Supreme Court of South Australia

(Civil)

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R (PLAINTIFF) v BONG & ORS

[2013] SASC 39

Reasons for Decision of Judge Burley a Master of the Supreme Court

19 March 2013

SUCCESSION - FAMILY PROVISION - ELIGIBLE APPLICANTS - SPOUSE OR PARTNER

Application for domestic partner declaration - plaintiff and deceased knew each other for approximately 38 years - from time to time lived together in a "close personal relationship" - plaintiff married on three occasions each, apart from the last, of relatively short duration - whether plaintiff and deceased were domestic partners one of the other as at date of death or at an earlier time for a period of three years or an aggregate period of three out of four years - alternatively, whether it is in the interests of justice that a declaration be made.

*Family Relationships Act 1975* Part 3; *Domestic Partners Property Act 1996* ss 3 and 4; *Inheritance (Family Provision) Act 1972* ss 4, 6 and 7; *Statutes Amendment (Domestic Partners) Act 2006* s 7, referred to.

R (PLAINTIFF) v BONG & ORS

[2013] SASC 39

**JUDGE BURLEY:**

By a Summons dated 19 July 2012 the plaintiff seeks a declaration pursuant to the *Family Relationships Act 1975* (“FRA”) that the plaintiff and another person (now deceased) were, on a given date, domestic partners and, if such a declaration is granted, an order for provision out of the estate of the deceased (who I shall refer to as “K”), pursuant to ss 6 and 7 of the *Inheritance (Family Provision) Act 1972* (“IFPA”). Sub-section 6(ba) IFPA provides that a domestic partner of a deceased person is entitled to claim the benefit of the Act. In s 4 IFPA, a “domestic partner” is defined as follows:

… in relation to a deceased person, means a person declared under the *Family Relationships Act 1975* to have been the domestic partner of the deceased as at the date of his or her death, or at some earlier date;

Two pieces of legislation deal with domestic partners: the FRA and the *Domestic Partners Property Act 1996* (“DPPA”). They contain similar provisions. The definition of “domestic partner” and “close personal relationship” are defined in the same way. However, there are some differences. Section 11A FRA refers to a period of three years, whereas there is no mention of the three year period in the DPPA. Section 11B FRA incorporates that three year period.[[1]](#footnote-2) I mention the DPPA only for the sake of completeness. Its provisions have no application in this matter.

Section 11B FRA provides for court declarations as to domestic partners. If the applicant comes within s 11A, a declaration must be granted pursuant to s 11B(2)(a). There is an additional basis upon which the declaration as to domestic partners might be granted which is provided for in s 11B(2)(b)(i) and (ii). That part of s 11B provides that in cases other than domestic partners who come within s 11A of the Act, if the persons lived together “on the date in question” in a close personal relationship and if it was in the interests of justice, such a declaration must be made.

Section 11B FRA enables a person to seek a declaration from the Court that two persons were domestic partners “on a certain date”. Section 11B(3) sets out the matters to be taken into account by the Court when considering whether or not to make a declaration. In addition, s 11B(6) of the FRA provides:

(6) For the purpose of determining whether a person was, on a certain date, the domestic partner of another, circumstances occurring before or after the commencement of this Part may be taken into account.

This is to be contrasted with s 4 DPPA which limits the application of the Act to relationships which were in existence on and after 16 December 1996, the date at which that Act came into operation. That limitation is not to be found in the FRA. On the contrary, by virtue of s 11B(6), the Court is able to take into account circumstances occurring both before or after the commencement of Part 3 of the FRA. In addition, s 7 of the *Statutes Amendment (Domestic Partners) Act 2006* provides that a declaration made under Part 3 FRA before the amendment, will, if the case requires, be taken to be that the relevant person was on the given date, the domestic partner of the other. In my opinion, the combination of s 11B(6) FRA and s 7 of the 2006 transitional Actindicate that the legislature intended that, once Part 3 FRA came into operation, declarations under s 11B FRA could be made in respect of relationships which were in existence at a date prior to the commencement of Part 3 FRA.

