De facto status without cohabitation- the exceptional case

Can a party claim to be a de facto partner in an FPA claim where they have not cohabited?

In *KQ v HAE* [2006] QCA 489 the Queensland Court of Appeal, in considering whether the parties had formed a de facto relationship for the purposes of a property distribution under the Property Law Act Qld, held:

> [20] "*Nevertheless, the definition of "de facto relationship"' suggests that, usually the parties should have, at some stage been "living together as a couple on a genuine domestic basis. The fact that the parties had never lived together in a common abode must be acknowledged to be an indicator that they have not "lived together as a couple on a genuine domestic basis". This indication will be especially significant where the parties have not shared the common burden of maintaining a household. It would be a wholly exceptional case in which one could conclude that a man and a woman, who have never lived together as husband and wife in a common residence, and have never made provision for their mutual support, have been living together as a couple on a genuine domestic basis*[1] (emphasis added)

In FO v HAF [2006] QCA 555 at [26] the Queensland Court of Appeal referred to *KQ* noting what was said about the "exceptional" case.

Although both cases were concerned with the Queensland Property Law Act 1974[2], the similarities of the workings and wording of that and the Acts Interpretation Act 1954[3] sufficiently analogous to the wording and working of section 57 of the Succession Act[4] (SA) [and s21C of the Acts Interpretation Act {vsee further below], such as to be appropriate authorities in relation to what constitutes a de facto relationship for the purposes of a claim for family provision under the SA.

S57 (1) of the SA, refers to s21 C of the Interpretation Act for the definition of de facto relationship. Section 21C of the Interpretation Act 1987 provides:

> (1) Meaning of "de facto partner" For the purposes of any Act or instrument, a person is the
> **"de facto partner"** of another person (whether of the same sex or a different sex) if:
> (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the *Relationships Register Act 2010* , or
> (b) the person is in a de facto relationship with the other person.
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> (2) Meaning of "de facto relationship" For the purposes of any Act or instrument, a person is in a
> **"de facto relationship"** with another person if:
> (a) they have a relationship as a couple living together, and

[1] The plaintiff admitted she had never lived with the defendant and was not inclined to until they married, potentially

[2] These were cases for property adjustments between de facto's which were heard in under each states statutory regime for de facto couples. Since the Family Law Amendment Act (De Facto Financial Matters and other Measures) Act 2008, effective from 1 March, 2009, these are now heard in the Family Court (of Federal Circuit Court) as family law matters.

[3] Under the Property Law Act, the definition of de facto partners is referenced by the definition found in the Acts Interpretation Act

[4] Succession Act 2006

(b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else.

(3) Determination of "relationship as a couple" In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
(a) the duration of the relationship,
(b) the nature and extent of their common residence,

(c) whether a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple

The passage In *KQ* referencing the "exceptional case" was not picked up in *Piras v Egan* [2008] NSWCA 59, a case where a party sought to be declared a de facto in the face of an intestate death. The facts were lengthy and exposed a plaintiff with a chequered past. The trial court had accepted that the appellant had, "from time to time stayed at the deceased's flat" but could not determine the frequency of this from the evidence.[5] As pointed out by the Court of Appeal though the importance of this evidence is of central importance as to whether a de facto relationship existed as it goes to the central issue of whether the two people lived together "as a couple"[6]

In *Vaughan v Hoskovich* [2010] NSW SC 706, another case were the deceased died intestate and the plaintiff sought to be declared the deceased spouse[7] White J cites the passage in *KQ* which references the exceptional case. In *Vaughan* though, the plaintiff had spent weekends and one night a week[8] with the deceased and this was held (when taken with the other indicia) sufficient for the court to find the parties were in a de facto relationship. The issue of cohabitation was sufficient albeit not full time, as White J held:

[5] [145] Piras
[6] [146] Piras- note- the wording of the SA on this issue is, "they have a relationship as a couple living together" and under the De Facto (Relationship) Act it is expressed as *who live together as a couple* – in substance, amounting to the same thing
[7] As such, the relevant definition was s 4 (1) of the Property Relations (Relationships) Act that being the relevant section referred to at 32G of the Probate and Administration Act, 1898, for definition of a de facto spouse
[8] Vaughan [8]

