IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2013-488-000269
[2014] NZHC 2416

UNDER	the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
BETWEEN	KELLY SUZANNE HAYES and ANDREW NATHANIEL HAYES as the Executors and Trustees of the Estate of MARLENE RUTH KEEYS Plaintiffs
AND	DOUGLAS FREDERICK PARLANE Defendant

Hearing: 3 and 4 June 2014

Counsel: J G Ross for the Plaintiffs
A M Swan for the Defendant (granted leave to withdraw)

Judgment: 3 October 2014

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 3 October 2014 at 2.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J G Ross, Whangarei
A M Swan, Auckland

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Titirangi Law Centre (R D Ganda), Auckland

[1] The plaintiffs, Kelly Hayes and Andrew Hayes, are the executors and trustees of the estate of the late Mrs Keeys. Mrs Hayes is the daughter of the deceased, and Mr Hayes is Mrs Hayes' son. They have applied for a declaration under the Declaratory Judgments Act 1908 that the defendant, Mr Parlane, was not in a de facto relationship with the deceased for five years before her death on 18 November 2012. The defendant claims that he was in a de facto relationship with the deceased over this period.

[2] The key issues in this proceeding are: (a) whether this is a suitable case for making a declaration under the Declaratory Judgments Act 1908; and, (b) if so, given that a declaration is a discretionary remedy, whether the Property (Relationships) Act 1976 is a bar to the exercise of that discretion. Under the Property (Relationships) Act, the Family Court has exclusive jurisdiction to hear and determine applications for orders regarding relationship property. These orders relate to the division of property between spouses or partners, determining the ownership status of certain property and other orders to adjust each party's share of the property. Whilst the Property (Relationships) Act does not provide for a specific declaration as to relationship status, naturally, the Family Court will make such findings in the course of determining the division of relationship property. Is this enough then to cause this Court to leave it to the Family Court to determine relationship status?

Background

[3] The deceased was the owner of the property at 24 Lewer Road in Whangaroa. She left a will dated 29 September 2012, and probate was granted on 7 January 2013.

[4] The material terms of the will were that:

(a) The plaintiffs were appointed as executors and trustees of the estate;

(b) A legacy of $20,000 was left to Mr Parlane; and

(c) The residue of the estate was to go to Mrs Hayes.

[5] The dispute between the parties arose around January 2013 when the defendant served a notice in terms of s 65 of the Property (Relationships) Act, electing under s 61 of that Act for a division of relationship property. This entailed the assertion that he and the deceased had been in a de facto relationship.

[6] Since serving notice under s 65, the defendant has taken no further steps to advance his claim under the Property (Relationships) Act. However, the defendant's notice under s 65 was enough to stall the distribution of the estate. After waiting some time for the defendant to advance his claim under the Property (Relationships) Act, on 13 May 2013, the plaintiffs commenced this proceeding. The defendant then responded by filing a statement of defence and counterclaim in which he alleged that he and the deceased were in a de facto relationship at the relevant time, and so he sought a declaratory order from the Court to that effect.

[7] A defended hearing of this proceeding was scheduled to commence on 3 June 2014. However, on that day, for the reasons set out in *Hayes v Parlane* [2014] NZHC 1306, the defendant and his counsel sought leave to withdraw, and this was granted. The defendant did not formally discontinue his defence or his counterclaim. The hearing of the plaintiffs' claim then proceeded the following day by way of formal proof. The defendant's withdrawal from the proceedings meant that the defence and counterclaim were not advanced.

Suitability of proceeding for a declaration under the Declaratory Judgments Act

[8] There are two parts to this question: does this proceeding meet the jurisdictional requirements for a declaration under the Declaratory Judgments Act; and if it does, how is that affected by the exclusive jurisdiction of the Family Court to determine questions of relationship property?

Jurisdiction

[9] Proceedings under the Declaratory Judgments Act require first, the determination of whether the proceeding falls within the scope of the

Declaratory Judgments Act (the jurisdiction issue) and secondly, whether the case is appropriate for the exercise of the discretion to make a declaration. Authorities about the jurisdiction of the courts to grant declaratory relief are legion; perhaps one of the most often cited statements is that of Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 501 (emphasis added):

> The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years it has become more and more extensively used - often as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists. *But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights.*
>
> The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party *to settle a dispute between them as to the existence or nature of the right claimed.* So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

[10] In New Zealand, the common law authority to grant a declaration is enhanced by the Declaratory Judgments Act. This statue confirms and extends the authority of the superior courts to make declarations.

[11] The relevant provisions of the Declaratory Judgments Act are:

> **2 Declaratory judgments**
>
> No action or proceeding in the **[**High Court**]** shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.
>
> **3 Declaratory orders on originating summons**
>
> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any

> memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
>
> Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—
>
> such person may apply to the High Court by originating summons … for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.
>
> **10 Jurisdiction discretionary**
>
> The jurisdiction hereby conferred upon the **[**High Court**]** to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

[12] In the present case, the plaintiffs seek a negative declaration to settle the dispute between them and the defendant as to the existence of a relationship on which the defendant's asserted rights under the Property (Relationships) Act turn. Also affected are the rights of the beneficiaries under the deceased's will, as the plaintiffs have held back from distributing the estate. Ordinarily, a party who receives notice of an asserted claim of right might choose to ignore it, until steps are taken to enforce the right. Here, the defendant took the first step to enforce his claimed right but went no further. This led to the plaintiffs seeking a declaration that the relationship on which the defendant based his claim does not exist.

