2012, Miss Burton’s admission forms to the Mater for chemotherapy had continued to show her marital status as never married, her religion as Church of England, her address as 3/86 Ogden Street, Townsville, her next-of-kin as her

mother Daphne Burton with her Toowoomba address, and her emergency contact as Bobbie Lena, who was described as a “friend”. Mr Spencer’s evidence about his involvement with her treatment at this stage was unconvincing and contradictory. He gave evidence that he was with her for all of those treatments but also gave evidence that she was not having chemotherapy at that time. He tried to give some explanation of the inconsistency in his evidence but his attempts to do so were most unconvincing. There is a note in the hospital records which shows that on 21 June 2012 Dr Sabesan asked an oncology nurse at the Mater to tell Miss Burton that, as her disease had progressed, he was ceasing chemotherapy. There were no more chemotherapy treatments after that.

### **Miss Burton and Mr Spencer live together at Metro Quays: June-July 2012**

- [159] Mrs Williams gave evidence that approximately two or three weeks before Miss Burton died, she moved into a bigger unit. Miss Burton told Mrs Williams that she needed someone to be with her and that Mr Spencer “was being good to her”. Miss Burton told Mrs Williams that she needed someone to look after her so she moved into a bigger unit so that Mr Spencer could move in.
- [160] The three-bedroom unit was unit 64 in the Metro Quays complex. The lease was signed by Mr Spencer and Miss Burton on 20 June 2012. The lease commenced on 23 June 2012.
- [161] Miss Burton told her mother that in the three-bedroom unit, she had her own room and that Mr Spencer was her carer. She took only a few towels and personal items there. She had locked up her own unit with her belongings in there, as she intended to return. She told her mother she was positive she would recover from cancer. Miss Burton also told her mother that Mr Spencer’s mother would be able to move into the three-bedroom apartment.
- [162] It is likely, given Miss Burton’s attachment to her personal belongings, that she did tell her friend Carole Hart, when she rang Miss Burton on 18 June 2012, that she did not want Mr Spencer to move into her flat as she did not want him getting into “her stuff”. I am also satisfied that she told her friend Debra Thomas that she was keeping all her “beautiful things” in her unit, unit 3, so that she had somewhere to go when she wanted to be alone. She told Debra Thomas at that time that Mr Spencer was paying all the bills for the three-bedroom unit and that “she agreed to Ken looking after her in her final days because she would need someone to look after her and it might as well be him.”
- [163] On 25 June 2012, Nurse Hockings from the Townsville Cancer Centre spoke to Miss Burton by telephone. Miss Burton told her that she was in the process of moving apartments, was feeling scared and was worried that she had made the wrong decision to remain in Townsville as she wanted to be in Toowoomba at “the end.” Mr Spencer said in his evidence that she had not been concerned and they both thought she had made the right decision to stay in Townsville.
- [164] On 28 June 2012, Dr Fried saw Miss Burton at the private clinic. Dr Fried notes with regard to her social circumstances: “With Ken (restarted relationship); from Toowoomba – Mum aged 85 lives there; no children of own; was teacher – now resigned.” Mr Spencer said he was present during that consultation, which Dr Fried’s notes confirm, “but didn’t really hear that ‘restart relationship’”. He could give no explanation as to why Miss Burton had said that. He also purported to be unable to remember her saying that her

mother was 85 and lived in Toowoomba. He did, however, have a clear recollection of Miss Burton telling Dr Fried that she did not have a Will.

[165] Dr Fried wrote on the same day to Dr Sabesan saying, *inter alia*:

“Thank you for referring Sharon Burton for palliative support. I saw her today for the first time, together with her partner Ken who has recently moved into her apartment to look after her ... Sharon was a teacher but has resigned because of illness. She lived alone until Ken, a previous partner, moved in with her. She has no children of her own and her only relative is her 85yo mother who still lives in Toowoomba, which she considers to be home and where she plans to be buried. Sharon has been advised to get her affairs in order and she has arranged her funeral, but has not so far been able to face doing her Will, Advanced Health Directive or Power of Attorney.”