> "In my view, the fact that they lived together only for a small part of each week does not mean that they cannot be said to have lived together as a couple. Whether they lived together as a couple, must of course take into account all of the circumstances, including those listed in subs (2)[9]. But it seems to me that the maintenance of separate residences is not inconsistent with the parties living together as a couple, provided that there is sufficient shared residence over a long enough period to amount to "living together". Parties can live together for part of a week and also live apart, for part of a week. Although living apart for some periods, they can still live together as a couple if all the circumstances indicate that they are "a couple". I accept that the phrase "living together as a couple" connotes that the persons will live together in a place which can be said to be their home, but a person can have more than one home (*Cardiacos v Cooper Consulting and Constructions Services (Aust) Pty Ltd* [2009] NSWSC 938 at [27]-[29] and cases there cited.) In the present case, as indicated in paras [10] and [12], the parties treated the plaintiff's Turramurra property as one of the deceased's homes. 54 Subsection 61B(3A) of the Probate and Administration Act provides.." (*his Honour then sets out the relevant provisions and proceeds to cites a series of decisions*[10] where the question of cohabitation as an element of finding a de facto relationship were considered).

Except for *K*Q which was a case where the parties had never lived together and were considering moving in, the parties in the other cases had in various degrees, spent overnight time in one house[11].

This then brings us to whether the workings and wording of s57 SA and s21C of the Acts Interpretation Act, allow for the "exceptional case", that is, the possibility of a de facto relationship where the parties have not "lived together" and, if so, what facts would satisfy such an exception.

In *Sedgwick v Varzonek* [2015] NSWSC 1275, the plaintiff brought Family Provision proceedings (together with alternate claims in contract, estoppel and restitution), asserting a de facto relationship. He had never lived with the deceased under one roof- although there were good if somewhat tragic reasons for his not having done so:

The plaintiff first met the deceased in August, 2002 at the Bourbon and Beefsteak Restaurant in Sydney's Kings Cross. At that time he was aged 60 and she was 40 and had been separated from her husband for 3 years.[12] Their relationship quickly turned into a loving one, and they went out for dinner, for coffee and were intimate.[13] Within a month of meeting, the deceased killed her estranged husband by stabbing him whilst they were driving together on the Gore Hill Freeway. She was sent to the Mulawa Correctional Centre and plaintiff visited her there.[14] As a result of concerns about the deceased's mental health, she was transferred to the Psychiatric Forensic Unit of Cumberland Hospital (known as Bunya) and there she

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[9] The reference there is to 4 (2) of the De Facto (Relationships) Act 1984 which is virtually identical to the provisions at s21C of the SA namely

[10] The cases cited were: *Green v Green* (1989) 17 NSWLR 343; *Weston v Public Trustee* (1986) 4 NSWLR 407; *Roy v Sturgeon* (1986) 11 NSWLR 454; Hayes v Marquis [2008] NSWCA 10; PY v CY [2005] QCA 247; FO v HAF [2006]QCA 555; (2007) 2 Qd R 138; KQ v HAE [2006] QCA 489; [2007] Qd R 32

Except for KQ decision, in all the other cases cited there had been some "cohabitation" and the issue was whether the nature of the cohabitation together with the other inidicia were sufficient to constitute a de facto relationship

[11] Avoidance of the phrase of cohabit is deliberate as that can be suggestive of the ultimate issue,

[12] [38] Sedgwick

[13] [39]Sedgwick

[14] [41], [42] Sedwick

suffered a florid psychosis.[15] Initially, as a result of her psychosis, the plaintiff did not visit but did maintain telephone contact and thereafter at the deceased's request, he started visiting her about 3 times a week. The plaintiff's visits would commence in the morning, with a short break whilst the deceased ate lunch with her fellow patients, and thereafter resume in the afternoon.[16]