[13] The proceeding does not fall within any of the categories specified in s 3 of the Declaratory Judgments Act. Unless, therefore, the plaintiffs can establish that the proceeding meets the requirements of s 2 of this Act, the Court will have no jurisdiction to make the declaration that they seek.

[14] In *Re Chase* [1989] 1 NZLR 325 (CA), Cooke P discussed the nature of the jurisdiction to make declarations of right under the Declaratory Judgments Act. At 332, Cooke P stated (emphasis added):

> By s 2 of the Declaratory Judgments Act 1908, "No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, *and the said Court may*

> *make binding declarations of right*, whether any consequential relief is or could be claimed or not".

In *Chase* at 332, Cooke P cautioned against a court taking a "narrow and excessively legalistic" approach to s 2.

[15] At 333, after drawing comparison with the courts' need to maintain a broad inherent jurisdiction, Cooke P re-stated his concern to avoid narrowing the jurisdiction given by s 2:

> Attempts to foreclose the categories of cases in which such jurisdiction [under s 2] may appropriately be exercised can be equally short-sighted. It is given to no Judge to foresee all the possible kinds of case, or all the shifts in what the public interest will require from time to time.

[16] Later at 333, Cooke P referred to the breadth of the language of s 2 of the Declaratory Judgments Act stating that it should not be restricted by interpretation, instead any restriction on access to a declaration was to be imposed by way of the broad discretion to refuse to make a declaration, given by s 10:

> As to jurisdiction, s 2 of the Declaratory Judgments Act is amply wide and in my view should not be restricted by interpretation: provided always that it is read together with s 10, which expressly states that the declaratory jurisdiction is discretionary "and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order".

[17] A number of cases have endorsed Cooke P's interpretation of s 2 in *Re Chase*: see *Birkenfeld v Yachting New Zealand Inc* [2008] NZCA 531, [2009] 1 NZLR 499; *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [34]; *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC); and *Johnston v Johnston* [1991] 2 NZLR 608 (HC) at 616.

[18] In *Johnston*, Neazor J said at 616:

> It is clear that s 2 of the Act does not refer only to the jurisdiction given by s 3. Section 2 removes objection which might have been offered in the past if a declaration had been sought in circumstances when no other relief was sought or was available, and confirms the power of the Court to make binding declarations of right.

[19] In *Johnston*, the plaintiff had pleaded the existence of an oral agreement that the second defendant was failing to perform. At trial, the second defendant argued that the alleged oral agreement did not come within s 3 of the Declaratory Judgments Act and it could not fit under s 2 because to seek a declaration under that section, the plaintiff must allege and provide a basis in pleading for some personal right. The plaintiff in *Johnston* had not expressly done this.

[20] At 617, Neazor J rejected the second defendant's arguments regarding the unavailability of s 2 of the Declaratory Judgments Act. The Judge described those arguments as no more than "an attempt to restrict jurisdiction by interpretation, an exercise which Cooke P disapproved in *Re Chase*". Neazor J also saw no reason why a declaration could be sought despite there being contested facts:

> In particular, there is no authority of which I am aware which holds that a declaration cannot be sought in an ordinary action in respect of an agreement which cannot be the subject of the speedy procedure provided for by virtue of s 3 of the [Declaratory Judgments] Act in relation to agreements in writing.

[21] Neazor J then referred to the well known observations of Lord Diplock in *Gouriet* at 501, (also cited herein at [9]), regarding the circumstances in which a right will give rise to jurisdiction to make a declaration. Later at 618, Neazor J applied those observations to the case at hand. This led the Judge to conclude that in a broad sense, the plaintiff's pleading implicitly raised a question regarding her rights, which was enough for the proceeding to come within the jurisdiction of s 2 of the Declaratory Judgments Act:

> The plaintiff has pleaded that agreements were entered into, the purport of the agreements and that the defendant has refused to perform them. That pleading can only, in my view, amount to an assertion that a personal right has accrued to her by reason of contracts and is being denied her. She may or may not establish that, but there is no doubt in my view that she has pleaded it, and that what she has pleaded falls squarely within the second paragraph of the passage from Lord Diplock's speech set out above.

[22] Similar affirmation of the breadth of the s 2 jurisdiction were made by Asher J in *Simpson*:

> [41] It is clear that s 2 of the Act does not refer only to the jurisdiction given by s 3. … Section 2 has a broader reference than just to the specific interpretation of issues referred to in s 3.

[23] And in *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA), at 318, the Court of Appeal discussed the Court's jurisdiction to make declarations and cited, with approval, from Lord Diplock's judgment in *Gouriet* at 501.

[24] Here, until the defendant withdrew from defending the proceeding, there was a live dispute between the parties. In his counterclaim, the defendant claimed that he was in a de facto relationship with the deceased, which gave him a right to a division of relationship property under the Property (Relationships) Act. The plaintiffs claimed there was no such relationship and, therefore, the defendant had no such rights. In this broad sense, therefore, the counterclaim can be read to implicitly raise questions as to the existence or nature of the right that the defendant claimed. There was enough to bring the matter within s 2 of the Declaratory Judgments Act.