[166] On 29 June 2012, Nurse Lynne Mitchell wrote that Miss Burton was a new referral to the Palliative Care Centre (“PCC”) and that she had attended the clinic accompanied by her partner Ken. She reported, *inter alia*, that Miss Burton felt very tired but had recently moved units.

[167] The Palliative Care Contact Information form, which is undated, showed Ken, her partner, as her “1<sup>st</sup> Preferred Contact”.

[168] The notes of the Townsville Cancer Centre on 4 July 2012 show that Nurse Hockings received a phone call from “Ken”, where he related Miss Burton’s pain and difficulties, and said that she was asking to come to the PCC. The note says that QAS transfer was to be arranged, that Dr Fried had accepted direct admission and that there was a bed available. The notes also show that there had been a phone call from Susan Webber, the social worker, who had received a phone call to similar effect from Mr Spencer, who was described as Miss Burton’s partner in the relevant notes. The notes say that he had told Ms Webber that Miss Burton had had a rapid rise in pain and he was going to call an ambulance. Nurse Hockings notes that she tried to call Ken and Sharon’s phone numbers but there was no answer.

[169] Mrs Williams called in to see Miss Burton while she was waiting for the ambulance. She noted that Mr Spencer was being very attentive to Miss Burton. Mr Spencer denied that Mrs Williams was there.

[170] Mr Spencer’s affidavit evidence was that he had taken Miss Burton to the hospital himself without the assistance of an ambulance on the Tuesday, which was 3 July 2012. He said that he had wanted to take her to the hospital on the Monday but it was a public holiday, so “we decided to leave it to the Tuesday.”

[171] A patient admission form shows Miss Burton’s admission to the Townsville Hospital via the Outpatient Department on 4 July 2012, a Wednesday. It also shows her next of kin as “Ken Spencer, Defacto, 3/86 Ogden Street, Townsville” and the person to contact as her mother, Daphne Burton. It should be noted that this form appears to have been completed on 21 May 2013 when handwritten notes were added by Dr S Moore, showing that Miss Burton had died in hospital from metastatic breast cancer.

[172] The notes from the Townsville Hospital also show that Sharon Burton was admitted to palliative care on 4 July 2012 “accompanied by partner Ken”. Under “social history”, the

notes refer to the fact that she used to work as primary school teacher and that she grew up in Toowoomba, where her mother and brother still lived, and had close ties with her family. In those notes, she is also recorded as having said that she had recently bought a cemetery plot for herself and her mother. She had not sorted out her Will but was willing to discuss it the following day. The notes recorded “Has been living by herself and completely independent until 2 weeks ago when Ken, her ex-partner moved back in with her + has been taking care of her since”. Mr Spencer said he heard what is recorded in the notes being said by Miss Burton and that it was all true; *except* that he did not hear her say that she had been living by herself and was completely independent until two weeks earlier when he, her “ex-partner”, had moved back in with her and had been taking care of her since. He said that not only did he not hear that said, it was not true. I am quite satisfied that the notes correctly record what was said and that the only reason that Mr Spencer gave evidence that he had not heard it said and that it was not true was because he realised how damaging it was to his case.