In July, 2004 the deceased was taken to Westmead Hospital for a medical appointment. Whilst waiting there, she fell from a balcony and as result, she suffered a brain injury and spinal cord damage rendering her a T4 paraplegic.[17] She was transferred to the Prince of Wales Hospital. In September 2004 (some 2 or so months after the accident), she was transferred to the Royal Rehabilitation Centre, Sydney and thereafter to the Moorong Spinal unit in Ryde for about 7 months where the plaintiff continued to visit her and when she was well enough they would go on outings together to the shops and to do banking.[18] In May 2005 the deceased attempted suicide and was transferred back to Bunya.[19]

In June 2005 the deceased was found not guilty of murder by reason of mental illness.[20] In August, 2005 the deceased commenced personal injury proceedings for her injuries.[21] At about this time the deceased and plaintiff had a conversation in words to the following effect:

Deceased:	"*If I get the money [from my personal injury claim], you are coming to live with me, Richard. I want to buy a home that is wheelchair accessible and has two bedrooms and two bathrooms so we can live together*"
Plaintiff:	*"If you get no money from your claim then you can come live with me. We will make a plan to somehow be together.*"[22]

The deceased attempted suicide again in February, 2006.[23]

In November, 2007 the deceased moved out of Bunya to a group home in Maroubra. The group home accommodated a small number of people with physical and/or mental disabilities; this particular group home was operated by Spinal Cord Injuries Australia.[24] The terms of accommodation at the group home allowed for overnight visits of up to 3 nights with notification and consent of other members.[25] His Honour found that although plaintiff's own accommodation was not suitable for the deceased to live in, had it been, he would have tried to persuade the deceased to come live with him.[26]

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[15] [43], [44] Sedgwick
[16] [47] Sedgwick
[17] [52], [53] Sedgwick
[18] [56] Sedgwick
[19] [58] [59] Sedgwick
[20] [61] Sedgwick
[21] [62] Sedgwick
[22] [63] Sedgwick
[23] [67] Sedgwick
[24] [75] Sedgwick
[25] [77] Sedgwick- the plaintiff never stayed overnight and no express point seems to have been made by the defendants about this, that is, there was an opportunity for the plaintiff to spend overnight time with the deceased and he never did. However, it may be that because overnight visits recquired consent and, as plaintiff's presence was not welcomed at the group home, (see paragraphs [86] –[106] of the judgment,
[26] [78] Sedgwick

Initially, in the early years, the plaintiff visited the deceased almost daily from about 8am to 4.30pm at the group home.[27] On Christmas day 2007 the deceased again said words to the effect, "*After I get my money from my claim we can live together in the same house. We can also go on holiday together*."[28]

In January, 2009 the deceased attempted suicide again.[29]

On 28 February 2010 the deceased again attempted suicide against the backdrop of eviction proceedings against her by the group home operators arising in the main from how the plaintiff had conducted himself with staff and house members (for an account of the behaviour that led to this see paragraphs referred to at footnote 25). This suicide attempt led to the deceased being hospitalised in St George Hospital and thereafter transferred to the Kiloh Rehabilitation Centre and Prince of Wales Hospital. Finally, in February, 2011 the deceased left the group home for a house arranged through NSW Housing in Anzac Parade Maroubra[30].

After the deceased move to Anzac Parade, the plaintiff's visits had dwindled to "barely weekly" [31].

By this time, the deceased had formed a close relationship with another man, Daniel Cave whom she had originally met in 2005 or 2006 whilst in Bunya. His Honour accepted that when the deceased moved to Anzac Parade the two were intimate and that Cave considered himself to be the deceased's boyfriend[32] .

The deceased's personal injury settled at mediation in November 2011. She executed a will on 8 December, 2011[33] appointing the defendant (a friend of hers) as executor with a 2% commission and leaving the residue of her estate to be divided equally between her sister, daughter and mother.[34] The deceased then took her own life two weeks later.

For the purposes of determining whether the plaintiff is an eligible person for the FPA claim, his Honour (Slattery J) undertakes an analysis of whether the plaintiff was in a de facto relationship with the deceased at the time of her death. He notes:

> [185] A common point in all the challenges to the plaintiff's alternative claims is his and Marlene's living arrangements. The point arises in deciding: not only, whether in his claimed de facto relationship they had "common residence" (*Interpretation Act*, s 21C(3)(b)); but whether in his claim of partial dependence he "was a member of a household of which the deceased person was a member" (*Succession Act*, s 57(1)(e)(ii)); and whether the plaintiff was "a person with whom [Marlene] was living in a close personal relationship" (*Succession Act, s* 57(1)(f)).