[25] Then the defendant withdrew on the day of the defended hearing, after this Court ordered that his late filed evidence would not be read. The defendant did not formally discontinue his defence or his counterclaim. So in a technical sense the dispute between the parties remains alive. Although the proceeding is being determined by way of formal proof, the plaintiffs must still prove their claim. In a broad sense, a decision on the declarations that each party has sought will settle the dispute between them. The alleged de facto relationship is the foundation for the defendant's claim to rights under the Property (Relationships) Act. The plaintiffs' rejection of the existence of that relationship, if upheld, would remove the impediment that has caused the plaintiffs to hold back from distributing the estate. If a legalistic view were to be taken of these circumstances, I do not think that they would qualify for determination under s 2 of the Declaratory Judgments Act. But if the respective claims of the parties are looked at broadly, they can be seen to raise questions of the respective parties' rights: first, the plaintiffs' asserted rights to deal with the estate as if it were free of any claims under the Property (Relationships) Act, and so to distribute it in accordance with the will; and secondly, the defendant's rights, if any, to maintain a claim against the estate based on asserted rights under the Property (Relationships) Act. Alternatively, the plaintiffs' right could be said to represent the beneficiaries' right to claim their entitlement under the will.

[26] I see this proceeding as marginal when it comes to determining whether it falls within s 2 of the Declaratory Judgments Act. However, I am mindful of the approach of Cooke P in *Chase* that jurisdiction in s 2 is broad and not to be unduly constrained by interpretation, or a narrow legalistic view of the s 2 jurisdiction; the better approach being to rely on the discretion to refuse relief in s 10 if the proceeding before the Court is seen to be unsuited to the making of a declaration. I am strengthened in this view by the reasoning of Neazor J in *Johnston*.

[27] There are similarities between the present case and the circumstances in *Johnston*. In that case, the allegation of the existence of an oral contract was seen by Neazor J to amount to an assertion of a personal right (at 618). Here, the mirror allegations raised by each side as to the existence or not of a de facto relationship can be regarded as assertions by them of their respective personal rights vis-a-viz the estate. Therefore, I am prepared to view the present proceeding as one that comes within s 2.

[28] The proceeding faces a further hurdle in that it has involved a factual contest; though this is now avoided by the formal proof hearing. There is a well settled view that a proceeding under the Declaratory Judgments Act is not a suitable means for resolving disputes that involve determinations of fact, or mixed fact and law: see *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85. This is something that arises from the discretionary nature of this remedy and not from its jurisdictional foundation: see *Carington v Carington* [2014] NZHC 869 at [42]-[43]; and *Ambrose* at [35]. A refusal to make a declaration in such circumstances results from the Courts' view that the procedure is unsuitable for determining contested facts, and not from a lack of authority: see *New Zealand Insurance Co Ltd* at 85:

> The jurisdiction to make orders under the Declaratory Judgments Act is wholly discretionary. The cases defining the attitude of the courts in the exercise of that discretion are numerous … and they establish certain guidelines which will generally be followed.

[29] In *Jew v Jew* [2003] 1 NZLR 708 (HC), at [33], Paterson J doubted whether a case involving contested questions of fact or mixed fact and law was an "appropriate case for a declaration under the Declaratory Judgments Act". However, the Judge

then noted that he did not need to decide the issue because the Court has jurisdiction to grant declaratory relief under the Judicature Amendment Act 1972, and under the common law. *Jew* was a case where the Declaratory Judgments Act was used by a plaintiff who sought a declaration on whether assets held by a family trust were relationship property. The application was struck out by the Master as an abuse of process, but on review Paterson J held that the husband was entitled to commence the proceedings in this Court.

[30] Where questions of fact or mixed fact and law are involved, I doubt that the Judicature Amendment Act can provide an alternative jurisdiction in the manner that Paterson J outlined in *Jew*. The jurisdiction to make declarations under the Judicature Amendment Act is founded in this Court's supervisory jurisdiction of judicial review: see discussion in *Gazley* at 318. Absent the exercise of that supervisory jurisdiction, the remedies provided for in the Judicature Amendment Act are unavailable. So I cannot see how the jurisdiction to make declarations under the Judicature Amendment Act could have been of assistance in *Jew*. I do agree with the comments in *Jew* regarding this Court's authority to make binding common law declarations of right. Those comments fit with the decision of Neazor J in *Johnston*.

[31] As was recognised by Neazor J in *Johnston* at 616, there is a difference between declarations that can only be sought under s 3 of the Declaratory Judgments Act and those sought under s 2. With the former, this Act specifies the procedure to be followed (formerly by originating summons and now under Part 18 of the High Court Rules), whereas with s 2 declarations, they may be sought under either Part 18, or, as was the case in *Johnston*, brought as an ordinary proceeding under Part 5. Section 2 declarations are declarations of right and they are available under the common law. Section 2 of the Declaratory Judgments Act does no more than to confirm their existence and to put beyond doubt the Court's authority to make them even when no other relief is sought.

[32] In *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC), Associate Judge Bell disagreed with Paterson J's view in *Jew*; at [66], the Judge said:

> [66] The current rules allow disputed questions of fact to be decided in an application for declaration. Under the High Court Rules, applications for declaration are made under Part 18. … Objections based on disputed questions of fact are no longer good reasons to refuse an application for declaration.

[33] Unlike Associate Judge Bell in *Yeoman*, I cannot see how procedural changes, provided in Part 18 of the High Court Rules for applications under the Declaratory Judgments Act, can of themselves bring about a more relaxed approach to the usual reluctance to make declarations when contested questions of fact, or mixed fact and law are involved, particularly in relation to declarations under s 3.

[34] In substance, the intended use of the Declaratory Judgments Act, in particular s 3, remains the same today as was described by McCarthy P in *New Zealand Insurance Co Ltd* at 85:

> The procedure is designed to provide a speedy and inexpensive method of obtaining a judicial interpretation where the matter in dispute cannot conveniently be brought before the court in its ordinary jurisdiction and where a declaratory judgment would be appropriate relief.

