



New South Wales Supreme Court

CITATION :	Ye v Fung; Ye v Fung [2006] NSWSC 243
HEARING DATE(S) :	06/03/06, 07/03/06
JUDGMENT DATE :	7 April 2006
JUDGMENT OF :	Gzell J
DECISION :	Plaintiff not a de facto spouse of deceased. Relief denied.

CATCHWORDS :	SUCCESSION - Wills, Probate and Administration - Probate and letters of administration - Application to revoke probate, declare intestacy and appoint plaintiff administrator - Whether plaintiff a de facto spouse of deceased under Wills, Probate and Administration Act 1898, s 61B(3A)(a) and s 32G(1) - Whether in a de facto relationship within Property (Relationships) Act 1984, s 4 - Student living with woman 37 years his senior in a non-sexual relationship - Whether de facto relationships confined to non-married adults in heterosexual or homosexual romantic relationships.
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LEGISLATION CITED : Wills, Probate and Administration Act 1898
Family Provision Act 1982
Property (Relationships) Act 1984
Uniform Civil Procedure Rules 2005
De Facto Relationships Act 1984
Property (Relationships) Legislation Amendment Act 1999
Property (Relationships) Legislation Amendment Bill 1999
New South Wales Parliamentary Debates (Hansard), 13 May 1999, 534
New South Wales Parliamentary Debates (Hansard), 26 May 1999, 228-229

CASES CITED : Weston v Public Trustee (1986) 4 NSWLR 407
Roy v Sturgeon (1986) 11 NSWLR 454
Simonis v Perpetual Trustee Co Ltd (1987) 21 NSWLR 677
Barnes v De Jesus [2001] NSWSC 19
Dridi v Fillmore (2001) DFC 95-232
Turnley v Swaab [1999] NSWSC 594
Devonshire v Hyde (2002) DFC 95-247
Hinde v Bush (2002) DFC 95-260
Hibberson v George (1989) 12 Fam LR 725
Lipman v Lipman (1989) 13 Fam LR 1
Thomson v Badger (1989) 13 Fam LR 559
Theodoropoulos v Theodosiou (1995) 38 NSWLR 424
Macquarie Dictionary (4th ed)
Oxford English Dictionary

PARTIES : Michael Ye - Plaintiff
Keith Yuk Kee Fung - Defendant

FILE NUMBER(S) : **SC** 6032/02; 108333/04

COUNSEL : Mr M Broun QC - Plaintiff
Mr L Ellison SC - Defendant

SOLICITORS :

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**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION**

GZELL J

FRIDAY 7 APRIL 2006

**6032/02 MICHAEL YE v KEITH YUK KEE FUNG
108333/04 MICHAEL YE v KEITH YUK KEE FUNG**

JUDGMENT

The two proceedings

1 Frances Lan Fong Fung died on 21 June 2001. Contested proceedings for probate of a testamentary document under the *Wills, Probate and Administration Act 1898*, s 18A were settled and probate issued to Keith Yuk Kee Fung, the defendant.

2 Michael Ye, the plaintiff, came to Australia from China to study. The deceased was separated from her husband. She invited Mr Ye to move into her unit where he lived in a non-sexual relationship with her. She was 37 years his senior.

3 Mr Ye was not a party to the probate proceedings. He commenced two actions against Mr Fung as executor of the estate of the deceased. They were ordered to be heard at the same time, evidence in one being evidence in the other.

4 In the first proceedings, Mr Ye sought an order that provision be made for his maintenance and advancement in life out of the estate of the deceased under the *Family Provision Act 1982*, s 7. In the second proceedings, he sought revocation of the grant of probate, a declaration that the deceased died intestate, and his appointment as administrator of the intestate estate.

Standing

5 It was common ground that Mr Ye had to establish an interest in the deceased's intestate estate to have the necessary standing to seek the relief he claimed in the second proceedings.

6 Since the deceased was survived by her husband he, *prima facie*, was entitled to the whole of the estate under the *Wills, Probate and Administration Act 1898*, s 61B(2) which provides that if the intestate leaves a husband or wife but no issue, the estate shall be held in trust for the husband or wife absolutely.

