

Graetz v Kent & Anor [2011] NTSC 70

PARTIES: JENNIFER MARIE GRAETZ

v

MICHAEL ANDREW KENT

AND

BENDIGO AND ADELAIDE BANK
LIMITED

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 140 of 2010 (21041970)

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JUDGMENT OF: MASTER LUPPINO

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Family Law – De facto relationships – Declaration as to existence of a de facto relationship – Order altering property interests - Factors relevant to the making of the declaration – Factors relevant to orders altering property interests - Pre-requisites for actions under the Family Law Act - Pre-requisites for actions under the Family Law Act in the Northern Territory Supreme Court.

Family Law Act (Cwth) ss 4AA, 90RA, 90RD, 90RG, 90SB, 90SK, 90SM

REPRESENTATION:

Counsel:

Plaintiff:	Ms Powell
First Defendant:	Not Represented
Second Defendant:	Not Represented

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	Not Represented
Second Defendant:	CridlandsMB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Graetz v Kent & Anor [2011] NTSC 70
No. 140 of 2010 (21041970)

BETWEEN:

JENNIFER MARIE GRAETZ
Plaintiff

AND:

MICHAEL ANDREW KENT
First Defendant

AND:

**BENDIGO AND ADELAIDE BANK
LIMITED**
Second Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 21 September 2011)

- [1] The Plaintiff seeks orders as against the First Defendant pursuant to the *Family Law Act* (“the Act”) declaring the existence of a de facto relationship and for an alteration of property interests. The Second Defendant is the mortgagee of a certain property at 3/9 Hogan Crescent, Gray (“the Gray Property”) which is registered in the name of the First Defendant. That is the property in respect of which the Plaintiff seeks an order altering property interests.

- [2] In separate proceedings in this Court (action No 100 of 2010, file 21031014), the Second Defendant obtained an order for possession of the Gray Property consequent upon a mortgage default. In these proceedings the Plaintiff also seeks orders against the Second Defendant with respect to the disposal of the balance funds after satisfaction of the entitlements of the Second Defendant. The Second Defendant has agreed to pay that balance into Court.
- [3] The First Defendant has not entered an Appearance or taken any part in the proceedings. Orders were made requiring all evidence in chief to be in the form of affidavits. An affidavit of the Plaintiff sworn 6 June 2011 was then filed for that purpose. Following a subsequent directions hearing, a further affidavit of the Plaintiff sworn 11 July 2011 was filed.
- [4] The Act has a number of requirements which are pre-requisites to applications under the Act and one pre-requisite which applies specifically to an action in this Court.
- [5] Section 39A of the Act requires that at least one of the parties must be either an Australian citizen or ordinarily resident in Australia or present in Australia on the day on which the proceedings were filed. The Plaintiff's affidavit sworn 6 June 2011 sufficiently evidences satisfaction of that requirement as the Plaintiff deposes to being born in Australia.
- [6] Section 90RG of the Act specifies a geographical requirement as a pre-condition to jurisdiction to make an order declaring the existence of a de

facto relationship. It differs from the requirement in section 39A of the Act in that it requires residence by at least one of the parties “*in a participating jurisdiction*” at the time when the proceedings commenced. The Northern Territory is a participating jurisdiction by reason of section 90RA(1) of the Act.

- [7] Section 90SB mandates a minimum length for a de facto relationship before the Court can make an order altering property interests. That minimum period is two years in aggregate (section 90SB(a)). The Plaintiff’s evidence in this respect was a bald assertion that she was in a de facto relationship with the First Defendant from 27 May 2006 until 6 July 2009. There was no evidence of where the cohabitation occurred throughout that period.
- [8] Section 90SK provides for a geographical requirement where an order for alteration of property interests is sought. Although there is some overlap with the requirements in sections 39A and 90RG, there are additional, as well as, alternative requirements. That section provides:-

90SK Geographical requirement

- (1) A court may make a declaration under section 90SL, or an order under section 90SM, in relation to a de facto relationship only if the court is satisfied:
 - (a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the *application time*); and
 - (b) that either:

- (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
- (ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

in one or more States or Territories that are participating jurisdictions at the application time;

or that the alternative condition in subsection (1A) is met.

(1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.

(2)-(5) Omitted.

