

**JURISDICTION** : FAMILY COURT OF WESTERN AUSTRALIA  
**ACT** : FAMILY COURT ACT 1997  
**LOCATION** : [REGIONAL CENTRE] and PERTH  
**CITATION** : TRUMAN and CLIFTON [2010] FCWA 91  
**CORAM** : THACKRAY CJ  
**HEARD** : 24, 25 & 26 NOVEMBER 2009, 13 & 27 MAY 2010,  
2 SEPTEMBER 2010  
**DELIVERED** : 2 SEPTEMBER 2010  
**FILE NO/S** : PTW 774 of 2009  
**BETWEEN** : MR TRUMAN  
Applicant  
  
AND  
  
MRS CLIFTON  
Respondent

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*Catchwords:*

FAMILY LAW - Jurisdiction - De facto relationship - Whether relationship "marriage-like" - Evaluation of factors indicating a de facto relationship - When a de facto relationship ends - Serious injustice - Application dismissed.

*Legislation:*

*Family Court Act 1997*  
*Interpretation Act 1984*

*Category:* Reportable

**Representation:**

*Counsel:*

Applicant : Mr H Moser and Mr T Clavey  
Respondent : Mr R Hooper

*Solicitors:*

Applicant : Clavey Legal  
Respondent : O'Sullivan Davies

**Case(s) referred to in judgment(s):**

E and P [2005] FCWA 4  
Hibberson v George (1989) DFC 95-064  
Hyde v Hyde (1866) LR 1 P & D 130 at 133  
Ingamells v Western Australian Trustees Ltd (unreported, Supreme Court of Western  
Australia, 5 March 1993)  
L and C [2005] FCWA 23  
Lynam v Director-General of Social Security (1983) 52 ALR 128 at 131  
MW v Director-General, Department of Community Services (2008) 244 ALR 205  
R v L (1991) 174 CLR 379  
Re Kevin (2003) FLC 93-127  
Richardson v Kidd [2002] NSWSC 306  
S v B (No 2) (2004) 32 Fam LR 429  
Van Jole v Cole (2000) 26 Fam LR 228  
W v T (1998) FLC 92 -808

**ABRIDGED JUDGMENT**

**WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT  
PARTIES' NAMES HAVE BEEN CHANGED**

1 Mr Truman claims he and Mrs Clifton lived in a de facto relationship from 2003 to 2007. If he is right, I have jurisdiction to entertain his application for property settlement filed in February 2009.

2 Mrs Clifton denies she lived in a de facto relationship with Mr Truman. If she is right, his application must be dismissed. Even if they did live in a de facto relationship, but it endured less than two years, the application must be dismissed unless Mr Truman establishes he made “substantial contributions” and that failure to make the orders sought would result in “serious injustice”. Mrs Clifton concedes Mr Truman made substantial contributions but submits there would not be serious injustice if the application was dismissed.

3 There is a further issue relating to the date on which the de facto relationship ended (if it ever existed). Mrs Clifton claims any such relationship ended more than two years before proceedings were commenced. If that is so, leave was needed to institute the proceedings. In order to deal with that proposition, Mr Truman sought permission at the commencement of the trial to amend his application to seek leave to file out of time. Mrs Clifton’s counsel opposed the amendment, saying it constituted an entirely different case to the one he had prepared to meet.

4 I did not deal with the application for leave to amend. I reasoned the issue would be academic if I found there had not been a de facto relationship. The same would apply if there was a de facto relationship that ended less than two years before the date of filing. I was concerned that if I permitted the late amendment I would be asked to adjourn the hearing to allow Mrs Clifton to meet the new application. On the other hand, I was not prepared to summarily dismiss the application to amend, given it had not been made clear earlier that the limitation issue would be raised.

**Brief background**

5 Mr Truman was 61 years of age at the time of trial. He is a [tour operator]. He lives in [a regional centre], having taken up residence there in 2002 when his employment with [a national company] was terminated. Mrs Clifton was 66 years of age at the time of trial. She is no longer working and lives [in the Eastern States].

6 The parties met in June 2003 while Mrs Clifton was on her winter vacation in [the regional centre]. Mr Truman had recently commenced [conducting tours] around the [region]. They commenced a romantic and sexual relationship almost as soon as they met.

7 Mrs Clifton was not in a relationship when she met Mr Truman. Her long marriage had recently ended. Mr Truman had also been married previously. He had since been involved with another woman, who is the mother of his young daughter.

8 Mrs Clifton went home to [the Eastern States] at the end of her holiday in August 2003. She and Mr Truman have different recollections of the way their relationship then developed. It is nevertheless common ground that over the following years they spent much time living together, building up a business in [the regional centre]. Mr Truman is now in another relationship, but the date it commenced is hotly contested.

### The legislation

9 Mr Truman's application was made under Part 5A of the *Family Court Act* 1997, which confers jurisdiction on the Family Court of Western Australia to make orders for settlement of property owned by parties who lived in a "de facto relationship".

10 The *Interpretation Act* 1984 provides the definition of a "de facto relationship". The relevant provisions of that Act are set out below [emphasis added]:

#### 13A. De facto relationship and de facto partner, references to

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons **who live together in a marriage-like relationship**.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, **but are not essential** –
  - (a) the length of the relationship between them;
  - (b) whether the 2 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;
  - (i) the reputation, and public aspects, of the relationship between them.

(3) **It does not matter whether -**

- (a) the persons are different sexes or the same sex; or
- (b) **either of the persons is legally married to someone else or in another de facto relationship...**

11 Section 205Z of the *Family Court Act 1997* sets out the circumstances in which the Court can make property settlement orders if it is satisfied a de facto relationship existed. It is in these terms:

**205Z(1) [Requirements to be satisfied]**

A court may make an order in relation to a de facto relationship only if satisfied –

- (a) there has been a de facto relationship between the partners for at least two years;
- (b) there is a child of the de facto relationship who has not yet attained the age of 18 years and failure to make the order would result in serious injustice to the partner caring or responsible for the child; or
- (c) the de facto partner who applies for the order made substantial contributions of a kind mentioned in section 205ZG(4)(a), (b) or (c) and failure to make the order would result in serious injustice to the partner.

**205Z(2) [Considerations to determine length of relationship]**

In deciding whether there has been a de facto relationship between the partners for at least two years, the court must 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 relationship.

**205Z(3) [Matters for consideration not limited]**

Subsection (2) does not limit the matters the court may consider.

**Credibility**

12 Before setting out my findings, I propose making observations concerning the credibility of the parties and the witnesses who were cross-examined.

***Mr Truman***

13 Mr Truman was an unconvincing witness. He presented as a man accustomed to getting his own way, very anxious to recover funds he believes are due to him. My

initial unfavourable impression of his credibility increased exponentially after I analysed the documents tendered during trial and compared them with his evidence.

14 Although confined to discrete issues, part of Mr Truman's evidence conflicted with that given by [Mr S]. Notwithstanding his testimony was given by video from the USA, I had no difficulty in assessing Mr S's demeanour. He appeared to be a reliable witness and I had little hesitation in accepting his evidence. His evidence was an important indicator that Mr Truman's testimony was unreliable.

15 Having had the opportunity to consider the documentary and unchallenged evidence at length, I am satisfied that Mr Truman is a witness without credibility. I would not accept his word unless firmly corroborated by a reliable source.