7 The *Wills, Probate and Administration Act 1898*, s 61B(3A)(a) provides, however, that if the intestate leaves a spouse and a de facto spouse, the interest of the spouse shall be held in trust for the de facto spouse where that person was the de facto spouse of the intestate for a continuous period of not less than two years prior to the death of the intestate, and the intestate did not, during any part of that period, live with a person to whom the intestate was married.

8 Mr Ye claimed that he was the de facto spouse of the deceased and the provisions of the *Wills, Probate and Administration Act 1898*, s 61B(3A)(a) were otherwise satisfied.

9 A de facto spouse is defined in the *Wills, Probate and Administration Act 1898*, s 32G(1) as someone who was the sole partner in a de facto relationship with the person dying intestate, and was not a partner in any other de facto relationship. In the same section it is provided that a de facto relationship has the same meaning as in the *Property (Relationships) Act 1984*.

Preliminary issue

10 Pursuant to the *Uniform Civil Procedure Rules 2005*, r 28.2, I ordered that a decision on the questions whether Mr Ye was a de facto spouse of the deceased within the meaning of the *Wills, Probate and Administration Act 1898*, s 32G and whether he satisfied the requirements of s 61B(3A) be made before any decision on any other part of the proceedings.

11 At the conclusion of the hearing on those preliminary issues, I found that Mr Ye was not a de facto spouse of the deceased. I said I would publish my reasons for this view in due course. These are my reasons.

The relationship between the deceased and Mr Ye

12 Mr Ye's aunt, who has been at high school with the deceased, provided him with a letter of introduction to her. Mr Ye arrived in Australia in January 1990 and introduced himself to the deceased in February of that year. The deceased invited him to visit her each day after his attendance at the University of Technology Sydney. She prepared dinner for them, he watched some TV and spoke with her for a while and returned to his place of residence each night.

13 During this period the deceased learned of Mr Ye's financial difficulty and she said to him: "You can move into my unit to keep me accompanied and I

can provide you with free accommodation and meals". In July 1990, Mr Ye moved into the deceased's unit. No one else lived there.

14 Mr Ye said that the deceased often remarked: "My home is your home, you can stay here free of charges."

15 Mr Ye paid no board. He said that without the deceased's support he could not have afforded to live and study at the same time. The deceased provided him with free accommodation and free meals. She contributed approximately \$22,000.00 towards his tuition fees. She purchased clothing and other necessities for him. She provided him with cash as a birthday present or as pocket money. She paid his public transport expenses. She paid when they went to restaurants or church parties at festival times. Mr Ye estimated her financial contribution to him at \$70,000.00.

16 From time to time Mr Ye obtained casual work in which event he paid some of his fees.

17 When Mr Ye applied to study at UTS, he had to establish a financial ability to finish the course. The deceased provided a certificate stating that she was prepared to financially fully support Mr Ye as a student while he was at UTS. A statement by her bankers as to the balance of her accounts accompanied the certificate.

18 In 1994, the deceased gave Mr Ye a Telstra homelink card so he could always phone her, even if he did not have the money.

19 Mr Ye said that on a number of occasions the deceased told him that he need not pay back the money she had lent him. What she really wanted from him was that he would look after her when she got old, even when he got married and had a family, she still wanted to be with him. He should just focus on building up his life so that he could look after her when she was getting old.

20 In evidence were a series of letters the deceased wrote to Mr Ye's parents in China in the early years of their relationship between 1990 and 1992. In her first letter of June 1990, the deceased informed Mr Ye's parents that he was to move into her home in July 1990 to live temporarily for three months, and if there was no problem, then he could keep on living in her home. She would not charge anything for accommodation and meals: "I will treat him like my own nephew". She described Mr Ye as: "Really a good child who is smart, diligent and has kind disposition."

