



Speech by

Mrs J. SHELDON

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PROPERTY LAW AMENDMENT BILL

Mrs SHELDON (Caloundra—LP) (9.45 p.m.): In Australia there appears to be a growing trend for couples to enter into de facto relationships as a precursor or alternative to first marriage and as an alternative to remarriage following separation or divorce. In 1997 de facto partners represented 9.1% of all persons living in couple relationships. Upon the breakdown of a relationship, married couples have recourse to mechanisms under the Commonwealth Family Law Act 1975 to resolve property disputes. In Queensland, because there is no statutory relief available, the resolution of property disputes upon the breakdown of a de facto relationship is governed by the common law. Although a number of common law remedies may be applicable in these situations, these remedies are often difficult to apply in practice.

A number of other States have moved to strengthen the legal position of de facto spouses upon the breakdown of their relationship by the enactment of legislation. New South Wales, the Australian Capital Territory, Victoria, South Australia and the Northern Territory have each enacted legislation dealing with the rights and duties of partners in a de facto relationship. The resolution of property disputes between de facto spouses in Queensland is currently governed by the common law. A wide range of common law remedies is available to a claimant in this situation, including resulting trusts, constructive trusts, estoppel, express trust, charge, unjust enrichment and contract. That situation has proved to be problematic. The availability of such wide-ranging and varied causes of action is not necessarily advantageous to the claimant or the claimant's legal representatives. The claimant may choose which action to plead and it may not be entirely clear which cause of action will be best suited to the particular circumstance of his or her case.

In Queensland, the remedy of most significance is constructive trust on the grounds of unconscionability. This remedy was laid down in the landmark High Court case of Baumgartner v. Baumgartner in 1987. The hallmark of this remedy is that the conduct of the legal title holder must be unconscionable. In this case, the de facto husband asserted that the contested property, which was financed in part through pooled funds, was his sole property to the exclusion of any interest of the de facto wife. This assertion amounted to unconscionable conduct. Subsequent cases have applied the principle laid down in this case and awarded a de facto partner a beneficial entitlement in property.

Some of the factors that need to be present before the courts will proceed to impose a constructive trust are the pooling of financial resources for joint benefit, for example, to make mortgage repayments and pay household expenses, contributions in the form of labour to a business or the renovation of property, contributions in the form of home making or parenting. It is not yet clear from the case law whether home making or parenting contributions alone will be sufficient to found a constructive trust.

The application of the common law in this area of de facto property law still has difficulties. For example, it is impossible to define the precise types of conduct that courts will consider unconscionable. This makes it difficult to predict whether a constructive trust will be imposed in a particular situation and the extent of the beneficial entitlement under the constructive trust. It is believed that people having an undoubted moral claim to another's property are still unlikely to litigate unless the claim is sufficiently large and has a reasonable prospect of success.

In the early 1990s the Queensland Law Reform Commission reviewed the law governing de facto relationships. In the course of its review, the QLRC noted that injustices could occur in the resolution of property disputes between de facto couples because of the inadequacies of the common law. Therefore, the QLRC recommended the enactment of legislation in Queensland to more fairly and equitably resolve financial disputes on the breakdown of a de facto relationship. To this end, the QLRC addressed the following areas: adjustment of property interests, the maintenance rights of de facto couples, cohabitation and separation agreements, declarations about the existence of a de facto relationship, mediation and arbitration, and jurisdiction and powers of courts.

According to the Explanatory Notes provided by the Attorney, the Property Law Amendment Bill 1999 reflects certain provisions of the QLRC draft legislation with respect to adjustments in property. The QLRC also made recommendations in the concept of de facto relationships. In its draft legislation, the QLRC proposed a definition of "de facto relationship" that extended to both homosexual and heterosexual unmarried couples. In recommending that the draft legislation govern both homosexual and heterosexual married de facto couples, the commission also had regard to changing legislative attitudes concerning homosexual relationships. It also noted that the Anti-Discrimination Act 1991 Queensland prohibits, with some exceptions, discrimination against a person on the grounds of lawful sexual activity. The QLRC therefore reasoned that it would be inappropriate to discriminate against homosexual de facto couples by denying them the benefits and responsibilities to be imposed by the proposed legislation.

