Stepchildren

In the 1995 decision of the Court of Appeal in *Re Monckton*[1] it was held that the then definition of "*stepchild*" in the then section 40 of the *Succession Act 1981*, did not include the children of a deceased person's former wife, who whilst still married to him had predeceased him – i.e. they were not his "*stepchildren*" at the time of his death.

Although, the decision was soundly based and followed a series of cases,[2] it highlighted the injustice caused by that interpretation of "*stepchild*" in the then section 40. The example given by *Lee*[3] explains the issue:

> "*Example*
> A and B marry and have a child J.
> A and B divorce. A marries C and B marries D.
> C and D are both stepparents of J
>
> If the stepparents predecease the parents, J will be able to make a family provision application against four estates, that is those of her parents A and B and her stepparents C and D.
>
> However, if the parents predeceased the stepparents, under the Full Court decision, J would have to make application on the death of each of her parents. She could not wait and apply on the subsequent death of the former stepparent, even although the former stepparent may have inherited her parent's estate. She would have to compete with the stepparent in the application."

The first set of amendments to the *Succession Act 1981* made in 1997[4] inserted a new definition of "*stepchild*", which remedied the previous limitation on the rights of a *stepchild* from a marriage that ended on divorce to make a Family Provision Application:

> "**40A Meaning of *stepchild***
> (1) A person is a ***stepchild*** of a deceased person for this part if—
> (a) the person is the child of a spouse of the deceased person; and
> (b) a relationship of stepchild and step-parent between the person and the deceased person did not stop under subsection (2).
> (2) The relationship of stepchild and step-parent stops on the divorce of the deceased person and the stepchild's parent.
> (3) To remove any doubt, it is declared that the relationship of stepchild and step-parent does not stop merely because—
> (a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
> (b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died.

This definition applies to deaths after the commencement of that amendment [i.e. 20 June 1997].

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1 [1996] 2 Qd R 174 - An application for special leave to appeal to the High Court was refused on 15 March 1996 – unreported HC B25/1995.
2 *Re Burt* [1988] 1 Qd. R. 23 & *Re Marstella* [1989] 1 Qd. R. 638.
3 WA Lee and AA Preece 2001, ***Lee's** Manual of Queensland Succession Law,* LBC, 5th ed, at [1306].
4 *Justice and Other Legislation (Miscellaneous Provisions) Act 1997.*

The second set of amendments to the *Succession Act 1981* made in 1997 by the *Succession Amendment Act 1997,* made extensive changes to the *Intestacy Rules.* Those amendments commenced on 1 May 1998.

Briefly those amendments had the following effect:

- Increased the entitlement of a spouse and eliminated the requirement for a spouse, where the deceased had no issue, to share the estate with the next of kin.

- Recognised long term *de facto* relationships [5 years] and provided for a de facto spouse to receive the spouse entitlement, where there was no lawful spouse.[5] The definition of de facto spouse inserted in section 5[6] was:

  'de facto spouse,' of a deceased person, means a person who—
  (a) has lived in a connubial relationship with the deceased person for a continuous period of at least **5 years** ending on the death of the deceased person; or
  (b) within the period of 6 years ending on the death of the deceased person, has lived in a connubial relationship[7] with the deceased person for periods totalling at least 5 years that include a period ending on the death of the deceased person.

  The new definition applied to Part 3 – the *Intestacy Rules* and rights under Part 4 – *Family Provision.*

- Specific provisions for the sharing of the spouse entitlement where the deceased was survived by a lawful spouse and a de facto spouse.

The rights of step-children were not altered by those amendments.

However, major changes were made to Family Provision Application rights of *stepchildren* by the *Discrimination Law Amendment Act 2002* (which commenced on 1 May 2013).

Those amendments expanded the definition of "*de facto spouse*" to include a wider class of the "*de facto partner"* and removed a "*de facto spouse*" from the definition of "*dependent*" in section 40.

