

De facto threshold test - Are you in a de facto relationship?
Truman and Clifton [2010] FCWA 91

The Law

Part 5A of the *Family Court Act 1997* (WA) ("the Act") confers jurisdiction on the Family Court of Western Australia to make orders for property settlement between parties who have lived in a de facto relationship. In the case of *Truman and Clifton*, Thackray CJ was required to determine whether the parties were in fact living in a de-facto relationship, as asserted by the applicant.

Section 13A(1) of the *Interpretation Act 1984* (WA) provides that references to a de facto relationship in Western Australian legislation shall be construed as a reference to a relationship (other than a legal marriage) between two persons who live together in a "**marriage-like relationship**".

Section 13A(2) of the *Interpretation Act* further provides that the following factors are indicative of a de facto relationship existing between two persons:

- (a) the length of the relationship between them;
- (b) whether the two persons have resided together;
- (c) the nature and extent of common residence;
- (d) whether there is, or has been, a sexual relationship between them;
- (e) the degree of financial dependence or interdependence and any arrangements for financial support between them;
- (f) the ownership, use and acquisition of their property (including property they own individually);
- (g) the degree of mutual commitment by them to a shared life;
- (h) whether they care for and support children; and
- (i) the reputation and public aspects of the relationship between.

These factors are merely indicators of two persons being in a de facto relationship. They are not essential.

Further, it does not matter whether the two persons are different sexes or the same sex or whether either of the persons are legally married to someone else or in another de facto relationship.

Section 205Z of the Act provides that the Court can only make orders in relation to a de facto relationship if it is satisfied:

1. there has been a de facto relationship between the parties for at least two years;
2. there is a child of the de facto relationship who has not yet attained the age of 18 years and

failure to make an order would result in serious injustice to the partner caring or responsible for the child; and/or

3. the de facto partner who applies for the order made substantial financial, non-financial and/or home maker/parent contributions to the conservation, acquisition and improvement of the parties property and failure to make the order would result in serious injustice to the partner.

In deciding whether there has been a de facto relationship between the parties for at least two years, the Court must also consider whether there was any break in the continuity of the relationship and, if so, the length of the break and the extent of the breakdown in the parties relationship.

The case of *S v B (No 2)* (2004) 32 Fam LR 429 provides that the party asserting the de facto relationship must prove the existence of it.

The applicant in *Truman and Clifton* failed to do so.

The Facts

In *Truman and Clifton*, Thackray CJ determined that the parties' relationship began in the middle of 2003 when they commenced sleeping together. However, he found their relationship began to deteriorate in or around August 2004 and that any semblance of a relationship, other than a business association, ended not later than July 2006, when the applicant left the parties' residence.

He found that the parties had a sexual relationship. However, this waned fairly quickly. Whilst the respondent had no other sexual partners during her relationship with the applicant, Thackray CJ did not accept the applicant's assertions that he had no other sexual partners during his relationship with the respondent, and in fact determined it was likely the applicant had engaged the services of prostitutes overseas. Thackray CJ also found that the applicant was involved in a sexual relationship with another woman from the first half of 2006.

Most significantly, before the parties commenced living together, whilst they were living together, and after they ceased living together, each and every financial transaction of any significance between the parties were formally recorded, sometimes by solicitors. The parties never opened a joint bank account, never owned a home together and never leased a home jointly. The parties never jointly owned any property of any significance, except for business assets.

Thackray CJ also found it was significant that the parties never spent Christmas together. In his view, the fact that Christmas was always spent apart was some indication of the fact that the parties were simply lovers and not part of each other's family.

Furthermore, at the trial a number of witnesses gave evidence that the parties were never seen being affectionate or showing signs of intimacy towards one another.

The Decision

Thackray CJ was not persuaded that the parties had lived in a "marriage- like" relationship, as he considered it was not in the accepted nature of a marriage for:

1. every important financial transaction between a couple to be formally documented;

2. for a man to use prostitutes at the same time he claims to have committed to his partner;
3. for a man to carry on a relationship behind the back of a woman whom he knows has been faithful to him; and
4. for a couple to voluntarily spend as much time apart from each other as the parties did, including Christmas.

The Parliament of Western Australia provided no definition of "marriage" when enacting the legislation which defines a de facto relationship as being "marriage-like".

Nevertheless, the legislation requires a judge to reflect on the nature of marriage when determining whether parties are in fact in a de facto relationship.

In Thackray CJ's view, Parliament has very wisely reposed a considerable amount of discretion in the Court to determine whether a relationship is "marriage-like".

The case of *Truman & Clifton*, confirms there is a significant difference between merely "living together" and living in a relationship that is "marriage-like" - where the line is drawn will depend upon a detailed assessment of all of the elements of the parties respective relationship.