CITATION:	*Goodman v Public Trustee for the Northern Territory* [2019] NTSC 63
PARTIES:	Shirley Margaret Goodman and Public Trustee for the Northern Territory (as the Administrator of the Estate of Graeme Arthur Phillips
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	AS 6 of 2018 (21815221)
DELIVERED ON:	13 August 2019
HEARING DATE:	4 December 2018 & 21 December 2018
JUDGMENT OF:	BARR J

CATCHWORDS:

SUCCESSION – Family provision – deceased intestate – plaintiff applicant claims to have been the de facto partner or former de facto partner of deceased – former de facto partner not entitled to make application for provision unless maintained by the deceased immediately before his death – plaintiff failed to establish that she was de facto partner of deceased – plaintiff failed to establish that she was former de facto partner of deceased – alternatively, plaintiff failed to establish that she was maintained by the deceased before his death – further alternatively, plaintiff failed to establish that she deemed to have been maintained by deceased before his death – plaintiff's claim dismissed.

Family Provision Act 1970 (NT) s 7 (1)(a), s 7 (2), s 7 (7)(c), s 8 (1),

De Facto Relationships Act 1991 (NT) s 3 (1), s 3A (1), s 3A (2)(d) & (f), s 3A (3)(c), s 14, s 25, s 26, s 28.

Interpretation Act 1978 (NT) s 19A (3)

REPRESENTATION:

Counsel:

Plaintiff:	B Gillies
Defendant:	J Truman

Solicitors:

Plaintiff:	Michael Vale and Associates
Defendant:	HWL Ebsworth Lawyers

Judgment category classification:	B
Judgment ID Number:	Bar1908
Number of pages:	37

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Goodman v Public Trustee for the Northern Territory [2019] NTSC 63
No. AS 6 of 2018 (21815221)

BETWEEN:

SHIRLEY MARGARET GOODMAN
Plaintiff

AND:

PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY (AS ADMINISTRATOR OF THE ESTATE OF GRAEME ARTHUR PHILLIPS)
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 13 August 2019)

Introduction

[1] By the amended Originating Motion filed 10 August 2018, the plaintiff claims that she was either the de facto partner or the former de facto partner of the deceased. She seeks provision pursuant to s 8 of the *Family Provision Act 1970* ("the Act") for her proper maintenance, education and advancement in life. The deceased died intestate.

[2] If the plaintiff were the de facto partner of a deceased, she would be entitled to make application to the Court for provision out of the deceased's estate. If she were a 'former de facto partner' of the

deceased, she would only be entitled to make such application if she had been maintained by the deceased immediately before his death.

[3] In the present case, however, if the plaintiff were the de facto partner of the deceased, she would be the sole beneficiary and it would therefore not be necessary for her to seek an order in her favour pursuant to s 8 of the Act. If she were to succeed in her claim only as a *former* de facto partner of the deceased, then it would be appropriate for her to seek an order for provision in her favour pursuant to s 8 of the Act.

[4] A de facto relationship is a "marriage-like relationship" between parties who are not married.[1] When a court is called upon to determine whether two persons are in a de facto relationship, all of the circumstances of their relationship must be taken into account, including a number of matters specified in the legislation.[2]

[5] The plaintiff claims that she was in a de facto relationship with the deceased from 1971 until his death in or about January 2017.[3] Alternatively, she claims that she was a former de facto partner of the deceased, in that she had been in a de facto relationship with the deceased from 1971 to 1981, and that she was being maintained by the

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1 See s 19A (3) *Interpretation Act 1978*, read with s 3 (1) and s 3A (1) *De Facto Relationships Act 1991*.
2 See s 3A (2) *De Facto Relationships Act 1991*.
3 The precise date of death is not known. The body of the deceased was not discovered until some weeks after his death and so it is possible that he died in late December 2016, or early January 2017.

deceased, or to be regarded as being maintained by the deceased,[4] immediately before his death.

[6] In his closing submissions, counsel for the plaintiff described the relationship between the plaintiff and the deceased as "an unusual relationship, but not so unusual that it was not a de facto relationship".

[7] In my assessment, however, taking into account all of the circumstances of the relationship between the plaintiff and the deceased, the plaintiff was not the de facto partner of the deceased at the time of his death. Although it is possible that the plaintiff and the deceased may have been in a de facto relationship at some time in the period from approximately 1971 to 1981, any such de facto relationship had long since ended by the time of the death of the deceased in late December 2016 or January 2017.

[8] As to the plaintiff's alternative claim, I am not satisfied on the balance of probabilities that the plaintiff and the deceased were in a de facto relationship at any time in the period 1971 to 1981. However, even if they had been, I am satisfied that the plaintiff was not maintained by the deceased immediately before his death and is not to be regarded as having been maintained within the statutory extension in s 7 (7)(c) of

4 See s 7 (7)(c) *De Facto Relationships Act 1991*: " … a person shall not be regarded as having been maintained by the deceased person immediately before his death unless: …. (c) a court would, if the deceased person were still living, have power to make an order requiring the deceased person to pay maintenance to or for the benefit of the other person.

the Act. Accordingly, she is not entitled to make an application to the Court for provision out of the estate of the deceased.

[9] My reasons follow.

Plaintiff's case

[10] The plaintiff was born on 30 October 1946. She was educated to Year 11 level at Euroa High School. She married Raymond Goodman in July 1964 and had two children with him, a boy born December 1964 and a girl born in October 1965. Mr Goodman was killed in a motor accident in 1968 and the plaintiff then had to work to support the children. She worked at a roadhouse at Winton (near Benalla) for 18 months.