*Mrs Clifton*

16 Mrs Clifton made a generally good impression. Although she sometimes confused the sequence of events, she appeared to have a good memory. It was nevertheless apparent that she remains deeply hurt by the cavalier fashion in which she believes (and I accept) she was treated by Mr Truman. Her desire to resist what she regards as his opportunistic attempt to relieve her of her wealth may have been what led to inaccuracy in her evidence. In particular, her recollection of the time Mr Truman spent with her in [the Eastern States] during (admittedly short) periods in their relationship and some of her evidence about the frequency of their telephone conversations was not borne out by the documentary evidence.

17 One area in which Mrs Clifton's evidence required particular scrutiny related to the dispute as to whether it was 2006 or 2007 when Mr Truman ceased living with her in [the regional centre]. There was some confusion because she had claimed initially that the last time she and Mr Truman had sex was on their houseboat in 2006, when in fact the houseboat was not completed until 2007. Mrs Clifton acknowledged she was in error in saying this occurred in 2006. On the other hand, Mr Truman was also confused when he initially said in his affidavit the houseboat had been completed in 2006. It was apparent each party (especially Mr Truman in his second affidavit) had attempted to reconstruct events based on documentary evidence, rather than their independent recall. The confusion about the date on which the houseboat was completed may have led to the discrepancy in Mrs Clifton's evidence. When I came to examine all of the evidence, I accepted Mrs Clifton was right in asserting it was 2006 when Mr Truman ceased living with her.

18 Mrs Clifton appeared to have a clear recollection of the ebb and flow of her relationship with Mr Truman. On almost every occasion when I sought to test her evidence against documentary material, the assertions she made were corroborated. The documents provided strong support for each of the "gut feelings" she described. On the other hand, Mr Truman's recollection of the state of their relationship was revealed as, at best, wishful thinking, and at worst, falsehood. I am satisfied the relationship meant a great deal more to her than it ever did to him. Its trials and tribulations are engraved in her memory in a way that makes her recollection, whilst prone to exaggeration, much more reliable.

*[Tony Truman]*

19 [Tony Truman] appeared most uncomfortable when giving evidence. He is close to his father and resented his relationship with Mrs Clifton. He is poorly disposed to Mrs Clifton, having clashed with her throughout her time in [the regional centre].

20 Tony Truman knew it was his father's case that he ceased living with Mrs Clifton in 2007 rather than 2006, and I consider he tailored his evidence accordingly. When he did make one statement that supported Mrs Clifton's case (that he had seen his father's swag rolled out in the [business premises] in 2006), he moved to correct the "error".

*[Mr H]*

21 The only other witness called by Mr Truman was Mr H. He was not in the box for very long, but presented as having a fairly good memory. I gained the impression he was a generally reliable witness. In assessing the relevance of his evidence it is important to appreciate he was in [the regional centre] at the start of the 2006 tourist season to assist with the work Mrs Clifton would normally have undertaken. He left to operate the [satellite] office when Mrs Clifton returned to [the regional centre] in June 2006.

*[Mr S]*

22 Mr Truman asserts that Mr S is a "very close friend" of Mrs Clifton, having sworn affidavits in other proceedings on her behalf. He says Mr S is no longer his friend. The inference he would want the Court to draw is that Mr S was prepared to perjure himself to support Mrs Clifton.

23 Mr S acknowledged he had visited Mrs Clifton in [the Eastern States] in 2008; however, I accept the primary purpose was to discuss the sale of her [business asset]. He also acknowledged he had lunch with her in the USA, but this was a one-off meeting, when Mrs Clifton came ashore from a cruise ship. Whilst Mr S acknowledged he was on friendly terms with Mrs Clifton, I do not accept this influenced his testimony. He appeared to be of very genial disposition and did not seem at all poorly disposed to Mr Truman.

24 As there appears to be disagreement, I find that Mr S stayed with Mr Truman during his visit to [the regional centre] in April/May 2008. I accepted his evidence that there was another woman apparently living with him at the time. I saw Mr Truman shaking his head in disagreement when this evidence was being given, but as I did not draw that fact to the attention of counsel I do not take it into account. Mr S was, however, convincing in denying that he stayed with Mrs Clifton in [the regional centre] during that visit.

*[Mr K]*

25 Mrs Clifton's son-in-law, Mr K, gave evidence from [the Eastern States]. I had no difficulty in assessing his demeanour, notwithstanding his testimony was given by

video link. Mr K is very fond of Mrs Clifton, but I nevertheless found him to be a reliable witness.

*[Ms F]*

26 Ms F lived next door to the parties. She was an impressive young woman and I found her evidence reliable. She was in the box for only a short time.

*[Ms V]*

27 The last witness called was Ms V. She is a close friend of Mrs Clifton, having worked in the business in 2004 and 2005. She demonstrated a strong bias against Mr Truman, whom she regarded as an abusive employer. Ms V was so anxious to support Mrs Clifton that I considered everything she said needed to be assessed with considerable care. With that caveat, I formed the impression that much of her evidence was accurate. This included her claim that she had never seen any sign of affection or an emotional relationship between Mr Truman and Mrs Clifton.

### **The documentary evidence**

28 I was provided with a plethora of documents. These were of great assistance in resolving the confusion in the chronology which arose from the parties' evidence (some of which contradicted evidence they had given earlier). The telephone bills in particular were most helpful. Unfortunately, only a portion of these were tendered (in various haphazard batches). They became such a valuable tool in clarifying the chronology after the trial concluded that I caused enquiry to be made as to whether all of Mr Truman's telephone records could be introduced. It was agreed they could.

29 In reviewing the documents over the long period in which this judgment has been reserved, I was able to undertake an analysis that counsel could not undertake, given the limitations associated with the conduct of the litigation (including the late stage at which permission to inspect the records was granted). My analysis has led me to make a few findings that I was not asked to make. Those findings are, however, of the same flavour as others urged on me. They confirm the validity of "gut feelings" described by Mrs Clifton, which Mr Truman put down to her "paranoia". I should stress, however, that my decision would have been the same had I confined my findings to those I was expressly asked to make.

### **The history of the relationship**

30 It is necessary to set out in detail my findings about the convoluted history of the relationship. I will do so in chronological order. I will then provide details associated with Mr Truman's longstanding association not only with [Ms B] (with whom he is now in a relationship) but also with another mystery figure [associated with a "mystery number" in Mr Truman's telephone records].

**[Paragraphs 31 to 291 have been deleted by direction of the Court. In those paragraphs his Honour conducts an in-depth examination of the evidence in the proceedings and sets out his findings in relation to the history of the relationship.]**

**The statutory indicators**

292 I turn now to the matters set out in s 13A of the *Interpretation Act* 1984. These are the indicators to be considered in determining whether a de facto relationship existed, although the legislation makes clear that the existence of each is not essential to a finding there such a relationship.

(a) *the length of the relationship;*

293 The parties were in a relationship from the time they commenced sleeping with each other in the middle of 2003. The relationship continued in various guises from that time, but began to disintegrate by not later than August 2004. Any semblance of a relationship, other than a business association, ended not later than July 2006, when Mr Truman left the residence in which they had resided. The fact Mrs Clifton craved a relationship with Mr Truman, and he made perfunctory efforts to pretend they might have one, does not mean they had a relationship.

(b) *whether they have resided together;*

294 The parties have resided together at the times I have described in detail. In summary there were some periods of cohabitation of many months at a time in [the regional centre] and some shorter periods when the parties resided together in [the Eastern States]. There were, however, significant periods when they did not reside together, some of which were not by necessity. They did not reside together at all after July 2006.

(c) *the nature and extent of common residence;*

295 I have described the extent of common residence. For most of they time they lived together their common residence was also their business premises.

296 I find it likely that most of the housework was undertaken by Mrs Clifton, with some paid assistance. I accept Mr Truman did undertake a few chores, but these were largely confined to cooking on the barbeque and purchasing the drinks.

