QUALIFYING AS A "SPOUSE" UNDER THE INTESTACY ACT: *BROWNELL V ROBINSON*

Sam McCullough

It is relatively rare for succession law issues to be considered on appeal by the Full Court of the Supreme Court of Tasmania. The Full Court in the 2017 case of *Brownell v Robinson* [2017] TASFC 11 upheld a decision of Justice Brett at first instance refusing to revoke a Grant of Letters of Administration that had been made in common form to the Plaintiff. This article considers several interesting aspects of the judgments of Brett J and the Full Court.

Introduction to the Case

Gerard McGarry ("Mr McGarry") died on 6 August 2013, without a Will. It was common ground between the parties at trial that Mr McGarry had for many years maintained some form of personal relationship with Christine Robinson ("Ms Robinson"). Mr McGarry and Ms Robinson did not marry, nor did they register their relationship. Mr McGarry did not have children.

Ms Robinson applied and obtained a Grant of Letters of Administration of Mr McGarry's estate in common form ("the Grant"). Mr McGarry's sister, Mary Anne Brownell ("Ms Brownell") applied to the Supreme Court of Tasmania (in the proceedings that were to become *Brownell v Robinson* [2017] TASSC 5) seeking to revoke the Grant. Ms Brownell asserted in those proceedings that Ms Robinson was not Mr McGarry's "spouse" at the time of his death, and was therefore not entitled to Mr McGarry's estate, or the Grant to administer that estate. Ms Robinson maintained that she was indeed Mr McGarry's "spouse", and defended the revocation proceedings.

The proceedings at first instance were determined by Brett J over a five day hearing, with Tremayne Faye Rheinberger (Chris Gunson SC and Renee Spencer as Counsel) for the Plaintiff, Ms Brownell, and Butler McIntyre & Butler (Daniel Zeeman as Counsel) for the Defendant, Ms Robinson. Brett J found for Ms Robinson. A costs hearing followed, the outcome of which was that Ms Brownell was ordered to pay Ms Robinson's costs of the action to be taxed, saved and except that the costs of a unsuccessful application by Ms Robinson to re-open her case were to be paid by Ms Robinson.

The Court of Appeal (Estcourt J, Pearce J and Marshall AJ) then heard Ms Brownell's appeal on 23 February 2017, Jane Needham SC taking over as Ms Brownell's Counsel. The appeal was dismissed unanimously, with Justice Estcourt providing a detailed judgment with which Justice Marshall agreed. Justice Pearce agreed that the appeal should be dismissed, agreeing with the reasons of Estcourt J with "one reservation" (which is considered below).

Relevant Legislation

Section 12 of the *Intestacy Act* 2010 (Tas) ("the Intestacy Act") provides that a person who is a "spouse" of an intestate, in circumstances where the intestate did not have children, receives all of the intestate's estate. If an intestate person has no spouse or children, then section 30 of the Intestacy Act provides that their siblings are entitled to share the estate equally between them.

"Spouse" is defined in section 6 of the Intestacy Act as follows:

> A spouse of an intestate is a person –
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> (a) who was married to the intestate immediately before the intestate's death; or
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> (b) who was a party to a registered personal relationship, within the meaning of the *Relationships Act 2003* , with the intestate; or
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> (c) who, immediately before the intestate's death, was a party to a **significant relationship**, within the meaning of the *Relationships Act 2003* , with the intestate that –
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> (i) **had been in existence for a continuous period of at least 2 years**; or
>
> (ii) had resulted in the birth of a child.

[Emphasis added]

Section 4(1) of the *Relationships Act 2003* (Tas) ("the Relationships Act") defines a "significant relationship" as a relationship between two adult persons, who "have a relationship as a couple" and are not married to one another or related by family.

Section 4(3) then lists the following statutory "indicia" of a "significant relationship" that is not a registered relationship, and directs that the Court must have regard to these indicia and all of the circumstances of the relationship when deciding whether a relationship qualifies as a "significant relationship" as defined by section 4(1) of the Act:

(a) the **duration** of the relationship;

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

(c) whether or not a **sexual relationship** exists;

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

(e) the **ownership, use and acquisition of property**;

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

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

(h) the performance of **household duties**;

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

[Emphasis added]

However, section 4(4) provides that no finding in respect of any of those indicia, or any combination of them, is to be regarded as necessary for the existence of a significant relationship, and "a court determining whether such a relationship

exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case".

That statutory test is similar to but not the same as that of a "de facto relationship" in section 4AA of the *Family Law Act* 1975 (Cth) ("the Family Law Act"), which applies to Tasmanian couples. The Family Law Act requires a finding that "having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis". The list of circumstances that the Family Law Courts are directed to consider are, however, almost identical (in wording and substance) to the indicia of a "significant relationship" noted above.