- [173] On 5 July 2012, under the heading of “physiotherapy”, the social history section notes that Miss Burton was from Toowoomba and planned to go back there, as her mother and her brother were there. She was said to be living in Townsville with her ex-partner and to have worked as a school teacher. It was also reported by another member of the nursing staff that her partner and friends had been in to visit throughout the day. The social worker reported at 4.20pm that she met with “Ken the partner who was keen to prepare” social work input. It was said that this was therapeutic for him.
- [174] The social work report was prepared on 5 July 2012. It appears that the social work report was based on what Mr Spencer told the social worker. He told her that Miss Burton had been in a relationship with him for 16 years and that her elderly mother currently lived in Toowoomba. He said that “Sharon lives in a one bedroom unit in the Townsville area”. He said that she identified with the Catholic Church but was not an active member and had a personal relationship with God. I have already noted that all of the documentation on which her religion is identified shows her as being Anglican or Church of England. When questioned about that in the trial before me, Mr Spencer said he could not remember saying that she identified with the Catholic Church but then said that that is what he thought her religious beliefs were.
- [175] He then said to the social worker that he was also caring for his elderly mother and due to Miss Burton having a one-bedroom unit, he had moved to other accommodation. The social worker noted that the plan should be, *inter alia*, to introduce end of life documentation sensitively.
- [176] At some point not identified in the evidence but most likely not long before Miss Burton lost consciousness, she told her friend Ms Secher what she wanted to have in her Will. She asked Ms Secher if she would be her executor and said that she wanted to provide for Mr Spencer, as well as her mother, if she needed it, and her nieces. However, no Will was ever written, either formally or informally.
- [177] Ms Secher was most anxious “to make sure [Miss Burton’s] wishes were fulfilled”, including Ms Secher’s understanding that Miss Burton wanted Mr Spencer to have the unit at Metro Quays. Her evidence about the relationship in issue was coloured by that desire, expressed most vehemently. As a result, I was not able to rely on her evidence about the nature of the relationship, as she was obviously of the view that the outcome of this case should give effect to what Ms Secher believed Miss Burton’s wishes were; in

other words, what Ms Secher thought would have been in Miss Burton's Will had she written one, which, as I have said earlier in these reasons, was not the question before the court.

[178] On 6 July 2012, the hospital notes refer to Mr Spencer in one entry as "husband Ken". They later record that it was suggested that he notify Sharon's family that "things are deteriorating rapidly". Mr Spencer then called Mrs Burton. By then, Miss Burton had lost consciousness.

[179] At 12.00 noon, it was noted: "Ken + friend in attendance." In the Care of the Dying Clinical Pathway, that friend is identified as Hanne Secher. In that document, it was noted that chaplaincy was offered by a Catholic Priest.

[180] The end of life documentation was then completed. Because Miss Burton was unconscious, it was thought she did not have capacity to consent to or refuse medical treatment. Under "patient choices", it was said that the following views had been expressed:

"Discussion with ex-partner and carer Ken. He does not believe that Sharon would want her suffering prolonged."

[181] At 1.15pm on 6 July 2012, Miss Burton died. It was reported in the hospital notes that her partner Ken had spent two hours with her and was stunned that it was all over. He was reported as saying his "only regret is that they did not get to organise a will for her before she got to[o] ill to do so & has passed without one and now all her personal issues will be dealt with by the public trustee". The Care of the Dying Clinical Pathway Care After Death document shows that her partner Ken and friend "Hannah" were with her when she died.

#### **After Miss Burton's death**

[182] After Miss Burton's death, her body was transported to Toowoomba and buried as she had requested at the Toowoomba Garden of Remembrance Cemetery on 13 July 2012. The funeral notice in the Toowoomba and Townsville newspapers was, according to Mr Spencer, organised by Peter and Irene Burton. This was not put to them, but is likely to be correct because the notice lists the names of their children and grandchildren, information which Mr Spencer did not know. He had never taken sufficient interest in Miss Burton's family to become familiar with their names. The funeral notice recognises that when Miss Burton died, Mr Spencer was her partner. In the end, however, the funeral notice does not take the matter any further as there is little dispute that the de facto relationship had recommenced in the weeks prior to Miss Burton's death.

[183] A patient registration form about Miss Burton completed on 9 July 2012 showing her next of kin as "Ken Spencer", who resided at 3/86 Ogden Street, does not assist in determining whether they were living together in a de facto relationship continuously from 6 July 2010 in view of the fact that it was dated three days after her death.

[184] Mr Spencer, describing himself as "Kent Spencer" and as her "de facto spouse" was the informant for Miss Burton's death certificate on 17 July 2012.

[185] Mr Spencer moved very quickly to take out letters of administration. By the end of July 2012, he had instructed solicitors and his intention to apply had been published in the

Townsville Bulletin and the Queensland Law Reporter, publications most unlikely to come to the attention of Miss Burton's family on the Darling Downs.