[9] The pre-requisites set out in the preceding paragraphs apply generally to all proceedings in respect of de facto financial matters under the Act. There is a further pre-requisite in respect of any application of that nature commenced in this Court. Section 39F of the Act has the additional requirement that at least one of the parties is to be ordinarily resident in the Northern Territory when the proceedings are commenced. It is framed as a condition to jurisdiction. That section provides as follows:-

39F Territory court does not have jurisdiction unless a party is ordinarily resident in the Territory

A court of a Territory must not hear or determine a de facto financial cause unless at least one of the parties to the proceedings is ordinarily resident in the Territory when the proceedings are instituted or are transferred to the court.

[10] Other than for the requirements of section 39A of the Act, there was no evidence to demonstrate that the requirements set out in all of the preceding

paragraphs have been satisfied. Although there is sufficient evidence from which an appropriate inference could be drawn that the Plaintiff was resident in the Northern Territory at the time she swore her affidavits, there is no evidence from which I can determine where the Plaintiff was resident at the date of filing of the Writ and that is the relevant date for the purposes of the pre-requisites.

[11] Consequently the Plaintiff was given an opportunity to make further submissions. The further submissions filed proved insufficient. I therefore invited the Plaintiff to apply for leave to re-open the case and to call further evidence to address the deficiency. That leave was granted and further evidence was led on 9 September 2011 which was sufficient to establish that the pre-requisites referred to above are satisfied.

[12] Turning now to the substantive issues, under the Act the determination of the existence of a de facto relationship is governed by section 4AA of the Act. That provides as follows:-

4AA De facto relationships

Meaning of de facto relationship

- (1) A person is in a *de facto relationship* with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

- (2) Those circumstances may include any or all of the following:
 - (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of children;
 - (i) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto 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.
- (5) For the purposes of this Act:
 - (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

- (6) For the purposes of subsection (1), 2 persons are *related by family* if:
- (a) one is the child (including an adopted child) of the other; or
 - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
 - (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

[13] Although I accept that to some extent the evidence of indirect or non-financial contributions may be relevant to the question of the existence of a de facto relationship, particularly pursuant to section 4AA(2)(d), (e) and (f) of the Act, other than that the Plaintiff's evidence as to the existence of the relationship consists of a bare statement, amounting to a conclusion by her, that she and the First Defendant were de facto spouses between 27 May 2006 and 6 July 2009.

[14] Therefore, on the first hearing date, I allowed further evidence in chief from the Plaintiff on this issue. With that additional evidence, it was revealed:-

1. That the Plaintiff attended to all financial matters for the parties;
2. That the Plaintiff attended to all moves from one residence to another;
3. That the Plaintiff attended to all things necessary in respect of the purchase of the Gray Property, albeit that it was put in the First Defendant's name only;

4. That the parties had joint accounts at all times and did not maintain any individual accounts during the term of the relationship;
5. That the parties attended social functions together;
6. That the parties went on holidays together;
7. That the parties were jointly involved in family functions and in particular that the Plaintiff arranged to have the First Defendant's sister travel to Darwin for one Christmas;
8. That the relations between the parties were "*intimate*".

[15] Additionally, when further evidence was called on 9 September 2011, it was revealed for the first time that the parties had plans to marry. This is highly relevant given section 4AA(2)(f) of the Act and it is surprising that the Plaintiff had initially omitted to lead this very cogent evidence.

[16] I accept the foregoing evidence and am satisfied of the existence of the de facto relationship.

[17] The Court's power to make orders altering property interests are set out in section 90SM of the Act which provides as follows:-

90SM Alteration of property interests

- (1) In property settlement proceedings after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:
 - (a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them—

altering the interests of the parties to the de facto relationship in the property; or

- (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship—altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

- (c) an order for a settlement of property in substitution for any interest in the property; and
- (d) an order requiring:
 - (i) either or both of the parties to the de facto relationship; or
 - (ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

- (3) The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court must take into account:
 - (a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
 - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
 - (ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of

the parties to the de facto relationship or either of them;
and

- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
 - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
 - (ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them;
and

- (c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and
- (d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and
- (e) the matters referred to in subsection 90SF(3) so far as they are relevant; and
- (f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and
- (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.

(5)-(7) Omitted

[18] The evidence reveals that at the commencement of the relationship the First Defendant did not have any significant assets. The Plaintiff had

approximately \$3,000.00 in savings and owned a Toyota Corolla motor vehicle outright.

[19] During the course of the relationship a number of properties were acquired both for residential purposes and investment purposes. The first was the Gray Property. The Plaintiff says that she paid the entire deposit for the purchase of that property and subsequently paid all utilities, rates and body corporate contributions in addition to “*several*” mortgage payments. The parties resided in that property for a time and thereafter it was rented. There is no evidence as to its current value.