21 This view of the deceased's relationship with Mr Ye permeated her letters. In August 1990 she said: "He is a good child. I will definitely do my best to care for him. Please do not worry. Because I do not have my own child, caring just for him is possible". In November 1990 the deceased said: "Hong is a good child who is intelligent and fond of study", and "Hong is really a good child who has gentle and kind disposition", and "Hong is really a good child who is well bred, gentle and good nature", and "I see that he is a good child who has kind natural disposition, so I am willing to do my best to help him, loan him money to let him have the opportunity to study again from the

beginning in another field". In her December 1990 letter the deceased said: "On the other hand, Hong is a good child and the main reason is that the God has made the arrangement by blessing and bestowing me with such good foster son. You are really extremely reasonable by doing this very special thing for me", and "So this time you let me also have the chance to be Hong's foster mother, it is really very generous and kind of you". In March 1991, the deceased said: "He is a good child and it is all because you brought up and educated him properly. I can have the chance to get such good foster son is also all owing to your bestowing and generosity". In October 1991 the deceased said: "I do not have my own son and he is a good child". In her letter of December 1991 she said: "Anyway, Hong is a good child who is willing to heed what an elder says. He has got gentle, natural disposition". In May 1992 she said: "Hong is a good child, who knows to study hard, has undivided attention to his study, is keen on hygiene and is organised", and "This boy is very sensitive, so if he is not in good mood, that will affect his study greatly."

22 It was put to Mr Ye that his relationship with the deceased deteriorated from 1993 and that explained the absence of letters to his parents after that time. Mr Ye responded that his parents did not keep letters after that date.

23 Mr Ye said the deceased told him that some of her friends and relatives said she was giving him too much help but she responded that he had also helped her: "We helped with each other". The deceased had been concerned for her own security when she lived alone: "Since you moved in I feel secure and no longer suffer from loneliness."

24 Mr Ye said he accompanied the deceased when she had business to attend to and they shared domestic duties. She did the cooking. He did his own washing, although she washed for him occasionally, and he for her when she was sick. He did the drying and collected things after drying. She did some sewing for him. He washed the dishes. He vacuumed and put out the garbage, mopped floors and cleaned blinds. He, or he and she, went shopping. He did general cleaning of the unit such as dusting. He collected mail and parcels for the deceased and posted her outgoing correspondence. He defrosted and cleaned the refrigerator. They folded bed sheets and he sometimes cut and dyed her hair. Mr Ye carried out some maintenance of the unit. When he was sick the deceased obtained medicine and served him meals in bed. She often cut his hair.

25 The deceased had a property at Lindfield. When tenants left, he accompanied her to inspect the property. If the garden was unkempt, he tidied it.

26 Due to her age and medical condition, the deceased required Mr Ye's assistance in her day to day routine. He administered her insulin injections when requested. He assisted her when sick. Sometimes she forgot to eat and he would prepare food for her. He accompanied her to her doctors and obtained the prescribed medicines. He massaged her back every day and applied medicine to her back to treat a skin disease. He accompanied her

when she went for a walk. He gave her his arm for support. She was often tired.

27 In August 1993, the deceased bought 10,000 Fosters Brewing Group Ltd shares in Mr Ye's name and she brought a further 10,000 in September 1993. But in 1994, the deceased sold the shares and kept the proceeds of sale.

28 The deceased went to China twice during the time Mr Ye lived with her. He assisted her in packing and saw her off at the airport.

29 The deceased took Mr Ye with her to various social activities such as weddings of her relatives and friends. They were photographed together at the wedding of the deceased's cousin, at the wedding of her nephew, and at the wedding of one of her friends. He was often invited to visit the homes of friends of the deceased and a series of photographs of them on these occasions were in evidence. The deceased also took Mr Ye to restaurants for dinner.

30 In May 1998, Mr Ye was granted a provisional resident visa that permitted him to remain in Australia until he was notified that a permanent visa application had been decided or the application was withdrawn. In order to obtain a permanent visa, Mr Ye had to have lived in Australia for 10 years.

31 In 1999, the deceased persuaded Mr Ye to return to China to visit his parents and familiarise himself with current developments in that country. He had intended to make the trip after he received his permanent visa, but in October 1999 he learned that his mother was seriously ill so he went back to China in November 1999. Mr Ye bought the airline ticket. The deceased asked to be shown it and she gave him the money for the ticket. She said it was a return ticket valid for one year and she enquired when he wanted to come back. Mr Ye said he did not know, it depended on his mother's condition. The deceased said: "This is your home in Australia, you can come back any time. If you need money, just let me know, I will send you some."

32 The deceased accompanied Mr Ye to the airport to see him off. Mr Ye said she gave him a big hug. Jean Norgate was also at the airport. She said they were on friendly terms. She said the deceased brought Mr Ye to visit her three or four times a year. She described their relationship like that of an aunt and a nephew.

