

*Ward & Anor v Shah* [2008] NTSC 43

PARTIES: WARD, MICHAEL JAMES  
and  
WARD, JENNY ESTHER

v

SHAH, ELIJAH

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY exercising Territory jurisdiction

FILE NO: 12/08 (20803363)

DELIVERED: 27 October 2008

HEARING DATES: 5 September 2008

JUDGMENT OF: THOMAS J

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiffs: V Farmer  
Defendant: Self Represented

*Solicitors:*

Plaintiffs: Withnalls  
Respondent: Self Represented

Judgment category classification: C  
Judgment ID Number: Tho200803  
Number of pages: 30

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

*Ward & Anor v Shah* [2008] NTSC 43  
No. 12/08 (20803363)

BETWEEN:

**WARD, MICHAEL JAMES**  
First Plaintiff  
**WARD, JENNY ESTHER**  
Second Plaintiff

AND:

**SHAH, ELIJAH**  
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 27 October 2008)

- [1] This is a claim on Amended Originating Motion dated 1 February 2008 seeking orders that the administration of the estate of Kimberley Michaela Ward by the defendant be revoked and that administration of the estate of the deceased be granted to the first and second plaintiff.
- [2] The plaintiffs also seek a declaration that they are entitled to receive the entirety of the deceased's estate in accordance with Part 4 of Schedule 6 of the Administration and Probate Act and a declaration that the defendant is not a person entitled to take an interest in the estate of the deceased.

- [3] On 23 November 2007, Letters of Administration for the estate of the deceased, Kimberley Michaela Ward, of 2/18 Gardens Hill Crescent, The Gardens in the Northern Territory of Australia were granted to Elijah Hussain Shah of 13 Craig Crescent, Coconut Grove in the Northern Territory of Australia. The deceased was a customer service officer, who died intestate on 18 November 2004 and who had, at the time of death, a personal estate within the jurisdiction sworn not to exceed in total value the sum of \$65,000.00. The Letters of Administration were granted to Mr Shah as the defacto spouse of the deceased, he having been first sworn that he would well and truly collect and administer the estate of the deceased according to the law.
- [4] The essential issue on the hearing of this claim was the assertion by the plaintiffs that the defendant was not the defacto spouse of the deceased and accordingly was not entitled to the grant of the Letters of Administration. The plaintiffs are the parents of the deceased and assert that Letters of Administration should be granted to them.
- [5] The only asset in the estate was an amount of \$64,158 superannuation. This amount of superannuation was held by an organisation known as HostPlus who were the trustee of the death benefit. The plaintiffs had also made representations to HostPlus concerning their interest in the deceased estate.

- [6] On 13 March 2007, there was a determination made by the trustee of the death benefit to pay the money to the legal representative of the deceased upon sighting Letters of Administration.
- [7] The Court file relating to the grant of Letters of Administration was tendered Exhibit P6. This shows that on 10 April 2007, the defendant filed a caveat with the Supreme Court stating that he was the defacto spouse of the deceased and intended to apply to the Supreme Court for Letters of Administration under his entitlement as defacto spouse. On 7 November 2007 the defendant lodged an application claiming administration of the estate be granted to him. The application was supported by an affidavit sworn by the defendant on 6 September 2008 claiming to be the defacto spouse of the deceased. The defendant, Elijah Shah, also swore an Affidavit of Death dated 6 September 2007 annexing a Death Certificate. An Affidavit of Publication and Search was affirmed by Jacqueline Kipling of David C. Story Solicitors for the defendant on 7 November 2007. An Affidavit of Assets and Liabilities was sworn by the defendant on 6 September 2007, showing that the total value of the assets of the deceased was the superannuation which was valued at \$64,158. The deceased had no liabilities that were disclosed.
- [8] Also included in the file, Exhibit P6, is an Affidavit of Service sworn by Keshena Wilson on 26 September 2007 deposing to the fact that on 11 September 2007 she served Jenny Esther Ward, the mother of the deceased, with a true copy of the application for Letters of Administration

from David C. Story Solicitors. On 6 September 2007, the defendant swore an Oath of Office that he would “well and truly collect and administer the estate of the deceased according to law”. The defendant sought a grant of Letters of Administration to himself.