[11] While working at the Winton Roadhouse the plaintiff met the deceased, who at that stage was a coach captain with Ansett Pioneer. In March 1970 the plaintiff moved to Alice Springs where she worked for 6 months in the Ansett Hotel as a housemaid, also doing bar work and other general duties. It is unclear whether the plaintiff went to Alice Springs in order to establish a relationship with the deceased but she did meet up with him in Alice Springs in March 1970 and, in 1971, the parties commenced a relationship. The plaintiff's description of the relationship is as follows:

> Our relationship continued for about ten years with me living in Alice Springs for part of each year with him, and he then living with me at 13 Smyth Street Benalla for part of each year.[5]

5 Plaintiff's affidavit sworn 20 March 2018, par 9.

> Our relationship continued for many years. It was an intimate relationship and I became pregnant. I had an abortion in late 1971 in Adelaide as I could not support another child. We had only been in a relationship for a short time.[6]
>
> Our relationship strengthened after I had the abortion, and we continued to visit each other regularly, me travelling to Alice Springs and he to Benalla, and we wrote and spoke on the telephone.[7]
>
> We continued to be very close, right up until his death. Over the years I have travelled to Alice Springs 67 times to be with him.[8]

[12] The plaintiff's description of the de facto relationship in the previous paragraph does not specify exactly what "part of each year" the plaintiff spent in Alice Springs living with the deceased, or that part of the year the deceased lived with her in Benalla. The drafting of that paragraph might suggest that the parties lived together for the whole year, whether in Alice Springs or in Benalla (except when the deceased was driving coaches), but that is not the evidence.

[13] In the sixth affidavit filed by the plaintiff, she gave a different version of the alleged de facto relationship, as follows:[9]

> I first met Graeme in 1969. Our de-facto relationship commenced in 1971. In that year I went to live in Alice Springs at the Ansett Lodge during the tourist season from March until October. Graeme then came to live with me at 13 Blyth Street, Benalla, from October to March. So half our year was spent in Alice Springs and the other half at 13 Smythe Street, Benalla. He gave his address and his mailing address as my home address in Benalla. Our relationship continued for at least 10 years and our close friendship remained until his death.

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6 Plaintiff's affidavit sworn 20 March 2018, par 11.
7 Plaintiff's affidavit sworn 20 March 2018, par 16.
8 Plaintiff's affidavit sworn 20 March 2018, par 17.
9 Plaintiff's affidavit sworn 27 November 2018, par 2.

[14] The plaintiff's description of the de facto relationship in [13] does not state that deceased lived with her at the Ansett Lodge. I infer he did not. As to the evidence that the deceased "came to live with [the plaintiff] at 13 Smythe Street, Benalla, from October to March", that appears to refer only to the period October 1971 to March 1972. The evidence of common residence is otherwise quite unclear. I am not prepared to infer, for example, that the parties lived together for six months in Alice Springs and six months in Benalla in each and every year of the alleged 10-year relationship. Moreover, if the plaintiff's suggestion (by use of the words "half our year") is that she returned to Alice Springs to live with the deceased for six months each year, I would reject that. It is not been established on the direct evidence and I would not be prepared to draw an inference to that effect.

[15] There is very little objective evidence for the plaintiff's claim to have been in a de facto relationship with the deceased for some 10 years, from 1971.

[16] The plaintiff tendered in evidence a letter dated 18 July 2017 from a close friend, Margot Kyatt, whose husband was the manager of Ansett Pioneer in Alice Springs from 1961 to 1972. In that letter, Ms Kyatt stated that the deceased was employed as a coach captain for the

company during the time her husband was the Alice Springs manager, and for a total of 25 years. The letter continued as follows: [10]

> In 1970 while in Alice Springs I met Shirley Margaret Goodman who has been a very close friend ever since. Shirley has been associated very closely with Graeme since this time. Graeme was a very private person who trusted, respected and valued Shirley's ideals in life.
>
> We have all kept in touch constantly and visited often, and know how much Graeme relied on Shirley, for help and advice with personal and financial problems. Shirley has been Graeme's only family.
>
> It is my belief that Shirley is the only beneficiary of Graeme Arthur Phillips' estate. To my knowledge no one else ever showed any concern for Graeme during his lifetime as Shirley has. I strongly regard Shirley Margaret Goodman as Graeme's only next of kin.

[17] Ms Kyatt's letter suggested a loyal friendship between the plaintiff and the deceased, and that the deceased may have been to some extent dependent on the plaintiff, but did not say anything about whether or not the parties were in a marriage-like relationship in 1971 and 1972, or at any subsequent time.

[18] The plaintiff tendered another letter, dated 9 July 2017, written by Patrick Dransfield, who had first met the deceased in 1963 when they worked together for Ansett Pioneer in Alice Springs. Mr Dransfield's letter read as follows:

> I have known Shirley Goodman since 2003. I have found her to be of good character, honest and caring. Shirley was a particularly important friend to Graeme Phillips, whom she met in 1969 when they both worked for Ansett in Alice Springs.

10 The letter is part of Exhibit 1.

> I first met Graeme in 1963 when we worked for Ansett Pioneer as transferees to Alice Springs … . On my frequent visits to the Alice in later years, I made a point of contacting Graeme at the Connellan Aircraft Museum where he volunteered on a Sunday. Graeme was a very private person but he expressed his confidence in Shirley as she assisted him with most of his personal and money matters.

[19] Mr Dransfield did not state how long he remained in Alice Springs after arriving there in 1963. It is unclear whether he was still living and working in Alice Springs in 1971, when the plaintiff alleges she and the deceased commenced their relationship. However, given that Mr Dransfield states that he had only known the plaintiff since 2003, then either (1) he was still living and working in Alice Springs, but unaware of the alleged relationship; or (2) he had left Alice Springs by 1971. In any case, Mr Dransfield's letter did not say anything about the plaintiff and the deceased being in a marriage-like relationship at any time. At its highest, the letter does no more than state that the plaintiff was "a particularly important friend" to the deceased, and that "in later years" (whenever that was), the deceased expressed his confidence in the plaintiff as a person who assisted him with personal and money matters. The letter is confirmatory of friendship only, and possibly some dependency by the deceased on the plaintiff.