33 When he was in China, Mr Ye kept in regular contact with the deceased. He returned to Australia in November 2000 and went straight to the unit. His first impression was that the deceased's health had deteriorated greatly. She looked very weak. She could not go out anymore by herself. She was not walking well. She needed Mr Ye to help her to the toilet. If she sat on the ground she could not get up without help.

34 During the last year of her life, the deceased's health deteriorated rapidly and Mr Ye said she was in great need of his help. In early December 2000 she was hospitalised and in intensive care. Subsequently she was transferred to Balmain Hospital for rehabilitation and Mr Ye visited her regularly bringing

her snacks and fruit. At the end of January 2001, the deceased was discharged.

35 Two or three weeks before her death, the deceased was admitted to Concord Hospital where Mr Ye visited her and took instructions to perform some business tasks on her behalf. He learned of her death when he went to the hospital to visit her.

36 There was an incident in May 1999 when Mr Ye and the deceased had an argument and she said she would call the police if he raised his voice. He did. The police were called. He collected a few clothes and left. About a week later he returned, apologised, and the deceased invited him back.

37 In documentation lodged by Mr Ye with the Department of Immigration and Multicultural Affairs, he consistently ticked the box entitled "never married" and did not tick the box entitled "living in a de facto marriage relationship." Nor did his solicitors, in December 2001, when alleging that Mr Ye was entitled to provision under the *Family Provision Act 1982*, make any mention of a de facto relationship.

38 Mr Fung was the brother of the deceased. He said that the deceased complained about Mr Ye not carrying out chores. He advised her not to let him back, but she did.

39 Esther Lan Ching Poon, the younger sister of the deceased, said that on two or three occasions she removed rubbish from the unit that smelt because Mr Ye had not done so. She said that Mr Ye became more and more reclusive and did not carry out any household chores after he returned from China.

40 Kwok Yueng Poon, the husband of Esther Lan Ching Poon, confirmed the failure of Mr Ye to remove rubbish from the unit after his return from China.

41 Susan Fung said that about 1996 the deceased said to her: "Michael does not attend college anymore. He leaves his bedroom early in the morning and says: "Aunty I am going" and when he returns home late in the evening he says: "Aunty I am back" and then goes straight into his bedroom".

42 James Yuk Chee Fung, another brother of the deceased, said that the deceased had complained to him about Mr Ye's behaviour on a number of occasions in 1999 and 2000.

43 Notwithstanding the family criticisms of Mr Ye after he returned from China, he did live with the deceased from January 1990 until her death on 21 June 2001, with the exception of his visit to China and the short interval after the police were called. And, notwithstanding the advice to the contrary, the deceased took Mr Ye back in after that incident.

44 It seems to me that Ms Norgate's description of the relationship between the deceased and Mr Ye as like that of an aunt and nephew is an accurate one. It reflects the deceased's references to Mr Ye as a child, as an adopted nephew, and as an adopted son. It accords with Ms Fung's evidence that Mr Ye referred to the deceased as aunty. The question is whether such a

relationship falls within the definition of a de facto relationship in the *Property (Relationships) Act 1984*. That issue requires some understanding of the history of the legislation.

De Facto Relationships Act 1984

45 Following an extensive report on de facto relationships in June 1983 by the New South Wales Law Reform Commission, the *De Facto Relationships Act 1984* was passed. It contained a definition in s 3(1) of a de facto relationship in terms of the relationship between de facto partners. The definition was as follows:

“ ***de facto relationship*** means the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other.”

Section 3(1) also contained a definition of a de facto partner in the terms summarised in the above definition:

“ ***de facto partner*** means:

(a) in relation to a man, a woman who is living or who has lived with the man as his wife on a bona fide domestic basis although not married to him, and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.”

46 In *Weston v Public Trustee* (1986) NSWLR 407 Young J was concerned with the then not dissimilar definition of one of the eligible persons under the *Family Provision Act 1982*, s 6 being “a person who where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis”. At 408 his Honour endorsed counsel’s approach to the definition by splitting it into three elements: living, bona fide domestic basis, as his wife.