(d) *whether there is, or has been, a sexual relationship;*

297 Sex was an important part of the relationship when the parties first lived together. Their physical relationship then waned fairly quickly, until Mr Truman lost all interest in Mrs Clifton. Their final, isolated, act of intercourse occurred even after the date Mr Truman acknowledges their relationship had ended.

298 Mrs Clifton had no other sexual partner from 2003 until the last time she had intercourse with Mr Truman in 2007. **[Deleted at the direction of the Court.]**

299 I do not accept Mr Truman's assertion that he had no other sexual partners during his relationship with Mrs Clifton. I have found it likely he used prostitutes [overseas]. The Court only knows about this because he bragged to someone who, to his surprise, became a witness. If he carried on like that during the early stages of a new relationship, I consider it is probable he would have behaved in a similar way at other times when the opportunity arose, as it did on many occasions – for example

during his many trips to Perth and the “scuba diving trip” with [Mr J], who was with him [overseas].

300 I find Mr Truman was involved in a sexual relationship with Ms B from not later than the first half of 2006. Ms B was in a relationship with him at the time of the trial (although according to Mr Truman not living with him all the time). She was in [the regional centre] throughout the trial, yet was not called to give evidence. The failure to call her to rebut the case that had been so firmly mounted demands an adverse inference. The evidence points firmly to a clandestine relationship over an extended period.

301 Notwithstanding the detail I have provided about his contact with the person connected to the mystery number (allegedly [an employee of the business]), I do not propose to make any finding about Mr Truman being involved in another sexual relationship at the same time (or even before) he was in a relationship with Ms B. The records do point to a suspicious set of circumstances, but ultimately Mr Truman was not given an opportunity to present a case on this topic. What I can say is that his *modus operandi* and his lack of credibility do not allow me to accept that his sexual relationships were confined to the one he maintained with Ms B during the time he says he was in a “marriage-like relationship” with Mrs Clifton.

302 I was asked to draw an adverse inference against Mr Truman because of his failure to call Mr J. This submission must be considered in light of the fact that Mr S’s affidavit was filed close to trial and leave was needed to rely upon it. Mr Truman’s advisers would have needed to move quickly to proof Mr J concerning what happened when he was with Mr Truman [overseas]. It may have been hoped that [Mr S’s] affidavit would not be admitted. Nevertheless, Mr Truman acknowledged he had seen Mr J just before the trial and he assumed he was still in [the regional centre] at the time of the trial. I was not informed of any effort to have Mr J attend to give oral evidence, which clearly would have been permitted given the late filing of [Mr S’s] affidavit. Nor was I requested to allow an adjournment for evidence to be obtained from Mr J. No attempt was made to lead evidence from him when an application to re-open was made months after trial. Although it is open to me to draw an adverse inference, I will not do so since I have arrived at my findings (in relation to the likelihood of Mr Truman having other sexual relationships) without the need to draw such an inference.

303 I also do not draw adverse inferences against Mrs Clifton arising out of the fact that she apparently “released” witnesses under subpoena (these included [Mr R], the owner of [a tourism business], and [Mr N], who was said to be on the houseboat on the night Mr Truman picked up Ms B). There could have been many reasons they were released, including my firmly stated intention to ensure the trial was completed in the three days allocated.

(e) *the degree of financial dependence or interdependence, and any arrangements for financial support;*

304 The evidence relating to this factor was scant. There is no doubt that Mrs Clifton propped up the business, but this appears to have been on a commercial basis, pursuant to which she was entitled to reimbursement. It also appears she paid

more than her share of the domestic expenses, although this was a reflection of the fact she had private means, and Mr Truman expected she would do so.

305 Mrs Clifton largely provided the accommodation in which the parties lived. This was a reflection of the fact that she was wealthy. Much of the money Mr Truman obtained appears to have been set aside for his own use, for example the deposit of the proceeds of his [business assets] into his superannuation fund. He did receive periodic payments arising out of the collapse of [the national company], but it is unclear what became of this money.

306 Mr Truman did finally obtain access to a MasterCard for which Mrs Clifton was responsible and which he says he used for “our private purchases”. He nevertheless acknowledged she watched every transaction and questioned him about them. Mr Truman also acknowledged that Mrs Clifton “controlled the purse strings of the two businesses” and maintained the accounts. Significantly, however, he also acknowledged he continued to have full trust in her to do this until August 2008, which is well after the relationship had ended, even on his own story.

307 Exhibit 4, which was the letter from the accountants who were retained from July 2005, suggests efforts were made to keep a record of private expenditure funded by the business. Although Mr Truman contended there were errors in the figures, the fact remains that a business record of expenditure, differentiating between the two parties, was kept. It might also be thought of some significance that Mrs Clifton went to some length to ensure Mr Truman did not become aware of the details of her private finances. The significance of that factor, however, stands to be considered in light of Mrs Clifton’s evidence that she adopted a similar approach with her husband of many years – albeit she was estranged from him for much of their marriage.

308 Most significantly, before they commenced living together, while they were living together, and after they ceased living together, each and every financial transaction of any significance between the parties was formally recorded, sometimes by solicitors. In other words, all financial transactions were entered into on a commercial basis. Even at times when they were on good terms (for example when Mr Truman returned to Australia with the [business assets] he acquired [overseas] in early 2004), Mrs Clifton made clear her intention that contracts be honoured.

***(f) the ownership, use and acquisition of their property (including property they own individually);***

309 The parties never had a joint bank account. They never owned a home together. They never leased a home jointly (with Mrs Clifton always providing the home, although the business paid part of the rent on [the unit] which served as both home and office). They never jointly owned any property of any significance, except for business assets.

310 I am satisfied it is likely that the crab pots and other gear upon which some emphasis was placed in cross-examination were business assets, and not jointly owned personal property. The main items of property they acquired jointly were held by [the company]. These included the houseboat and fast boat (subject of chattel mortgages

that were guaranteed by the parties) and a motor vehicle. They leased a bus and they also leased [business premises] through the company.

311 I consider it is significant that the support provided by Mrs Clifton to Mr Truman in acquiring valuable assets in his own right not only pre-dates, but also post-dates, the period in which it could be reasonably suggested they were living in a de facto relationship.

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

312 I am satisfied Mrs Clifton was moving toward a commitment to a shared life, at least for a few months in 2004, but I am not persuaded Mr Truman ever had such a commitment. After 2004, Mrs Clifton still wanted to commit to a shared life with Mr Truman but, as time progressed, realised this was not to be.

313 I accept Mrs Clifton's evidence that whilst in the early days Mr Truman said he was going to marry her, he never actually proposed. Instead he said he would "force" her to marry him "one day". Her response was to laugh and reply in a non-committal fashion, as she was "ambivalent about the whole thing". The impression I gained is that she was anxious to have a loving relationship rather than the formality associated with marriage, given the unhappiness she had experienced in her previous marriage. I accept, however, that she was cautious about making a commitment and that her intention was to test the waters to see how events unfolded.

314 It is true that Mr Truman spoke to Mrs Clifton of "growing old" together, but she was looking for immediate satisfaction and commitment, not some prospect of merely spending the rest of their days together. I consider she accurately stated the nature of their relationship when she said "we were lovers – that is how we looked at it – I did not think it was a de facto or committed marriage-like relationship – we were having fun for a while".

315 I certainly did not accept the proposition put to Mrs Clifton that as early as the time they were in [the Eastern States] in 2004 they had decided to have a life together. I accept Mr Truman was expressing a strong desire for Mrs Clifton to come and live in [the regional centre] and was saying he wanted to spend the rest of his life with her. Whilst Mrs Clifton enjoyed the expressions of devotion, she also felt that Mr Truman was "coming on a bit hot and strong" and that it was "too full on".