[20] The plaintiff's counsel submits that the letters of Mr Dransfield and Ms Kyatt "are testament to the public aspects of the relationship" between the plaintiff and the deceased. However, on my analysis, that submission must be rejected. The letters do no such thing. There is no

reference to reputation and public aspects of the relationship, for example, or to the plaintiff and the deceased socialising as a couple with other persons, such as Mr Dransfield and Ms Kyatt. As to other possibly relevant matters, there was no mention of the deceased's involvement with the plaintiff's children; and no observations of domestic circumstances in a common household or otherwise. Mr Dransfield did not even meet the plaintiff until 2003, and so his observations, such as they are, could not relate to the period 1971 to 1981. Although he refers to his frequent visits to Alice Springs in later years, when he made contact with the deceased, Mr Dransfield does not mention ever seeing the deceased and the plaintiff together.

[21] I bear in mind that the letters were written in support of the plaintiff's application to administer the deceased's estate as his next of kin. They were not written specifically in relation to the plaintiff's claims in this proceeding. However, both Mr Dransfield and Ms Kyatt are persons from whom evidence might have been obtained and led in support of the plaintiff's case that she and the deceased were in a de facto relationship from 1971 to 1981 (and perhaps subsequently). No such evidence was led.

[22] The plaintiff's daughter, Jeanette Marshall, gave evidence in relation to the period 1971 to 1981 as follows:[11]

11 Affidavit Jeanette Margaret Marshall sworn 27 November 2018, pars 4 and 5.

> Graeme was the only father figure I have known. He was together with us, my brother, my mother and myself as a family very often over a period of more than ten years. He would come and live with us in Benalla. We would travel to Alice Springs and stay there. We would go on bus trips with him, and drove cars with him up to Alice Springs. We spent a great deal of time together.
>
> Unfortunately, it was never continuous over that period because he worked as a coach driver and went away, but he always came back or we went to see him, and when he was with us it was just like we were a normal family.

[23] Ms Marshall gave evidence and was cross-examined. She described fun times with the deceased, for example, when they would drive to meet him when he was on a bus trip interstate, or going on a day trip in Melbourne with him.

[24] The evidence of Ms Marshall described in [22] and [23] is consistent with the plaintiff and the deceased having been in a de facto relationship, but is equally consistent with them having been just friends or close friends. Ms Marshall referred to travelling to Alice Springs and staying there, but did not say where they stayed, or whether they stayed with the deceased (or the deceased with them). Ms Marshall did not say anything about whether her mother and the deceased shared a bedroom, or showed affection towards one another, or about the extent to which the deceased may have cared for and/or supported Ms Marshall and her brother. That may not be overly surprising in a child who was about six years old when the alleged de facto relationship commenced, but it is surprising in the case of Ms

Marshall as a 16 year old in 1981.[12] Ms Marshall's evidence was vague as to the nature and extent of common residence, that is, the time the deceased actually spent with her, her brother and her mother on those occasions when he would live or stay with the plaintiff's family in Benalla.

[25] In relation to the alleged de facto relationship from 1971 to 1981, it is quite possible that there was a sexual relationship in the early stages. However, I am not able to decide how long that sexual relationship lasted. The evidence does not enable me to be satisfied beyond reasonable doubt that the relationship ever became one which would now qualify as a de facto relationship for the purposes of the *De Facto Relationships Act 1991* (noting that the legislation was not then enacted).

[26] The plaintiff alleges that the deceased maintained her for some years after they first met. She claims that he initially gave her a car and then paid her $200 per week for about eight years, until 1979.[13] When cross-examined about the weekly amount, the plaintiff said that the deceased bought groceries and fuel for the car so that "it amounted to around about $200 a week" in cash or kind.[14] When confronted with the likelihood that the deceased would only have been earning about $80 per week in 1971, the plaintiff said that the plaintiff bought and sold

12 Ms Marshall was born on 9 October 1965, and so would have turned 6 years old in October 1971 and 16 in October 1981.
13 Plaintiff's affidavit sworn 24 May 2018, par 2.
14 Transcript extract, p 59.

cars, over 1000 cars in his lifetime, from which he earned extra money. Her evidence was most unconvincing. It is very hard to accept that, even with the additional income from the sale of motor vehicles, the deceased would have been paying the plaintiff an amount of maintenance equal to approximately twice his take-home salary.

[27] The plaintiff alleges that, over the years (I assume starting after the deceased had stopped maintaining her), she loaned and gave the deceased many thousands of dollars, which he used "to purchase items for his collecting addiction" and to maintain himself after Ansett Pioneer when into liquidation. The plaintiff claims, somewhat non-specifically, "the larger amounts I generally recorded and he usually paid them back, but the smaller amounts of around $2,000 or $3,000 I did not keep a record of".[15] She claimed that her gifts and loans of money to the deceased over the years were extensive, amounting to approximately $150,000.[16]

[28] The plaintiff claims that she loaned the deceased $10,000 in about 1981 to enable him to build a shed on his property to house his vehicles. The making of the loan is relied on as evidence of financial support given by the plaintiff to the deceased.[17] The plaintiff said that the deceased repaid the moneys. She claimed that the deceased was

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15 Plaintiff's affidavit sworn 20 March 2018, par 12.
16 Plaintiff's affidavit sworn 9 November 2018, par 2.
17 One of the matters referred to in s 3A (2) *De Facto Relationship Act 1991* is "(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them".

able to repay the money by selling two cars.[18] However, there was no supporting evidence in relation to the loan, specifically evidence as to how that relatively significant amount of money was advanced or evidence as to when and in what manner the moneys were repaid.

[29] The plaintiff also claims that on 13 May 1994 she loaned the deceased $8,000 which, she alleges, he did not repay. Annexed to the plaintiff's affidavit sworn 20 March 2018 was an undated and unsigned copy of a loan agreement said to have been prepared by her then solicitor, Hamilton Clarke (since deceased). The document referred to a loan of $8,000, repayable on demand. However, produced in the course of the plaintiff's cross examination was a copy of the same loan agreement, this one signed by the deceased.[19] Also produced was a copy of the covering letter dated 13 May 1984 sent to the deceased by Hamilton Clarke and which read, relevantly, as follows:

> I enclose herewith Loan Agreement which I would be pleased if you would sign in the presence of an adult witness and return to me.
>
> Mrs Goodman is not currently making demand upon you for the repayment of the debt but she requires some documentary evidence that you owe her the sum of $8,000.00.
>
> I would be pleased if you would attend to the signing of this document as a matter of urgency.