47 In *Roy v Sturgeon* (1986) 11 NSWLR 454, Powell J considered the definition of a de facto relationship in the *De Facto Relationships Act 1984*, s 3(1). At 458-459 his Honour rejected the approach of Young J in *Weston*, preferring the view that each case should involve the court in making a value judgment having regard to a variety of factors relating to a particular relationship including, but not limited to, the following:

- “1. the duration of the relationship;
2. the nature and extent of the common residence;

3. whether or not a sexual relationship existed;
4. the degree of financial interdependence, and any arrangements for support, between or by the parties;
5. the ownership, use and acquisition of property;
6. the procreation of children;
7. the care and support of children;
8. the performance of household duties;
9. the degree of mutual commitment and mutual support;
10. reputation and “public” aspects of the relationship.”

48 This approach was followed by Kearney J in *Simonis v Perpetual Trustee Co Ltd* (1987) 21 NSWLR 677 where his Honour considered the de facto relationship provision in the *Family Provision Act 1982*, s 6. At 685 his Honour said:

“I consider that the expression under consideration constitutes a single composite expression of a comprehensive notion or concept, and therefore has to be approached by considering the expression as a whole and not in several parts.”

49 Reference has been made to this approach on a number of occasions. For example, in *Barnes v De Jesus* [2001] NSWSC 19 at [26], Windeyer J referred to both decisions and pointed out that it was important to consider the evidence as a whole and not under isolated headings.

Property (Relationships) Act 1984

50 By the *Property (Relationships) Legislation Amendment Act 1999*, the name of the Act was changed to the *Property (Relationships) Act 1984* and the definitions of de facto relationship and de facto partner were omitted. The amendment Act inserted a new definition of de facto relationship in s 4 and a new concept of domestic relationship was introduced in s 5. The Act also repealed what was then s 32G of the *Wills Probate and Administration Act 1898* and replaced it with the current section. The new definition of a de facto relationship in the *Property (Relationships) Act 1984*, s 4 adopted the general approach to the facts espoused in *Roy* and *Simonis* and included most of the matters they had indicated should be taken into account. It was in the following terms:

“(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to

one another or related by family.

(2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be 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.

(3) No finding in respect of any of the matters mentioned in subsection (2)(a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship."

Section 5A(1) provides that persons are related by family if one is the parent or another ancestor of the other or one is the child or another descendant of the other or they have a parent in common.

51 The new concept of a domestic relationship was defined in the *Property (Relationships) Act 1984*, s 5. It was more extensive than a de facto relationship in that it included close personal relationships based on domestic support and personal care. It was in the following terms:

“(1) For the purposes of this Act, a domestic relationship is:

(a) a de facto relationship,
or

(b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of subsection (1) (b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

(3) A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:

(a) a child born as a result of sexual relations between the parties,

(b) a child adopted by both parties,

(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the

woman:

(i) of whom the man is the father, or

(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted,

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

(4) Except as provided by section 6, a reference in this Act to a party to a domestic relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.”

52 The close personal relationship introduced by the section would include the relationship between a daughter and an invalid mother. It would not include persons sharing a flat as a matter of convenience. It might well apply to the relationship between an aging aunt and her supportive nephew.

53 In my view, if Mr Ye was not in a de facto relationship with the deceased, he was in a close personal relationship with her. He lived with her and for no fee or reward, he provided the deceased with domestic support and personal care. That support and care was of a high order, at least until his visit to China. And whether or not the criticisms of the quality of his performance after his return are accepted, he continued to live with the deceased and provide domestic support and personal care to her.

54 The new definition of a de facto relation in the *Property (Relationships) Act 1984*, s 4(1) requires the parties to live together as a couple, not being married to each other and not being related by family.

55 Initially, I was concerned that the exclusion of persons related by family meant that, in the absence of the exclusion, persons related by family could

be in a de facto relationship. It seems to me, however, that the purpose of the exclusion is to highlight the distinction between a de facto relationship on the one hand and a close personal relationship on the other. The latter can include persons related by family and, through abundance of caution, I think, the exclusion was inserted in the *Property (Relationships) Act 1984*, s 4(1)(b) to highlight that the category of the de facto relationship is restricted to unmarried persons living together and holding themselves out to be a couple. Persons related by family within the meaning of s 5A(1) are not thought of as living together as a couple. A parent and child, or grandparent and grandchild, may live together, but the community would not regard them as living together as a couple.