- [186] On 14 August 2012, Mr Spencer obtained letters of administration of Miss Burton's estate. It is likely that he was under significant financial stress with many pressing debts and so did whatever he could to get moneys under his control.
- [187] On 17 August 2012, on Mr Spencer's application, the Queensland Teachers' Mutual Bank transferred \$607,380.92 from an account in the name of Miss Burton to Mr Spencer. That was the balance of moneys held in her name after the mortgage loan on 3/86 Ogden Street had been discharged.
- [188] Mr Spencer used funds from the estate to pay personal credit card debts owed by him of \$34,000 between August and December 2012 until a restraining order was granted by the court on 13 December 2012. On 25 June 2015, Henry J found that Mr Spencer had committed various contempts of that order but reserved punishment pending the handing down of this decision.<sup>6</sup>
- [189] On 27 August 2012, Mr Spencer handed a bundle of bank cheques to Peter Burton. Those cheques were in the sums of \$55,000 for Daphne Burton; \$10,000 each to Andrew James Burton, Ashleigh Jennifer Corrallie Burton and Rowena Jade Burton; and \$5,000 each to Asher James Burton, Matthew Charlie Morton [*sic*] and Lachlan David James Burton. After Peter and Irene Burton enquired whether these cheques were inheritances or a gift, they received a handwritten, undated letter from Mr Spencer on 11 September 2012 stating that the moneys received were a gift from Kent Spencer from the estate of Sharon Burton.
- [190] In his affidavit sworn on 28 February 2013, Mr Spencer says that he gave all of Miss Burton's jewellery, except for the diamond ring he had bought her, to Peter Burton. This was disputed by Peter Burton and by Mrs Burton. Then, in his affidavit sworn on 11 April 2013, Mr Spencer said, "I however did in the last couple of weeks find a wedding ring, an engagement ring and my gold Seiko watch in a gold coloured make-up bag belonging to Sharon. Each of these items was wrapped in white tissue. There were no valuation papers in this make-up bag. The wedding ring and the engagement ring do not appear to be of any significant value and I did not give these items to Sharon. I will give these rings to Sharon's mother if she wants them".
- [191] Mr Spencer let unit 3 from September 2012 and continued to live in the three bedroom unit at Metro Quays. On 30 January 2013, his solicitor wrote to Mrs Burton's solicitor as the tenant Mr Spencer had put into unit 3 had broken the lease and Mr Spencer wanted to relet it and offset the rent received against the cost of the rent of the unit in which he was living. He asserted that this was the arrangement he had made with Miss Burton when they leased the three-bedroom unit. This is another occasion where Mr Spencer told a lie for financial advantage. There was no such arrangement. It is contrary to what Miss Burton told her mother and is inconsistent with the behaviour of a woman who valued her unit and all the things she kept in it that were precious to her. Even Mr Spencer acknowledged this aspect of Miss Burton's personality when he said of Daphne Burton in his evidence, "If Daphne's anything like Sharon, which I believe the – being the mother of Sharon, that everything was precious." He also said in his oral evidence that Miss

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<sup>6</sup> *Burton v Spencer* [2015] QSC 187

Burton was “very – very shy the fact of – of the amount of thing that is we did have in our home and she wouldn’t want people to see.”

[192] On 14 February 2013, Mr Spencer filed an affidavit in these proceedings attaching an account of the estate pursuant to orders made by this court on 31 January 2013. However, in an affidavit sworn on 7 June 2013, Mr Spencer said there had been an “inadvertent error” in that affidavit in that he left out an amount of \$90,332.92 which represented moneys he had used primarily for personal expenses. They included a gift to his daughter of \$10,000, payment of various credit card debts of his on 21 and 23 August, 1 and 31 October, and 3 and 12 December 2012; general day-to-day living expenses; and the purchase of furniture, including furniture he said he had purchased for unit 3/86 Ogden Street. The only estate expenditure appears to be memorial service costs of \$3,049.18. He said that he regarded the moneys as moneys he was entitled to use in the same way as he had gifted the amount of \$100,000 to Mrs Burton and her family. He said he used the amount of money between 17 August and 12 December 2012. The affidavit of 7 June 2013 was filed after a letter was sent by Mrs Burton’s solicitors to Mr Spencer’s solicitors observing that there was \$90,332.92 unaccounted for in the affidavit of Mr Spencer dated 14 February 2013.

