FEDERAL CIRCUIT COURT OF AUSTRALIA

KRISTOFF & EMERSON *[2015] FCCA 13*

Catchwords:
FAMILY LAW – Property – de facto claim – finding that there was no de facto relationship.

Legislation:
Family Law Act 1975, ss.4AA, 90SF(3), 90SM(4), 90SM(3), 4AA(1), 4AA(2), 79(2), 79(4), 117, 117(2A)
Evidence Act 1995 (Cth), ss.140, 140(1), 140(2), 142

Cases cited:
Briginshaw v Briginshaw (1938) 60 CLR 336
Calverley v Green (1984) 155 CLR 242, (1984) FLC 91-565
Rogers & Rogers (1980) FLC 90-874
Ferguson & Ferguson (1978) FLC 90-500
Bevan & Bevan (2013) FLC 93-545
Benenke v Benenke (1996) FLC 92-698
Stanford & Stanford (2012) 247 CLR 108, (2012) FLC 93-518

Applicant:	MS KRISTOFF
Respondent:	MR EMERSON
File Number:	CAC 1636 of 2013
Judgment of:	Judge Brewster
Hearing dates:	4 & 5 November 2014
Date of Last Submission:	5 November 2014
Delivered at:	Canberra
Delivered on:	13 January 2015

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondent: Mr Clutterbuck

Solicitors for the Respondent: Hill & Rummery

ORDERS

(1) That the application filed by the applicant Ms Kristoff on 22 October 2013 be dismissed.

IT IS NOTED that publication of this judgment under the pseudonym *Kristoff & Emerson* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT CANBERRA

CAC 1636 of 2013

MS KRISTOFF
Applicant

And

MR EMERSON
Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application by Ms Kristoff seeking orders as to property division between her and the respondent Mr Emerson. The parties were never married but the applicant maintains that from 2003 until late 2011 they lived in a de facto relationship within the meaning of the Family Law Act. The application is therefore governed by the provisions of Part VIIIAB of the Act.

Background

2. The applicant is aged 45 and the respondent 55. They met in 1999. The applicant was employed as a sex worker and the respondent was one of her clients. In the course of their sexual encounters they ended up discussing personal matters relating to their families and their interests. They discovered they had a mutual interest in horses and country life. They became friends. The applicant began to involve the respondent with her family. From 2000 onwards the sexual relationship between the parties ceased to be a commercial one, that is the respondent was not required to pay for sexual encounters.

3. The relationship developed such that towards the end of 2000 the parties travelled together to (omitted) for about a week.

4. About this time the respondent and a friend, Mr P, were renovating a house they had acquired at Property M. The applicant was invited to accompany the respondent on a number of occasions whilst the applicant and Mr P worked on this house. She assisted to a degree in fetching tools and materials and cleaning up the property. This occurred at weekends which were a busy time in the sex industry and the respondent would often give her a few hundred dollars to compensate for her loss of income. At one stage she said he gave her a "roll of hundred dollar notes" which apparently was related to her loss of income and his paying for sexual services for which he had not hitherto paid.

5. In late 2001 or early 2002 the applicant gave up her job as a sex worker. She implies in her affidavit that this was due to the respondent but I am not prepared to make that finding. She obtained employment as a (occupation omitted) at the (employer omitted).

6. The relationship between the parties broke down towards the end of 2002. At the time there had been incidents between the parties and between the respondent and the applicant's sister. The end result is that the respondent approached the police and alleged that the applicant and her sister had assaulted him. He applied for a Domestic Violence Order. It is not necessary to make findings in relation to this or to dilate on this episode. This estrangement seemed to have been comparatively short lived and at the end of 2002 the respondent approached the applicant with a view to reconciliation. Their relationship resumed. In early 2003 they travelled together to (omitted) for about five days.

7. Up until 2003 the applicant had lived full time in a home in (omitted). She shared this home with her sister. The respondent owned a house in Property B. In 2003 he acquired another property in Property G. When the respondent bought the Property G property the applicant started spending time there. Her evidence is that she came to spend most nights at Property G and that she would only stay overnight in (omitted) if she had a function on in the City. In support of her version she produced Telstra bills and Rates Notices showing her address as a

post office box in (omitted) used by the respondent and other people associated with him in business.

8. The respondent denies that the applicant spent most nights in Property G. On his version she would stay there only occasionally.