[30] It can be reasonably inferred from the letter and attached loan document that the plaintiff had had instructed her solicitor that she had

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18 Plaintiff's affidavit sworn 9 November 2018, par 6.
19 Part of exhibit 6.

loaned the deceased $8,000 at some time prior to 13 May 1994, and that she sought written confirmation of the loan or acknowledgement of indebtedness. The solicitor's letter clearly indicates that the loan had been made, hence the sentence "Mrs Goodman is not currently making demand upon you for the repayment of the debt". The fact that the plaintiff sought to have the debt confirmed by means of a loan agreement document prepared by her solicitor might suggest that the parties were not in a de facto relationship, although it could indicate simply that the plaintiff was cautious in her financial dealings with the deceased and wanted to maintain a position at arm's length. I am unable to make a finding as to whether or not the loan amount was ever repaid by the deceased. My conclusion is that, to the extent that the letter and loan agreement might constitute some evidence of the deceased's financial dependence on the plaintiff – specifically in the course of the alleged de facto relationship – the evidence is equivocal.

[31] The plaintiff gave evidence that the deceased led her to believe that he had made a will and that she was to be the executor. That evidence is possibly relevant to the continuation of the alleged de facto relationship and the related issue of "arrangements for financial support" made by the deceased in favour of the plaintiff.[20] I set out the plaintiff's evidence below: [21]

20 *De Facto Relationship Act 1991*, s 3A (2)(d).
21 Plaintiff's affidavit sworn 20 March 2018, par 18 and part par 19.

> He told me on a number of occasions that he had a Will which was in his house. I recall specifically, in 2008, he assured me he had made a Will and he also told me where it was located and where the title to his land and his birth certificate were. He said that I was to be the Executor of his Estate. He had told me that he wished to be cremated and to be allowed to fly free. I arranged his memorial service on 13 May 2017 at the National Transport Hall of Fame in Alice Springs and also a memorial service in Ballarat on 14 October 2017 and spread his ashes as he wished me in Spencers Hill in Alice Springs.
>
> He referred to me as his next of kin and named me as such in his superannuation insurance, medical and hospital files …

[32] The plaintiff's evidence is supported to some extent by the contents of a statement signed by former Alice Springs Solicitor, Allan David Forrest Cockburn Salmon, dated 10 May 2017.[22] Mr Salmon was the deceased's next door neighbour in Gosse Street, Alice Springs, for some years, from 2003 until 2008. During all that time Mr Salmon's attempts to engage with the deceased were unsuccessful; he describes the deceased as shy and reclusive. When Mr Salmon decided to move from Alice Springs he held a lawn sale at his home, which was attended by the deceased. Mr Salmon had a reasonable recollection of that occasion because it was the first occasion the deceased had ever attended at his home. During the course of a conversation with Mr Salmon that day, the deceased said he wanted to sort out his affairs, and that he wanted to leave his Gosse Street home to a female he identified as "Shirley". Mr Salmon's statement read as follows:

> I do not recall our conversation in detail. However, because of my interest in motor vehicles, my interest in Graeme himself, and the

22 Exhibit 4.

> fact that his property adjoined mine, I do recall some details of our conversation.
>
> I recall that he told me that he wanted to leave his Gosse Street property to a Shirley. …
>
> I recall Shirley's name because at the time I had an Aunt Shirley who was my mother's sister … who has since passed away. According to Graeme, Shirley was a friend he'd known for years and who'd been very loyal to him.
>
> He told me that anything left over, which I assumed to be the residue of his Estate, was to go to Shirley and an ex-partner. I don't recall the name of the ex-partner.

[33] Mr Salmon did not accept instructions to prepare a will for the deceased because he was about to leave Alice Springs. As is made clear in exhibit 4, he had ceased practice in partnership as a solicitor, and was intending to leave Alice Springs.[23]

[34] Mr Salmon did not give evidence at trial, but his statement was tendered in the plaintiff's case without objection. Although it supports the plaintiff's contention that the deceased led her to believe that she would be a beneficiary under his will, it also indicates that the deceased considered the plaintiff as "a loyal friend", in contradistinction to a de facto partner, a woman with whom he was in a marriage-like relationship. Moreover, it would appear that the deceased in his conversation with Mr Salmon distinguished between 'Shirley' and another woman he did identify as an ex-partner. This reinforces the suggestion that the deceased did not regard the plaintiff as his partner or ex-partner, but rather as a friend, albeit a loyal friend of many years.

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23 I reject the submission made by the plaintiff's counsel that Mr Salmon was the deceased's neighbour from 2003 until the deceased's death.

That does not exclude the possibility that the plaintiff was a former partner of the deceased, but it does not prove that she was.

[35] When the plaintiff travelled to Alice Springs after the death of the deceased, she carried out an exhaustive search for a will at his home, in the place or places he had told her his will was kept. She found other important documents, but not the will. It is possible that there was a will secreted amongst papers which were contaminated as a result of decomposition of the deceased's body. However, whether the deceased did, in fact, make a will in which he named the plaintiff as a beneficiary will probably never be known. Moreover, while it is a matter of great importance to the plaintiff, it is only peripherally relevant to the issues I have to decide, because making provision for a person in a will is equally consistent with wanting to acknowledge and benefit a loyal friend of many years as with wanting to make arrangements for the financial support of a de facto partner (or former de facto partner).

[36] As appears from the evidence extracted in [11] above, the plaintiff claims that, after her abortion early in the relationship, she and the deceased continued to visit each other regularly, with the plaintiff travelling to Alice Springs and the deceased to Benalla. She also claims that they wrote and spoke on the telephone. According to the plaintiff, she and the deceased continued to be very close, right up to the time of his death. She claims that, over the years, she travelled to

Alice Springs 67 times to be with him.[24] That particular claim is curious, because it implies a careful and exact count by the plaintiff of the number of her visits to Alice Springs. However, there was no evidence as to when the plaintiff travelled to Alice Springs, how she travelled, or how long she stayed. There was no evidence of any airline travel booking or reservation or, if she drove to Alice Springs, bank statements showing a debit for the purchase of fuel or payment of accommodation expenses for the journey. Nor was there evidence of any ATM withdrawal(s) or credit card debits which might have indicated her presence in Alice Springs at any particular time.

