PUBLICATION PROHIBITED SAVE IN ACCORDANCE WITH SECTION 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-590

BETWEEN	B Appellant
AND	F Respondent

Hearing: 7 July 2009

Counsel: M S McKechnie and S A MacBeth for Appellant
D A Blair and C F Allen for Respondent

Judgment: 3 September 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 3 September 2009 at 9.30am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
McKechnie, Quirke and Lewis, PO Box 242, Rotorua
Holland Beckett, PO Box 12011, Tauranga
Counsel:
M S McKechnie, PO Box 1227, Rotorua
S A MacBeth, PO Box 7235, Rotorua
D A Blair, PO Box 13284, Tauranga

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Introduction

[1] Ms B appeals against a judgment given by Judge Twaddle, in the Family Court at Tauranga, on 25 June 2008. The only question for the Judge's determination at the hearing was whether Ms B and Mr F had been in a *de facto* relationship.

[2] Ms B contended that she had been in a *de facto* relationship with Mr F, whereas he denied that they were ever in a relationship of that type. Mr F asserted that they had a longstanding relationship, in the nature of boyfriend and girlfriend.

[3] After a hearing that lasted three days, Judge Twaddle determined that Ms B was not in a qualifying *de facto* relationship, for the purposes of the Property (Relationships) Act 1976 (the Act). He dismissed Ms B's application under the Act, holding that the Court had no jurisdiction to consider it.

[4] On appeal, Ms B contends that the Judge erred in finding that she and Mr F did not "live together as a couple", for the purposes of s 2D(1)(b) of the Act.

Approach to appellate review

[5] The leading authority on the approach to appellate review is *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC). That case involved an appeal under the Trade Marks Act and considered the concept of an appellate Court's "deference" to a decision of a specialist tribunal. Delivering the judgment of the Supreme Court, Elias CJ said:

> [13] The procedure prescribed for appeals by s 27 [of the Trade Marks Act] does not provide for full *de novo* rehearing of evidence. While "further material" can be brought forward under subs (8) either "in the manner prescribed or by special leave of the Court", it is clearly envisaged that there will be rehearing on the record. That is usual, and is for example the manner of appeals under s 76 of the District Courts Act 1947. *The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary"*. Such caution when facts found by the trial judge turn on issues of credibility is illustrated by *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [[1998] 3 NZLR 190 (CA)] and *Rangatira Ltd v Commissioner of Inland Revenue* [[1997] 1 NZLR 129 (PC)].
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> …
>
> [16] *Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.* In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion. (my emphasis)

[6] Relationship property appeals from the Family Court are governed by s 39 of the Act, which imports ss 74 to 78 of the District Courts Act 1947 as part of the procedures on appeal. The appeal is by way of rehearing (s 75) and falls within the scope of an appeal of the type to which the Chief Justice referred in *Austin Nichols,* at para [17]. If the appeal were allowed, this Court may make any decision that it thinks should have been made or remit the proceeding to the Family Court for reconsideration on a basis to be articulated clearly in its decision: s 76(1).

[7] Application of the *Austin Nichols* principles is not altogether easy, in the context of appeals from the Family Court. Many first instance decisions represent a mix of findings of fact (after seeing and hearing witnesses), the formation of an evaluative judgment and the exercise of statutory discretions. Sometimes it is difficult to characterise a particular decision as evaluative, factual or discretionary in nature.

[8] I approach this appeal on the following basis:

a) First, I must take account of the advantage that Judge Twaddle had of hearing and seeing the witnesses give evidence before him: see *Austin Nichols* at para [13].

b) Second, to the extent that the Judge exercised any discretion in reaching his decision, I must determine whether those discretionary decisions were or were not open to him, based on *May v May* [1982] 1 NZFLR 165 (CA) and *Blackstone v Blackstone* [2008] NZCA 312 at para [8].

c) Otherwise, I am free to reconsider the Family Court's decision and to substitute my own view on questions of fact and evaluation, if I were convinced that the first instance decision was wrong.

In that regard, I align myself with Randerson J's remarks in *WPH v ITP [Length of Relationship]* [2009] NZFLR 745 (HC) at paras [15]-[17].