9. The evidence corroborating either party's version is equivocal or absent. The respondent says that the applicant changed her postal address for her telephone bills and Rates Notices because her sister for some reason was in the habit of hiding these bills when they arrived at (omitted). The applicant concedes that her sister would do this. The applicant's sister could have been called to verify the applicant's account but I am satisfied that the circumstances are such that I should not draw any inferences from her failure to give evidence. The same applies to a woman with whom the respondent was associated during relevant periods. I need not discuss the reasons proffered for their non involvement in the case.

10. I find on the balance of probabilities that the applicant stayed at the respondent's Property G property more frequently than the respondent would concede. On the other hand I am not satisfied that she would only spend nights at (omitted) when she had a function to attend in that area. I find there was likely to have been at least two nights a week that the applicant would stay in Property G but it would not on average have exceeded five nights a week. When I make this finding however I do not do so with any real confidence. In the end I can summarise the position by saying that the onus ultimately is on the applicant to make out her case and I am not satisfied that she spent as much time at the Property G property as she claims.

11. The parties disagree as to the extent of their sexual relationship. The applicant says that sexual intercourse was a regular feature of their relationship. The respondent denies this. I accept the applicant's version.

12. The respondent describes his relationship with the applicant as being in the nature of a "friendship". I find that there was more to it than this. When one is dealing with a concept as amorphous as "love" it is difficult to make findings as to the degree of attachment the respondent felt towards the applicant. However after the parties separated the

respondent telephoned her and professed his love for her. Whatever the extent of the respondent's feelings towards the applicant they were definitely more significant than a "friendship".

13. The parties never shared an economic life. At no stage did they have a joint bank or other account. They never jointly acquired property. The great majority of expenses when the parties stayed together were met by the respondent.

14. As I understand it a part of the applicant's case would involve my making a finding that her career was adversely affected by the relationship. In essence she says that the respondent was the cause of her giving up employment as a sex worker and her giving up or being dismissed from subsequent employment at the (employer omitted). The evidence in relation to this is as follows:

(a) The applicant implies that she gave up employment as a sex worker because of the respondent. I do not accept this. She gave up this employment in late 2001 or early 2002. She then obtained employment as a (occupation omitted) at the (employer omitted).

(b) The applicant says that the respondent told her that he would prefer that she not work and told her that he was able to support her. In the latter part of 2004 the respondent was charged with an assault on a sex worker. The applicant says that she "accepted some blame for his actions as I had ignored his requests for me not to work and to resign from my new position". The new position was as a (occupation omitted) at (employer omitted).

(c) I accept that the applicant did not work for a time but do not accept that this was at the request of the respondent. Moreover I do not accept that this had any lasting financial impact on the respondent. She says that towards the middle of 2005, after the respondent was convicted of the assault charge, she told him that "regardless of him generously paying for everything I wanted I missed having a routine" (ie the routine of a job) and that in February 2006 she obtained employment as a (occupation omitted) at (employer omitted).

(d) In 2011 the applicant began to experience problems at work. This was because of issues between her and a (employee omitted) employed at the (employer omitted). She says that the respondent urged her to resign from this employment to resolve the issue. She says that the respondent rang her supervisor about this issue. She says that the respondent told her supervisor that she (the applicant) used to work as a prostitute. She says that she then resigned and this was because of the actions of the respondent. I do not accept that the respondent was the cause of her resigning. I do not accept that the respondent told the manager of the applicant's past. I find that the position was that the supervisor was left with a choice of losing either the (employee omitted) or the applicant and reluctantly decided that it was the applicant who had to go.

The parties' applications

15. The applicant seeks that the court order that there be an alteration made in the parties' property interests such that the respondent pay her an amount which would result in her having twenty-five percent of the combined assets of the parties. The respondent seeks that this application be dismissed.

16. The only significant property owned by the applicant is a one third share of the (omitted) property. She and her two siblings inherited this property from her mother. She values this share at $267,000. In relation to this and all other valuations neither party has sought to have the property of the other valued and I am left in the position where I must accept the estimates each has given.

17. The respondent's property and the values he ascribes for each are as follows:

(a) He has the Property G property valued at $780,000.

(b) He retains the Property B property valued at $378,000.

(c) He has about $160,000 worth of shares.

(d) He has a little over $11,000 in savings.

(e) He has two motor vehicles with a combined value of about $51,000.

(f) He has household contents valued at $67,000.

(g) He has an interest in a property in the (country omitted) valued in his Financial Statement at $105,000. There seems to be some doubt as to whether he will ever be able to become the legal owner of this property. For present purposes I adopt the valuation in the Financial Statement.

(h) He has a Self-Managed Superannuation Fund with assets valued at about $605,000.