316 I find it is of at least some significance that the parties never spent Christmas together. Mrs Clifton liked Mr Truman's mother, yet there is no suggestion [Mr Truman's mother] was ever asked to join the Clifton family for Christmas, which they regarded as a very important occasion. Mr Truman also clearly regarded Christmas as significant, but seems to have been content to travel a long distance to spend it with his mother, rather than with the woman with whom he claims he was living in a "marriage-like relationship". Whilst Mrs Clifton expressed dissatisfaction with many aspects of her relationship with Mr Truman, she never expressed the slightest disappointment about him spending Christmas away.

317 Mr Truman explained the fact the parties always spent Christmas apart in this way:

[Mrs Clifton] was 59 years old when we met and I was 55. Before we had met, we both had established families (with adult children) and lived fairly independent lives. We discussed this and the fact that while we were committed to each other and our relationship, there were some parts of our lives that we wanted to remain independent of our relationship, such as our arrangements at Christmas.

318 I regard that assertion as self-serving. In my view, the fact that Christmas was always spent apart is some indication of the fact that the parties were lovers, not part of each other's family.

319 I accept that the parties kept in regular telephone contact over many years; however, this included times when the relationship was in very poor shape. The large number of telephone calls needs to be assessed in light of what I consider to be important facts. First, Mr Truman made numerous calls to many people (although his text messaging was confined to a select few). Secondly, the parties had a business which required them to be in frequent contact. Thirdly, Mr Truman was apprehensive about what would happen if Mrs Clifton withdrew her financial backing from the business. In my view this goes a long way to explaining why he continued to maintain he had affection for her, when it seems clear his affections had been transferred elsewhere. One way he pretended to have affection was to telephone Mrs Clifton frequently when they were apart.

320 I accept that the parties in the early days talked of their future life together, after they had made their fortune from the business, when they would travel and perhaps even live overseas. However, in context, I see this as being just as consistent with a relationship between lovers who were planning to operate a business together and dreaming of what might be if everything worked out.

321 I accept that Mr Truman found Mrs Clifton "charming and had a great sense of fun early on in our relationship". However, I do not accept his assertion that it was her "controlling behaviour in relation to my relationship with [Tony Truman, his son] and constant paranoia about me having affairs [that] eventually forced me to end the relationship". What ended the relationship was that Mrs Clifton finally realised that Mr Truman had never really cared for her and wanted to pursue at least one other relationship. Once it was clear that she had formed that view, Mr Truman decided to move out of the residence which had become nothing more than a convenient base.

**(h) whether they care for and support children;**

322 There were no children of the relationship.

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

323 Mr Truman acknowledged in his affidavit he could not recall how Mrs Clifton introduced him to others. However he also claimed that "she did at times refer to me as her friend, as I did with her. She would also use terms like partner as would I". In particular, Mr Truman claimed to remember that Mrs Clifton introduced him as her "partner" when the Bishop of [the regional centre] came for dinner. If she did, I consider the context would have suggested they were business partners. Mrs Clifton is

somewhat “old school” and I accept does not use “partner” in anything other than the business sense. I consider it more likely, as she claimed, that she called Mr Truman her “friend”, “lover” or “business partner” depending on the context.

324 Mrs Clifton’s friend and neighbour in [the Eastern States], [Ms W], was not required for cross-examination. She said she met Mr Truman in April/May 2004, when he was introduced by Mrs Clifton as her “business partner”. She said she had never seen Mr Truman again, nor seen any indication of his presence at Mrs Clifton’s home (although it is to be noted that Ms W spends January, February and March away each year). Ms W also said Mrs Clifton never spoke to her about Mr Truman after their initial meeting.

325 Mr Truman asserts that he and Mrs Clifton were seen as a couple from “fairly early on in our relationship”. For example, he says they were invited to [a corporate] tent for the [races] from 2004 to 2007, and they also received an invitation to the launch of [an art exhibition]. He did not accept that it was Mrs Clifton who arranged for him to be invited to attend these events. I find that it is likely it was she who was instrumental in such invitations being issued.

326 I accept the parties would have been seen around the town as people who ran a business together; sometimes went out together; and spent part of the year living in the same residence (which for much of their relationship was also their business office). On many other occasions, however, Mrs Clifton would have been seen at social events in [the regional centre] without Mr Truman, for example when she was in the company of Ms V. They would also have often been seen going their “own way”, with one [travelling] away from [the regional centre] whilst the other remained behind.

327 Anybody who saw Mr Truman and Mrs Clifton together would never have seen any signs of affection or intimacy. In this regard, Mr Truman’s testimony was telling when commenting on the evidence of Ms F. Ms F was a reliable witness who lived next door to the apartment. Her testimony is significant in considering the “reputation and public aspects” of the relationship. I therefore propose to set out her evidence almost in full (excluding the “rumour” evidence):

1. ...
2. I first met [Mrs Clifton] and [Mr Truman] when they moved into next door to where my husband [A] and I were living, at the “[the apartment block]” in [the regional centre], which is [a complex] overlooking [the ocean]. I do not recall when this first meeting took place.
3. [BC], who owned one of the units at the [apartment block] invited [A] and I over for dinner to introduce us to [Mrs Clifton] who had moved into [BC’s] apartment, next door to us.
4. [A] and I met [Mr Truman] and [Mrs Clifton] as a couple. We had never seen them next door, at the time.

5. My first impression of [Mr Truman] and [Mrs Clifton] was that they had a business relationship (they informed me they were operating a business together). I never thought that [Mrs Clifton] and [Mr Truman] were in any sort of personal relationship, as I did not observe any physical affection or displays of intimacy between them.
6. Over the time that I saw [Mr Truman] and [Mrs Clifton] together, I never witnessed any loving or affection displayed by [Mr Truman] towards [Mrs Clifton].
7. After that first meeting, I regularly had conversations with [Mrs Clifton] at the [complex]. In contrast, I only recall having a few conversations with [Mr Truman]. I did not have any in depth conversations with [Mr Truman].
8. As I recall, [Mrs Clifton] regularly went back to [the Eastern States] and was generally in [the regional centre] for short stints at a time. [Mrs Clifton] told me in conversation that she owned a home in [the Eastern States], and also had children and grandchildren there.
9. [Mrs Clifton] would travel to [the Eastern States] and stay for variable periods of time, usually between about 2 weeks though to 1 month. I recall that on one occasion [Mrs Clifton] was absent from [the regional centre] for a very long time, and I found out in conversation with her at a later point that she had undergone [an] operation.
10. I had spoken with [Mr Truman] a couple of times during that period, but he had not mentioned that [Mrs Clifton] was unwell.
11. I recall being invited for dinner at the unit [Mrs Clifton] and [Mr Truman] were staying in at the [complex]. I recall that they did not sit close to each other and that [Mr Truman] went to bed before [Mrs Clifton]. There did not appear to be any romantic connection between them.
12. I did not ever witness, during the whole time the unit was rented by [Mrs Clifton] and [Mr Truman], any affection between them.
13. On the few occasions when I had spoken to [Mrs Clifton] and [Mr Truman] together, I recall that the majority of [Mr Truman's] comments were "money oriented" and generally concerned matters such as the purchase of new boats and machinery for the business, [work] to be carried out on the [business assets], and so forth.

...

328 When it was put to Mr Truman that Ms F had seen no signs of "physical affection or displays of intimacy" between him and Mrs Clifton, he said "that is

normal for me. I am not intimate with my partner in public. I am not a person to walk down the street holding hands”.