The Family Court judgment

[9] Prior to 1991 Ms B was married and living in Australia. Mr F was a family friend whom Ms B had known since she was a teenager. Ms B returned to New Zealand in May 1991, when her marriage ended in Australia.

[10] Initially, Ms B formed a relationship with another man. Subsequently a friendship developed with Mr F.

[11] In May 1994, Ms B went to Australia to resolve outstanding issues with her former husband. Mr F accompanied her, as a support person. During the time they were in Australia, it appears that a more intimate relationship developed. When they returned to New Zealand later in 1994, Mr F established Ms B and her two children in a flat situated at M Street, in the suburb of [omitted] in Tauranga. That flat was situated about 15 minutes drive from Mr F's parents' home in R Road, in the suburb of [omitted].

[12] Later, in 1998, Ms B moved to M Drive, in [omitted]. That residence was about five minutes drive from R Road.

[13] Judge Twaddle found as a fact that Ms B and Mr F formed "a relationship" when they returned to Tauranga, in April or May 1994, and that the "relationship" ended in November 2004. He then turned to consider whether the nature of relationship was such that it could be characterised as *de facto* in nature.

[14] The Judge discussed the competing evidence on whether Ms B and Mr F shared a common residence during the time she lived at M Street and M Drive. The evidence was in conflict.

[15] Things were made more complicated by some rather odd aspects of Mr F's routines. Although Mr F would spend many nights at Ms B's property, his clothes and personal possessions were retained at his parents' home in R Road, for the whole of the period between 1994 and 2004. Often he would sleep at his parents' home. In addition, Mr F would always shower and change clothes at R Road. His mother did all of his washing and ironing there. In contrast, Mr F would spend time at both M Street and (later) M Drive, cooking (his passion) and socialising there.

[16] Judge Twaddle took the view that, while a person may have more than one residence, "to reside in a place a person must spend some time exclusively at that place". The Judge found that, apart from periods when Ms B was absent, Mr F never spent exclusive time at either M Street or M Drive. Judge Twaddle found that Mr F never regarded Ms B's residence as his own, or as his home.

[17] In addition, the Judge found that, while Ms B and Mr F used the M Street and M Drive properties "for many joint activities and spent a significant amount of time there together", those properties were never used as a "common residence".

[18] Ms B's position was that a sexual relationship was strong, particularly between 1994 and 1996 when "they were having sex every day and night". Mr F talked of the relationship developing into a sexual one, which was "on and off". His

position was that the sexual relationship began to wane around 1996, when an issue arose over Ms B's mental health.

[19] The Family Court Judge found that Ms B's evidence of the frequency of sexual activity was likely overstated. He found that between 1994 and 1996, she and Mr F enjoyed an active sexual relationship, though it became less frequent as the years went by and was likely to have stopped by early 2004.

[20] The Judge found that while Ms B and Mr F did not have a joint bank account and their financial affairs were not intertwined, Mr F provided very significant financial support to Ms B and the children between 1994 and 2004. In the period from 1994 until 2000 (with one or two exceptions) Ms B had been in receipt of a domestic purposes benefit, in respect of which she now asserts she made a false declaration. Mr F's contributions enabled her to maintain a higher standard of living than would otherwise have been the case.

[21] Mr F and Ms B did not purchase property in their joint names. Though Mr F paid for and later retained household furniture and whiteware purchased by him.

[22] Aside from the question of "common residence" the other factor in dispute was the degree of mutual commitment to a shared life. There are some surprising aspects of the evidence on this topic.

[23] Mr F's evidence is that his visits to Ms B's home at night became less frequent from 1996 on, leading to the cessation of whatever "relationship" existed. Yet, his evidence was also that by 2002 his commitment to the "relationship" was increasing, to the extent that he arranged for a property sharing agreement to be prepared by a solicitor, he says in contemplation of them entering into a *de facto* relationship. It is not easy to reconcile those two pieces of evidence.

[24] Judge Twaddle took the view that there was no mutual commitment. He considered that Ms B demonstrated commitment to a relationship during the early part of their time together but that had dwindled away by late 2003/early 2004. On the other hand, Mr F's commitment was less at the early stage but increased around

the time that Ms B's diminished. Therefore, the Judge held there was no coincidence of time during which each had a commitment to share their life with the other.