[37] At the end of her cross examination, I asked the plaintiff how often she had gone to Alice Springs in the two or three years preceding the death of the deceased. She answered "probably about five times". She said that she had seen him at the end of June 2016. I infer that was the last occasion she saw Mr Phillips alive. She later said that she flew to Alice Springs a couple of times "in that five year period" (an apparent reference to the period of two to three years she had been asked about), but that, on the last occasion, she had travelled by road.[25]

[38] In re-examination, with specific reference to visiting the deceased in the last five years of his life, the plaintiff said that she never stayed at the home of the deceased (in short, because it was not fit for

24 Plaintiff's affidavit sworn 20 March 2018, par 17.
25 Transcript extract p 71.

accommodating a guest), and "stayed with friends most times". In particular she referred to friends who lived a couple of doors down, on the other side of the road from the deceased's home, for whom the deceased had worked part-time in the past. She also stayed with "people on the Mount Gillen side" (that is the western side of Alice Springs), and in motels. She claimed that when she stayed in a hotel, the deceased would stay with her "most times".

[39] I note that there was no supporting evidence in relation to the plaintiff's visits to Alice Springs in the three year (or five year) period referred to. I refer to and repeat the observations I made in [36] as to the absence of evidence which would be expected in circumstances where the plaintiff bears the onus of proving a de facto relationship continuing to the death of the deceased. Since the plaintiff "most times" stayed with friends who lived in close vicinity to the deceased and who (based on the plaintiff's evidence) had been instructed by the deceased that, if anything were to happen to him, they were to contact the plaintiff, it would be expected that some evidence would be led from those persons in support of the plaintiff's claim. I refer to evidence confirmatory of the plaintiff's visits to Alice Springs and evidence as to what the deceased had said to them, if anything, about his relationship with the plaintiff. Further, given that the plaintiff claimed to have stayed at motels or hotels in the five-year period, it is

unusual that she did not seek to prove accommodation expenses, by reference to receipts and/or bank or credit card statements.

The plaintiff's evolving de facto partner claim

[40] At the time of the trial in December 2018, the plaintiff had been in a de facto relationship with Raymond Malcolm since 1995, that is, for about 23 years. She had been living with Mr Malcolm, in a residence owned by Mr Malcolm. The plaintiff had retired from her position as a postal services officer with Australia Post in 2008, and then, for about three years, received Newstart allowance before becoming eligible for an Age Pension at the age of 65. The plaintiff agreed in giving evidence that any documents she completed for Centrelink purposes nominated Raymond Malcolm as her de facto partner and that she did not declare the deceased as her de facto partner in any Centrelink documents.[26]

[41] The *De Facto Relationships Act 1991* states the circumstances which must be taken into account to determine whether two persons are in a de facto relationship, but also makes clear that the fact that either of the persons is in another de facto relationship is irrelevant.[27] To that extent, the plaintiff's de facto relationship with Mr Malcolm is irrelevant. However, I am satisfied that for many years she had been familiar with the terms 'de facto partner' and 'de facto relationship', and that she was certainly familiar with those terms in January 2017.

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26 Transcript extract p 10.1, p 13.3.
27 *De Facto Relationships Act 1991*, s 3A, esp. s 3A (3)(c).

[42] On 23 January 2017, the plaintiff completed a printed form, entitled 'General Report', which she submitted it to the Public Trustee. The truth of the information provided was verified on oath. She gave her name as the designated 'contact person re deceased's affairs' (the words of the form itself). She described her relationship to the deceased, in her own words, as "Long-time friend and his next of kin". She did not use the words 'de facto' or 'partner' separately or in combination. In providing information about the deceased's marital status, the plaintiff circled 'single', out of a list of the following possible choices: "Married, Divorced, Defacto, Separated, Tribal Marriage, Single, Widow or Widower". She then drew or ruled a diagonal line through a number of boxes including the box "*If defacto*", effectively declining the opportunity to provide information as to the date of commencement of any de facto relationship and/or to attach documentary evidence in support.[28]

[43] The plaintiff was cross examined about the fact that she had circled 'single'. The evidence was as follows:

> And your circled 'single', didn't you? --- Exactly, because he was single. He never ever married.
>
> There was 'de facto' there, wasn't there? --- I hardly called our relationship de-facto. I'd never heard of the word until this later part of the years. My term was more that he was 'my partner for those very long years'. And if you want to call it 'de facto', exactly as it is nowadays, that's what it is.

28 Annexure DI-3 to the affidavit of Dorothy Iji affirmed 18 September 2018, box 8 and boxes 35-41.

> So, when do you say [that] the term 'de facto' was one that you came to understand? --- The term 'de facto' is one that I have come to understand in the last probably 25 years of now sharing a household with someone else.
>
> And that's Mr Malcolm, Raymond Malcolm? --- Yes, it is.
>
> And you fully understand and appreciate that for that last 25 years since 1995 [when] you said that relationship commenced? --- Yes
>
> You have been in a de-facto relationship with Raymond Malcolm? --- That's what it's called. Yes.

[44] The plaintiff later clarified in evidence that, when she used the words "those very long years", she was referring to the period from "the first time that we cohabited in 1971, to his death". As mentioned in [42], the plaintiff did not use the word 'partner' when completing the General Report document, and so her evidence – extracted in [43] – to the effect that her preferred way to characterize the deceased was as her "partner for those very long years" is inconsistent with the words "Long-time friend" used in the General Report.

[45] At a slightly later point in cross examination, the plaintiff offered the following explanation for not making a claim or identifying herself as a de facto partner of the deceased in the General Report document:

> I was not going to declare all of the things that I knew about my friend, my partner, my soul mate. I was not going to because I did not really know that this was – this was told to me as just a general report, anything that I could think of or know would be handy from Ms Iji because she was trying to pursue administering the Estate of Mr Graeme Phillips.