329 Mr Truman otherwise sought to downplay Ms F’s evidence by claiming he had “minimal” contact with her after she had ignored him when he tried to say “hello” after the dinner party. He said he found Ms F to be “strange and rude” and volunteered he had not spoken to her once during the dinner party. My impression of Ms F, albeit based on her brief appearance in Court, was that she was a most charming and impressive young woman. In any event, Mr Truman could not remember that Ms F had also subsequently been to dinner with him and Mrs Clifton at the apartment. To the extent his evidence conflicted with hers, I accepted that of Ms F.

330 Ms V worked closely with both parties in the business. In the first week (in 2004) she witnessed Mr Truman abusing Mrs Clifton to such an extent that she formed the view he did not even like her. She asked Mrs Clifton why she was living with him, to which she replied that she and Mr Truman had “chemistry”. Ms V said she could never see any indication of this, instead observing that Mrs Clifton was “bullied incessantly”. On Mothers Day 2005, after Mr Truman walked out of a dinner at which he behaved “obnoxiously”, Mrs Clifton told Ms V she wanted to go home to [the Eastern States]. She also told Ms V that she could “have” Mr Truman - a proposition she quickly declined.

331 Mrs Clifton attempted to lead evidence of rumours [DELETED] concerning the notoriety of Mr Truman’s relationship with Ms B. Most of this was not given in a form that would assist in establishing when Mr Truman and Ms B commenced their relationship. However, in considering the public reputation of the relationship of Mr Truman and Mrs Clifton it may be seen as significant that a reliable witness such as Ms F was expecting to see Mr Truman and Ms B together at functions as early as Christmas 2005. However, I propose not to take this account, especially given the way I sought to curtail cross examination about [the rumours] during the trial.

332 It was noteworthy that Mr Truman failed to call Mr J to give evidence concerning the “reputation and public aspects” of the relationship. As counsel for Mrs Clifton commented, Mr J’s name kept popping up in the evidence. He went along on the trip [overseas]. He was on other overseas trips taken by Mr Truman. He accompanied Mr Truman and Ms B when they travelled back to [the regional centre] together in February 2007. He worked at [the regional centre business premises]. He went with Mr Truman and Mrs Clifton on the one and only occasion Mrs Clifton recalled she went crabbing with Mr Truman in 2005. He was clearly on close terms with Mr Truman and could potentially have given evidence of value. Ultimately, however, my findings about the “public aspects” of the relationship are made on the basis of the evidence given, rather than on the failure of Mr Truman to call an important witness.

333 I regard it as a matter of minor significance that a local shopkeeper told Tony Truman that his “mother” had been in their shop recently, when the reference was to Mrs Clifton. I treat that evidence as of similar value to the [rumours] which suggested Mr Truman was involved with Ms B and with [another] woman. No doubt all sorts of people had views about the nature of the parties’ relationship (and Mr Truman’s relationships with other women). One certain thing is that Mrs Clifton

was not, in fact, Tony Truman's mother. Suggestions to the contrary were no more than inaccurate supposition.

334 I accept that within Mrs Clifton's family there was consternation about the possibility of Mr Truman snaring some of Mrs Clifton's wealth, based upon a fear they might be in a serious relationship. However, I have accepted Mr K's evidence that Mrs Clifton assured him in this context in 2005 that she was not in a serious relationship. I also accept his evidence that whilst he was surprised to see Mr Truman come on the [family holiday], he and Mrs Clifton did not appear to be in a personal relationship, but rather seemed no more than friends and business partners. Mr K noted, for example, that there was no display of affection by Mr Truman towards Mrs Clifton throughout the holiday – in fact he did not see him touch her.

### Discussion

335 We live in a pluralist society in which concepts of even the most fundamental institutions, such as marriage, are highly value laden. Some of the components I have described of the relationship between Mrs Clifton and Mr Truman would be seen by some as consistent (or at least not inconsistent) with the concept of marriage and yet be seen by others as anathema to that concept.

336 In the case of legal marriage we have the certainty associated with the certificate of marriage. No matter how appalling the nature of the relationship, those who have complied with the formal requirements of the *Marriage Act 1961* (Cth), or its overseas equivalents, are without doubt married. However, the moment a construct such as "*marriage-like*" is introduced, value judgments will come flooding.

337 It may well be there are men (and women) who enter into marriage, fully intending to carry on, or at least leave open the possibility of, sexual relationships with others. There are no doubt men (and women) who treat their spouse badly from the very moment they enter into their marriage. There are no doubt marriages in which the wealth or potential wealth of one party is the major inducement to join the union. There are marriages in which husband and wife keep strict accounts, never intermingling what they regard as "theirs". Some prospective spouses enter into agreements about how their financial issues will be resolved in the event their marriage ends – a phenomenon now regulated by our legal system.

338 How then is a judge expected to decide whether a relationship between a man and a woman (or indeed under this legislation same-sex couples) is "*marriage-like*" in circumstances where married couples straddle the spectrum from the deliriously happy to the homicidally estranged?

339 Faced with such a dilemma the judge will look first to the legislation which governs the dispute and will also be guided, insofar as they are not inconsistent with the legislation, by any authoritative utterances from other judges, especially those occupying superior positions in the hierarchy.

340 In contemplating pronouncements of other judges it is, of course, most important to keep in mind the statute with which they were dealing. Thus in the present case I was referred to authorities where the court was interpreting different statutory

formulations to that governing the present proceedings. For example, in *S v B (No 2)* (2004) 32 Fam LR 429 the Court of Appeal of the Supreme Court of Queensland was dealing with a definition of a “de facto partner” as being a reference to “either 1 or 2 persons who are living together as a couple on a genuine domestic basis”. In *Ingamells v Western Australian Trustees Ltd* (unreported, Supreme Court of Western Australia, Malcolm, Rowland and Ipp JJ, 5 March 1993) the Full Court of the Supreme Court of Western Australia was dealing with “a de facto widow or widower”. In *Richardson v Kidd* [2002] NSWSC 306 the Equity Division of the Supreme Court of New South Wales was considering a “de facto relationship” which was defined as a “relationship between two adult persons... who live together as a couple”. None of those cases were concerned with the interpretation of the expression “marriage-like”, which is an integral component of the definition in s 13A of the *Interpretation Act* 1984.

341 Former Chief Justice Gleeson grappled with the concept of de facto marriage in *MW v Director-General, Department of Community Services* (2008) 244 ALR 205. In that case the High Court was required to consider whether the parents of a child who had previously resided in New Zealand had lived there “as a couple in a relationship in the nature of marriage or civil union”. Putting aside the New Zealand “civil union”, which involves a public registration process, the expression “a relationship in the nature of marriage” is so analogous to the expression “marriage-like relationship”, as to make the observations of Gleeson CJ of potential assistance.

342 Gleeson CJ was in the minority in *MW*; however, his dissent arose from his view of the facts rather than the content of the law. In explaining his reasons, his Honour made the following observations [emphasis added, footnotes omitted]:

Finn J [in the Full Court of the Family Court in the matter under appeal] was correct to stress the difference between living together and living together “as a couple in a relationship in the nature of marriage or civil union”. **The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved.** (As will appear, the qualification is significant in the present case.)