56 The new definition of a de facto relationship in the *Property (Relationships) Act 1984*, s 4 clearly encompasses homosexual partners. That was its purpose. The *Property (Relationships) Legislation Amendment Bill 1999* was introduced in the Legislative Council. In his second reading speech, the Attorney General said (*New South Wales Parliamentary Debates (Hansard)*, 13 May 1999, at 228-229):

“The Property (Relationships) Legislation Amendment Bill recognises that contemporary society has developed to a point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable. Presently, persons living in intimate partnerships but who are not married or covered by the existing De Facto Relationships Act have limited rights to a share of the property of the partnership in the event that it fails or one partner dies.”

Having discussed the extension of the legislation to domestic relationships the Attorney continued:

“A de facto relationship is redefined as being a relationship between two adult persons who live together as a couple and who are not married to one another or related by family. This redefinition of de facto relationship is designed to be clearly inclusive of those living together as homosexual couples.”

57 In the second reading speech in the Legislative Assembly (*New South Wales Parliamentary Debates (Hansard)*, 26 May 1999, at 534) the Minister said:

““De facto relationship” is redefined as being a relationship between two adult persons who live together as a couple and

who are not married to one another. This redefinition of “de facto relationship” is designed to be clearly inclusive of those living together as homosexual couples.”

58 The *Property (Relationships) Legislation Amendment Act 1999* did not disturb the existing provisions of the *De Facto Relationships Act 1984*, the purpose of which are to provide for the redistribution of property of the relationship on its breakdown. The amendment Act had the effect that such provisions now apply equally for the benefit of those in close personal relationships together with those in de facto relationships regardless of sexual orientation.

59 In my view, it is doubtful whether the new definition in the *Property (Relationships) Act 1984*, s 4 extended the concept of a de facto relationship beyond unmarried adult persons living together as partners to a heterosexual or a homosexual relationship.

60 It was submitted that one should not interpret the new definition of a de facto relationship in the *Property (Relationships) Act 1984*, s 4 in light of the history of the matter. In particular, it was submitted that the matters in s 4(2) must now be construed generally in relation to persons living together.

61 In *Dridi v Fillmore* (2001) DFC 95-232, Master Macready at [12] pointed out that the definition of a de facto relationship in the *Property (Relationships) Act 1984*, s 4 apart from the provisions in s 4(1), merely reflected the existing state of the law as it had been developed under the *De Facto Relationships Act 1984*. He referred to *Simonis*.

62 I do not understand the Master to have suggested that the matters in the *Property (Relationships) Act 1984*, s 4(2) are confined to an analysis of heterosexual relationships, because that was the state of the existing law, and play no part in the analysis of homosexual relationships. Those matters must be taken into consideration in considering all the facts of any relationship claimed to answer the statutory definition.

63 It is clear that a number of the matters specified in the *Property (Relationships) Act 1984*, s 4(2) apply to the relationship between Mr Ye and the deceased. Their relationship lasted for 10 years. They lived in a common residence, but Mr Ye had his own bedroom and the deceased had hers. The relationship was non-sexual. Mr Ye was partially financially dependent upon the deceased, but there was no financial interdependence and the financial support extended to Mr Ye was ad hoc. There was no joint ownership or acquisition of property and the only property used by both was the unit and its contents. There was mutual commitment to sharing the unit, but not to a shared life. The relationship between the pair was affectionate but not what would generally be regarded as a shared life. There were no children. Household duties were shared. Apart from visits together to functions, restaurants and outings, there was no evidence that either promoted the notion that they were living together as a couple and no evidence of any public perception to that effect.

64 A de facto relationship requires more than adult persons living together. They must live together as a couple. When one thinks of persons as a couple, one thinks of two people in a romantic relationship. That is the first meaning given in the *Macquarie Dictionary* (4th ed) with reference to people as a couple. The *Oxford English Dictionary* in defining the word in the sense of the union of two, or a pair, gives as its first meaning with reference to two people: "A man and woman united by love or marriage; a wedded or engaged pair."

65 In my view the word in the *Property (Relationships) Act* 1984, s 4(1)(a), in the context of the extension of relief under the Act to persons in a domestic relationship, connotes two adult unmarried persons living together, united by love, or living together in a romantic relationship. The effect of such a construction is that de facto relationships are confined to heterosexual and homosexual romantic relationships.