[9] An affidavit of the second plaintiff, Jenny Esther Ward, sworn 1 February 2008, is Exhibit P5. Mrs Ward deposes to the fact that the documents collected by her from the office of David C. Story on 11 September 2007 were as follows:

- (i) Correspondence dated 11 September 2007;
- (ii) Affidavit of witness to consent – Michael Ward;
- (iii) Consent to administration – Michael Ward;
- (iv) Affidavit of witness to consent – Jenny Ward;
- (v) Consent to administration – Jenny Ward;
- (vi) Affidavit of death sworn by Elijah Shah on 6 September 2007 with relevant annexures;
- (vii) Affidavit of assets and liabilities sworn by Elijah Shah on 6 September 2007 with relevant annexure;
- (viii) Oath of Office signed by Elijah Shah dated 6 September 2007;
- (ix) Application;
- (x) Affidavit of Delay sworn 6 September 2007.

[10] The file, Exhibit P6, includes an affidavit dated 19 November 2007 sworn by Kasey Jay Stewart a solicitor with the firm of David C. Story. In that affidavit is a copy of a letter dated 11 September 2007 (annexure “A”) to Mrs Ward which, omitting formal parts, reads as follows:

“RE: Estate of Kimberley Michaela Ward

I refer to the above matter and advise that Mr E Shah the de facto spouse of Ms Ward intends to make an application for Letters of Administration.

I have enclosed the following documents by way of notice:

- Affidavit of Witness to consent (for both yourself and Mr Ward)
- Affidavit of Death
- Affidavit of Assets and Liabilities
- Oath of Office
- Application
- Affidavit of Delay

I ask that should you consent please complete the affidavit of consents and return them to my office. Should you not consent please be advised that an application will be made in 48 days hereof.”

- [11] In the affidavit of Kasey Jay Stewart sworn 19 November 2007 and marked annexure “B” is a copy of a letter dated 12 September 2007 from Withnalls solicitors which, omitting formal parts, reads as follows:

“RE: Estate of Kimberley Ward

I refer to your correspondence to Ms Jennifer Ward dated 11 September 2007 and advise that Withnalls has acted on behalf of Ms Ward in relation to her daughter Kimberley Ward’s estate since her passing. I have secured the entire distribution from the relevant superannuation body payable to Mr & Mrs Ward on behalf of Kimberley Ward.

Mr & Mrs Ward dispute that at any time or the relevant time being the date of death, Mr Shah was a defacto of the deceased and will not at any time being the administrator of the lat Kimberley Wards’ estate.”

- [12] Annexure “C” is copy of a letter which Ms Stewart stated during cross examination by counsel for the plaintiffs, was forwarded to Withnalls on

13 September 2007, although the letter incorrectly bears the date of 16 November 2007. Omitting formal parts, this letter states as follows:

“RE: Estate of Kimberley Ward

I refer to your correspondence dated 12 September 2007 and advise that my client instructs me that he was in fact the de facto spouse of the deceased, both leading up to and at the time of Ms Ward’s death.

My clients instructs me to continue with the application for Letters of Administration.

I note that I have today spoken with Samantha from Host Plus who has advised me that the current position of Host Plus is to pay 100% of the superannuation to the Legal Personal Representative of the Estate.”

- [13] It later emerged, in the evidence of Ms Stewart that in fact this letter was never forwarded to Withnalls as it bore the incorrect facsimile number. The facsimile number to which it was addressed was back to the office of David C. Story.
- [14] Following the grant of Letters of Administration on 23 November 2007, HostPlus paid out the amount of superannuation held in the name of Kimberley Ward to David C. Story solicitors for the defendant.
- [15] On 1 February 2008, being the date of the filing of the Amended Originating Motion, the plaintiffs obtained an ex parte order made by Olsson AJ restraining the defendant from dealing with the assets of the estate of Kimberley Michaela Ward. The matter was adjourned to 8 February 2008.

- [16] On 8 February Olsson AJ made orders for service of the Amended Originating Motion and supporting documentation. The matter was adjourned to 14 February 2008.
- [17] On 14 February the defendant, Elijah Shah, appeared before Olsson AJ who adjourned the matter to 28 February 2008 to give Mr Shah an opportunity to seek legal advice. Olsson AJ advised Mr Shah, that the matter was urgent. On 1 April 2008, Mr Shah paid an amount of \$20,000 into the Supreme Court Litigant's Fund pending the hearing of this matter.
- [18] The matter was adjourned on a number of further occasions. It was listed for hearing on 23 July 2008.
- [19] On 23 July 2008 the plaintiffs attended court for the hearing of the matter. I raised with Ms Farmer, counsel for the plaintiffs, whether she should appropriately join the Registrar of the Supreme Court as a party to the proceedings. Ms Farmer stated that she was not alleging the Registrar had in any way proceeded incorrectly and that, in Ms Farmer's opinion, it was neither necessary nor appropriate to join the Registrar of the Supreme Court as a party.
- [20] The essence of the plaintiffs' claim is that the defendant was not in law the defacto spouse of the deceased and had no entitlement to the grant of Letters of Administration.