[25] Judge Twaddle found that Mr F put "a lot of time, money and effort" into caring for and supporting the children over a period of 10 years. Mr F provided financial and emotional support and acted as a father figure for the children.

[26] The Judge found that Mr F performed many of the household duties at both M Street and M Drive. In addition, he "effectively managed the household". On the other hand, Ms B "was responsible largely for washing and ironing for herself and the children".

[27] The Judge, rejecting explanations from Mr F and his mother to the contrary, found that, to most of their friends and acquaintances, Ms B and Mr F presented as a couple.

[28] While the Family Court Judge reviewed in some detail the competing evidence and made findings in respect of each of the factors set out in s 2D(2), the reasons for his conclusion that Ms B and Mr F did not live together as a couple were brief:

> [100] I must apply a commonsense objective judgment, weighing all the circumstances. There are factors which go both ways and no factor is to be accorded primacy. I have not found the decision to be easy, but I have come to the view that Ms B and Mr F did not live together as a couple. While they had a long relationship, socialised together and for part at least of the time had a sexual relationship, they kept their financial affairs separate, did not share a common residence and did not have a mutual commitment to a shared life. But these factors are guides only, and taking an overall view, I am not satisfied that Mr Brown and Mr F lived together as a couple.

[29] With respect, while critical to the Judge's decision, para [100] is problematic in its terms. At one level, the Judge appears to have given the absence of a common residence or mutual commitment to a shared life primacy in reaching his conclusion that Ms B and Mr F did not live together as a couple. However, the final sentence of para [100] casts some doubt on that interpretation: I am not sure what the Judge meant by "taking an overall view", irrespective of his conclusions on each of the factors identified in s 2D(2).

Competing arguments

[30] Mr McKechnie, for Ms B, challenges Judge Twaddle's evaluation of the evidence, in relation to the sharing of a residence. He submits that the Judge failed to appreciate that he was required to determine the extent to which a common residence was shared, having regard to the fact that the social and personal lives of both Ms B and Mr F was centred on the dwellings occupied by Ms B.

[31] Mr McKechnie also contends that the Judge gave inadequate weight to the relationship that exists between Mr F and Ms B's children.

[32] Both of those factors are relevant also to the degree to which the parties were committed to a shared life. Mr McKechnie submits that the judge's analysis on this topic is inconsistent with the conclusion reached in para [100] of his judgment (set out at para [28] above) and that insufficient weight was given to evidence by Mr F in an early affidavit that a *de facto* relationship did, at least at one time, exist.

[33] Finally, Mr McKechnie submits that the Judge's approach, in analysing individually the s 2D(2) criteria (set out at para [39] below) evidenced an overly mechanical approach to the evaluative question of whether Ms B and Mr F were "[living] together as a couple".

[34] Mr Blair, for Mr F, submits that the Judge was entitled to reach the conclusion that he did and that no error has been shown that would justify this Court in interfering with his decision.

[35] Mr Blair submitted that there was ample evidence for the Judge's critical findings that Ms B and Mr F did not share a common residence or have any mutual commitment to a shared life. He submitted that the Judge's findings of fact were all open to him. Given the nature of the evaluative judgment in issue, Mr Blair submitted that the appeal ought to be dismissed.

Legal principles: living together "as a couple"

[36] The term *de facto* relationship is defined by s 2D(1) of the Act. It states:

> **2D Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) Who are not married to, or in a civil union with, one another.
>
> …

[37] In this case, it was clear that the criteria in s 2D(1)(a) and (c) were satisfied. In issue was the applicability (or otherwise) of s 2D(1)(b).

[38] *Scragg v Scott* [2006] NZFLR 106 (HC) discusses s 2D(1)(b). The approach articulated by Gendall and Ellen France JJ requires a Family Court Judge to form an evaluative judgment about whether two people were living together as a couple. That question falls for determination by reference to the criteria set out in s 2D(2) and any other relevant factors arising on the facts of the particular case.