Readers may also be interested to contrast the definitions of "significant relationship" with that of a "caring relationship" in section 5 of the Relationships Act. The fundamental difference in the two tests is that a significant relationship requires a relationship *as a couple*.

Section 13 of the *Administration and Probate Act* 1935 (Tas) provides the foundation for the Court's discretion to grant Letters of Administration. Subsection (a) directs that in the case of a full intestacy a Grant should be made "to some one or more of the persons interested in the residuary estate of the deceased".

The power to revoke or set aside a Grant of Letters of Administration (or a Grant of Probate), and related jurisdiction, arises from section 6(5) of the *Supreme Court Civil Procedure Act* 1912 (Tas).

Rule 22 of the *Probate Rules* 1936 (Tas) (and now Rule 19 of the *Probate Rules* 2017 (Tas)) sets out the right of priority to apply for a Grant of Letters of Administration, which is first a "spouse", then children, and then more remote intestacy beneficiaries.

Whilst not in issue in the proceedings under consideration, the definition of "spouse" in section 2 of the *Testator's Family Maintenance Act* 1912 (Tasmania) ("the TFM Act") is worth noting as follows:

> ***spouse*** includes the person with whom a person is, or was at the time of his or her death, in a significant relationship, within the meaning of the *Relationships Act 2003*;

Notably, the additional requirements of the Intestacy Act that the relationship must have been in existence for a continuous period of at least two years, or had resulted in the birth of a child, are **not** requirements for the purpose of establishing eligibility as a "spouse" pursuant to section 3A of the TFM Act.

The Onus and Standard of Proof

Ground 10 of the Notice of Appeal asserted that Brett J had erred in law by failing to follow or apply the principles applicable to making findings of fact in cases such as this, as summarised in cases including *Ashton v Pratt (No 2)* [2012] NSWSC 3.

Counsel for Ms Brownell argued at first instance that: **(a)** Ms Robinson carried the onus of establishing that she was a "spouse"; **(b)** the Court was required to carefully scrutinise her evidence, and be satisfied that she was Mr McGarry's spouse "to a level of actual persuasion"; **(c)** the Court should not accept Ms Robinson's evidence about the relationship without it being corroborated.

Brett J said the following about those matters (at para 35):

> … It is **the plaintiff who will ordinarily carry the onus of proof**, at least to establish the existence of the cause in respect of the revocation of the grant. **However**, … taking into account that the grant which is sought to be revoked was granted in the non-contentious probate jurisdiction of the Court, and therefore without the scrutiny and analysis that would have occurred had the plaintiff contested the grant, it is appropriate to proceed on the basis that **I should only determine that the requisite relationship exists if I am positively satisfied of that fact on the balance of probabilities.** The determination that I am required to make is **a determination of fact which requires me to take into account all of the relevant circumstances and then make a judgment based on the criteria set out in s 4 of the *Relationships Act*.** … Having regard to the specific nature of this jurisdiction, and the type of exercise required to determine whether or not the relationship existed, I think that I should **only take into account a positive matter of fact asserted by either party if satisfied on the balance of probabilities of the existence of that matter**. I will then **need to make an overall assessment** in accordance with the type of exercise envisaged by s 4 of the Relationships Act." [Emphasis added]

The Court of Appeal agreed, with

Estcourt J finding that Brett J's analysis of the question of onus of proof extracted above was correct, and noting that it was relevant that probate litigation "has an inquisitorial heritage not shared by common law adversarial contests". Noting that the bulk of the evidence about the relationship came from Ms Robinson and her witnesses, Estcourt J concluded that it could not be said that the outcome turned on either the onus or standard of proof.

Was it a "Significant Relationship"?

Most of the evidence was directed towards the statutory indicia of a "significant relationship" set out above. The judgment at first instance, and the judgment of Estcourt J on appeal, each detail the evidence given by the various witnesses, and provide an assessment of how that evidence was relevant to the indicia of a "significant relationship".

Ms Robinson relied on the evidence of thirteen (13) witnesses, which can be briefly summarised as including the following:

- **her own evidence**, about the history and circumstances of their relationship. This included evidence about commencing a romantic relationship in 1990, and then moving in to live with each other for a short period in 1992. Ms Robinson's evidence was that because of Mr McGarry's problem with "hoarding" they had ceased living together later in 1992, and had separated for six months. At all times she maintained her own unit, and Mr McGarry his own home. She said that until Mr McGarry's death they "maintained a loving and committed relationship, an exclusive sexual relationship, and spent a considerable amount of time together". They visited each other regularly during the week, and had meals together regularly. She detailed the activities they would engage in together, including shopping, quiz nights, and family and social functions. They had conceived a child together in 1994, but jointly decided to terminate that pregnancy, and then later spent six years in the IVF program;
- the evidence of **Moira Nicholls and Rosemary Jones, work colleagues** of Ms Robinson and Mr McGarry, to the effect that Ms Robinson and Mr McGarry acted "like a couple", and that Mr McGarry had made statements to Ms Jones acknowledging the existence and de facto nature of the relationship, and in the last year of his life to the effect that he was happy in his relationship with Ms Robinson;
- the evidence of **Ms Robinson's sister**, **Ms Robinson's niece**, and **Mr McGarry's** Aunt, which was to the general effect that on many occasions they had both observed Mr McGarry and Ms Robinson acting as partners, and had always believed them to be so;
- the evidence of a **Anneliese Smith, a long-term friend** of Ms Robinson who knew Mr McGarry for the entirety of Ms Robinson's relationship with him, and frequently shared meals and social outings with them. She gave evidence of her observations of the relationship, and also Mr McGarry's "domestic" contribution; and
- **six other** witnesses, a mixture of work colleagues, friends and associates, all of whom gave evidence of observing, and believing, that Mr McGarry and Ms Robinson were a couple.

In seeking to prove that Mr McGarry and Ms Robinson were **not** in a significant relationship, **Ms Brownell** took a more numerically conservative approach to witness selection than Ms Robinson, with her case including only:

- **her own evidence**, which she acknowledged contained little direct observation of the relationship between Mr McGarry and Ms Robinson, as she had lived overseas and then interstate. She had met Ms Robinson at family functions, but had also observed occasions when Mr McGarry attended those functions without her. Mr McGarry had never said to her "that he was living in a domestic relationship with [Ms Robinson]"; and
- the evidence of **Julian McGarry, Mr McGarry's nephew**. Julian McGarry said that he and Mr McGarry had a close relationship, and had socialised together. His evidence was said by Brett J to have the overall effect of downplaying the strength of the relationship between Mr McGarry and Ms Robinson. That evidence included statements said to have been made to him by Mr McGarry to the effect that he did not want to be in a de facto relationship again with Ms Robinson, and to caution Julian McGarry against getting into relationships of that type. His evidence also included observing Mr McGarry being interested in meeting other women, and speaking to other women, but in cross examination he could not provide many specific examples of Mr McGarry exhibiting that behaviour.

Brett J clearly felt the absence of evidence from Simon McGarry, the brother of Ms Brownell and Mr McGarry, and the other person who stood to receive a share in Mr McGarry's estate if he was found to have died intestate without a spouse. Brett J queried whether he should make any inference from the absence of either party to call Mr McGarry, without explanation, but concluded that he was unable to draw any inference, as to do so would be of little weight in the circumstances.

Brett J noted the absence of several of the statutory indicia of a "significant relationship", or "features that would normally be expected in a marriage or marriage-like relationship". It was common ground that the parties did not reside together, except for a short period at the start of their relationship. They maintained completely separate finances. They did not always record the fact of their relationship with third parties like hospitals.

However, ultimately Brett J was convinced by the evidence that a significant relationship did exist (at paras 40-42):

> I am satisfied… that for a period of 23 years, (subpar (3)(a)) continuing up to the time of Mr McGarry's death, the parties shared a relationship in which each regarded the other as his or her exclusive partner in a sexual, emotional and practical sense. They fashioned their relationship around the particular circumstances of their lives… they maintained an exclusive sexual relationship …and had a mutual commitment to a shared life to the exclusion of anyone else… albeit that they accepted that they would not live together and would not have a shared financial relationship. They spent time together on a daily basis, went to social functions together regularly and were accepted by members of each of their families and by their mutual and individual friends, as a couple … Their original intention to have children was frustrated by external circumstances, but that was an indication of an emotional relationship which I am satisfied continued in the ensuing years until Mr McGarry's death. …the attempt to have a child can be seen as an indication of the strength of the emotional bond between them, and of their 'mutual commitment to a shared life'.
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> …I am satisfied that immediately before Mr McGarry's death, both he and the defendant regarded their relationship as the significant relationship in their lives. They were in a partnership, based on a romantic relationship, which was permanent and exclusive and involved a shared life, albeit not with some of the traditional features of a marriage-like relationship. However, as I have already discussed, the definition in the *Relationships Act* **is intended to embrace relationships constituted by two persons as a couple, which are of importance or of consequence to the parties to that relationship, to the exclusion of others…**

The substantive ground of appeal against the finding that the relationship was a "significant relationship" within the meaning of the Relationships Act set out above also failed.

Estcourt J noted that this was "a very unusual relationship" (at para 64), and noted several indicia/features of a "significant relationship" (including common residence) that were absent from it. However, "a mutual commitment to a shared life", and the provision of household duties, were established.

