The danger of de facto relationships

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The High Court has recently emphasised the dangers couples face in being classed as de facto, despite maintaining separate residences. The remarkable feature of the recent case of *Clear v Sutton*[1] is that the couple did not cohabit for the majority of their relationship, yet were found to be in a de facto relationship, pursuant to section 2D of the Property (Relationships) Act 1976 (PRA).

Mr Clear and Ms Sutton lived in separate residences for the first five years of their relationship and only moved in together in the final six months of their relationship. The relationship ended by virtue of Mr Clear's passing and he left his entire estate to his children, leaving nothing to Ms Sutton. This case involved a claim by Ms Sutton for division of relationship property on the basis that she had been in a de facto relationship with Mr Clear. The High Court ultimately held the parties were in a de facto relationship.

Section 2D(2) of the PRA sets out various indicia which the court must have regard to in assessing the existence of a de facto relationship. The test under section 2D may be satisfied if various factors, when viewed cumulatively, show the existence of a de facto relationship[2]. Whilst a de facto relationship is likely to involve cohabitation, a common residence is not a prerequisite[3]. There may in fact be compelling reasons why a couple does not share a common residence[4]. In circumstances where a de facto relationship is asserted despite a couple maintaining separate residences, the reasons why the couple have chosen not to cohabit are likely to be instructive[5].

As with all the factors set out in section 2D, a finding of no common residence is not necessarily fatal. The amount of time spent living together or staying over will be one of many considerations in determining the existence of a de facto relationship.

A mutual commitment to a shared life will favour the existence of a de facto relationship, however, the commitment must be mutual. Difficulties are likely to arise where the commitment of one party was noticeably more than that of the other. Demonstrating such a commitment from an evidential point of view may come from the testimony of friends or family.

The degree of commitment to a shared life has been considered a factor that is relevant to all the other section 2D(2) factors, as it refers to the quality of the other factors. The elevation of this factor is supported by *PZ v JC*[6] where, although the relationship was affectionate, mutually supportive and close, it lacked a mutual commitment to a shared life and thus was held not to be a de facto relationship. In the recent case of *Milliken v Davidson-Meek*[7], the mutual commitment to a shared life was the deciding factor.

The circumstances of *Clear v Sutton*[8] were such that Mr Clear's children were quite significantly disapproving of their father's relationship with Ms Sutton. There was a clear lack of acceptance by Mr Clear's children of Ms Sutton into Mr Clear's life. This occurred to the point where Ms Sutton had refused a marriage proposal by Mr Clear due to concern as to the negative impact it may have on the relationship with Mr Clear's children. The court found the primary reason for the couple maintaining separate residences was in order to conceal the relationship as much as possible from Mr Clear's children.

The factors found by the High Court to be relevant in showing the existence of a de facto relationship were:

(a) a number of witnesses gave evidence as to the close and romantic attachment the couple had;
(b) Mr Clear paid for the majority of the couple's everyday non-household expenses and overseas travel;
(c) there were a number of birthday and Christmas cards admitted in evidence which were expressed in romantic terms by Mr Clear towards Ms Sutton;
(d) Mr Clear was a father figure to Ms Sutton's daughter from a previous relationship;
(e) Ms Sutton supported Mr Clear through his terminal illness;
(f) the couple took holidays together; and
(g) the couple attended social and recreational events together.

Factors which pointed against the existence of a de facto relationship (apart from that they maintained separate residences) included the fact that there was no regular pattern of the couple spending the night at each other's home, Mr Clear made no provision for Ms Sutton in his will and she was well aware of this fact, when Ms Sutton wanted to invest in an airfield hangar owned by Mr Clear, she had to borrow funds to do so, and there was no common ownership of property.

Despite these factors, a de facto relationship was held to exist. This only serves to emphasise that proving the existence of a de facto relationship in circumstances where a couple does not cohabit is likely to be very finely balanced, depending on numerous considerations.

1 *Clear v Sutton* [2017] NZHC 1484.
2 *Scragg v Scott* [2006] NZFLR 1076, (2006) FRNZ 942 (HC).
3 *Sutton v Clear* [2015] NZFC 8126 at [51].
4 *G v B* [2006] NZFLR 1047, (2006) 26 FRNZ 28.
5 *Clear v Sutton* [2017] NZHC 1484.
6 *PZ v JC* [2006] NZFLR 97.
7 *Milliken v Davidson-Meek* [2016] NZFC 10795.
8 Above n1.