The QLRC further noted that, because homosexual couples are unable to marry, such couples are restricted to common law remedies to resolve any disputes that arise on separation. The QLRC included provisions for the adjustment of property interest in its draft legislation. The provisions which set out the matters that the court may take into account in altering interests in property were modelled in the equivalent provisions of the Family Law Act 1975 Commonwealth.

The Property Law Amendment Bill, to some extent, has extended and codified the common law relating to de facto property distribution. The Scrutiny of Legislation Committee has noted that the extension of the rights currently available at common law could operate to the detriment of a de facto spouse who holds the sole legal title to relevant assets. The Bill also discusses de facto relationships, and the Bill applies to de facto couples of the same or the opposite sex. This application results from the definition of "de facto spouse" which is spelt out in clause 260, which states—

"A 'de facto spouse' is either 1 of 2 persons, whether of the same or the opposite sex, who are living or have lived together as a couple."

Clause 260(2)(a) states—

"2 persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other."

However, a person who is merely a cotenant does not fall within the definition, and we see that in clause 260(2)(b).

As pointed out by the Scrutiny of Legislation Committee, the definition of the term "de facto spouse" is couched in somewhat general terms. In the committee's view, this element of uncertainty in the establishment of the concept is necessary. This is because de facto relationships arise not from a formal legal step such as marriage but from the circumstances of the relationship in each case. It is also noted that the definition of "de facto spouse" in this instance is similar to the relevant part of the amended definition of "spouse" in the Domestic Violence (Family Protection) Act 1989 Queensland.

We need to look possibly at what happens in other jurisdictions, and I will quote New South Wales as an example. In June 1999 New South Wales enacted the Property (Relationships) Legislation Amendment Act 1999. This Act made significant amendments to the De Facto Relationships Act 1984. The provisions of the Act were broadened so that they applied to parties in relationships of a more widely defined class of persons, and the amended De Facto Relationships Act 1984 was renamed the Property (Relationships) Act 1984 to reflect these changes.

That Act covers parties in a domestic relationship including a de facto relationship or a close personal relationship other than a marriage or a de facto relationship between two adult persons, whether or not related, who are living together, one of each of whom provides the other with domestic support and personal care. A de facto relationship is redefined as being a relationship between two adult persons who live together as a couple and who are not married to one another or related by family. In deciding whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account and a non-exhaustive checklist of matters to be considered is included.

The Bill also looks at property adjustment orders. The Bill establishes a statutory mechanism under which a de facto spouse can apply to a court of relevant jurisdiction after a de facto relationship has ended for an order to adjust the property interests of either or both de facto spouses. The purpose of a property adjustment order is to facilitate a just and equitable property distribution. The right of a de

facto spouse to apply for a property adjustment order is not automatic in contrast to similar rights arising from a marriage. The Bill sets out the criteria that a de facto spouse must satisfy to be entitled to apply for an order. A court can make a property adjustment order only if the de facto spouses have cohabited for at least two years; there is a child of the de facto spouses under 18 years or one spouse has made substantial contributions to the property of financial resources of the couple or to the family welfare; and failure to make the order would result in serious injustice to the applicant.

The Bill also permits the court to make any property adjustment order it considers just and equitable. In deciding what is just and equitable, the court must consider the following matters, and there are certainly a number of them and I will go through some of them: financial and non-financial contributions made directly or indirectly by or for the de facto spouses or a child of the de facto spouse to property or financial resources; contributions to family welfare; effect on future earning capacity; child support; and, other relevant court orders. Additional matters that are listed include age and health, resources and employment capacity, caring for children, responsibility to support others, length of the relationship and child maintenance. I do not think child maintenance is necessarily covered in this Bill, but the Law Reform Commission did refer to it. Finance resources include a prospective element such as a future entitlement to superannuation, resignation, termination or retirement benefits. The Bill also makes it clear that the contributions to family welfare include home making or parenting contributions made by either of the de facto spouses or a child of their union.

The Bill does cover a number of other issues which, in the confined time we have to speak tonight, I will not cover. I think I have covered the main ones. I do support the Bill, especially the provisions as espoused by the Queensland Law Reform Commission. I believe in the essence of what Liberal Party philosophy is all about—that is, of tolerance and of acceptance of people's lifestyle even though they may be different to our own, particularly if they do not impinge in any negative way on the lifestyle of others. We should not make moral pronouncements on them, nor should we say that we are right and they are wrong. I support the context of this Bill. As a Liberal, I will be supporting it when the vote is taken.