As a result of the above analysis, it seems to me that any application by the plaintiff under the IFPA is to be dealt with by reference to the provisions of Part 3 FRA. If such a declaration is made, then the plaintiff becomes entitled, pursuant to s 6(ba) IFPA to make a claim under that Act pursuant to s 7 of that Act.

In these proceedings the parties have reached a compromise. The defendants do not oppose the making of a declaration in terms of minutes handed up to me on 29 January 2013. The declaration sought is as follows:

THE COURT DECLARES THAT

1. The plaintiff … and [K] … deceased … were domestic partners one of the other within the meaning of section 11A of *The Family Relationships Act 1975* from the period of the 1st day of February 1992 to the 1st day of December 1996 inclusive.

If that declaration is made, the parties have reached agreement as to the nature of the order for provision out of the estate to be made for the plaintiff pursuant to the provisions of the IFPA.

In each instance, the Court must be satisfied respectively that the plaintiff is entitled to the declaration sought and, if it is made, that he is entitled to the provision out of the estate contemplated by the parties. It is not a matter of making consent orders, because the Court must be independently satisfied that the plaintiff must come within the provisions of each statute.

The first matter that requires detailed consideration is whether or not the plaintiff is entitled to a declaration. It is convenient to note at this stage that, in the minutes of order, the period “of the 1st day of February 1992 to the 1st day of December 1996 inclusive” is referred to. It does not appear to me that the Court has the power to make such a declaration. I have already set out the definition of “domestic partner” in s 4 of the IFPA. That refers to a person declared under the FRA to have been the domestic partner of, in this case, the deceased, as at the date of his death or at some earlier date. Whether it be the date of death or some earlier date, the declaration must be confined to a particular day. If the relevant relationship did not exist at the date of death of the deceased, “some earlier date” must be referred to in the declaration. In my opinion, this means that where the relevant relationship existed for a period ending prior to the date of death of the deceased, the surviving partner is entitled to apply under s 6 IFPA because the definition of “domestic partner” in s 4 IFPA specifically provides for a declaration which operates “at some earlier date”. This is consistent with the way in which s 6 IFPA entitles both a spouse of the deceased person and a former spouse to apply for provision under the Act.

It follows from my examination thus far of the relevant provisions of each statute that, in broad terms, the application for a declaration must be considered by reference to, first, whether or not the relevant relationship existed either at the date of death or at some earlier date and, second, to whether or not the relationship persisted for the statutory period of three years or whether, in the case that it did not, it is in the interests of justice[[2]](#footnote-3) that such a declaration be made.

I should also refer to s 11A FRA which refers firstly to a three year period, but then by placitum (ii) of s 11A(a) to an aggregate period of three years “during the period of 4 years immediately preceding [the relevant date]”. This provision should be taken into account because the affidavit evidence relied upon by the plaintiff discloses a relationship between the plaintiff and the deceased over a considerable period of time.

Unlike earlier versions of the FRA, it does not appear that corroboration either generally or in relation to particular aspects of the application, is required.

I turn now to the affidavit evidence. I mention first the affidavits of R and H. R was the deceased’s neighbour for a period of about five years after 2005. She was aware of the bond between the plaintiff and the deceased. During the five year period the plaintiff resided in Adelaide and K resided in Victoria. R’s affidavit, by way of secondary evidence, supports the plaintiff’s evidence that he visited the deceased from Adelaide on a regular basis during that five year period.

H is the plaintiff’s sister. She first met the deceased in 1973. She was aware of the relationship between the plaintiff and the deceased. She was able to give very general evidence supporting the plaintiff’s evidence that the plaintiff and the deceased knew each other over a long period of time, that they lived together in a sexual relationship from time to time and, although their relationship persisted over a period of about 38 years, it “had quite a number of ups and downs along the way”.