## **Plaintiffs' Evidence**

- [21] I have confined my references to the evidence to the issue between the parties as to the status of the defendant with respect to Kimberley Ward. In support of the plaintiffs' claim, an affidavit of Michael Ward, the first plaintiff, was tendered Exhibit P1. The first plaintiff is the father of the deceased. Exhibit P2 is a copy of the caveat signed by the defendant, dated 10 April 2007. Exhibit P3 is copy of a caveat filed on behalf of the defendant by David C. Story Solicitors on 26 September 2007. In this caveat, the defendant claims he is the defacto spouse of the deceased, having been in a relationship with her for a continuous period of not less than two years preceding her death. An order by the Registrar (Exhibit P4) dated 16 October 2007, extends the caveat filed on 20 April 2007 by a further seven days.
- [22] The first plaintiff gave evidence he had not personally been served with the application for Letters of Administration filed by the defendant. He gave evidence that his daughter (the deceased) resided with the defendant from June 2004 till early September 2004. The first plaintiff stated that in September 2004, the deceased asked to come home and then resided with her parents till her departure for Perth, Western Australia on 6 November 2004. Mr Ward gave evidence that during this time she spent most nights at her parents home. She brought all her personal possessions with her but left behind furniture that her parents had supplied when she resided with the defendant at Gardens Hill Crescent.

- [23] In cross examination the first plaintiff gave evidence that in September 2004 the relationship between the deceased and the defendant had concluded.
- [24] The second plaintiff, Jenny Ward, gave evidence. An affidavit sworn by her on 1 February 2008 is Exhibit P5. In this affidavit, the second plaintiff deposes to the fact the deceased met the defendant in late July 2003 and formed a romantic involvement with him at the end of 2003. At this time the deceased commenced living with the defendant at 13 Craig Crescent, Coconut Grove. After that time, there were short periods when she did not reside with the defendant. The deceased and the defendant reconciled at the end of June 2004 and lived together at Unit 2/18 Gardens Hill Crescent, Gardens Hill from 30 June 2004 to early September 2004. The lease was in both their names. Mrs Ward gave evidence that in late August early September 2004, the deceased returned to her parents home to live.
- [25] The second plaintiff denied that the defendant was at any time the defacto spouse of Kimberley Ward. In support of this assertion the second plaintiff annexed a number of documents to her affidavit. These included her statutory declaration dated 22 February 2007 provided to HostPlus stating that at the time of her passing, Kimberley Ward was not in a relationship with Elijah Shah. The declaration sets out the course of the relationship as already detailed in her affidavit. Also annexed were copies of notes made by Kimberley Ward. One of these, dated 7 November 2004, referred to the removal of the defendant from Kimberley's private medical health fund. Annexure "B" is copy of a Tax File Number declaration made by Kimberley

dated 6 November 2007 and her agreement with Grunt Labour Services. The address stated is that of the Kimberley's parents on Cox Peninsular Road, Berry Springs.

- [26] Annexure "D" to the affidavit of the second plaintiff is a copy of the determination made by HostPlus administration dated 14 September 2006 to pay the full superannuation to the defendant as defacto spouse. The second plaintiff stated that she gave instructions to her solicitor, Vanessa Farmer, to appeal this determination.
- [27] Annexure "E" is copy of a letter from HostPlus administration stating that after consideration of all documents provided, the full benefit would be paid to "the Legal Personal Representative of the late Kimberley Michaela Ward upon sighting Letters of Administration".
- [28] On 18 July 2007, a notice of Intended Application for Letters of Administration by the plaintiffs was published in the Northern Territory News (annexure "F") having been lodged by solicitors for the plaintiffs on the plaintiffs' instructions.
- [29] On 11 September 2007, the second plaintiff accepted service of a number of documents which were handed to her by the receptionist at the office of David C. Story. These were the documents already enumerated.
- [30] Mrs Ward, the second plaintiff gave evidence that these documents appeared to be draft documents which contained blanks, they had not been filed in the

Supreme Court. Withnalls, who were solicitors for the plaintiffs, wrote to David C. Story, solicitors for the defendant, advising that they would not consent to the grant of Letters of Administration to the defendant.