When divorce, for various reasons, was more difficult, in former times, de facto relationships often existed because there was an impediment to legal marriage. A common impediment was a subsisting marriage of one of the parties. Marriage, in Australia and New Zealand, involves legal requirements of formality, publicity and exclusivity. A person may be a party to only one marriage at a time. De facto relationships, on the other hand, do not involve these elements. They are entered into, and may be dissolved, informally. In Australia, marriages are required to be entered on a public register. In New Zealand, marriages and civil unions must be registered. Parties to marriages and civil unions do not have a choice as to whether, when, and by what means they will disclose their status to the

public. It goes without saying that there is no mandatory public registration of sexual relationships, even if they involve cohabitation. **De facto relationships may co-exist with the marriage of one or both parties and, at least in some circumstances, people may be parties to multiple de facto relationships. Yet the law to be applied in this case acknowledges that some are, and some are not, in the nature of marriage. How is the difference to be determined? No single and comprehensive answer to that question can be given, but there is one test that is applicable to the present case.**

In *Stack v Dowden*, Baroness Hale of Richmond said:

“Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage ... So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves ‘as good as married’ anyway: Law Commission, *Consultation Paper No 179, Part 2, para 2.45.*”

There is no reason to doubt that the same is generally true of Australia and New Zealand. It may be added that, in Australia, what often prompts cohabiting couples to marry is a decision to have a child, and to do so within the context of a marriage. People often refer to this as “starting a family”. The cohabiting parties to many relationships, especially first relationships of the “short-lived and childless” kind, may be surprised to be told that they are involved in a relationship in the nature of marriage or civil union. They may intend no such thing. **The same may apply to some people in longer-term cohabitation who have chosen not to marry. It is the common intention of the parties as to what their relationship is to be, and to involve, and as to their respective roles and responsibilities, that primarily determines the nature of that relationship. The intention need not be formed in terms of legal status: to some people that is important; to others it is a matter of indifference.** (By hypothesis, the parties to a relationship that satisfies the statutory description are not married, or in a civil union.) **The intention**

may be expressed, or it may be implied. What is relevant is their intention as to matters that are characteristic of a marriage or a civil union, but that do not depend upon the formal legal status thus acquired. To describe a relationship as being in the nature of marriage implies a view about the nature of marriage. The same applies to a civil union. It is unnecessary, for present purposes, to attempt a comprehensive account of the features of a relationship that might justify such a description. Plainly, “living together” is not enough. For present purposes it is sufficient to focus upon that aspect of the relationship between the appellant and the father that gives rise to this dispute, that is to say, shared parenthood, and upon the inferences as to intention that may be drawn from that.

In *Magill v Magill*, and earlier in *Russell v Russell*, reference was made to the historical role of the institution of marriage as a means of involving males in the nurture and protection of their offspring, and to the importance of the structure of marriage and the family in sustaining responsibility for, and obligations towards, children. There is a wide range of human behaviour across the spectrum between a sexual encounter and a marriage or civil union. It includes relationships which could never be described as being in the nature of marriage or civil union. **Nevertheless, when a sexual union results in the birth of a child, cohabitation between the parties to the union is no longer a matter of purely personal convenience or satisfaction.** The interests of a third party have intervened. Traditional concepts of marriage and the family as institutions for the protection of children, and modern concepts of shared parental responsibilities even in the absence of a formal union, may come into play in characterising the relationship. The present case provides an example.

343 It will be seen that Gleeson CJ was of the view that not all “de facto relationships” are “in the nature of marriage”. He also acknowledged that describing “a relationship as being in the nature of marriage implies a view about the nature of marriage”.

344 Marriage is commonly (although not universally) described by reference to the formulation used by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130 at 133. His Lordship saw marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others”. This formulation is echoed in legislative provisions, including the *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth). The latter now expressly defines marriage as being “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

345 The Hon Alastair Nicholson, former Chief Justice of the Family Court of Australia, strongly criticised the insertion of this definition of marriage in the *Marriage Act 1961*, primarily because of its impact on same-sex couples. Writing in the *Melbourne University Law Review*, the former Chief Justice suggested it was “more likely that [this] concept of marriage had its origins in the commercial ambitions of the English upper and middle classes of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries”. In the course of his criticism of the decision to amend the legislation by

incorporating the Lord Penzance definition, Mr Nicholson wrote ([2005] MULR 17, footnotes omitted):

It is worth noting that Lord Penzance's definition was inaccurate at the time that he gave it and remains inaccurate today. It is difficult to understand how, even in 1866, marriage could have been defined as 'a union for life', having regard to the passage of the *Divorce and Matrimonial Causes Act 1857*...which established civil divorce. Given that the rate of divorce is increasing, it is even more nonsensical to refer to marriage as a union for life today.

Similarly, since the concept of matrimonial fault has been abolished by the [*Family Law Act 1975*], and in particular since adultery is no longer a ground for divorce, it is difficult to argue that a modern marriage necessarily excludes all others, as Lord Penzance ... would have it...

346 In *Re Kevin* (2003) FLC 93-127 the Full Court of the Family Court of Australia (with Nicholson CJ presiding) held (at [87]) that "[t]he concept of marriage... cannot, in our view, be correctly said to be one that is or ever was frozen in time". This statement preceded the 2004 amendment to the *Marriage Act 1961* by which the Lord Penzance definition of marriage was inserted. It should be noted, however, that this definition applies only for the purposes of that Act. (For other discussions of the concept of marriage see *R v L* (1991) 174 CLR 379 and *W v T* (1998) FLC 92 -808.)

347 The Parliament of Western Australia provided no definition of "marriage" when enacting the legislation which defines a de facto relationship as being "marriage-like". There would be little point in doing so, given that to come within the definition a relationship needs only to be "like" a marriage, and is thus inherently an elastic concept. Nevertheless, the formulation does require a judge administering the law to reflect on the nature of marriage. In reflecting, the judge is directed to consider the list of factors contained in the *Interpretation Act 1984*. The utility of the list is nevertheless to some extent limited, as the legislation makes clear that the existence of each of the factors is not "essential" to the existence of the relationship.

348 It is also important to note that s 13A(3)(b) of the Act specifically provides that in deciding whether two people lived in a de facto relationship, "it does not matter whether ... either of the persons is legally married to someone else or in another de facto relationship". This is, at first glance, a somewhat puzzling proposition, given that exclusivity is generally accepted in western society as a hallmark of marriage, notwithstanding it is understood that some married people have extramarital liaisons.

349 In any event, s 13A(3)(b) was seized upon in these proceedings as meaning that it didn't really matter whether Mr Truman might have been having a relationship with another woman whilst professing to be in a committed relationship with Mrs Clifton. He could have been living in a de facto relationship with Ms B and yet have been in a de facto relationship with Mrs Clifton at the same time.

350 Interpretation of s 13A(3)(b) causes no difficulty insofar as it allows for a de facto relationship to co-exist with a legal marriage. One or both of the parties may still be legally married but have no connection of any sort with their legal spouse.

But how can a couple be in a “marriage-like” relationship if at the very same time they are also in the same sort of relationship with another person? The Attorney General referred to this provision in his second reading speech but gave no indication of the circumstances in which the provision would have real application: Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 August 2001, 3291-3296 (Jim McGinty, Attorney General).

351 In my view it might come as a surprise to a citizen of Western Australia to learn that a man can carry on a relationship with two women at the same time and yet have **both** relationships described as “marriage-like”. Such conduct would be more likely to be seen as “playing the field”. It would be unlikely to be seen as consistent with the “mutual commitment ... to a shared life” which the legislation lays down as one indicator of a marriage-like relationship. Such conduct could also impact upon the “the reputation, and public aspects, of the relationship” if the second relationship is not kept entirely secret.