Estcourt J concluded (at paras 64-65):

> To my mind the evidence was overwhelming that the two had a "relationship as a couple" in the very broad and varied sense contemplated and embraced by the *Relationships Act*. I recognise that minds may differ as to the relative importance of the various relevant indicia of their relationship as a couple… The learned trial judge's evaluation of the evidence in his synopsis at [36]–[38] of his reasons bears out, in my view, the correctness of his Honour's analysis and conclusion at [39]–[42] of those reasons that, taking all of the circumstances of the case into account, including relevant indicia listed under s 4(3) of that Act, the respondent and the deceased were in a significant relationship for many years.

What was the Relevance of Periods of "Separation"?

There was evidence from Ms Robinson that following what were described as "tiffs" and "periods of not speaking" she and Mr McGarry "always got back together again". The question for the Court was whether these periods constituted an ending of any "significant relationship" that had been in existence before the falling out. A related issue was whether a relevant "separation" had occurred during the period two years immediately before Mr McGarry's death, with that being argued to result in the definition of "spouse" in section 6 of the Intestacy Act not being satisfied for that reason.

Brett J said, referring with approval to the judgment of Dutney J in *S v B* [2004] QCA 449 (at para 54):

> … The point being made by their Honours is that **a de facto relationship will depend for its existence on the mutual consent of both parties to be in that relationship**. When that consent is withdrawn by one party, the necessary element of mutuality is destroyed, and hence the relationship is no longer in existence. It is not the fact of separation per se which is important, **it is whether that separation manifests an intention on the part of one party to end the relationship, thereby withdrawing the necessary consent required for the existence of the relationship**… [Emphasis added]

The apparent ease by which "significant relationships" can be brought to an end (notice by one party to the other), particularly when compared to the requirement of at least twelve months separation as a couple and then divorce to end a marriage, continues to be an important distinction in the legal treatment of "de facto" relationships and compared to marriages, and the succession law and related consequences that can apply to the parties to them.

Brett J was not satisfied that a relevant separation had occurred in this case (at para 55):

> …The separations described by the defendant, including the last, could not, on the evidence, be taken to have manifested an intention by her to withdraw from the relationship. The mere fact that one or both parties, because of an argument, for a period of time, did not see or talk to the other party, does not necessarily manifest an intention to bring the relationship to an end. … In fact, the capacity of the relationship to endure periods of difficulty without real or long term impact on the viability of the relationship, demonstrates the degree of mutual commitment of the parties to that relationship.

Was the Relationship On Foot For Two Years Before Death? What is Required?

An interesting and still somewhat unresolved question considered by the judgment of Brett J at first instance, and then by the Court of Appeal, was whether for section 6 of the Intestacy Act to be satisfied the relationship had to be "on foot" for two years immediately prior to the death of the intestate, or only for any two year period at any time in the past.

Estcourt J said (at paras 93-98):

> I would nonetheless find myself in agreement with his Honour's observation that there is no reason from a policy point of view why the two year period specified by s 6(c)(i) of the *Intestacy Act* would need to exist immediately prior to the death of an intestate person *provided* that the significant relationship was in existence at that time.
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> … I do agree that the references in s 6(c)(ii) of the *Intestacy Act* to the birth of a child *or* the existence of a continuous period of at least two years are not references to temporal requirements, but to qualifying substantive qualities of the relationship required.
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> …in my view, the two-year period specified in s 6(a)(i) of the *Intestacy Act* is a qualitative requirement in the same way as is the birth of a child resulting at any time from a significant relationship in s 6(c)(ii) of that Act… It is only necessary that the significant relationship be in existence immediately before the intestate's death, and that that same significant relationship had been in existence at any time for a continuous period of at least two years.

As noted above, Marshall AJ agreed with the reasons of Estcourt J, including the above, without qualification or comment.

Pearce J gave a short judgment, agreeing with the reasons and conclusions of Estcourt J, but stopping short of stating a view about the two year issue. His Honour said (at para 102):

> Having made the findings of fact and law that the significant relationship had existed for the two years immediately before Mr McGarry's death, the conclusion reached by the trial judge on the final question was not determinative of the action. However, this appeal also challenges that conclusion. It is a question of statutory construction which, in my view, is attended by doubt. Given the decision of the majority of this Court, it is not necessary that I express a final view and I would prefer to not do so.

A fight therefore perhaps to be had another day, between two different families.

Concluding Comments

It can be very difficult to apply the statutory indicia of a "significant relationship" to the particular facts of a real relationship, particularly when one party to that relationship has died and cannot give their evidence and view about it. The significance of a relationship ending but then resuming within two years of death remains to be fully tested by facts that clearly evidence a relevant ending of the relationship. Future disputes about whether or not a significant relationship was terminated and not resumed before death are foreseeable. *Brownell* illustrates that making a Will and taking legal advice about the legal consequences of their relationship status for succession law (and superannuation law) purposes can be particularly important for those in what might (or might not) be later found to be a "significant relationship".

SAM MCCULLOUGH
Senior Associate
Simmons Wolfhagen