[20] In February 2007 the parties acquired a property at 23 Widdup Crescent, Driver (“the Driver Property”). This was purchased for \$320,000.00. It was sold in January 2009 for \$350,000.00. The Plaintiff’s parents provided a secured guarantee for \$99,000.00 of the loan funds borrowed to purchase that property. The Plaintiff’s evidence is that a number of loans were rolled over into the loan secured over that property and that it was sold leaving a sizeable outstanding debt. Presumably the financier only allowed this to occur given the secured guarantee from the Plaintiff’s parents.

[21] The final property purchased by the parties was a rural property at 180 Monck Road, Acacia Hills (“the Acacia Hills Property”). This was purchased in January 2009 for \$440,000.00. It was sold in June 2010 for \$445,000.00. A loan taken out by the First Defendant for the purchase of a car in the sum of \$20,000.00 was rolled in with the loan secured on the

property. When sold, the balance of the mortgage secured over that property was, with the other debts, rolled in with the debt secured over the Gray Property.

- [22] The Plaintiff continues to make payments at the rate of approximately \$300 per week against the outstanding debt on the Gray Property. There is no evidence that the First Defendant has made any payments to that outstanding debt.
- [23] There is also a four wheel motorbike which was retained by the First Defendant on separation. There is evidence that it may have been disposed of since then but nothing turns on that. A joint loan was taken out to purchase that vehicle and the First Defendant is a joint borrower. There was no evidence as to the balance owing on that loan.
- [24] The property pool therefore consists only of the Gray Property. There is no evidence as to the balance outstanding and secured over that property or as to the value of that property. Given that a mortgagee sale is apparently inevitable, in that event nothing turns on the absence of that evidence. Other than that the only issue requiring determination is the debt owing in respect of the motorbike referred to in the preceding paragraph.
- [25] The evidence relevant to the determination of an appropriate order altering property interest in summary form, is as follows:-

1. The Plaintiff paid the deposit of \$2,000.00 for the purchase of the Gray Property;
2. The Plaintiff paid all rates, taxes, utilities and body corporate contributions in respect of the Gray Property;
3. The Plaintiff attended to all arrangements relative to the rental of the Gray Property including arranging the tenancy, attending to maintenance and repairs, liaising with the tenant, liaising with the body corporate;
4. The Plaintiff organised the contracts and finance for the purchase of the Gray Property;
5. The Plaintiff made all arrangements with respect of the purchase of the Driver Property;
6. The Plaintiff, with the assistance of her parents, cleaned up and prepared the Driver Property for sale and made the arrangements for the sale;
7. The Plaintiff made all payments on the mortgage over the Acacia Hills Property until it was sold;
8. The Plaintiff attended to all arrangements in respect of the sale of the Acacia Hills Property;
9. The Plaintiff undertook most of the homemaker contributions of the relationship.

[26] Although it will only be determined once a mortgagee sale of the Gray Property is effected, the evidence suggests that the net proceeds of sale may only be sufficient to discharge the debt secured by the Plaintiff's parents' guarantee. It appears doubtful that there will be sufficient funds left over after that to reimburse the Plaintiff for the post separation contributions by way of mortgage and loan payments.

[27] The Plaintiff has at least made out a case for applying the net proceeds of sale of the Gray Property to the outstanding debt for the property loans and then secondly to payment of the joint loan for the motorbike and thirdly for reimbursement to the Plaintiff for amounts expended since separation.

[28] In those circumstances, I am satisfied that it is just and equitable to make an order altering property interests.

[29] In summary, I find as follows:-

1. That the parties were in a de facto relationship within the meaning of section 4AA of the Act from the period 27 May 2006 until 6 July 2009 and I accordingly make a declaration pursuant to section 90RD(1) of the Act;
2. That the geographical requirements and other prerequisites in sections 39A, 39F, 90RG, 90SB, 90SK and 90SM of the Act are satisfied;

3. That by way of alteration of property interests pursuant to section 90SM of the Act, the net proceeds of sale of the Gray Property be applied as follows:

- (i) firstly, for an amount up to the amount required to discharge the balance outstanding on the guarantee given by the Plaintiff's parents, to the Plaintiff on that account;
- (ii) secondly, for an amount up to the amount required to discharge the loan on the motorbike, to the Plaintiff to be applied towards that debt.

4. Consideration of the question of the payment of any amount remaining after the payment in the preceding order is adjourned sine die.

[30] I will hear the Plaintiff as to the precise terms of the orders and as to any ancillary orders, including if applicable, orders for payment out of Court of any funds paid in by the Second Defendant.