- [31] Also annexed to the affidavit of the second plaintiff was a copy of a tax invoice for the funeral expenses addressed to Mrs Ward. The plaintiff paid this account. No reimbursement had been received for these expenses. The funeral expenses were not listed as a liability in the grant of Letters of Administration to the defendant. The amount of the funeral expenses was \$7,696.
- [32] The second plaintiff gave evidence that during the period the deceased had a relationship with the defendant, they had not done anything together with Mr and Mrs Ward as a family.
- [33] Under cross examination by the defendant, the second plaintiff gave evidence that the defendant had only visited their home with the deceased on one occasion. It is her evidence that during the time that the deceased and the defendant were together, they would stay intermittently with other people. Mrs Ward gave evidence that after she was served with the documents in support of the defendant's application for Letters of Administration, she had taken the papers to her solicitor with instructions that she did not consent to the defendant's application. It is the second plaintiff's evidence that she had never asked the defendant to pay for the funeral expenses for the deceased's funeral.

[34] At the conclusion of the Court sitting time on 23 July 2008, the matter was adjourned to 5 September 2008 to enable Mr Shah to present the evidence he wanted to put before the Court.

### **Evidence of Elijah Shah**

[35] The defendant, Elijah Shah, gave evidence that he is currently unemployed. He stated he first met the deceased in 2002. They had a sexual relationship for about three months before the deceased moved in to live with him at his mother's home. He gave evidence that they commenced living together in about mid March 2003. The defendant gave evidence when he first met the deceased that she was very troubled and was abusing benzodiazepines. The defendant said he persuaded her to slow down but after a while the defendant said he and Kimberley were both using morphine.

[36] In July 2003, they both moved to Northern New South Wales to live with his eldest brother. In October they attended a wedding and about a week later moved into a caravan park in Lismore where they stayed for a month. The deceased started to get depressed and was taking anti-depressants. She lost her job at the local bakery and fell into a pattern of depression, continually crying. In late November early December they returned to Darwin and resumed living with the defendant's mother. They were both addicted to morphine and decided to move in with the defendant's father at Gunn Point and "detox". After a few weeks they returned to his mother's home in Craig Crescent, Coconut Grove. The defendant obtained work as a security guard.

Kimberley Ward was working at the Sky City Casino. Mr Shah gave evidence that in June 2004 the deceased argued violently with the defendant's mother and became quite aggressive. He stated that Kimberley returned to live with her own parents. Subsequently Kimberley and Elijah Shah moved in together at Unit 2/18 Gardens Hill Crescent. Kimberley became depressed. The defendant gave evidence he was working a number of shifts and was not often home. The deceased returned to live with her parents again but would visit the defendant.

[37] On 6 November 2004, the deceased left to travel to Perth. They spoke on the telephone. The defendant said the deceased asked him to travel down to Perth. The defendant had work commitments and could not leave Darwin. The deceased told him she did not want to return to Darwin and asked the defendant to send down his curriculum vitae so she could check for security work where he could be employed.

[38] After the deceased died on 18 November 2004, the defendant travelled to Northern New South Wales to live with his brothers. He did not return to Darwin for about two years.

[39] Photographs of clothing the defendant says Kimberley left in their unit at Gardens Hill Crescent, were tendered Exhibit D7. Two letters written by Kimberley were tendered Exhibit D8. The letters are to Kimberley's sister and Elijah's mother. They are not dated or signed.

[40] The defendant tendered a number of statutory declarations which are Exhibit D9. They include statutory declarations sworn by the defendant that he had been in a defacto relationship with the deceased for approximately two years. A statutory declaration by Deborah Shah, mother of the defendant, states the deceased and her son lived together in her home for at least 12 months before moving into their own unit at Gardens Hill Crescent. It was her belief that they were in a defacto relationship. Mrs Shah was aware the deceased stayed with her parents for a few weeks before leaving for Perth.

[41] Other statutory declarations are from a number of persons who deposed to the fact that they knew the defendant and the deceased to be in a defacto relationship and that they were very close as a couple. The defendant stated that other than himself, the persons who had prepared the statutory declarations were not available to attend Court to be cross examined on their statutory declarations. The defendant acknowledged he understood this might affect the weight that the Court could place on these documents.

[42] A copy of the HostPlus membership application form prepared by the deceased on 24 April 2004 is Exhibit D10. This form indicates that Kimberley Ward had nominated Elijah Shah as the preferred beneficiary of her superannuation.

[43] The Tenancy Agreement for 2/18 Gardens Hill Crescent dated 26 June 2004, is for a period of six months commencing 30 June 2004. This agreement is

in the name of Kimberley Ward and Elijah Shah. The Tenancy Agreement is Exhibit D11.

[44] Two further statutory declarations by relatives of the defendant deposing to the defacto relationship between the defendant and the deceased are Exhibit D12.