[46] The plaintiff denied that her assertion in court proceedings of a de facto relationship was a "made up story" – specifically a story

fabricated subsequent to the submission of the 'General Report'. She insisted that it was "the utter truth".

[47] Dorothy Iji was at all material times employed by the Office of the Public Trustee as a Principal Trust Officer, who had day to day responsibility for managing the administration of the deceased's estate. When she first met the plaintiff in Alice Springs on 1 February 2017, the plaintiff introduced herself as a "close friend" of the deceased.

[48] Ms Iji subsequently received a letter dated 6 February 2017 sent by Michael Vale and Associates, solicitors acting for the Plaintiff.[29] In that letter the plaintiff was described as "the close friend" of the deceased. Although the plaintiff's solicitors referred to her "close association with [the deceased] for many decades", and to the fact that the plaintiff was "nominated by the deceased as his next of kin", the letter was in relation to the possible existence of a will; the writer made a formal request for the plaintiff to be permitted to re-enter the deceased's house to search for a will. No mention was made of the plaintiff's claim to be the de facto partner (or the former de facto partner) of the deceased.

[49] When the plaintiff was asked in cross-examination about why Mr Vale's letter did not refer to her having been a de facto partner of the deceased, whereas by that time she obviously knew the meaning of the

29 Annexure DI-4 to the affidavit of Dorothy Iji sworn 18 September 2018.

terms ‘de facto’ and ‘de facto partner’ (because of her 23-year relationship with Mr Malcom), she made the following statement:[30]

> I was hiding the fact of my de-facto relationship with – with Graeme because of circumstances of having an abortion during that period. I didn’t want to discredit my family, myself or Mr Phillips, and I – my upbringing tells me that we just kept our relationship very quiet and I didn’t see any need at that time to have it exposed. I was going back up to find that will because I had not been allowed into the premises to do so, and I knew where to locate it, and so that’s why I used the term “a close friend”.

[50] That explanation was desperately unconvincing. Indeed, when pressed, the plaintiff admitted that she did not need to reveal the fact that she had had an abortion in order to assert that she was the de facto partner of the deceased. She nonetheless maintained that that was the reason she had not said she was the de facto partner of the deceased.

[51] On 30 July 2017, the plaintiff signed a claim document which was received by the Public Trustee on 14 August 2017. The operative parts of the document were as follows:

> I, Shirley Margaret Goodman, born 30 October 1946 of [address] do hereby lay claim to the Estate of the late Graeme Arthur Phillips.
>
> I make this claim as Graeme’s will was unable to be located at the time of his death.
>
> I have known Graeme Arthur Phillips since 1969 and have had regular and constant contact with him since that time.
>
> I was Graeme’s closest and personal friend in whom he confided all personal details and matters of his life…..

30 Transcript extract p 16.3.

> Graeme always referred to me as his next of kin. He named me as his next of kin in his superannuation, insurance, medical and hospital files…..
>
> I was a constant and important part of his life. He never disclosed this part of his life [abandonment as a child and upbringing in an orphanage] to anyone except me. This is why I devoted 49 years of my life to being there for him; to listen, console his black times, assist in decisions, encourage him, be his friend. We were closer than brother and sister. I loved and respected him for what he had achieved in life and I did what he asked of me when it came to his death…..
>
> Based on the above statements of my very personal relationship and Graeme's verbal instructions to me, I claim the positions of Executor and Beneficiary of the Estate of Graeme Arthur Phillips.

[52] It is significant that, although the plaintiff emphasised the closeness of her friendship with the deceased, which she described as "closer than brother and sister", the plaintiff did not say, for example, "We were closer than most couples", or even "We were a very close couple", or similar. Rather, her comparison was to a sibling relationship; there was no hint of a sexual relationship, or a de facto relationship, or a marriage-like relationship, or even that they were 'partners'.

[53] The plaintiff first claimed to have been in a de-facto relationship with the deceased in her affidavit sworn 20 March 2018. The plaintiff's evidence at that stage was that her relationship with the deceased had commenced in 1971 and continued for about 10 years (affidavit paragraph 9). The plaintiff also stated that her relationship with the deceased "continued for many years" (affidavit paragraph 11). Both of those statements, but particularly the first statement, suggest that the alleged de facto relationship came to an end. The logical inference is

that the relationship ended in or about 1981. Although the plaintiff also deposed, "We continued to be very close, right up until his death" (affidavit paragraph 17), she did not claim to have been in a de facto relationship with the deceased up to the time of his death. In her affidavit sworn 17 July 2018, the plaintiff stated that her relationship with the deceased continued up until he died. She added:

> Although we did not live together we had a mutually supportive relationship, in particular by sending him money……
>
> I also supported him emotionally and advised and assisted him with his house, its contents and his collections. I spoke with him frequently and visited him when I could.

[54] In the extract from the plaintiff's sixth affidavit in [13] above, the plaintiff herself drew a distinction between the nature of her alleged relationship with the deceased from 1971 to 1981, and that of the relationship after that time. Referring to the de facto relationship which, she said, commenced in 1971, she said:

> Our relationship continued for at least 10 years and our close friendship remained until his death.

[55] The plaintiff thus appeared to be asserting that she was in a de-facto relationship with the deceased for about ten years from 1971 to about 1981, and that they subsequently remained close friends, although no

longer in a de-facto relationship. That is at least consistent with her original claim to have been a *former* de facto partner of the deceased.[31]

[56] Notwithstanding the plaintiff's multiple affidavits and her own evidence at trial, she never spoke of there being a mutual commitment on the part of herself and the deceased to a shared life,[32] whether in the period 1971 to 1981, or subsequently. As counsel for the defendant submitted, there was "not even … a discussion between the plaintiff and the deceased about a shared life with one another".[33] In the absence of such evidence, the fact that the plaintiff and the deceased lived in different states is a telling factor that they had not made a commitment to a shared life.