In his affidavit the plaintiff gives a relatively detailed account of his friendship and relationship. The deceased was born in 1928 and he died in 2011 at age 82. The plaintiff was born in 1946. There was thus an age difference between the plaintiff and K of nearly 18 years. The plaintiff met the deceased in December 1972. Prior to that the plaintiff had had two separate relationships with different women. There was a child from each relationship.

Having met in 1972, in February 1973 the plaintiff and the deceased lived together at Ashburton, Victoria, until April 1974. The plaintiff then moved back to Adelaide for work reasons, but he stayed in close contact with the deceased. The plaintiff lived in Adelaide until August 1985, except for a period of 12 months at Albury Wodonga. When there, he formed a relationship with a woman I shall refer to as “J”. They were married in late 1983 and separated in mid‑1985. They were divorced in 1986. According to the plaintiff, he maintained a relationship not only with J but also with K during this period.

From August 1985 to January 1987 the plaintiff and K lived together in Victoria at a place called the Patch. In January 1987, the plaintiff formed a relationship with a woman I shall refer to as “M”. They were married in mid‑1987 and separated in early 1988. During this period the plaintiff maintained contact with the deceased.

In January 1989 the plaintiff moved back to The Patch and he and K lived together until March 1990 when the plaintiff moved to Springvale. This was closer to his place of work. He would live in a caravan at Springvale during the week and he and K lived together at the Patch every weekend. In March 1995 the plaintiff moved from Springvale to the Patch. The plaintiff and K lived together until December 1996 when the plaintiff moved back to Adelaide because his father was ill.

Between 1997 and 2010 the plaintiff lived in Adelaide. K remained in Victoria until October 2010 when he moved to Adelaide to live in a house at Salisbury East.

In 2001 the plaintiff formed a relationship with a woman I shall refer to as “T”. They were married in November 2001 and the relationship lasted for three years. The plaintiff said that he maintained his relationship with K.

In early 2005 the plaintiff met his present wife, who I shall refer to as “C”. They were married in 2006 and they are still married.

In 2005 K had a heart attack and the plaintiff went to Victoria to visit him from time to time. They lived together for periods of weeks intermittently.

K remained at Elizabeth East from October 2010 until his death in June 2011. Whilst he lived at this place he had a close relationship with the plaintiff and with his wife, C. The effect of the plaintiff’s evidence is that they virtually lived together as a family, although K on the one hand and the plaintiff and his wife on the other maintained separate residences. During the period of K’s stay at Elizabeth East, the plaintiff looked after him in a continuous and detailed manner. They had daily contact.

I accept the evidence of the plaintiff, other than when he makes assertions as to the nature of his relationship with K when he was married to the various women referred to in his affidavit evidence.

Having set out the facts, I mention again some provisions of the FRA. Section 11A provides that a person is the domestic partner of another person if on the relevant date they were living in a close personal relationship for a period of three years, or for an aggregate of three years in the four year period immediately preceding the relevant date.

A “close personal relationship” is defined in s 11 as follows:

***close personal relationship***means the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis …

I have not set out the exclusions in the definition because neither of them applies. I should mention that the following note appears at the end of the definition:

Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

The next section to be referred to is s 11B. That enables a person to claim declaratory relief. The relevant parts of the section are as follows:

**11B—Declaration as to domestic partners**

1. A person whose rights or obligations depend on whether—
2. he or she and another person; or
3. 2 other persons,

were, on a certain date, domestic partners 1 of the other many apply to the Court for a declaration under this section.

I have already set out sub-s (2) which refers to domestic partners within the meaning of s 11A or, in the alternative, to the case where it is in the interests of justice that a declaration be made.