[35] In the present case, the proceeding was commenced under Part 18 of the High Court Rules and not as an ordinary proceeding under Part 5. In accordance with settled principle, the involvement of questions of contested fact or mixed law and fact would tell against the making of a declaration. However, whether the reluctance to make declarations in cases involving questions of contested fact, or mixed law and fact is limited to s 3 declarations or whether it extends to declarations of right as well is a general question that I need not determine. Nor do I have to determine if that reluctance has been diminished by Part 18 of the High Court Rules. As the matter now lies before me, it does not involve contested questions of fact, or mixed fact and law. In a formal proof hearing, a Court makes determinations on uncontested allegations. In such circumstances, I see no reason why declarations under the Declaratory Judgments Act cannot be made if the Court has the requisite jurisdiction and is otherwise of a mind to make them.

[36] Moreover, in this case there is another factor that tells against refusing relief on the ground that the case involves contested questions of fact or mixed law and fact. Before the defendant withdrew from the hearing, each side was seeking mirror

declarations under the Declaratory Judgments Act, and each was content for their respective claims for a declaration to proceed. This is a relevant consideration in favour of exercising the s 10 discretion, even if the proceeding had been opposed. In other cases where the unsuitability of declaratory relief in cases involving contested questions of fact or mixed law and fact has been raised as an issue, this has been done by the party opposing the making of a declaration as one of the grounds of defence.

[37] In *Gazley v Attorney-General* (1996) 10 PRNZ 47 (CA) at 51, a review of the earlier *Gazley* decision, the Court of Appeal expressly recognised that s 11 of the Declaratory Judgments Act permits declarations to be made even though "another Court has, independently of the Act, exclusive jurisdiction over the matter in issue". Though the Court of Appeal then acknowledged that this "broad grant or recognition of jurisdiction" was balanced by s 10, which gave the Court the "broadest" discretion when it came to deciding whether to grant declaratory orders or not. Thus, any jurisdictional concerns regarding whether a declaration in the present case might intrude on the exclusive jurisdiction given to the Family Court by the Property (Relationships) Act are answered by s 11 of the Declaratory Judgments Act.

Impact of Property (Relationships) Act on proceeding

[38] I now turn to consider if the Property (Relationships) Act precludes this Court from determining if the defendant and the late Mrs Keeys were in a de facto relationship or not.

[39] Section 22(1) of the Property (Relationships) Act provides that "every application under this Act must be heard and determined in a Family Court". This is subject to "any other provision of this Act that confers jurisdiction on any other court" (s 22(2)).

[40] Prior to the 2001 reforms, the Family Court and the High Court had concurrent jurisdiction to deal with relationship property matters. The former s 22 was substituted from 1 February 2002 by s 23 of the Property (Relationships) Amendment Act 2001. Section 22 has since been amended again. Prior to 30 March

2014, a Family Court Judge had jurisdiction to order complex proceedings to be transferred to the High Court if the Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings. Those subsections of s 22 were repealed from 31 March 2014 by s 4 of the Property (Relationships) Amendment Act (No 2) 2013.

[41] Section 23 of the Property (Relationships) Act sets out who can apply under that Act:

> **23 Who can apply**
>
> (1) The following persons may apply for an order under section 25(1)(a) or (b) or an order or declaration under section 25(3):
>
> (a) either spouse or partner, or both of them jointly:
>
> (b) any person on whom the spouses or partners have made conflicting claims in respect of property.
>
> …

[42] The purpose of the Property (Relationships) Act is to provide for the division of relationship property. Section 25 provides:

> **25 When Court may make orders**
>
> (1) On an application under section 23, the Court may—
>
> (a) make any order it considers just—
>
> (i) determining the respective shares of each spouse or partner in the relationship property or any part of that property; or
>
> (ii) dividing the relationship property or any part of that property between the spouses or partners:
>
> (b) make any other order that it is empowered to make by any provision of this Act.
>
> …
>
> (3) Regardless of subsection (2), the Court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just.
>
> …

[43] I now turn to consider the relevant statutory provisions and case law. The Family Court has exclusive jurisdiction for applications made under the Property (Relationships) Act: see s 22(1). Those applications relate to property division orders, or a declaration as to the ownership of specific property: see ss 23 and 25. The power to make additional orders under this Act is ancillary to the powers in ss 23 and 25.

[44] Also relevant are the provisions in the Property (Relationships) Act allowing a surviving spouse or partner to choose between a property division under this Act, or to take under will or intestacy. Section 61 provides for this election. Section 62 imposes time limits for making the election. Notice requirements are provided for in s 65. It is worthwhile to set out s 62 in full:

> **62 Time limit for making choice**
>
> (1) A surviving spouse or partner who wishes to choose option A or option B must make that choice within the following time limits:
>
> (a) if the estate of the deceased spouse or partner is a small estate (as defined in section 2), the choice must be made—
>
> (i) no later than 6 months after the date of the death of the deceased spouse or partner; or
>
> (ii) if administration of the estate is granted in New Zealand within that period, no later than 6 months after the grant of administration,—
>
> whichever is the later:
>
> (b) in any other case, the choice must be made no later than 6 months after administration of the estate of the deceased spouse or partner is granted in New Zealand.
>
> (2) Regardless of subsection (1), but subject to subsection (4), the Court may extend the time for making that choice after hearing—
>
> (a) the applicant; and
>
> (b) any other persons who the Court considers should be heard.
>
> (3) The Court's power under this section extends to cases where the time for making the choice has already expired, including cases where it expired before the commencement, on 1 February 2002, of the Property (Relationships) Amendment Act 2001.