[45] A statutory declaration prepared by Kenlee Franklin, sworn 4 September 2008, deposed to the relationship between Kimberley Ward and Kimberley's mother, Kimberley's problems with drug abuse and her relationship with the defendant. This is Exhibit D13.

[46] Copy of the Letters of Administration are Exhibit D14.

[47] Copy of a letter from Withnalls, dated 4 April 2008, to the defendant seeking discovery is Exhibit D15.

[48] Copy of bank statements in the name of Mrs DM Shah is Exhibit P16.

[49] The defendant gave further evidence concerning the deceased's drug addiction. He referred to the care he provided her with during her depressed moods.

[50] Under cross examination by Ms Farmer, the defendant agreed that it was possible the deceased was in a domestic relationship with a John Charlton early in March 2003. The defendant was also asked about a domestic violence incident on 30 June 2003 in which the deceased was involved with Dean Carroll. When asked why the deceased would have told police she was



single if she was living with the defendant when she reported this incident, the defendant stated that at that time Kimberley was heavily into drugs, was getting into lot of trouble and that what she said was not reliable.

[51] Documents produced on subpoena by the Commissioner of Police were tendered and marked Exhibit P17. They refer to reported incidents of domestic disturbances involving Kimberley Ward as the victim. Police attended upon the victim on 1 and 5 March, 29 and 30 June 2003. The report in March involved Mr Charlton. The reports in June involved Mr Carroll. With reference to an incident reported to police on 1 March 2003, Police attended 6 Laurie Court, Stuart Park and spoke to Mr Charlton who reported to Police he had argued with his girlfriend on 5 March 2008. Police again attended 6 Laurie Street and spoke to Kim Ward and John Charlton and reported as follows:

“Description

Mbrs Macmichael/Middleton rpts attending 6 Laurie Crt Stuartpark spoke to both participants they stated that they have sorted some of their troubles out but are seeking counselling – they stated that they have been in a relationship now for two years. Both stated that they have support with friends/family. Wish no further police action – thanked mbrs for calling back. DVU contact card left and advised to call if they require any further information/assistance. At this stage nil further required from this unit.”

[52] The defendant stated that Mr Charlton is not a very nice person who would say anything to police to get out of trouble.

- [53] On 29 June 2003, there was a report of a domestic violence incident at 5 Mangola Court Larrakeyah involving Kim Ward and Dean Carroll, police attended and spoke with Kim Ward.
- [54] There is a further report on 30 June 2003 of an incident in which police attended 5 Mangola Court, Larrakeyah after receiving a complaint about a domestic disturbance. The complainant was Kimberley Ward who stated her ex-boyfriend kept coming round and that they argued.
- [55] On 4 July 2003 police attended upon Kim Ward. Ms Ward complained about her ex-boyfriend Dean Carroll who visited her at 139 Smith Street and was causing her problems.
- [56] The defendant said the deceased had told him about an incident between herself and Mr Carroll on 30 June 2003. The defendant could not remember much about it. He stated he knew Mr Carroll and that the deceased had been in a relationship with Mr Carroll years ago.
- [57] The defendant agreed that at this time between March and June 2003, he was also addicted to drugs. He was taking amphetamines and ecstasy and said he was going to a lot of parties.
- [58] The police report of the incident that occurred on 30 June 2003 records that Kimberley Ward had told police she was “single, had not married, never married”.

[59] The defendant was taken to handwritten notes made by Kimberley Ward included in annexure “A” to the affidavit of Mrs Ward (Exhibit P5).

[60] The defendant disagreed that on 7 November 2004, Kimberley had written a note to the effect that she wanted him removed from her MBF Health Fund. He said he could not be sure it was the deceased’s handwriting. He gave evidence he could not explain why, on 8 November 2004, Kimberley would write a note to the effect that she wanted her name removed from the lease. When asked about the note the deceased wrote on stating that she was leaving Darwin to get away from people meaning the defendant, Mr Shah stated Kimberley usually wrote his name with a square E. He said he knew Kimberley was confused and angry which might explain why she wrote the notes that she did. The defendant stated that as soon as Kimberley had died he left the unit at Gardens Hill Crescent. The bond money at the time the lease had been entered into had been paid by Kimberley’s parents. He presumed the bond money was used for the unpaid rent after he left the unit.

[61] The defendant was then asked questions about the monies he received following the grant of Letters of Administration. He said he received \$51,000 from David C. Story. He paid this into his account at Bank SA. The defendant agreed he had not responded to a letter from Withnalls dated 4 April 2008 seeking discovery of bank statements. He agreed this letter was handed to him in Court on 30 April 2008. He referred to statements he had handed to Ms Farmer shortly before coming into Court on 23 July 2008.