18. There are no liabilities that should be deducted from this pool.

19. On this basis the combined assets of the parties total about $2,157,000. On this basis a twenty five percent share is about $539,000. After deducting the value of the applicant's interest in the (omitted) property her application would have her being paid an amount of about $272,000. It is not necessary to do a precise calculation.

Discussion

20. The Family Law Act gives the court power to alter the interests of people in their property if they are or were married or if they are or were living in a de facto relationship. The first thing the applicant must establish is that the parties were in a de facto relationship. If the parties were in such a relationship for more than two years the court's powers to make property orders are enlivened.

21. The extent to which the applicant must satisfy me that a de facto relationship existed between the parties is specified in section 140 of the Evidence Act. This section reads as follows:

(1): In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) The nature of the cause of action or defence; and

(b) The nature of the subject-matter of the proceedings; and

(c) The gravity of the matters alleged.

22. The reference to "the gravity of the matters alleged" appears to be a reference to the principles set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. At page 361-362 Dixon J said as follows:

When the law requires that proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independent of any belief in its reality…it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of all facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of the occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issues has been proved to the reasonable satisfaction of the tribunal.

23. The issue of whether a *Briginshaw* standard of proof should be required in a case involving a dispute as to a de facto relationship has not been definitively determined. In the recent case of *Owens & Bensom,* a decision of the Full Court of the Family Court delivered on 22 December 2014 Austin J said as follows:

29. However, the respondent (the party contending that there was a de facto relationship such that the court's powers to make property orders were enlivened) *only needed to discharge his burden on the balance of probabilities. The ultimate issues about when the de facto relationship ended and for how long it endured were not issues of such nature or gravity as to enliven the application of s 140(2) of the Evidence Act. The provisions of s 140(1) of the Evidence Act capably accommodated the issues at hand and the evidence adduced by the parties in respect of those issues.*

24. The issue in that case was not whether or not there had ever been a de facto relationship but rather the date on which it ended. The issue of the application of the Evidence Act however seems to me to be the same.

25. The remaining members of the Full Court, Finn and Strickland JJ left that question open. They said that they agreed with Austin J's judgment "save that we are not necessarily persuaded that the application of s 142 of the *Evidence Act 1995* (Cth) was not enlivened in relation to the issue of the jurisdictional fact as to whether the de facto relationship in this case existed beyond 1 March 2009."

26. It is not necessary in this case for me to form a conclusion as to this issue. I will adopt the test most favourable to the applicant. I require that she merely prove her case simply on the balance of probabilities without requiring her to satisfy the *Briginshaw* criteria.

27. The term "de facto relationship" is defined in Section 4AA of the Act. Section 4AA(1) provides that a person is in a de facto relationship with another person if

> *(a) the persons are not legally married to each other; and*
>
> *(b) the persons are not related by family; and*
>
> *(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.*

28. The circumstances referred to in paragraph (c) above are set out in section 4AA(2). That section provides that the circumstances may include any or all of the following:

> *(a) the duration of the relationship;*
>
> *(b) the nature and extent of their common residence;*
>
> *(c) whether a sexual relationship exists;*
>
> *(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;*
>
> *(e) the ownership, use and acquisition of their **property**;*

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

*(g) whether the relationship is or was registered under a prescribed law of a **State** or **Territory** as a prescribed kind of relationship;*

*(h) the care and support of **children**;*

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

29. I shall now discuss each paragraph in Section 4AA(2) in turn.

30. Insofar as the duration of the relationship is concerned I am prepared to accept that if the parties were in a de facto relationship that relationship was from 2003 until the end of 2011.

31. Insofar as paragraph (b) is concerned I will proceed on a basis that is most favourable to the applicant. I will assume that she spent the majority of her time, on average about five nights a week, at the respondent's home.

32. As I have indicated I accept that a sexual relationship existed in this period and I accept the applicant's version as to the extent of this relationship.

33. In relation to paragraph (d) I find there was no financial dependence, or interdependence between the parties. I find that the respondent paid the great majority of the costs of his household (which included the applicant when she was there) but that there was never any arrangement in relation to financial support between them.

34. In relation to paragraph (e) the parties never jointly owned any property nor acquired any property. They never jointly used any property except to the extent that the applicant would stay in the respondent's Property G property.

35. In relation to paragraph (f) I find that the parties had a mutual commitment to a shared life except that that did not involve their living together full time and did not involve any financial interdependence.

36. In relation to paragraph (g) the relationship was not registered under the ACT Civil Unions Act.

37. In relation to paragraph (h) there were no children of the relationship.

38. In relation to paragraph (i) the parties did not socialise together to any substantial degree. The applicant attributes this to the respondent's personality which she says resulted in his having few friends. I do not know and am unable to make a finding as to how other people perceived their relationship.