(4) The Court may not grant an extension of time under subsection (2) unless the application for the extension is made before the final distribution of the estate of the deceased spouse or partner.

[45] Once an election is made and notice is given under s 65, an estate cannot be distributed: see s 72(1). This section provides:

> **72 Distribution of estate after choice made but before proceedings commenced**
>
> (1) If a surviving spouse or partner chooses option A, the administrator or trustee of the estate of the deceased spouse or partner must not distribute any part of the estate before—
>
> (a) the surviving spouse or partner applies for a division of relationship property under this Act; or
>
> (b) the expiry of the period specified in section 62(1) (or any extension of that period granted under section 62(2)),—
>
> whichever happens first.
>
> (2) Despite subsection (1), a distribution may be made in any of the cases referred to in section 71(2).

[46] Section 72 refers to the rights of the administrator or trustee of an estate to distribute. If a party who has given notice should then fail to commence proceedings for a property division within the time specified by 72(1)(b), the estate can be distributed. The time limits imposed under s 72(1)(b) refer back to those imposed under s 62(1), which sets out the time limits for giving notice under s 65. Section 72(1)(b) permits a Court to extend those time limits (under s 62(2)).

[47] In the case of de facto partners, s 89 permits one partner to make a claim for a division of property under the Property (Relationships) Act after the death of the other partner. A claim can be made irrespective of whether they were living together at the time of the death of the deceased partner.

[48] Section 90 provides time limits on behalf of the applicant of a property division order:

90 Time limits for commencing proceedings

(1) Proceedings must be commenced within the following time limits:

(a) if the estate of the deceased spouse or partner is a small estate (as defined in section 2), the proceedings must be commenced—

(i) no later than 12 months after the date of the death of the deceased spouse or partner; or

(ii) if administration of the estate is granted in New Zealand within that period, no later than 12 months after the grant of administration,—

whichever is the later:

(b) in any other case, the proceedings must be commenced no later than 12 months after administration of the estate of the deceased spouse or partner is granted in New Zealand.

(2) Regardless of subsection (1), but subject to subsection (3), the Court may extend the time for commencing proceedings after hearing—

(a) the applicant; and

(b) any other persons who have an interest in the property that would be affected by the order sought and who the Court considers should be heard.

(3) The Court's power under this section extends to cases where the time for commencing proceedings has already expired, including cases where it expired before the commencement, on 1 February 2002, of the Property (Relationships) Amendment Act 2001.

(4) The Court may not grant an extension of time under subsection (2) unless the application for the extension is made before the final distribution of the estate of the deceased spouse or partner.

[49] Nonetheless, under s 74, the distribution of an estate will not be disturbed if it has occurred before the personal representatives are given notice of, inter alia, an application for an extension of time under s 90(2):

74 Distribution of estate not to be disturbed

(1) This section applies where any part of the estate of a deceased spouse or partner has been distributed—

(a) before the personal representative of that spouse or partner receives notice that an application has been made to the Court—

…

(iv) under section 89(2) or section 90(2) for an extension of the time for making an application; and

…

[50] The prohibition in s 72(1) against distributing once in receipt of a notice under s 65 is subject to s 71(2): this provision permits a Court to approve a distribution. Therefore, the executors and trustees of an estate who are faced with a tardy claimant like the defendant can either wait until the specified time limits have expired and then distribute, or apply to the Family Court under s 71(2)(c) for approval to distribute. The latter course would suit cautious executors and trustees who were reluctant to act on their own accord on the expiry of the specified time limit. It is, therefore, an alternative process that was available to the plaintiffs.

[51] In *Jew*, Paterson J found that it was inconceivable that the legislature intended the Family Court's power under s 25(3) to be exercised in respect of property owned by third parties: [40]. The Judge also found that the Family Court's exclusive jurisdiction only applies to applications for orders under s 25. As the application before him was for declaratory relief, he found that it did not come under s 25(3), so the High Court had jurisdiction to grant this relief: [41].

[52] *Jew* was followed in *AB v EF* [2012] NZHC 722, [2012] NZFLR 661, a protest to jurisdiction case in which the ownership of trust property after de facto partners had separated was in question. Andrews J confirmed the view that the exclusive jurisdiction of the Family Court is limited to applications under s 25: [36]. The Judge found that in this case, the causes of action were not brought under s 25 but instead relied on s 174 of the Companies Act 1993. Andrews J at [37] held that s 4(4) of the Act:

> [37] … does not have the effect of ousting the jurisdiction of any court hearing proceedings which are not brought under the Property (Relationships) Act; it merely provides that the court hearing the proceeding must decide any issue relating to relationship property as if it had been raised in proceedings brought under the Act. That is, by applying the principles of the Act to that issue.

Accordingly, Andrews J set aside the protest to jurisdiction.

[53] *Jew* was also followed in *Sloan v Cox* [2004] NZFLR 777 (HC). This was an unsuccessful strike-out application. The proceeding involved a claim to enforce an agreement between the deceased and her de facto partner to transfer property from a joint tenancy to a tenancy in common. At the heart of the claim was an alleged breach of contract, or unjust enrichment, rather than the division of relationship property under s 25 of the Act per se. At [41] Master Gendall held:

> [41] I am satisfied, therefore, that under the circumstances here the High Court has jurisdiction to consider the plaintiffs present claim. To hold otherwise, in my view, would risk the absurd consequence that in every property dispute involving individuals, the Family Court first would be required to undertake a consideration of whether the parties could be considered to be in a de facto relationship, and whether the Property (Relationships) Act 1976 therefore applied.