Sub-section 11B(3) sets out the matters to be considered by the Court on such an application pursuant to the section. These are:

(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) the degree of financial dependence and interdependence, or arrangements for financial support;

(d) the ownership, use and acquisition of property;

(e) the degree of mutual commitment to a shared life;

(f) [immaterial]

(fa) [immaterial]

(g) [immaterial]

(h) the performance of household duties;

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

There is very little evidence regarding factors (c) and (d).

The first question to be addressed is whether or not the relationship existed as at the date of death of K. For the three years prior to his death in June 2011, the plaintiff was married to his present wife. He and his wife lived together in Adelaide. Until late 2010, K resided in Victoria, although there was frequent contact both by way of telephone and visits between K and the plaintiff. There was no common residence occupied by them. There was no evidence of any financial dependence or inter-dependence between them. There was no evidence that they held property in common.

As to the degree of mutual commitment to a shared life, I consider that the marriage of the plaintiff to C precludes a finding that there was a sufficient mutual commitment to a shared life. When these factors are taken into account, it could not be said of the plaintiff and K that, at the date of death, there was a close personal relationship between two persons who lived “together as a couple on a genuine domestic basis”.

I accept that the plaintiff may have performed the preponderance of household duties whilst K was ill and living at Elizabeth East. That by itself or in combination with any other facts would not be sufficient to justify a finding that the relevant relationship existed as at the date of death.

For the above reasons I have concluded that the plaintiff is not entitled to a declaration that the plaintiff and the deceased were domestic partners one of the other as at the date of K’s death.

The next matter to be considered is whether or not there existed at an earlier date the relevant relationship between the plaintiff and K. This involves an examination of the relationship between them from December 1972 to the date of death, looking for continuous periods of three years, or an aggregate of three years out of four, by reference to which it could be said that, on a consideration of the factors referred to in s 11B(3) FRA, they were domestic partners one of the other. They lived together at Ashburton between February 1973 and April 1974. The plaintiff then moved to Adelaide where he remained until August 1985. Within that period he married the woman called J and they lived together between December 1983 and mid-1985. The nature of that relationship, even though it was only relatively short-lived, preclude a finding that the plaintiff and K were domestic partners one of the other between 1984 and 1985.

Between August 1985 and January 1987 the plaintiff and K lived together in Victoria in the area called the Patch. Then in January 1987 the plaintiff formed a relationship with M and they married in August 1987. They separated in January 1988, but the existence of the marriage again, it seems to me, precludes a finding that the relevant relationship existed between the plaintiff and K between August 1985 and January 1988. It may well have existed up to January 1987 because they were living together between August 1985 and January 1987, but not thereafter.

In January 1989 the plaintiff moved to the location referred to as the Patch and lived with K until March 1990 when the plaintiff moved to Springvale to be closer to work. He lived at Springvale for a period of five years.

Whilst I accept that the plaintiff and K saw each other every weekend during that five year period, I do not think it could be said that they lived together as a couple on a genuine domestic basis for the entirety of that period. There was very little commitment to a shared life, which is evidenced by the fact that the physical separation took place over a period of five years. Even though they were seeing each other each weekend over that five year period, neither was sufficiently committed to a shared life during the week because of a failure on the part of each of them to structure their arrangements such that they could live together all of the time. It is a question of degree. It is a frequent occurrence in Australia that people who are employed in remote areas may be separated from their family for three weeks out of four, or two weeks out of five, or some such proportion, in respect of which it could not be said that the parties to the relationship, whether married or otherwise, would regard their relationship as at an end. But in circumstances where over a period of five years the parties only saw each other, by and large, each weekend, the line should, in my opinion, be drawn against the conclusion of the continuance of the required relationship.

The next relevant period is from 1997 to 2010. During that period, apart from the last nine months, the plaintiff lived in Adelaide and K lived in Victoria. In addition, the plaintiff married M in 2001. That marriage lasted for three years. Next, in May 2006, the plaintiff married his present wife.