The key changes were the following new sections (a) 5AA of the *Succession Act 1981* and (b) section 32DA of the *Acts Interpretation Act 1954.*

"5AA Who is a person's "spouse"
(1) Generally, a person's **"spouse"** is the person's—
(a) husband or wife; or
(b) de facto partner, as defined in the *Acts Interpretation Act 1954* (the **"AIA"**), section 32DA.

(2) However, a person is a **"spouse"** of a deceased person only if, on the deceased's death—

5 See Succession – *Amendments to the Intestacy Rules Including De Facto Recognition,* by Gay Clarke, Proctor December 1997 at p.18.
6 This definition was moved from definition of "dependant" in s.40(d) in Part 4 – Family Provision.
7 A 'connubial relationship' was not defined in the Act.

(a) the person was the deceased's husband or wife; or
(b) the following applied to the person—
(i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;
(ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or
(c) for part 4, the person was—
(i) a person mentioned in paragraph (a) or (b); or
(ii) the deceased's dependant former husband or wife.

(3) Subsection (2) applies—
(a) despite the AIA, section 32DA(6) and section 36, definition "spouse"; and
(b) whether the deceased died testate or intestate.

(4) In this section—
'dependant former husband or wife', of a deceased person, means a person who—
(a) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and
(b) had not remarried before the deceased's death; and
(c) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased."

"32DA Meaning of 'facto partner'
(1) In an Act, a reference to a **"de facto partner"** is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.

(2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances—
(a) the nature and extent of their common residence;
(b) the length of their relationship;
(c) whether or not a sexual relationship exists or existed;
(d) the degree of financial dependence or interdependence, and any arrangement for financial support;
(e) their ownership, use and acquisition of property;
(f) the degree of mutual commitment to a shared life, including the care and support of each other;
(g) the care and support of children;
(h) the performance of household tasks;
(i) the reputation and public aspects of their relationship.

(2) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.

(3) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.

(5) For subsection (1)—
(a) the gender of the persons is not relevant; and
(b) a person is related by family to another person if the person and the other person would be within a prohibited relationship within the meaning of the *Marriage Act 1961* (Cwlth), section 23B, if they were parties to a marriage to which that section applies.

> **(6)** In an Act enacted before the commencement of this section, a reference to a spouse includes a reference to a de facto partner as defined in this section unless the Act expressly provides to the contrary."

The two major changes made by those sections were:

[a] the inclusion of same sex couples in the new definition of "*de facto partner*"; and

[b] the reduction of the period for recognition of a *de facto partnership* from five years to two years[8] for both Intestacy entitlements and Family Provision Applications.

The right to make a Family Provision Application is given by section 41(1):

> "If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the **deceased person's spouse, child or dependant**,"

The section 40 definition of a "*child*" is:

> "***child*** means, in relation to a deceased person, any child, **stepchild** or adopted child of that person."

The section 40A definition of "*stepchild*" is:

> **"40A Meaning of *stepchild***
> (1) A person is a ***stepchild*** of a deceased person for this part if—
> (a) the person is the **child of a spouse of the deceased person**;"

The result was that from 1 May 2003, the children of different and same gender *de facto partners* from all previous relationships become the *stepchildren* of their de facto partner.

So, the children of a spouse,[9] who is a *de facto partner*, were the *stepchildren* of the deceased spouse (including *de facto partners*) for the purposes of Part 4 of the *Succession Act* 1981; i.e. eligible applicants to make a Family Provisions Application.

The uncertain issue is - *when do de facto stepchildren cease to be stepchildren?*

The section 40A definition defines when a *stepchild* relationship is created and then deals specifically with the circumstances when the stepchild relationship ends **if their parent was married to their stepparent.**

Although the *Discrimination Law Amendment Act 2002* changed the definition of "*spouse*" to include "*de facto partner*" it did not make any amendments to section 40A to specify the circumstances when the relationship of *stepchildren arising* from a de facto partnership ceased.

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8 See Amendments to the Succession Act for de facto couples, by Barbara Hamilton, Proctor December 2003 at p.23.

9 S.5AA(2)(b) & s.32DA of the Acts Interpretation Act 1952.

Section 40A(2) states that "*the relationship of stepchild and step-parent stops on the divorce of the deceased person and the stepchild's parent*." This sub-section has no effect on the status of the children of a *de facto partner*.

Section 40A(3) seeks to remove any doubt by declaring …

> "… that the relationship of stepchild and step-parent does not stop merely because—
>
> (a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
>
> (b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died.

However, this subsection does not apply to *stepchildren* who are the children of a *de facto partner* because there is no marriage.

It can be argued that, in the absence of a statutory provision, once the relationship of *stepchild* arises from a *de facto partnership* created under the current sections detailed above, the relationship continues indefinitely because section 40A does not include any provision to declare when that relationship ceases. Or to put it another way if the "*parent*" and "*stepparent*" were not married – *then once a stepchild always a stepchild.*

If this interpretation is correct then the *stepchildren* from a *de facto partnership* have greater rights than *stepchildren* from a marriage.

The alternative argument is that because section 5AA(2)(b)(ii) states that …

> *"*the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years **ending on the deceased's death"**

then, unless the *de facto partnership* exists at the time of the death of the partner the survivor is not a spouse and therefore their children are not the *stepchildren* of the deceased at that point in time.

The issue of *de facto stepchildren* was recently considered by Derham AsJ in *Bail v Scott-Mackenzie* [2016] VSC 563.

The defendant sought to dismiss the plaintiff's claim on basis that plaintiff was not an eligible person under section 90 *Administration and Probate Act 1958* (Vic) and that the claim had no real prospects of success.

The plaintiff claimed that she was deceased's *stepchild*, being the daughter of a former *de facto partner*, who died while their *de facto partnership* existed.

The issue to be determined was whether plaintiff fell within the definition of "*stepchild*", to be an eligible applicant; i.e. did a *stepchild* include child of deceased's *former de facto partner* of over 40 years.

Her Honour held that the clear intention of the Victorian Legislature's was to include child of parent who was in domestic partnership with deceased, when prescribing who was an eligible person to make an FPA.

After stating that the 2014 amendments to the Victorian Act, indicated "… *a legislative intent to embrace the wider meaning of 'stepchild' as including the child of a parent who was in a domestic partnership with the deceased*", her Honour said:

> "6. **By analogy with the common law position** of a stepchild of a marriage, the relationship of stepparent and stepchild of a domestic partnership for the purposes of Part IV ends if, before the death of the deceased, **the domestic partnership ends otherwise than by the death of the parent**. **That is, if the domestic partnership ends by complete separation, or what might loosely be called dissolution**."

At paragraphs 89 to 97, her Honour referred to the Queensland case law that led to the enactment of section 40A of the *Succession Act 1981* and then reviewed other Australian authorities; including the judgment Dean J in *Re Cook & Anor; Ex parte C & Anor* [1985] HCA 47 at 262-263 where he stated that "*(i)t has been held that the relationship will only persist while the marriage by reason of which it arises, remains undissolved."*

In paragraphs 85 to 96 of the judgement, her Honour refers to the Queensland cases and she concluded that the common law as stated by Deane J in *Re Cook* [1985] 156 CLR 249 was not fully considered by McPherson J and Thomas (see paragraphs 103 & 104).

Her Honour reached the following conclusion:

> "108 ... (I)t is my view that the inclusion of a domestic partner at the time of the deceased's death as an eligible person, with equal status to a spouse, is an indication that the legislature may have intended that stepchildren of domestic partnerships should be encompassed in the meaning of stepchild. The doubt or ambiguity as to the legislative intention is resolved by the Explanatory Memorandum.
>
> 109 By analogy with the common law position of a stepchild of a marriage, the relationship of stepparent and stepchild of a domestic partnership for the purposes of Part IV ends if, before the death of the deceased, the domestic partnership ends otherwise than by the death of the parent. **That is, if the domestic partnership ends by complete separation, or what might loosely be called dissolution**.
>
> 110 **But if the domestic partnership remains undissolved at the time of death of the natural parent, again by analogy with the position at common law, the relationship of affinity between stepparent and stepchild continues**.

This issue must be resolved in Queensland, remove the uncertainty.

Glenn Dickson
Barrister
15 March 2017