The submissions

66 It was submitted that *de facto* is to be contrasted with *de jure* and the relationship determined by reference to the facts rather than a relationship between parties recognised at law. But that approach fails to give due regard to the requirement that the individuals in question live together as a couple.

67 It was submitted that the word "couple" was one of wide import and required only that there be two unmarried adults. But the definition specifically requires two adult persons who are not married or related by family. To construe the word "couple" in that general sense, adds nothing further to the definition and renders the *Property (Relationships) Act* 1984, s 4(1)(a) otiose.

68 It was submitted that the difference in age of 37 years was not, of itself, significant. The parties in *Turnley v Swaab* [1999] NSWSC 594 were 25 years apart. But that was an application under the *Family Provision Act* 1982 by a man who had commenced an intimate relationship with the deceased and moved in to live with her 20 years before her death. It does not address the construction questions with which I am concerned.

69 Reference was made to *Devonshire v Hyde* (2002) DFC 95-247. But that was a homosexual relationship in which, not only did the parties share a common residence, they had a sexual relationship while living together and a marriage ceremony between them evidenced their commitment to a shared life. Those facts are far removed from the instant circumstances.

70 *Hinde v Bush* (2002) DFC 95-260 was also relied upon. The plaintiff lived with the deceased for a period of 10 years until her death. Acting Master Berecny decided that the plaintiff satisfied the criteria to establish that he was in a de facto relationship in terms of the *Property (Relationships) Act* 1984, s 4(2) and that, even if the defendant's argument that he was merely a companion and a carer was accepted, he had established, at the very least, that there was a close personal relationship under s 5(1)(b). The case does not address the construction issue and no claim is or could be made in

this case that a close personal relationship is sufficient to give Mr Ye standing for the relief he claims.

Resolution of the first issue

71 I am of the view that the definition of a de facto relationship in the *Property (Relationships) Act 1984*, s 4 is limited to relationships between non-married adults in heterosexual or homosexual romantic relationships. To live together as a couple requires a romantic relationship between the persons constituting the couple. The absence of such a relationship between Mr Ye and the deceased means that, in my view, he has not established that he lived in a de facto relationship with the deceased. In consequence, I find that he was not a de facto spouse of the deceased within the meaning of the *Wills, Probate and Administration Act 1898*, s 32G.

The second issue

72 It is, therefore, unnecessary for me to decide the second question, whether Mr Ye had satisfied the requirements of the *Wills, Probate and Administration Act 1898*, s 61B(3A).

73 It was submitted that the requirement that a de facto spouse be such for a continuous period of not less than two years prior to the death of the intestate meant that the two year period must immediately precede the death.

74 I would have thought that that was too narrow a construction of the provision. Not only does it require the interpolation of the word “immediately” after the reference to two years, but also it requires unbroken living together to constitute a de facto relationship.

75 In *Hibberson v George* (1989) 12 Fam LR 725 at 740, Mahoney JA in considering the definition of de facto partner in the *De Facto Relationships Act 1984*, s 3(1) stated that it was correct that the relevant relationship might continue notwithstanding that the parties are apart, for example, on holidays. A similar view has been expressed in *Lipman v Lipman* (1989) 13 Fam LR 1, *Thomson v Badger* (1989) 13 Fam LR 559, *Theodoropoulos v Theodosiou* (1995) 38 NSWLR 424, and in *Turnley*.

76 In my view, if Mr Ye had been the de facto spouse of the deceased within the meaning of the *Wills, Probate and Administration Act 1898*, s 32G, I doubt that his trip to China would have disqualified him from compliance with the *Wills, Probate and Administration Act 1898*, s 61B(3A)(a).

Conclusion

77 At the end of the hearing on the preliminary questions, I found that Mr Ye was not the de facto spouse of the deceased within the meaning of the *Wills, Probate and Administration Act 1898*, s 32G. I now publish my reasons for that decision.

78 I reserved the question of costs and otherwise reserved my decision with respect to the second proceedings. I stood the first proceedings over before

me for two days commencing at 11.00 am on Tuesday 6 June 2006.

79 I will hear the parties on costs and on appropriate orders in the second proceedings. I direct the parties to bring in short minutes of orders in the second proceedings reflecting these reasons.

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