[57] Counsel for the plaintiff somewhat optimistically asserts in closing submissions that the relationship never came to an end, and the mere fact that the plaintiff lived with Raymond Malcolm for 25 years did not alter the fact that the de facto relationship with the deceased continued during that time.[34] The basis for that assertion is that (1) there had been no intention to permanently end the relationship by either party, certainly not by the deceased, and that (2) the deceased had no other relationships. The submission, however, fails to take account of the plaintiff's statements to third parties as to the nature and duration of her relationship with the deceased, considered and discussed in [42]-

31 Originating Motion filed 26 March 2018.
32 *De Facto Relationships Act 1991*, s 3A (2)(f).
33 Submissions on behalf of the defendant, par 102.
34 Plaintiff's closing submissions, par 15.

[52], and the plaintiff's evidence, considered and discussed in [53]-[56]. Moreover, there is a logical inconsistency in the contention that an ongoing de facto relationship between the plaintiff and the deceased can be inferred from the fact that the deceased did not have any relevant relationships, whereas the fact that the plaintiff had a 25 year de facto relationship may be ignored. Finally, no weight can be given to the absence of evidence that the deceased took positive steps to end an alleged de facto relationship in circumstances where I am not satisfied on the balance of probabilities that there ever was such a relationship.

Plaintiff's alleged financial support of the deceased

[58] Perhaps the least credible of the plaintiff's claims is that she paid maintenance to the deceased over a period of many years, from 1989 onwards, including the period from 2010 to 2017.

[59] In her affidavit evidence, the plaintiff was inconsistent as to the details of the alleged payments. The plaintiff did not even mention the alleged maintenance payments in her first affidavit. In her second affidavit, she said that she would send the deceased between $100 and $200 per fortnight by way of maintenance.[35] In her fourth affidavit, she said that, from 1989 onwards, she sent the deceased weekly amounts of $100 cash by express post. If she happened to miss a week, she would send him $200 cash the next week. She did this because she was concerned

35 Plaintiff's affidavit sworn 24 May 2018, par 4.

to ensure that he eat and look after himself properly. Occasionally she would send a greater amount, but she would not have sent an amount of more than $500 on any one occasion.

[60] The alleged maintenance payments to the deceased are to be considered in the context that, as at March 2018, the plaintiff was receiving an Age Pension of $320 per week (and I presume a lesser amount in previous years). She had very little in the way of savings. On the other hand, the deceased's bank statements, issued by BankSA for the period January 2010 to 31 January 2017, indicate significant and regular deposits for 'salary'. As at 1 January 2017 (the approximate date of death) the account balance was $61,824.05.[36] The deceased clearly did not need to be maintained.

[61] When it was put the plaintiff in cross-examination that the deceased was not the kind of man who would continue to receive money from someone (in this case an old friend, in receipt of an Age Pension) when he did not need the money, the plaintiff was evasive. She claimed that the deceased, "at the time of his near-demise, was not a well man". That hardly explains why he would have accepted the alleged maintenance payments for more than 25 years, before he became unwell. When asked about the deceased's considerable bank balance, the plaintiff said, "He still needed to have food and I sent him only the small amount, so he could buy some food." When it was pointed out

36 Affidavit Dorothy Iji affirmed 18 September 2018, exhibit DI-7.

that the deceased made regular cash withdrawals from his bank account, co-inciding with receipt of 'salary' amounts, the plaintiff suggested, "… maybe he didn't want to hurt my feelings about not accepting my – my amount. I don't know. I can't answer for Mr Phillips. … He never said to me to stop." [37]

[62] There was no objective evidence in relation to any of the alleged maintenance payments. For example, there was no evidence of weekly or fortnightly withdrawals from the plaintiff's bank account, or receipts from Australia Post for the purchase of what must have been hundreds of express post envelopes. When asked about the absence of such evidence in cross-examination, the plaintiff replied, "There was evidence I was taking money out, but I don't have any written evidence of paying that amount to Mr Phillips".[38] When then asked whether she would at least be able to show that she had taken money out each week, she replied, "I mightn't take it out every week … I might take it out when the pension comes once a fortnight and then hold it and then send it." When the plaintiff was clearly alerted to the point of the cross examination, namely that there would be evidence of withdrawals from her bank account of $100 or $200, as the case may be, she replied, "No, there wouldn't, because most times I took out much larger amounts to cover our own costs and my costs … ." The plaintiff had an answer for everything, some answers possibly true. When asked

37 Transcript extract, p 70.
38 Transcript extract, p 64.

whether she had provided evidence of the bank accounts, she replied, "No one asked me to".

[63] In support of her claim that she had maintained the deceased, the plaintiff said that, when searching through the stacks of newspapers in the deceased's car after his death, in the company of a policeman, she found an express post envelope which she had sent the deceased, unopened, with $100 inside.[39] She said in evidence that the police officer told her that she could keep the money. The police officer was not called to give evidence. The express post envelope – a very significant piece of physical evidence in the circumstances – was not produced in evidence. Moreover, there was no evidence of the presence in the deceased's home of even one used express post envelope, let alone the very significant number of such envelopes which one might have expected in the case of a hoarder who had been receiving the alleged maintenance payments by express post for so many years.

[64] If the plaintiff's evidence referred to in [63] were accepted, she found only one unopened express post envelope sent by her. The deceased had died in late December or early January. The deceased did not have a letterbox at his home, but had a post office box to which his mail was sent. If it were true that the plaintiff found an unopened express post envelope in the deceased's car, then it could be inferred that the deceased had collected that envelope from his post office box. The

39 Plaintiff's affidavit sworn 9 November 2018, par 4.

plaintiff agreed with the proposition put to her that, if she had been sending $100 per week, there would have been three express post envelopes waiting to be collected in the deceased's post office box. The deceased could not have collected them. The plaintiff said that she did not know where they could have gone; she had given the key to the post office box to the coroner's assistant. She said, "I wasn't told about any more envelopes". When it was suggested to her that the reason she had not been told about any more envelopes was that there were none, that she had not been sending $100 per week to the deceased, she replied, "That's your assumption".[40]

[65] I do not accept the plaintiff's evidence that she paid weekly maintenance to the deceased, as alleged or at all. The evidence as to the making of such payments was so improbable that I am satisfied that the plaintiff told a series of deliberate untruths to create evidence of financial dependence as a circumstance of the alleged de facto relationship.