Even allowing for the fact that the plaintiff and K were in frequent communication and towards the end of his life the plaintiff took daily care of K, it could not be said that for any continuous three year period or a period of an aggregate of three years out of a four year period, the plaintiff and K shared a common residence, that there was any financial dependence or inter-dependence, that they owned property together or that there was a significant degree of mutual commitment to a shared life.

The above analysis of the relationship between the plaintiff and K since 1973, in my opinion, leads inevitably to the conclusion that the required relationship of three years duration or three out of four years in aggregate did not exist at any time prior to the death of the deceased. In those circumstances the plaintiff is not entitled to a declaration to that effect pursuant to s 11B(2)(a).

The remaining matter to be considered is whether, notwithstanding that the required relationship could not be said to exist either at the date of death or at an earlier time, it is in the interests of justice that such a declaration be made. This involves a consideration of s 11B(2)(b) FRA which is as follows:

(b) in any other case—

(i) the persons in relation to whom the declaration is sought were, on the date in question, living together in a close personal relationship; and

(ii) the interests of justice require that such a declaration be made,

Paragraph (b) enables the Court to make a declaration where, although the relationship has not been in existence for a period of three years or a period of three years out of four, it did exist at a particular date and it is in the interests of justice that a declaration be made.

The given dates are either the date of death or an earlier date.[[3]](#footnote-4) For the reasons given in relation to my finding that there was no relationship (of three years’ or three out of four years’ duration) as at the date of death, the same reasoning applies to whether or not the date of death can, for the purposes of s 11B(2)(b)(i), be the date in question.[[4]](#footnote-5) Consequently, the only date in question can be an earlier date. Thus, the question becomes one of whether or not there existed during the period of the 38 year relationship a close personal relationship of a given duration (but less than three years or three out of four years) which, in combination with any other material facts, are sufficient to persuade a court to grant a declaration under s 11B(2)(b) FRA.

There are at least two periods when the required relationship existed, but for a period of less than three years or an aggregate of three years out of four. Those periods are

1. February 1973 – April 1974;
2. August 1985 – January 1987, and
3. January 1989 – March 1990.

The question must next be considered: in all the circumstances is it in the interests of justice to make a declaration? To answer this question I think it appropriate to refer to the nature of the relationship between the two over the 38 year period. There were significant periods during which it could be said that they lived together in a close personal relationship, namely those periods when they actually lived together.

There was a mutual friendship, including a sexual relationship, which manifested itself often during the period 1973 to 2011. As against that, the plaintiff’s commitment to the relationship was significantly lacking from time to time, as evidenced by his three marriages.

Towards the end, the plaintiff displayed a willingness to look after the deceased in a concerted manner, which is evidence of his attachment to K.

I think the evidence establishes that K maintained throughout significant periods of their relationship a desire to live together on a genuine domestic basis.

An additional factor which counts very much in the plaintiff’s favour is that the defendants to the proceedings under the IFP Act have, in anticipation of a declaration being made, settled the plaintiff’s claim.

In all the circumstances, I consider it is in the interests of justice to make a declaration that there existed between the plaintiff and K the required relationship as at 1 March 1990. This places the plaintiff in the position of being a former domestic partner of the deceased which, by virtue of the definition of “domestic partner” in s 4 of the IFPA, entitles the plaintiff to make a claim for provision out of the estate of the deceased.

Having read the affidavits filed by the parties, I am satisfied that the further provision contemplated by the parties as set out in the minutes of order would constitute a proper exercise of discretion on the part of the Court in favour of the plaintiff.

For the above reasons there will be an order in terms of the minutes amended and initialled by me.

1. Section 11B(2)(a). [↑](#footnote-ref-2)
2. Section 11B(2)(b) FRA. [↑](#footnote-ref-3)
3. Section 4 IFPA “domestic partner”. [↑](#footnote-ref-4)
4. I find that the required relationship did not exist for at least four years prior to K’s death. [↑](#footnote-ref-5)