[62] The defendant agreed that on 1 February 2008, the Court had ordered an injunction to prevent him dealing with these monies. He first became aware of the injunction when it was brought to his attention on 9 February 2008. He agreed he then appeared before Olsson AJ on 14 February 2008. On 28 February he appeared before Justice Mildren and sought an adjournment for three weeks because he was attending rehabilitation. The defendant agreed Justice Mildren warned him if he spent the money he could go to gaol.

[63] Ms Farmer referred to the document the defendant had just handed to her in Court being bank statements of Mrs DM Shah (Exhibit P16). Statement 58 is for a period from 4 March to 1 April 2008. A credit appears on 28 March 2008 from GBS internet Elijah in the amount of \$20,000. There is a withdrawal shown on 1 April 2008 of \$20,005.40 which the defendant says his mother paid into the Court account.

[64] The defendant was referred to copy of an Australian Central Credit Union Statement included in Exhibit P16. There is a withdrawal of \$40,000 on 31 January 2008. On 28 December 2007, the defendant transferred \$44,995 into his mother's bank account. He had already spent the difference between this amount and the \$51,000 he had received. From the money, he transferred to his mother's account \$20,000 was paid into the account at the Supreme Court. He gave evidence he owed his mother \$20,000 and he paid that back.

[65] The defendant stated that as he had not spoken to Mr and Mrs Ward, he was not aware they had incurred funeral expenses with respect to the deceased. He stated, from what he knew, there were no outstanding debts of the estate. The defendant disagreed that \$20,000 of his money was still in his mother's bank account and denied that he had failed to account fully for the money.

[66] The defendant called Kasey Stewart as a witness.

[67] Kasey Stewart is a solicitor with the firm of David C. Story. Ms Stewart applied for Letters of Administration on behalf of the defendant.

[68] On 11 September 2007 Mrs Ward attended the office of David C. Story. Ms Stewart swore an affidavit, dated 19 November 2007, which is part of Exhibit P6. Ms Stewart stated she filed the application for Letters of Administration after the date of service of the documents on Mrs Ward. She did not think the matter was contested. No originating motion had been filed by the parents.

[69] Ms Stewart gave evidence that she had received a letter from Withnalls dated 12 September (annexure "B" to her affidavit) stating the parents did not consent based on their belief that they had already secured the estate from the relevant superannuation fund. Ms Stewart said she believed she had put the parents on notice of the application. After 48 days had expired she attended the Registry office of the Supreme Court. Ms Stewart gave evidence she was informed by Anne O'Rourke, a member of the Registry staff, that she telephoned Withnalls asking if they intended to dispute the

application but had received no response. Ms Stewart said she believed that the parents of Kimberley Ward had decided not to pursue the matter.

[70] Ms Stewart gave evidence that she was now aware that annexure “C” to her affidavit, a letter from her office which she referred to as in fact being dated 13 September 2007, although it now bears the date 16 November 2007, had never been communicated to Withnalls office. The letter was originally dated 13 September 2007. It had been sent to the facsimile number of David C. Story’s by mistake. It should have been sent to the facsimile number for Withnalls. Ms Stewart agreed this letter had never been forwarded to or received by Withnalls.

[71] Ms Stewart gave evidence that in preparing the application for Letters of Administration on behalf of the defendant, he had told her he had been in a defacto relationship with the deceased for over two years. He had said they had lived together for all that time except for a period of two months at the start of the relationship. He told Ms Stewart the deceased had gone to Perth for a month to visit her cousin and intended to return to Darwin.

[72] The bundle of documents that were served on Mrs Ward are Exhibit P18.

[73] Ms Stewart agreed that once the application for Letters of Administration were filed with the Court, a copy had not been served on Mr or Mrs Ward or Withnalls. Ms Stewart agreed that with hindsight she should have telephoned Withnalls to ask whether their clients were consenting to the application or not. Ms Stewart stated that at the time she thought she had

put the plaintiffs on notice and that she should proceed with the application on behalf of her client, Elijah Shah.