Conclusion

[66] My conclusion to this point is as follows. I am not satisfied on the balance of probabilities that the plaintiff was the de facto partner of the deceased (as at the time of his death). Indeed, it is highly improbable that the plaintiff was the de facto partner of the deceased. Moreover, I am not satisfied on the balance of probabilities that the plaintiff was a

40 Transcript extract, p 68.

de facto partner of the deceased at any time, whether from 1971 to 1981, or at any time during that period, or at any time subsequently. It follows that I am not satisfied on the balance of probabilities that the plaintiff is a former de facto partner of the deceased.

Alternative consideration

[67] The only arguable possibility of a de facto relationship between the plaintiff and the deceased was that of a relationship, for some period, within the overall period from approximately 1971 to 1981. I referred to this possibility in [7] above. Although, as found in [8] and [66], I am not satisfied on the balance of probabilities that the plaintiff was the de facto partner of the deceased in that period (and hence not a 'former de facto partner'), I now proceed to consider in the alternative whether, if she were a de facto partner of the deceased during that time (and on that basis a 'former de facto partner'), she was maintained by the deceased immediately prior to his death. I find that she was not actually maintained by the deceased immediately prior to his death. He was not paying any amount or providing any non-monetary benefit which might be considered as maintenance. However, it is then necessary to decide whether the plaintiff is to be regarded as having been maintained by the deceased immediately prior to his death, pursuant to s 7 (7) (c) *Family Provision Act 1970*.

[68] Expressed in the double negative ('shall not'/'unless'), s 7 (7) of the Act both extends and limits the meaning of being "being maintained by

the deceased person" immediately before the person died. The subsection reads as follows:

> (7) For the purposes of this section, a person shall not be regarded as having been maintained by the deceased person immediately before his death unless:
>
> (a) there was in force at that time an order of a court requiring the deceased person to pay maintenance to or for the benefit of the other person;
>
> (b) the deceased person was, at that time, whether under an agreement in writing or otherwise, maintaining that other person or making a contribution to the maintenance of that other person, being a contribution that, in all of the circumstances, can be regarded as other than a nominal contribution; or
>
> (c) a court would, if the deceased person were still living, have power to make an order requiring the deceased person to pay maintenance to or for the benefit of the other person.

[69] There was no court order requiring the deceased to pay maintenance, and, as found in [67], the deceased was not paying maintenance or making any contribution towards the maintenance of the plaintiff. Therefore, the only possible basis available to the plaintiff is s 7 (7)(c), which, on a plain reading, requires a hypothetical jurisdictional consideration ("a court would have power"), not a hypothetical merits consideration.

[70] A de facto partner's entitlement to an order for maintenance is dealt with in s 26 of the *De Facto Relationships Act 1991*:

> **26 Order for maintenance**
>
> (1) A court may make an order for periodic or other maintenance if it is satisfied as to either or both of the following:
>
> (a) that the partner applying for the order is unable to support

himself or herself adequately because of having the care and control of a child of the de facto partners, or a child of the other partner, who has not attained the age of 18 years on the day on which the application is made;

(b) that the partner is unable to support himself or herself adequately because the partner's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court:

(i) an order for maintenance would increase the partner's earning capacity by enabling the partner to undertake a course or program of training or education; and

(ii) it is reasonable to make the order, having regard to all the circumstances of the case.

(2) In determining whether to make an order under this Division for maintenance and in fixing an amount to be paid, a court must have regard to the following:

(a) the income, property and financial resources of each de facto partner;

(b) the physical and mental capacity of each de facto partner for appropriate gainful employment;

(c) the financial needs and obligations of each de facto partner;

(d) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under a law of the Commonwealth or a State or Territory of the Commonwealth, or of another country, and the rate of any such pension, allowance or benefit being paid to either party;

(e) the responsibilities of either de facto partner to support any other person;

(f) the terms of any order made or proposed to be made under Division 3 with respect to the property of the de facto partners;

(g) any payments made for the maintenance of a child or children in the care and control of the partner applying for the order.

[71] In the case of a de facto relationship which has ended, an application for maintenance must be made within two years from the day on which the relationship ended.[41] The time limited may be extended in the case

41 *De Facto Relationships Act 1991*, s 25(1), read with s 14(1).

of relative hardship,[42] but only in the case of an application for maintenance based on the matters referred to s 26(1)(a) *De Facto Relationships Act 1991*. The latter Act expressly provides that the time extension provision does not apply to an application for an order for maintenance "if the grounds on which the application is made are or include the grounds specified in s 26(1)(b)".[43]

[72] As mentioned in [10] above, the plaintiff's only two children were born in December 1964 and October 1965. They were both over the age of 50 years when the deceased died. Therefore, a court could not have made an order granting leave to the plaintiff to commence maintenance proceedings out of time based on her inability to support herself adequately because of having the care and control of a child under the age of 18 years. To the extent that the plaintiff might have relied on any other basis for the hypothetical maintenance application, it could only have been pursuant to s 26 (1)(b), in respect of which the time extension provision could not have applied. The hypothetical maintenance application would have been irretrievably time-barred, as submitted by counsel for the plaintiff.

[73] As a result, the plaintiff is not to be regarded as having been maintained by the deceased pursuant to s 7 (7)(c) of the Act.

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42 *De Facto Relationships Act 1991*, s 25(1), read with s 14(2).
43 *De Facto Relationships Act 1991*, s 25(2).

[74] There is at least one other significant jurisdictional difficulty with the plaintiff's hypothetical maintenance application. Section 28 *De Facto Relationships Act 1991* provides that, where de facto partners have ended their de facto relationship, a partner who has subsequently married or entered into another de facto relationship may not apply for an order for maintenance against the previous de facto partner. The plaintiff's long-term relationship with Mr Malcolm would have precluded her making any application for maintenance against the deceased.

[75] The plaintiff's claim must be dismissed. I will hear the parties on the issue of costs.