[54] In *Yeoman*, the deceased died intestate and an application had been made by one of his sons and his widow under the Family Protection Act 1955. The widow had also made an application under the Property (Relationships) Act for property division. The widow also sought declaratory relief in the High Court to determine whether assets held by a family trust formed part of the deceased's estate for the proceedings in the Family Court. The widow was the settler, trustee and a beneficiary of the trust. The proceedings in the Family Court were put on hold until the High Court proceeding had been determined.

[55] The defendant protested the jurisdiction of the High Court to hear the proceeding. Associate Judge Bell appeared critical of the decision in *Jew*. At [60], he stated:

> If Paterson J's judgment means that in proceedings issued in the Family Court under the Property (Relationships) Act, the Family Court could not decide whether assets in the Jew Family Trust were relationship property, then with great respect, I disagree. There is no good reason to remove such questions from the Family Court's inventory-taking function.

[56] Further, at [61], the Judge confirmed that both the Family Court and the High Court can consider whether the deceased had a beneficiary's interest in the family trust:

> [61] While the Family Court can decide the matters in this proceeding as part of its inventory-taking function under the Property (Relationships) Act and the Family Protection Act, those matters also fall within the general

> jurisdiction of this court under s 16 of the Judicature Act 1908. There is overlapping jurisdiction. So long as this court does not decide the division of relationship property, but decides ownership of assets under general property rules, it will not encroach on the exclusive jurisdiction of the Family Court under the Property (Relationships) Act. On the authority of *Jew* v *Jew* this court can hear the widow's proceeding.

[57] Ultimately, the application for a declaration was deemed to be an abuse of procedure, as the widow sought the same relief as in the other concurrent proceedings before the Family Court.

[58] All the general orders that the Property (Relationships) Act provides for are in respect of property division. The other ancillary orders that this Act provides for are secondary in nature to those general orders. Nowhere is there provision for a party outside the relationship to make an application for an order to determine the character or status of a relationship. The High Court in this case is not being asked to divide property, but simply to make a declaration on the relationship, if any, between the defendant and the deceased, which in turn will identify the rights accorded to that relationship. Thus, the declaration that the plaintiffs seek does not invoke any of the orders that can be made under the Property (Relationships) Act.

[59] Whilst the subject matter of the case law considered above is different from the present, the observations in those cases regarding the bounds of the exclusive jurisdiction that the Property (Relationships) Act gives to the Family Court are instructive. Those cases have taken the approach that unless the orders sought fall squarely within the Family Court's exclusive jurisdiction, there is overlapping jurisdiction between the High Court and the Family Court. Further, those cases show that so long as the High Court does not order the division of property under s 25, it does not encroach on the exclusive jurisdiction that the Property (Relationships) Act gives to the Family Court. For completeness, I note that the Family Courts Act 1980 is also silent as to whether the Family Court has exclusive jurisdiction in this case.

[60] The existence of procedures in the Property (Relationships) Act that enable an estate to deal with tardy claimants is relevant to whether that Act provides an exclusive jurisdiction that precludes this Court from granting declaratory relief. Those procedures do not appear to me to be broad enough to exclude this Court's

jurisdiction to grant declaratory relief. Particularly, given that s 11 of the Declaratory Judgments Act provides for declarations to be made when such matters are within the exclusive jurisdiction of other Courts. However, I do consider that the existence of those other procedures is relevant in this case to the exercise of the discretion whether to grant relief or not.

The discretion in s 10 of the Declaratory Judgments Act

[61] In *Chase* and in *Gazley*, the Court of Appeal referred to the breadth of the discretion in s 10. Further, as was noted by Cooke P in *Chase* at 334, (citing *Turner v Pickering* [1976] 1 NZLR 129 (SC)) declarations have been refused when the orders sought would have been "quite useless".

[62] If the application had continued to raise contested questions of fact, or mixed fact and law, it might have been appropriate as a matter of discretion to refuse to make the declaration that is sought. Though for the reasons that I have outlined, this case may have warranted a departure from the usual approach. But as matters now stand, this is not an issue. The only issue is whether the evidence of the plaintiffs goes to show that there was no de facto relationship between the defendant and the deceased, which impacts upon the underlying asserted rights of the respective parties.

[63] Another occasion where the Court may refuse to make a declaration is when the specified time limits in s 90 of the Property (Relationships) Act have not expired. In such circumstances, this Court would want to avoid dealing with a question that could be the subject of proceedings under that Act. However, this does not apply here. In the present case, the time limit in s 90(1) has well and truly expired. The defendant has made no application for an extension of that time limit in order to commence proceedings. In this case, probate was granted on 7 January 2013. Given the delay that the defendant has occasioned to date and the length of time that has now gone by, it is hard to see why the Family Court would grant him an extension of time to commence proceedings for division of relationship property.