[39] Section 2D(2) sets out relevant (but not exhaustive) "matters" to be considered in determining whether the s 2D(1)(b) criterion is met:

> **2D Meaning of de facto relationship**
>
> …
>
> (2) In determining whether 2 persons live together as a couple, 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 common residence:
>
> (c) whether or not a sexual relationship exists:

> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
>
> (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.

[40] Before 1 February 2002 (when the provisions dealing with relationship property in the context of *de facto* relationships came into force) the question whether a couple were or were not in a *de facto* relationship was of relatively little significance. Couples who were not married were left to regulate their own property arrangements. That could be done by contract before or during the relationship. The alternative was to resort to the equitable jurisdiction of the High Court when the relationship broke down: for example, see *Gillies v Keogh* [1989] 2 NZLR 327 (CA) and *Lankow v Rose* [1995] 1 NZLR 277 (CA).

[41] Sometimes, parties might be in a form of "relationship" that falls short of one meeting the "*de facto* relationship" standard. Although not decided under the Act, an example is *O'Connell v Muharemi* (High Court, Auckland, CP546-SD01, 24 October 2003). In *Muharemi,* Ms O'Connell was held to have been Mr Muharemi's mistress in the earlier parts of the relationship (including periods when he was married), while in the latter part they were in a *de facto* relationship.

[42] The concept of two people living together "as a couple" can be contrasted with the notion of "living apart", for the purpose of determining a date of separation. The concepts of "living together" and "living apart" are opposite sides of the same coin. The authorities on "separation", not having been determined on the basis of statutory criteria, tend to recognise the more fluid approach that is necessary to determining the way in which human relationships develop.

[43] In *Scragg v Scott*, the Full Court considered whether there was a difference between the concept of "living together" (on one hand) and entering into a

"relationship in the nature of marriage" (on the other). Gendall and Ellen France JJ said:

> [26] It is significant that the phrases "living together" or entering into a "relationship in the nature of marriage" do not appear in the Act, although whether parties "live together as a couple" is relevant in determining whether s 2D(2) comes into play. The concept of "relationship in the nature of a marriage" was specifically excluded because a de facto relationship in terms of s 2D may be between a man and a man or a woman and a woman. The legislative history makes it clear that Parliament did not intend the test to be whether the relationship was "in the nature of marriage".

[44] In referring to para [26] of *Scragg v Scott,* it might be thought that the Judges considered that the question whether the parties "lived together as a couple" was relevant to determination of the s 2D(2) criteria. I am sure that was not their intention. The criteria set out in s 2D(2) provide a framework for analysing whether the parties "lived together as a couple", for the purpose of establishing one of the three prerequisites to the existence of a *de facto* relationship: see s 2D(1).

[45] While there can be no factual dispute over the starting date of a marriage or a civil union, the assessment of a starting date for a *de facto* relationship more problematic. In *Benseman v Ball* [2007] NZFLR 127 (HC) at [33], Priestley J said:

> [33] The methodology described in *Scragg v Scott* is particularly apposite. There can be no factual dispute over the start date of a marriage or a civil union. That date can be proved by a certificate. But assessing the start date of a de facto relationship is bedevilled with difficulty, particularly given the dynamic and progression of affectionate relationships which usually evolve without specific way-points.

[46] Since at least 1897, it has been acknowledged that cohabitation does not necessarily imply that husband and wife were living together physically under the same roof: *Bradshaw v Bradshaw* [1897] P 24 at 26; see also *Huxtable v Huxtable* (1899) 68 LJP 83 at 85 and *Millett v Millett* [1924] NZLR 381 (SC) at 383.

[47] A more significant decision is *Sullivan v Sullivan* [1958] NZLR 912 (CA). Both Turner and Finlay JJ took the view that "living apart" was the opposite of "cohabitation": Turner J at 924 and Finlay J at 919. In a passage worth repeating in full, Turner J explained the concept of "living apart" as follows, at 924-925:

> *"Living apart" must, in my opinion, involve two essential ingredients – a physical separation, and a mental attitude averse to cohabitation on the part of one or both of the spouses.* I do not forget, of course, that it was contended in argument that the mental attitude of the spouses is irrelevant, and that "living apart" is a mere "state of affairs". If this view were correct, however, a man might be held to be living apart from his wife when he was on a temporary business visit to another city, if she did not accompany him thither. *Mere physical separation can never, in my opinion, constitute "living apart", even if long continued. There must also be demonstrated, on the part of one or both of the spouses, a mental attitude averse to cohabitation. It is true that, in certain cases, it may be that this attitude is itself demonstrated by little or no more than evidence of physical separation long continued; but the mental attitude must be demonstrated nevertheless. Where it is demonstrated, and physical separation is also proved, the spouses will then be held to be living apart.* Where one of them only is averse to cohabitation, and the other does not acquiesce in separation, desertion will be the end result. If both spouses form the necessary *animus separandi*, the result will be a consensual separation, but in both classes of case the mental attitude of at least one of the spouses is, in my view, an essential ingredient of "living apart".
>
> *It may be said that in some cases the state of living apart comes about from the mere indifference of the spouses – that they "drift apart"* and that by a process of which mere apathy is the main constituent, they ultimately begin to "live apart". *To such a suggestion my answer must be that (the parties having already physically separated) the state of living apart does not begin to exist until that day on which, if the spouse in question were compellingly asked to define his or her attitude to cohabitation, he (or she) would express an attitude averse to it.* Until this state is reached, cohabitation is not, in my opinion, broken. When it is reached, living apart begins. The difficulty of proving satisfactorily which was the day on which living apart began does not affect the principle which I have endeavoured to enunciate. (my emphasis)

[48] It is important to ensure that property consequences do not flow from relationships formed between two people that are not necessarily indicative of an intent to share property. For that reason some rigour is required in analysing whether a *de facto* relationship exists.

Analysis

[49] In *L v P [Division of Property]* [2008] NZFLR 401 (HC), Asher J considered an appeal from the Family Court. That Court had held that the parties had been in a qualifying *de facto* relationship of more than three years. The appeal was allowed, on the basis that the relationship was of a shorter duration than was found by the Family Court Judge.

[50] Asher J took the view that the Family Court Judge had erred in his approach to the test of what constituted a *de facto* relationship. He said:

> [43] The learned Judge noted correctly that the Judge's approach must be evaluative, and that the list of factors is not limited to those set out in s 2D. He then set out to consider in detail the s 2D factors item by item. The matter he appears to have weighted most is the circumstance of a degree of mutual commitment to a shared life, and in that regard he focused on the decision to live together. He picked up this point in his final evaluation of all the factors, to find that from the time of that decision to live together ". . . their relationship assumed a significant degree of mutual commitment and their lives became significantly intertwined".
>
> [44] *The Judge in this part of his analysis appeared to lose sight of the structure of s 2D, and that the central plank of a de facto relationship is the parties living together. He considered each s 2D(2) factor as if it were indicative of a de facto relationship, rather than indicative of whether the parties were living together as a couple*. The Judge focused on a particular event, undoubtedly an important one, namely their decision to live together, and appeared to elevate this to their actually commencing a de facto relationship. In doing so, he lost sight of the fact that while the parties need not reside together all the time for there to be a de facto relationship, the circumstances must equate to their living together. The dominating factor remains whether the parties can be seen as living together as a couple. … (my emphasis)

[51] With respect to the experienced Family Court Judge, I conclude that he made a mistake of the same type. The judgment under appeal reviews the evidence extensively under headings that correspond to the factors identified in s 2D(2). However, that review was not matched by an analysis of why the Judge considered that, standing back, Ms B and Mr F were not living together as a couple during the relevant period. I agree with Mr McKechnie that the final judgment on whether the parties were living together in a qualifying relationship was reached by an overly-mechanical application of non-exhaustive statutory criteria.

[52] Parties are entitled to reasons that explain why the Judge has reached a particular conclusion. Those reasons need to indicate those findings on which the Judge has relied to conclude that the relevant state of affairs has or has not been proved. Usually, in a case like this, that will require a Judge to identify clearly those factors that acted most influentially on his or her decision. Such an approach is necessary because, necessarily some factors will point in one direction and the balance in another.

[53] I am not confident that the Judge proceeded on the basis I have indicated. My unease stems, primarily, from the way in which the Judge expressed his conclusions: see para [28] above. In those circumstances, I consider afresh whether Ms B and Mr F were living together as a couple during the period of their "relationship". In doing so, however, I propose to rely on findings of fact made by the Judge, most of which are not seriously in dispute.

[54] By their very nature, disputes of this type which fall to be resolved by the Court will often arise out of the unconventional living arrangements of particular individuals. To some extent, there will always be the problem of trying to fit a square peg (representing the parties' choices about their own living arrangements) into a round hole (representing the concept of a *de facto* relationship, for the purposes of the Act)". Nevertheless, even in an unusual relationship, the law requires a Court to evaluate the evidence to determine whether the legal threshold is met.

[55] On Judge Twaddle's own findings, there was a "relationship" between Mr F and Mr Brown that lasted from about 1994 until 2004: see para [13] above. At issue was the legal characterisation of that "relationship".

[56] From 1994, the parties enjoyed a sexual relationship. However, they did not "live together" in any conventional sense. From 1994 until 2000 (with the exception of 1997), Ms B was in receipt of a domestic purposes benefit. She said, in order to obtain that benefit, that she had made a false declaration, that she was living alone with two children. Ms B deposed that she sought the benefit with Mr F's knowledge and at his insistence, a point on which Judge Twaddle made no express finding. Ordinarily, an application for a benefit is something that will weigh heavily against the existence of a *de facto* relationship. In this case, however, I regard the point as equivocal. The unusual aspects of Mr F's chosen living arrangements (see para [15] above) were just as consistent with a desire to distance himself from a false benefit application as they were with living apart.

[57] The Judge found that Ms B's income was used to maintain the children and to pay rent, power, telephone, childcare and house cleaning. Mr F then provided

money for other living costs. Ms B and Mr F never held joint accounts. Chattels that were purchased were retained by Mr F after the relationship ended.

[58] Mr F accepted that he paid for house and contents insurance for the properties in which Ms B resided, met other expenses (such as veterinary and Sky TV accounts), paid for orthodontic treatment for the children and part of similar costs for Ms B, met the costs of overseas travel (providing a supplementary credit card to Ms B to assist her while she was overseas), provided mobile telephones for the children and paid for some liposuction surgery for Ms B.

[59] On several occasions Mr F, Ms B and the children travelled to Australia as a family unit. When staying in hotels or motels, Mr F and Ms B would share one bedroom and the children would have another.

[60] The Judge found that the pair did not share a common residence. However, with respect, the way in which the Judge approached that question may have deflected him from the true inquiry. The Judge's focus was on whether Mr F had any exclusive occupation of the houses at R Road and M Drive, in which Ms B had lived. I prefer to look at this issue by reference to the way in which a particular dwelling was used for family purposes. I put the issue in that way because it is clear (and Judge Twaddle accepted) that to most of their friends and acquaintances Ms B and Mr F presented themselves as a couple.

[61] In any event, I would have held that the Judge erred in holding that "to reside in a place a person must spend some time exclusively at that place". With respect, a person may share a family residence while electing not to sleep at that property exclusively, during the period of the relationship.

[62] The way in which Ms B and Mr F arranged their lives can best be seen by quoting two extracts from Judge Twaddle's judgment:

> [22] Ms B said the relationship was unusual in that Mr F kept his clothes at, and showered at another house. Also they never had meals together because of the way he ate (he would eat fruit during the day and have his evening meal of steamed vegetables late at night. He ate standing up and straight out of the pot and never had the same food as Ms B and the children).

…

> [25] Ms B's son, R, aged 20 (who was not required for cross-examination) said:
>
> > [Mr F] was at the home from 1994 or thereabouts right through to 2004. He was there every day from about 5.00pm. He cooked meals every night. He was home every night until at least when [K] and I went to bed. However I do appreciate that he would go and stay at his parents' home three or four times a week. The balance of the time I would see [Mr F] in the mornings at our home. He would often stay over on the weekends and I would see him in the mornings.

The evidence of Ms B's son, not having been subjected to cross-examination, must be accepted.

[63] It is fair to characterise some aspects of the relationship as matters of convenience. Plainly, Mr F preferred to keep his clothes at and to sleep (at least some of the time) at his parent's home. But, he also chose to spend much of his time with Ms B and her children, including sleeping at her home on many occasions while a sexual relationship existed.

[64] There was not much evidence to suggest that either was unfaithful to the other, during the whole period of the relationship.

[65] A puzzling aspect of Judge Twaddle's judgment is that he considered Ms B was more committed to the relationship prior to 2002 but the position had been reversed by that time. The Judge said:

> [82] [By 1996 or 1997], Ms B reached the point of considering where the relationship was going; she wanted a commitment from Mr F in the form of marriage which he was not willing to give. Nevertheless she remained committed to sharing aspects of their life and the arrangement they had continued without any significant change after 1996. As time went by, Mr F's acceptance of and commitment to the shared aspects of the relationship strengthened to the point that by 2002 he was prepared to acknowledge this in the purchase of a house, the signing of a property agreement and making provision for Ms B in his will. But by this time Ms B's commitment was waning and by late 2003/early 2004 had largely dwindled away. Overall I find that while each independently at some point in the ten year relationship had a commitment to a fully shared relationship, their commitment did not coincide and could not be described as mutual.

[66] My reading of those findings suggests the existence of a serious relationship between the parties in 2002, when the Act was extended to cover *de facto* relationships.

[67] The real issue, in this case, is whether, despite the unusual arrangements between the parties, they could properly be characterised as having been living together as a couple at the time the Act came into force on 1 February 2002.

[68] In my view, they were in a *de facto* relationship. My reasons for forming that view can be summarised as follows:

a) There was a mutual commitment to a shared relationship over some ten years. Even though the Judge identified periods when the commitment of one of them might have waned, I do not consider that the evidence established that whatever relationship existed had ended by the time the Act applied to *de facto* relationships.

b) Ms B and Mr F presented themselves outwardly as a couple. Apart from the times when Mr F chose to be at his parent's home, to dress, to shower or to sleep, they lived a life that most would regard as "shared". The fact that Mr F did not exclusively treat the property in which Ms B was living as his own home was not determinative of the issue before the Court. People may be separated from time to time, yet continue to live together. So much is clear from Turner J's judgment in *Sullivan v Sullivan,* set out at para [47] above.

c) Mr F acknowledged, early in the litigation, that he and Ms B were in a *de facto* relationship, at least for some of the time. He attempted to explain away that evidence by saying that he did not fully understand, at that time, what constituted a "*de facto*" relationship. Nevertheless, the fact that he was prepared to give that label to his relationship with Ms B suggests that he did regard himself as, at least, in a relationship that went well beyond that of boyfriend and girlfriend.

d) Ms B, Mr F and the children gave the public appearance of a family unit. Despite the time Ms B spent on the domestic purposes benefit, Mr F's continued support of her and the children during this period is consistent with a serious relationship during which the parties shared their lives.

Result

[69] For the reasons given, the appeal is allowed. Ms B's application under the Act is remitted to the Family Court for determination.

[70] The result of this appeal demonstrates problems that can arise when the existence or otherwise of a qualifying relationship is determined as a preliminary question. The only issue, for the purpose of the qualification judgment, was whether, as at the time the Act was passed, a *de facto* relationship existed. No specific findings can now be made on the duration of that relationship, nor on the proportions in which it would be just for property to be shared. Those issues remain for determination in the future. Regrettably, some of the ground over which the parties have already gone in evidence may need to be repeated in the Family Court, unless the same Judge is able to complete the hearing.

[71] I make those observations simply to sound a word of caution to Family Court Judges who are asked to embark upon an exercise of this type. Sometimes, what appears to be a short cut can be the longest route to the ultimate destination.

[72] Counsel specifically asked that I reserve all questions of costs. I do so. The Registrar is directed to arrange a telephone conference before me as soon as practicable, so that timetabling directions for the exchange of memoranda on costs can be made.

[73] I thank counsel for their assistance.

P R Heath J

Delivered at 9.30am on 3 September 2009