352 Although I do not have the benefit of submissions, it occurs to me there is one way in which the legislation can be interpreted so as not to distort beyond recognition the generally accepted concept of marriage in western society. This approach proceeds on the basis of an acceptance that the permutations of intimate relationships are infinite. For example, we sometimes hear of men who lead “a double life”. They have one woman in one place and one in another, with the existence of both known only to him. Each of the women (and those who know them) may consider they are in a committed relationship and accept it is an unfortunate reality that their partner has to travel so often. Parliament may have wanted to put beyond doubt that women placed in that position would not be denied the beneficial effect of the legislation. In my view, what Parliament has done, very wisely, is to repose in the courts a considerable discretion in determining whether a relationship is “marriage-like”. Section 13A(3)(b) is just part of the way in which Parliament has achieved that objective.

353 One thing is clear. As Gleeson CJ (and Finn J in the Full Court of the Family Court of Australia) pointed out in *MW* (supra), there is a significant difference between merely “living together” and living in a relationship that is “marriage-like” or “in the nature of marriage”. Where the line is drawn will depend upon an assessment of all of the elements of the relationship. As the Full Court of the Federal Court said in *Lynam v Director-General of Social Security* (1983) 52 ALR 128 at 131 [my emphasis added]:

Each element of a relationship draws its colour and significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. **In any particular case, it will be a question of fact and degree, a jury question**, whether a relationship between two unrelated persons of the opposite sex meet the statutory test.

354 As Dutney J said in *S v B (No 2)* (supra at [49]), “In a de facto situation it is the party asserting the relationship that must prove cohabitation of the required quality”. I am not persuaded that Mr Truman and Mrs Clifton lived in a “marriage-like” relationship. I find they merely lived together from time to time.

355 At the risk of falling into the error referred to in *Lynam*, I have to say I do not consider it is in the accepted nature of a marriage for every important financial transaction between a couple to be formally documented. It is not in the accepted nature of a marriage for a man to use prostitutes (or to tell people he uses prostitutes) at the same time he claims to have committed to a woman for life. It is not in the nature of a marriage for a man to carry on a relationship behind the back of a woman who he knows has been faithful to him. It is not in the nature of a marriage for a couple to spend what they regard as a most significant occasion every single year apart from the other. Arguably it is also not in the nature of a marriage for a couple voluntarily to spend as much time apart from each other as this couple did. This relationship lacked the commitment to a shared life that characterises marriage. I am also not persuaded that the relationship was seen by those who knew them as being “marriage-like”. On the contrary, many wondered why they were together at all.

356 I find this relationship to be that of two people who “fell” for each other during a romantic interlude in a tropical paradise. She was looking for love after coming out of a loveless marriage. He too may have been looking for love, but not of the long term nature she craved. He was pleased to have found an attractive companion, but even more pleased she was so rich. After a few months of comparative happiness, their relationship disintegrated. Thereafter it was little more than a business partnership, interspersed with occasional sex, in which one pined for what she had lost, and the other connived to keep what he had gained.

### **When did any de facto marriage relationship end?**

357 If I am wrong in concluding that this relationship was not “marriage-like”, the question would then arise as to when it “ended”. This is because s 205ZB(1) of the *Family Court Act 1997* provides that proceedings for property settlement must be commenced within two years after a de facto relationship “ended” (unless leave of the Court is given). I have written at some length concerning this provision in other judgments including *E and P* [2005] FCWA 4 and *L and C* [2005] FCWA 23. Given my finding that there was not a de facto relationship here I do not propose to spend a great deal of time dealing with this issue.

358 I adopt, with respect, the observations of Mahoney JA in *Hibberson v George* (1989) DFC 95-064, where his Honour said (at 75,766) in considering the time of cessation of a de facto relationship:

There is, of course, more to the relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship of marriage, being based in law, continues notwithstanding all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated, without children, and

without the exchange of incidents which the relationship normally involve. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to “live together” with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as was suggested in the present case, to enable the one party or other to decide whether it should continue.

359 In *Hibberson & George*, the trial Judge had said:

In the absence of any overt act or indication by the defendant to the plaintiff that she was staying away only temporarily and intended to return, it seems that I must find that the relationship had ceased by 1 July [i.e. the date of which the NSW *De Facto Relationships Act 1984* commenced].

360 Mahoney JA, and the other members of the New South Wales Court of Appeal, saw no error in this approach.

361 For the reasons I have given, it is clear that any de facto relationship that may have existed ended not later than July 2006 when Mr Truman last lived with Mrs Clifton. However, I find that any such relationship ended in August 2004 when Mrs Clifton went home to [the Eastern States] after sending the letter to Mr Truman following the day at the races. That letter terminated their personal relationship in the form it had existed to that time and although Mrs Clifton thereafter returned to [the regional centre] residence (as she said she would), it was on a different basis than when they had first commenced to live together. Upon her return Mrs Clifton was there to protect her interest in the business, albeit carrying on some form of relationship with Mr Truman and hoping it might resume the form it had taken in the first few months they lived together. It never did.

362 That being the case, not only was this a relationship of well under two years’ duration, but Mr Truman also needed leave to institute the proceedings as he delayed commencing action in this Court until February 2009 (having in the meantime commenced proceedings in the Supreme Court). I have not yet ruled on the application to amend to seek leave to file out of time. Given that I have found there was no de facto relationship, it is unnecessary to do so.

### **Serious injustice**

363 If I am mistaken in concluding there was no de facto relationship (but right in concluding any such relationship lasted less than two years) it would be necessary for me to determine whether there would be serious injustice if orders were not made as sought by Mr Truman, given it was conceded he made “substantial contributions” during the relationship.

364 Mr Truman’s case in relation to this part of the dispute proceeded on an assumption that, following the breakdown of their relationship, Mrs Clifton had behaved vindictively, with a view to obtaining revenge. He claims to have missed out on the money he hoped to receive from the sale of the business and to have lost his

half share of a thriving business. The way he sees this misfortune being resolved is by resort to the discretionary property regime available under the *Family Court Act 1997*, rather than by resort to the law which would apply to others engaged in the sort of joint venture in which he was involved with Mrs Clifton.

365 I find no merit in this proposition. Everything of substance the parties did together financially was documented at arms length. They held an equal number of shares in the corporations by which they elected to conduct their joint venture. They made a conscious decision concerning the appointment of a sole director to each of the corporations. They had a Shareholders Agreement governing their arrangement. If the law applying to others involved in such an enterprise does not provide Mr Truman with what he considers to be his entitlement, I am not satisfied there has been a “serious injustice”. In this regard, I note it was he who first invoked the jurisdiction of courts other than this Court. I also note that since that time other courts have dealt with many elements of the controversy, sometimes holding in favour of Mr Truman and sometimes not.

366 I consider it is of significance in this context that Mr Truman did not produce records of his superannuation fund. Whilst he claimed he had not been paid wages he was owed by the business (a fact in dispute), he did not provide adequate evidence of the extent to which superannuation contributions were paid on his behalf by the joint venture. There is evidence showing his superannuation fund received substantial payments during the time the parties were together. To the extent Mr Truman now asserts he did not receive wages, payments into his superannuation fund would necessarily have to be taken into account in assessing whether there would be “serious injustice” if relief was not granted by this court.

367 It is significant also to keep in mind that Mr Truman seems to have lived very well during his time with Mrs Clifton. He had a number of overseas trips funded by her or by the business. He has lived in high quality accommodation in both [the Eastern States] and in [the regional centre]. He gave no evidence of going without anything. He dined out regularly. He has put money into his superannuation fund. He has certainly not come out of the business as well as it seemed at one stage he would. However, the opportunity to do so well out of the business was only available as a result of the capital backing of Mrs Clifton. She too hoped to achieve a much better result from her hard work and from risking her home for the business. Whatever the true reason for Mr Truman’s detention [overseas], it was certainly not her fault – and yet it was arguably that incident which led to both of them losing the very attractive deal they had negotiated to dispose of their business.