[64] When the plaintiffs brought the application for declaratory orders, the defendant did not make protest as to jurisdiction. Instead, the defendant submitted to this Court's jurisdiction by filing a statement of defence and a counterclaim in which he sought a mirror declaration to the effect that he and the deceased were in a de facto relationship together. So until the defendant's evidence was excluded, each side was prepared to argue the merits of in whose favour a declaration should be made. In some respects, the defendant's counterclaim for an affirmative declaration that he and the deceased were in a de facto relationship that gave him rights under the Property (Relationships) Act fits more easily under the s 2 jurisdiction than does the plaintiffs' application for a negative declaration. Had the defendant's late evidence not been excluded by the Court, this would have been a case where each side appeared and actively asserted underlying rights affecting the estate property, based upon whether the Court found that there was a de facto relationship or not. It would have been a more conventional case in terms of settled principle than it presently appears to be. In such circumstances, it would be an unusual turn of events if the defendant's removal of himself from the hearing became the sole factor that tipped the balance against exercising the s 10 discretion. The common stance the parties took to this being a suitable case for a declaration supports the exercise of the s 10 discretion.

[65] The commencement of the proceeding in this Court and the attention the parties have given to it has meant that more than a year has gone by between the defendant giving notice under s 65 and the formal proof hearing. On my reading of the Property (Relationships) Act, there is presently nothing to prevent the plaintiffs from distributing the estate. This Court could, therefore, refuse to make a declaration for the reason that it would serve no useful purpose: see *Chase* at 343; *Turner v Pickery* at 141-142; and *Johnston* at 618.

[66] However, I am not satisfied that a declaration as sought by the plaintiffs would be useless. The Property (Relationships) Act allows someone in the defendant's position to apply for an extension of time to bring relationship property proceedings under s 90(2) in the Family Court. A refusal by this Court to make a declaration might prompt an immediate application by the defendant to the Family Court for an extension of time to bring a relationship property proceeding.

Under s 74(1)(a)(iv), notification of that application would be enough to delay further the distribution of the estate. The plaintiffs could oppose such an extension of time but that would put them to further cost and delay. The distribution of the estate has been held up for long enough. I consider that a declaration that had the effect of conveying that the defendant was not in a de facto relationship with the deceased would be useful as it would help to preclude any further delay regarding distributing the estate, and it would enable the beneficiaries of the estate to receive their entitlement under the deceased's will.

[67] For all of the above reasons, I am satisfied that, provided the plaintiffs can prove their case, the discretion to make a declaration should be exercised in their favour.

Decision on the facts

[68] The date of the deceased's death is 18 November 2012. I have assessed the plaintiffs' affidavit evidence and the relevant law on when a de facto relationship will be recognised to exist. I conclude that there was a de facto relationship of short duration from December 2007 to July 2008 and again from December 2008 to April 2009. In my view, the deceased and the defendant were not in a de facto relationship at the time of her death. My reasons for reaching this conclusion are set out below.

[69] The plaintiffs have filed 18 affidavits, four of which were written by the first named plaintiff, Kelly Hayes ("Ms Hayes"). It is clear that the deceased and the defendant were in a romantic relationship together at some point. Ms Hayes deposed that the deceased first met the defendant in July 2007 and they started dating from this time. Ms Hayes deposed that in late 2007 there was a family barbeque to introduce the defendant's family to the deceased's family. The defendant moved into the deceased's home over the Christmas period in 2007 and they frequently entertained friends over this time. Ms Hayes further deposed that in early 2008, the deceased and the defendant often took weekend trips away in the defendant's campervan to visit friends. The deceased informed Ms Hayes that the defendant paid for the groceries and personal expenses, and the deceased continued to pay the bills.

[70] Ms Hayes then referred to some renovation work that her mother did in June 2008. Whilst the defendant assisted her in some ways, the deceased covered all the costs of materials and labour. In mid-2008, the defendant's granddaughter was having difficulties at home and the deceased agreed that she could stay with them. The granddaughter and the deceased did not get along and the deceased asked her to leave. Ms Hayes deposed that this event was fatal to the deceased's relationship with the defendant, and the defendant then moved out.

[71] Ms Hayes deposed that it took some time for the deceased and the defendant to start talking again but in December 2008, the defendant moved back in. They left for a two month South Island trip in February 2009. The day after their return, Ms Hayes deposed, the defendant had moved out again. The deceased told Ms Hayes that the second part of the trip had not gone well and that the defendant had been drinking heavily and had often verbally abused her. Ms Hayes deposed that around this time, the deceased went into a deep depression. Ms Hayes' chronology from this point on is consistent with that deposed by another witness, Ms Boyd.

[72] Ms Boyd, who is the former Mental Health Co-ordinator for the Far North, provided counselling and support to the deceased in 2009. During counselling sessions with Ms Boyd, the deceased was clear that she was depressed at that time because her relationship with the defendant was at an end. The deceased was open to Ms Boyd about her relationship with the defendant and identified that the relationship had become "toxic". The deceased revealed to Ms Boyd that she felt compelled to help the defendant and tried to be a positive influence in his life, but his emotional abuse became too much for her in the end. The deceased revealed to Ms Boyd that whilst she was in a relationship with the defendant, they had never, in the deceased's view, properly lived together, and that they lead quite independent lives. Ms Boyd left her position for maternity leave in October 2009; by this time she described the deceased as having worked through her depression and was pleased that she was no longer in a relationship with the defendant.

[73] Ms Hayes deposed that it was not until February 2010 that the deceased and the defendant started to speak to each other again and would occasionally see each other. I infer from the evidence that their friendship blossomed again and they began to see each other more often. Ms Hayes deposed to staying with the deceased on two occasions in 2010; Ms Hayes said that the defendant was not staying with them during those times. Ms Hayes deposed that the friendship between the defendant and the deceased continued and around April 2011, the defendant moved into the downstairs flat at the deceased's home. This flat was sometimes rented out by the deceased. They did not attend family functions together.