39. When making a finding as to whether or not a de facto relationship existed there is no "bright line" test. It is not a case where if a certain number of boxes are ticked a de facto relationship will be found to have existed. The situation was aptly described by Mason & Brennan JJ in *Calverley v Green* (1984) 155 CLR 242, (1984) FLC 91-565 where they said that "the term 'de facto husband and wife' embraces a wide variety of heterosexual relationships; it is a term obfuscatory of any legal principle except in distinguishing the relationship from that between husband and wife."

40. In this case I am not satisfied that there was a de facto relationship between the parties. Some of the indicia of a de facto relationship were present, some were not. The factor to which I attach most weight is the lack of any financial relationship between the parties.

41. For completeness however I add that even if I had found there was a de facto relationship between the parties I would not have made an order altering their property interests. I will explain why.

42. Section 90SM(3) gives the court the power to alter the interests of parties to a de facto relationship in their property. Section 90SF(3) however provides that the court must not make an order under that section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. There is no doubt that the respondent is the sole legal and beneficial owner of the property to which I have referred in paragraph 17. Before I can alter those interests in favour of the applicant she must satisfy the criteria set out in Section 90SF(3).

43. Satisfying those criteria is not a formality. In *Rogers & Rogers* (1980) FLC 90-874 the Full Court of the Family Court quoted with approval a passage from a decision of Strauss J in *Ferguson & Ferguson* (1978) FLC 90-500 where at page 77,615 his Honour said;

> *It seems to me, that the main purpose of sec. 79(2)* (this is equivalent to Section 90FS(3) and concerns property disputes between couples who are or were married) *is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it requisite to make any order under this section, the Court must be satisfied that the alteration so ordered, will go no further than the justice of the matter demands.*

44. That passage from *Rogers* was quoted with approval in the joint judgment of Bryant CJ and Thackray J in *Bevan & Bevan* (2013) FLC 93-545 at page 87,231 and (semble) with approval by Kay J in *Benenke v Benenke* (1996) FLC 92-698 at page 83,370.

45. Section 79(2) was considered by the High Court in *Stanford & Stanford* (2012) 24 CLR 108, (2012) FLC 93-518. In their joint judgment at paragraph 39 French CJ, Hayne, Kiefel and Bell JJ said as follows:

> *…… because the power to make a property settlement is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then* exist.

46. Along the same lines at paragraph 40 their Honours said:

> (Whether) *making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised in accordance with legal principles, including the principles which the Act itself lays down. To conclude that making an order is "just and equitable" only because of and by reference to the various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.*

47. In this case I am not satisfied that there are sufficiently cogent reasons to alter the interests of the respondent in his property in favour of the applicant had I found that the parties had been in a de facto relationship. The applicant made some contributions to the relationship. She helped to clean the respondent's Property B property after he moved out. She helped with Property M. I assume that when she stayed at the Property G property she helped with domestic tasks just as I imagine she did when she lived in (omitted). She made no significant financial contribution. Her contributions were not such as to justify the court making orders altering the interest of the respondent in his property in her favour. As I have indicated there was no financial interdependence between the parties. There are no children of the relationship. I am not satisfied that the respondent was responsible for the applicant giving up her employment as a sex worker or giving up, or being dismissed from, her subsequent jobs. I am not satisfied that the applicant has been adversely affected financially in any way by the relationship.

Conclusion

48. I therefore dismiss the applicant's application.

49. The respondent may consider making an application that the applicant pay his costs. For the benefit of the applicant who acted for herself I will briefly explain the law as to costs. This is found in section 117 of the Family Law Act.

50. The starting point is that each party should bear his or her own costs. However if the court is of the opinion that there are circumstances that justify its doing so it may make an order that one party pay all or a part of the other's costs. Section 117(2A) sets out a number of matters to be considered if an application for costs is made.

51. I imagine that if the respondent were to seek costs he would do so on the basis of paragraph (e) of that section which refers to whether a party has been wholly unsuccessful in the proceedings. The applicant has been wholly unsuccessful. Normally that is a very weighty factor justifying an order for costs.

52. However another consideration is found in paragraph (a) which refers to the financial circumstances of the parties. It is obvious that the respondent has much more by way of assets than has the applicant.

53. My inclination at this stage would be to refuse any application for costs. However there may be facts of which I am unaware that bring other paragraphs into play and I have not heard submissions on behalf of the respondent. The above does not indicate a fixed position.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of Judge Brewster

Date: 13 January 2015