However, as will be seen, it is not the fact that plaintiff did not live with the deceased as a couple per se that was in issue, but rather, the fact that the "relationship" at the time of her death was one of bare

[27] [81] Sedgwick
[28] [82] Sedgwick
[29] [90] Sedgwick
[30] [141]-[146] Sedgwick
[31] [151] Sedgwick
[32] [158] Sedgwick
[33] [3] Sedgwick
[34] [12] Sedgwick. Her sister and mother lived in Poland. Her daughter had commenced separate Family Provision proceedings which were settled on the first day of the hearing

friendship or "over" at the time of death[35] . In fact, on the issue of "common residence" his Honour finds:

> [217] " *Common Residence*. Richard submits that there was no practical opportunity from the time he met Marlene right up until the time of her death where it would have been possible to have lived together. There is some force in this submission. The Court accepts that Marlene and Richard did discuss the prospect of their living together when her personal injury claim settled as the Court has found. Until some time in 2009 their relationship should be characterized as one in which they both intended to move in together if they physically could. But from 2010 on if Marlene had a choice of moving in to live with Richard Sedgwick or Danial Cave, in my view she would have chosen the latter. And Richard made no serious attempt to try and co-habit with Marlene when she was at Anzac Parade."

His Honour then undertakes an analysis of the other indicia finding:

Sexual relationship: There was one with the plaintiff prior to deceased's injury and with Cave towards the end of her life.[36]

Financial Dependence, Interdependence and Support: Plaintiff provided regular financial support which declined over time[37].

Ownership Use and Acquisition of Property: There was evidence of plaintiff making use of deceased furniture instead of storing it, but later in the piece, the deceased seemed to want it back, another indication to His Honour about the status of the relationship[38].

Mutual Commitment to a shared life: Again, whilst this was discussed in the earlier years, it was not raised towards the end.[39]

Care and Support of Children: There were no children of the relationship although there were adult children from previous relationships on both sides[40].

Performance of Household Duties: Whilst there had been some prior to 2009, thereafter, whatever was done was out of friendship or motivated by the prospect of receiving a share of the settlement.[41]

Reputation and Public Aspects of the Relationship: His Honour finds that until about 2007, were public expressions consistent with a de facto relationship[42].

His Honour interestingly does not find that for example that the failure to move in after the deceased moves to Anzac Parade is of itself fatal to the claim; what he finds is that the deceased would not have done so because the relationship was at an end, her affection now being transferred to Cave. This raises a question of what the nature or status of the "relationship" was prior to its demise. In other words, had the deceased died prior to 2007 when, according to his Honour the relationship was still on foot, would it be a de facto relationship for the purposes of the SA, notwithstanding the absence of the parties

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[35] [124] Sedgwick
[36] [218] Sedgwick
[37] [219] Sedgwick
[38] [220] Sedgwick
[39] [221] Sedgwick
[40] [222] Sedgwick
[41] [223] Sedgwick
[42] [224] Sedgwick

physically living together in the one household- would his Honour have come to the view that there is room for an "exceptional case" and this is it?

It remains an intriguing question. On one view, the wording of s 2 (a) of the Interpretation Act may be against any suggestion of a de facto relationship where parties have not at any time been a "couple living together". That is so, because the wording of the section (see below) seems to make it part of the definition: A person is in a de facto relationship with another person if

(a) they have a relationship as a couple *living together*, and

(b) they are not married to one another or related by family (emphasis added)

The indicia at sub section (3) are aspects a court can look at in determining whether the parties were in a de facto relationship but by definition, this must be underpinned by a living together. An argument that may have been made in Sedgwick is that, in the circumstances of the parties (at least prior to the deceased moving to her own accommodation) the parties, were, in so far as circumstances allowed living together, albeit each night plaintiff did return to his own apartment. One may have to wait for a bold plaintiff with a unique set of circumstances, before the proposition can be determined.

Allan Blank

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