## **Findings**

- [74] After hearing all of the evidence I concluded that Elijah Shah was not a credible or reliable witness. On his own evidence he was, during substantial periods of his relationship with Kimberley, affected by drugs. He agreed that Kimberley had moved out of the unit they shared in Gardens Hill Crescent before she left to travel to Perth on 6 November 2004. He did not have any real recollection of when she had moved out.
- [75] Mr Shah gave instructions to his solicitor, Ms Stewart, that he had been in a defacto relationship with Kimberley Ward for over two years yet, even on his own evidence, the period of the defacto relationship was considerably less than two years.
- [76] Mr Shah gave evidence that he and Kimberley moved in together to live with his mother at 13 Craig Crescent, Coconut Grove about mid-March 2003. Mrs Ward gave evidence her daughter, Kimberley, commenced a relationship with Elijah Shah in July 2003. Elijah Shah tendered a statutory declaration from his mother Deborah Shah stating that the couple had lived with her at 13 Craig Crescent, Coconut Grove for at least 12 months before moving into their own unit at Gardens Hill Crescent. On the basis the couple moved in together at Gardens Hill Crescent at the end of June 2004,

this would support the fact they did not commence living together at the home of Elijah Shah's mother prior to June/July 2003.

[77] The documents produced on subpoena from the Commissioner of Police (Exhibit P17) support an inference that between March and July 2003, Kimberley Ward was not living in a defacto relationship with Elijah Shah.

[78] I accept the evidence of Mrs Ward that in July 2003 her daughter Kimberley commenced a sexual relationship with Elijah Shah. I accept the evidence of Mrs Ward that Kimberley continued to spend a lot of her time with her parents. I find it difficult to determine exactly when Kimberley and the defendant commenced living together. I am satisfied, on the balance of probabilities, it was not before July 2003.

[79] I accept the evidence of Mr and Mrs Ward that toward the end of August, early September 2004, Kimberley returned home to live with her parents at Cox Peninsular Road, Berry Springs. Kimberley did not resume cohabitation with the defendant. On 6 November 2004 she departed for Perth where she remained until the date of her death on 18 November 2004.

[80] I do not think there is any credible evidence on which to base a finding that Kimberley Ward intended to resume a relationship with the defendant.

[81] During the time that Kimberley Ward and Elijah Shah were living together during 2003 and 2004, there were intermittent times when Kimberley would return home to her parents. I accept the evidence of Mrs Ward that prior to



the couple signing a lease for the unit at Gardens Hill Crescent in June 2004, Kimberley spent periods of time not living with the defendant. They had been reconciled in June 2004 and subsequently signed a lease together. This arrangement lasted approximately two months although they had committed themselves to a six month lease. Kimberley returned to her parents home to live at the end of August, early September 2004.

[82] There is no evidence, during the period of their cohabitation, that Kimberley and the defendant acquired property together. They both had spasmodic employment and each contributed to their joint living expenses. Mr Shah's parents had provided them with accommodation from time to time. Kimberley's parents had provided the bond money for the unit at Gardens Hill Crescent and provided the couple with furniture for the unit.

[83] The legislative provisions that are relevant to the issue of whether a defacto relationship existed are s 3A of the De Facto Relationships Act which provides as follows:

**“3A De facto relationships**

- (1) For this Act, 2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.
- (2) To determine whether 2 persons are in a de facto relationship, all the circumstances of their relationship must be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
  - (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 them;
  - (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 their relationship.
- (3) For subsection (2), the following matters are irrelevant:
- (a) the persons are different sexes or the same sex;
  - (b) either of the persons is married to another person;
  - (c) either of the persons is in another de facto relationship.”

[84] I address each of these matters which are to be taken into account.

- (a) The duration of the relationship when Kimberley and the defendant lived together as man and wife in a defacto relationship was at the most 13-14 months from July 2003 to late August early September 2004.
- (b) The defendant and Kimberley resided together in a variety of residences, including the home of the defendant’s mother, the home of the defendant’s brother in Northern NSW, the home of the defendant’s father and a unit at Gardens Hill Crescent in which the lease was in their joint names. This lease commenced on 30 June

2004. Kimberley left the shared unit late in August 2004 and returned to live with her parents at Cox Peninsular Road, Berry Springs until her departure for Perth on 6 November 2004.

- (c) A sexual relationship existed.
- (d) There were no arrangements for financial support. Each of them contributed to their general living expenses while they were working. The parents of Kimberley provided some financial assistance to Kimberley including provision of the bond money when the lease was taken out on the unit at Gardens Hill Crescent and provision of furniture. The parents of Elijah Shah provided them from time to time with accommodation.
- (e) There is no evidence the defendant and Kimberley acquired any joint property or that either of them owned property apart from some personal possessions.
- (f) I am not able to find evidence there was a commitment by Kimberley to a shared life.
- (g) There were no children of the relationship.
- (h) Mr Shah gave evidence they looked after each other. There is no evidence about what household duties either of them performed when they resided with either of Mr Shah's parents or with Mr Shah's older brother. They were together at the unit in Gardens Hill

Crescent for a very short period of approximately two months.