[193] As I stated at the beginning of these reasons, the question to be determined in this case was whether or not Sharon Burton and Kent Spencer had been de facto partners – that is, living together as a couple on a genuine domestic basis for a continuous period of at least two years ending when Miss Burton died on 6 July 2012.

[194] Section 32DA(2) of the AIA sets out a list of non-exclusive criteria to which the court may have regard. I shall summarise my findings with respect to each of them.

#### **The nature and extent of their common residence**

[195] I am satisfied that Mr Spencer and Miss Burton lived together in a residence owned by her from about 1999 to 2008. Thereafter they ceased to live in a common residence until 2012, when they intended to move together to live at Airlie Beach and then moved into a three-bedroom apartment at Metro Quays in June 2012. Mr Spencer’s case as to their being de facto partners was that they had been living together for a continuous period of some thirteen years, or at least for two years ending on 6 July 2012. This was not true.

#### **The length of their relationship**

[196] Their relationship spanned many years but its nature changed in about 2008 to 2009 when they ceased to live together. It became more of a social boyfriend-girlfriend relationship until after Miss Burton’s diagnosis with terminal cancer in December 2011.

#### **Whether or not a sexual relationship exists or existed**

[197] From the evidence led about this aspect of their relationship, I am satisfied that they had a sexual relationship which continued in a casual way even when they were no longer living together.

#### **The degree of financial dependence or interdependence and any arrangement for financial support**

[198] I am satisfied that Miss Burton valued and maintained her financial independence from Mr Spencer until the last months of her life.

**Their ownership, use and acquisition of property**

[199] Each of them acquired property separately and regarded it as their own. Miss Burton allowed Mr Spencer to live with her in the unit she owned until 2008 but excluded him from the property in 2009 when she was not living there. Mr Spencer regarded his vehicles as his own although he used them for purposes which included driving Miss Burton. In June 2012, they jointly signed a lease on unit 64 at Metro Quays.

**The degree of mutual commitment to a shared life, including the care and support of each other**

[200] Once Miss Burton was diagnosed with terminal cancer in January 2012, Mr Spencer provided her with the care and support that might be expected of a committed relationship. However, that degree of mutual commitment to a shared life did not exist as at 6 July 2010 or in the ensuing months until the diagnosis that her disease was terminal was made.

**The care and support of children**

[201] There were no children of the relationship and Miss Burton did not provide any care or support to Mr Spencer's daughter

**The performance of household tasks**

[202] No evidence was adduced about this matter.

**The reputation and public aspects of their relationship**

[203] There was a division of opinion from the witnesses about this aspect of the relationship between Mr Spencer and Miss Burton. Her family did not regard them as being in a marriage-like relationship. Many of their friends knew that the relationship between them had existed for a long time but were partisan in their expression of views about, or ignorant of, whether or not that relationship changed during 2008 to early in 2011.

**Conclusion**

[204] Taking into account all of the evidence before me as I have, I am not satisfied that Mr Spencer and Miss Burton were de facto partners for a continuous period of at least two years ending when Miss Burton died on 6 July 2012.

**Orders**

[205] Accordingly, I make the following orders:

1. It is declared that the respondent was not a spouse or a de facto partner of Sharon Ann Burton (deceased) (as those terms are defined in the *Succession Act 1981* (Qld) and the *Acts Interpretation Act 1954* (Qld)).
2. It is ordered that Letters of Administration on Intestacy be granted to the applicant.

[206] I will hear the parties as to any consequential orders and as to costs.