368 Any “serious injustice” to Mr Truman in these proceedings could only be rectified by funds flowing from Mrs Clifton. I am not persuaded it would be in any way just for her to be required to part with any funds, save for those which she would be required to pay by application of the general law. I am not persuaded she adopted anything other than a commercial approach to the resolution of the issues that arose after [a potential buyer] pulled out of the deal to acquire the business. She had been as keen as Mr Truman to obtain a good price on sale of the business. It was not her fault the deal collapsed. She now stands to gain no more out of the winding up of their affairs than that to which she is entitled by application of the law governing all commercial transactions. There is no significant element of their dispute which

relates to anything other than their business, which it was clear was intended to be conducted on a strictly commercial basis.

369 I am not even satisfied that Mr Truman would achieve a better outcome under the discretionary regime available under the *Family Court Act*. Even if he might do better, that in itself could not constitute “serious injustice”, which by definition must involve something more than “injustice”. I therefore do not accept the submission of counsel for Mr Truman there can be no such thing as an injustice that is not serious. It is clear Parliament intended that something more than mere “injustice” must be established in order to satisfy the requirements of the statute.

370 Martin, Crooks and Moncrieff JJ in recent decisions in this Court have all cited with approval *Van Jole v Cole* (2000) 26 Fam LR 228 in which the term “serious injustice” was considered. That case concerned an application to set aside a separation agreement, but the discussion is of general application. In seeking to elucidate the meaning of “serious injustice”, Riley J said (at 231) that a court:

... will not interfere where there is simple injustice. Rather, it must be satisfied that a failure to intervene would result in “serious injustice” between the parties. What it is meant by that expression is not defined in the Act and has not been explored in any helpful way in any case that either counsel or myself have been able to locate. The expression is not a term of art and does not have any technical legal sense. It is therefore to be understood in the sense in which it is commonly used in the English language.

...An injustice is the opposite of justice and includes the concepts of a wrong or unfairness. The word serious in this context suggests weighty, grave or considerable.

371 I respectfully adopt that construction of “serious injustice” and find that the case presented on behalf of Mr Truman falls well short of meeting it.

## Transcript

372 The resources of the Court are insufficient to allow transcript to be obtained of proceedings. Judges are routinely forced to rely upon their own notes. On occasions these prove inadequate and resort is then made to the tape recording of the hearing.

373 In preparing these reasons it became necessary to resort to the recording of the third day of the trial to clarify some parts of the evidence. My Associate was informed that the tape recording held in [the regional centre] had been erased. The parties were then invited to provide their own transcript of the evidence, it having been noted that a clerk engaged by one of the solicitors had been keeping a typewritten record when she was not engaged in inspecting recently produced documents. That transcript was duly provided, for which I was grateful. However, it immediately thereafter transpired that the tape recording had not been erased.

374 In these circumstances I should record that these reasons have been prepared on the basis of my own notes, with occasional resort to the tape recording and without resort to the clerk's transcript.

### Delay

375 It is not customary in my experience for judges to explain delay in delivery of judgments; however, I note that in recent times some superior courts have commented adversely on unexplained delay. Given the delay in delivery of these reasons I consider it appropriate I make some brief remarks on this topic.

376 At the time I reserved my decision I warned the parties that there would be a long delay in publication of my reasons. Although the hearing had occupied only three days, there were numerous factual issues requiring determination. I anticipated this would involve careful study of voluminous records that had been tendered. As I anticipated, the sifting through and analysis of these records proved to be time consuming.

377 A second factor leading to delay was the application made by Mr Truman to re-open the proceedings, which I was only able to consider adequately when I had undertaken my analysis of the evidence led at the trial.

378 A third explanation pertains to the resources of the Court of which I am the Chief Judge. In this regard I note that in his second reading speech introducing the "de facto amendments" to the *Family Court Act* in 2001, the then Attorney General drew attention to the workload and resources of the Court. The Attorney said this:

The Family Court of Western Australia was established in 1976, consequent to an agreement dated 26 May 1976 between the Commonwealth Government and the Western Australian Government. The Commonwealth provides funding for the operation of the Family Court of Western Australia pursuant to the terms of the 1976 agreement. The agreement also provides that the State will not appoint judges to the Family Court of Western Australia except with the approval of the commonwealth Attorney-General. By 1977, five judges had been appointed to the Family Court of Western Australia. Since then there has been no addition to the number of judges on the court.

Over the past 24 years the workload of the Family Court has increased considerably. The only way in which the court has been able to cope with this increase in its workload has been by the transfer of work from the judges to the registrar magistrates. There are seven registrar magistrate positions at the Family Court of Western Australia, but the number of registrar magistrates has not changed since May 1990 – a period of over 11 years.

I have written to the commonwealth Attorney-General and I will meet with him next Friday to discuss the resources of the Family Court of Western Australia and the appointment of a new judge to the court. An additional judge is required for two principal reasons. First, the pressure of the

court's existing workload has now reached the point that the court is unable to deliver an acceptable level of service to parties bringing applications before it, particularly in contested matters. Secondly, this Bill will confer on the Family Court of Western Australia additional jurisdiction relating to de facto relationships.

At the end of 1993, 106 cases were awaiting hearing in the defended list, and the list was growing. In March 2000, the number had increased to 374 cases that were awaiting hearing in Perth and a further 53 cases in circuit towns. That is a total of 426 cases, and the situation has deteriorated even further since then. At the end of July 2001, 414 cases were awaiting hearing in Perth and a further 71 cases in circuit towns, a total of 485 cases. These figures would have been even worse had not the Chief Judge conducted a review of the oldest 300 matters in the defended list in March 2001, which resulted in a number of cases being settled.

In 2000, the period between the filing of the initiating application and a likely trial date was approximately 16 months. Or even greater concern was the period between the conciliation conference and the trial date, which stood at approximately 12 months. In the current year the court has undertaken drastic changes to its case management procedures in an attempt to bring about a reduction in waiting times. These changes are currently in a transitional phase but cannot provide a complete answer to the problem.

379           Regrettably the additional judge referred to by the Attorney General in his second reading speech did not materialise. Nor did the discussions relating to resources result in any increase in the level of funding (although in more recent times funding has been provided to allow for the appointment of an Acting Magistrate to assist in reducing the backlog). At 30 June 2010 there were 597 cases in the defended list in Perth and the time from filing to trial had blown out to nearly two years.

380           The de facto property jurisdiction of the Court occupies a significant amount of judicial time. Filing in de facto property matters now constitutes 17% of the total number of filings. Unlike cases involving married couples, there are frequent jurisdictional disputes, such as the present, which lead to hotly contested hearings and which can then be followed by a dispute concerning the substantive issue in the event the Court is found to have jurisdiction, followed then by disputes in relation to costs. Thus one matter can lead to three judgments, not to mention numerous interlocutory skirmishes. Apart from paltry sums provided on an *ad hoc* basis by the State Government, the Court has received no additional funding to deal with this substantially increased jurisdiction.

381           In these circumstances it is to be expected that judicial officers will give priority to hearing and determining cases involving children, many of which are extremely urgent, rather than concentrating on jurisdictional disputes between couples seeking to divide their wealth. That said, however, I greatly regret the delay in delivery of these reasons and apologise to the parties and those who represent them for the undoubted anxiety and inconvenience.

**Orders and costs**

382 For the reasons I have given, the application of Mr Truman filed on 19 February 2009 will be dismissed. I will hear submissions from counsel in relation to the question of costs.

I certify that the preceding [382] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate