De factos – the I do's and I don'ts

WITH CHRISTINE SMYTH

Love and marriage go together like a horse and carriage…[1]

It seems for many Australians the crooner's chorus is not a melody which resonates, because, as of 2016, some 1,751,424 Australians had chosen to be in a de facto relationship. Nationally, that equates to just over 10% of our population, but in Queensland it is as high as 12%.[2]

Perhaps it was for that reason the Queensland State Parliament saw fit to amend the *Succession Act 1981* (Qld) in 2017,[3] inserting a new section 15B which provides for the effect of the end of a de facto relationship on a will. In short, the ending of a testator's de facto relationship now revokes:

- a disposition to the testator's former de facto partner made by a will in existence when the relationship ends
- an appointment, made by will, of the former de facto partner as an executor, trustee, advisory trustee or guardian
- any grant, made by will, of a power of appointment exercisable by, or in favour of, the testator's former de facto.

The amendments alter a longstanding difference between the effect of the end of a marriage on a will and the end of a de facto relationship on a will. While some might consider the amendments have harmonised and equalised the circumstances, they may in fact create more problems than they solve.

This is because no other state or territory has an equivalent provision. This provision only exists in Queensland. That will likely create a conflict of laws issue on their death, if the testator executes a will in any jurisdiction and then moves interstate and the de facto relationship ends. At the very least it creates a risk management issue for both estate planning lawyers and family lawyers, not just in Queensland but Australia-wide.

It is also important to note that this Queensland provision only impacts the will on the ending of a de facto relationship. Entry into a de facto relationship does not impact on the will. A further anomaly is that entry into and ending of a marriage impacts a Queensland enduring power of attorney, however there is no corresponding amendment to s15B *Succession Act 1981* made to the *Powers of Attorney Act 1998*, nor within the recent amendments to that Act passed in April this year.

A further conundrum is that, while we are legislatively prohibited from having more than one marriage at a time, there is no prohibition on having multiple de facto relationships, or being married and in a de facto relationship simultaneously.

So that we can properly advise our clients, we and they need to understand what a de facto relationship is for the purposes of succession law and when does it end? This is important because currently Australia has no less than 33 different legislative definitions of de facto status.[4]

For the purposes of Queensland succession law, the answer lies in the combination of the definition of 'spouse' under S5AA of the *Succession Act 1981*, which then refers to section 32DA of the *Acts Interpretation Act 1954* (the AIA). However, neither the *Succession Act 1981* (Qld) nor any other provides guidance on when a de facto relationship ends. For that, we are left looking to the common law and there we are faced with a wide array of approaches and outcomes.

Most recently, in *In the Matter of the estate of Benjamin John Gleeson, deceased* [2019] VSC 589, the court found that the onus is on the propounder to positively demonstrate that the defining characteristics of a de facto relationship are in existence, with the court taking a cautious approach to the evidence, because the deceased party is not able to give evidence.[5]

In attempting to demonstrate the ending of a de facto relationship, in *Dow v Hoskins* [2003] VSC 206 the court considered it must take into account the human reality and not apply a narrow and pedantic view of living together in the circumstances. There the court considered that the propounder must demonstrate the shared intentions of the parties to continue their relationship, despite the existence of extenuating difficulties.

In *Estate Hawkins; Huxtable v Hawkins* [2018] NSWSC 174 Justice Lindsay determined that whether there was or was not a de facto relationship was a question of how the parties conducted their relationship.

In that context the family law decision of *Cadman & Hallett* [2014] FamCAFC 142 evidences just how complicated that can be. The matter involved a gay couple in a non-exclusive relationship for 19 years. They were not always residing together. One party left Australia to study overseas and did not return full time but did return from time to time. Despite living in different countries and not having a sexual relationship, the determination as to whether the relationship had come to an end came down to a question of whether communication of the end of the relationship had occurred. The court looked at a number of things, including ongoing financial contributions and when one of the parties made changes to his will.

Levers v Superannuation Complaints Tribunal [2016] FCA 936 involved an application for judicial review of a trustee's determination to pay 100% of super to the de facto husband. Mrs Levers, the mother of the deceased, was the legal personal representative of her deceased daughter's estate, Ms Redfearn. She died tragically on 22 April 2011, as a consequence of an attempted suicide on 20 April 2011. Mr Hattingh, the third respondent, contended he was living with Ms Redfearn at the time in a relationship. He lodged a complaint in relation to the trustee's decision with the Superannuation Complaints Tribunal, the first respondent. The tribunal set aside the trustee's determination and determined that 100% of the death benefit should be paid to Mr Hattingh.

There was evidence as to the history of domestic violence between the couple. Relevantly, Mr Hattingh was imprisoned for a period for breach of a domestic violence order. Central to this was the interaction between the couple after Mr Hattingh was released from jail. Mrs Levers asserted that the cause of the testator's suicide was because Mr Hattingh had ended the relationship. However, it was found there was no evidence supporting that. Further, the existence of domestic violence in a relationship was not considered a relevant factor in determining whether the relationship existed.

So, what practical steps can practitioners take to address these complexities?

- When discussing de facto status with the client, identify for them what it means in succession law terms.
- Conflict of laws – advise the client that if they change their domicile, then they should review the situation with a succession lawyer in that state or territory.
- Be aware that clients can have more than one spouse, and multiple de factos, and raise that with them.
- Recommend the client seeks legal advice if they are concerned about whether they have ended the de facto relationship.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP.

Notes

1 *Love and Marriage*, Frank Sinatra, 1955.
2 2016 Census – Australian Bureau of Statistics.
3 See the Court and Civil Legislation Amendment Bill 2017passed on 5 June 2017. cabinet.qld.gov.au/documents/2017/Mar/CandCBill/Attachments/Bill.PDF.
4 For list of the various pieces of legislation defining 'de facto' see the writer's *Proctor* column, August 2015, discussing de facto matter of *Spence v Burton* QCA 104.
5 At [31].