Mr Shah gave evidence he was working outside the home for long hours at this time and was not home very much.

- (i) Friends and family of Mr Shah have attested in statutory declarations that there was a defacto relationship between Kimberley and Elijah. These statutory declarations attest to the opinions of the deponents. They refer to the intensity of the relationship and to the relationship at a particular time. They are not of much assistance with respect to whether in law Mr Shah was in a defacto relationship with Kimberley.

The family of Kimberley knew she was in a relationship with Mr Shah but had never recognised Mr Shah as having a defacto relationship with Kimberley. Mr Shah was not included in the activities of Kimberley's family. Kimberley spent a lot of time with her parents and other members of her family unaccompanied by Mr Shah.

[85] The other legislative provision that is relevant to consider is s 16(1) of the De Facto Relationship Act which provides as follows:

“Except as provided by subsection (2), a court shall not make an order under this Division unless it is satisfied that the de facto partners have lived together in a de facto relationship for a period of not less than 2 years.”

Subsection (2) is not relevant because there are no children involved.

- [86] I am aware that in this matter Mr Shah is not seeking an order under the De Facto Relationship Act. Rather it is the plaintiffs who have to prove on the balance of probabilities that Mr Shah was not in a defacto relationship with their daughter Kimberley.
- [87] The other provision of peripheral relevance is s 67 of the Administration and Probate Act which provides that where an intestate is survived by both a spouse and a defacto partner the defacto partner is entitled to the personal chattels of the intestate if there was a continuous defacto relationship of not less than two years immediately preceding the intestate's death and the intestate did not in that period live with the person to whom they were married.
- [88] I have been unable to find any decisions in the Supreme Court of the Northern Territory on the issue of a defacto spouse inheriting a deceased estate.
- [89] I did make reference to a number of authorities from the Supreme Court of New South Wales which are based on the same or similar legislation to the Northern Territory, in particular, the meaning of "defacto relationship" as set out in s 3A of the De Facto Relationships Act 1991.
- [90] In *Nelson v Brennan* [2002] NSWSC 979, a decision of the Supreme Court of New South Wales delivered 21 October 2002, Master McLaughlin considered the same criteria as set out in s 3A of the NT legislation referred to above. McLaughlin J found a defacto relationship existed between the

plaintiff and the deceased. Two of the important reasons for the finding were:

- 1) because they had lived together continuously over a period in excess of four years; and
- 2) the defendant to the proceedings, who was the executor to the deceased's Will, had completed the death certificate describing the deceased as being in a defacto relationship.

[91] In *Sim v Powell* (1997) 22 Fam Cr 243, a decision of the Supreme Court of New South Wales delivered 10 September 1997, Young J considered exactly the same criteria as set out in s 3A of the NT legislation.

[92] His Honour dismissed the plaintiff's claim that a defacto relationship existed. In the course of his reasons for judgment his Honour, after considering all the criteria that were to apply in deciding whether a defacto relationship existed, stated:

“Looking at all those factors together, it does not seem to me that the plaintiff has established on the balance of probabilities that for a two year period between 1990 and 1994, he and the defendant were living as husband and wife.”

[93] In *Rakusan v Edgecombe; Edgecombe v Edgecombe (Estate of Barry Stuart Edgecombe)* an unreported decision of Master McLaughlin delivered 20 September 1995, the Master considered the competing interests between the widow of the deceased and the plaintiff who claimed to be in a defacto relationship with the deceased at the time of his death. Master McLaughlin

awarded an amount of \$50,000 to the plaintiff from the estate of the deceased. In the course of his reasons for judgment, Master McLaughlin found that the period of the defacto relationship was twenty months. He stated:

“The relationship between the plaintiff and the deceased was only a short one. However, the evidence satisfies me that it was the intention of the parties to continue their lives together and that that would have happened except for the untimely death of the deceased.”

[94] In the matter before this Court, I find on the evidence that the defendant, Elijah Shah and Kimberley Ward did cohabit together between July 2003 and August 2004. This was not a continuous period of cohabitation but broken from time to time when Kimberley returned to live with her parents. Kimberley and the defendant were not residing together at the time of Kimberley’s death. They had taken out a joint lease of a unit in Darwin at the end of June 2004. Two months later Kimberley moved out of the unit and returned to live with her parents until she left to travel to Perth in November 2004. There is no credible evidence that Kimberley intended to resume the relationship.

[95] The plaintiffs have satisfied me that, on the balance of probabilities, the defendant was not in a defacto relationship with their daughter Kimberley as at the date of her death on 18 November 2004.

[96] I will hear from the parties as to the appropriate orders and deal with the issue of costs.