[74] Ms Hayes deposed that in November 2011, the defendant's daughter and family visited New Zealand, and the deceased declined to have them to stay with her. The deceased and the defendant fought over this and he moved out of the downstairs flat.

[75] In March 2012, the defendant moved back into the downstairs flat and was initially paying rent. However, Ms Hayes deposed that as time went on, it was clear that he was no longer paying rent, but simply bought groceries for the house. The defendant went on holiday from July to September 2012, during which time the deceased's health deteriorated. Ms Hayes deposed that whilst the defendant continued to stay at the house, he made it clear that he did not want to be a part of arranging the deceased's affairs and organising the funeral. As the deceased's condition deteriorated, Ms Hayes deposed that the defendant distanced himself and was eventually asked to leave the house.

[76] Ms Hayes' comprehensive chronology of the events is corroborated by other affidavits. In particular, Ms Roberts, a friend of the deceased, deposed that she was aware that the deceased and the defendant were in a relationship in 2008 but had split up by the second half of 2008. Ms Roberts recalls that the deceased had informed her that a friendship with the defendant had resumed around early 2012.

[77] There is evidence to support that the deceased and the defendant were only friends towards the end of her life. Ms Smith, legal executive at the law firm that drew up the deceased's will, spoke with the deceased and inquired whether she had a

new partner, to which she replied "no way – I have a friend but that's all he is". Further, Ms Swanepoel, solicitor for the deceased, deposed visiting the deceased in September 2012, on that occasion the defendant introduced himself as "a friend of Marlene's". It was on this day that the deceased asked if she could leave a legacy to a friend, meaning the defendant.

[78] Ms Tane deposed to visiting the deceased several times in 2011 and stated that the deceased and the defendant were not sharing a bed during her visits. Further, there was no evidence of his belongings in the main bedroom or bathroom when she visited. When the defendant moved back into the downstairs flat in March 2012, Ms Tane deposed that "this was not a loving relationship as in the past but more like a companionship sharing". Others share this sentiment. Ms Tattersall deposed that when she visited the deceased regularly during her illness in late 2012, the impression she got from the interactions between the deceased and the defendant was that he was "a caring friend, but there was no intimacy, no empathy, between them".

[79] There is also documentary evidence where the deceased and the defendant represented that they were not in a de facto relationship. On 23 February 2011, the deceased stated to Northland District Health Board in a Needs Assessment Services referral that she lived alone and that her next of kin was Ms Hayes. In March 2012, the defendant represented to Work and Income that he lived alone and, therefore, was to receive his superannuation at a "living alone rate". Letters that Work and Income sent to the defendant were sent to his address in Kerikeri and not to the deceased's address. On 25 September 2012, the defendant represented to a registered Hospice nurse that he was only a friend of the deceased. In a Carer Support Claim form dated 20 September 2012, the defendant referred to himself as only a friend of the deceased, and represented that his physical address was in Whangaroa and not the address of the deceased.

Relevant law

[80] Under s 11 of the Property (Relationships) Act, there is a presumption of equal division of relationship property between spouses or partners in the family home, family chattels and any other relationship property.

[81] Section 13 of the Property (Relationships) Act provides an exception to the equal sharing rule where there are extraordinary circumstances that make the equal sharing of property "repugnant to justice". If this test is made out, the share of each spouse or partner is to be determined in accordance with their contribution to the relationship.

[82] The equal sharing rule does not generally apply if the de facto relationship is one of short duration. Section 14A provides:

> **14A De facto relationships of short duration**
>
> (1) This section applies if a de facto relationship is a relationship of short duration (as defined in section 2E).
>
> (2) If this section applies, an order cannot be made under this Act for the division of relationship property unless—
>
> (a) the Court is satisfied—
>
> (i) that there is a child of the de facto relationship; or
>
> (ii) that the applicant has made a substantial contribution to the de facto relationship; and
>
> (b) the Court is satisfied that failure to make the order would result in serious injustice.
>
> (3) If this section applies, and the Court is satisfied that the grounds specified in subsection (2) for making an order on an application under this Act are made out, the share of each de facto partner in the relationship property is to be determined in accordance with the contribution of each de facto partner to the de facto relationship.
>
> (4) Nothing in this section prevents a Court from making a declaration or an order under section 25(3), even though the de facto partners have lived in a de facto relationship for less than 3 years.
>
> (5) This section is subject to sections 15 to 17A.

[83] A relationship of short duration is defined in s 2E:

> **2E Meaning of relationship of short duration**
>
> (1) In this Act, *relationship of short duration* means,—
>
> …
>
> (b) in relation to a de facto relationship, a de facto relationship in which the de facto partners have lived together as de facto partners—
>
> (i) for a period of less than 3 years; or
>
> (ii) for a period of 3 years or longer, if the Court, having regard to all the circumstances of the de facto relationship, considers it just to treat the de facto relationship as a relationship of short duration.
>
> (2) For the purposes of paragraphs (a)(i) … and (b)(i) of subsection (1), in computing the period for which the parties have lived together as a married couple, civil union partners, or as de facto partners, the Court may exclude a period of resumed cohabitation that has the motive of reconciliation and is no longer than 3 months.]

[84] The meaning of a de facto relationship is defined in s 2D:

> **2D Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a *de facto relationship* is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to, or in a civil union with, one another.
>
> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a 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 the parties:
>
> (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 the relationship.

(3) In determining whether 2 persons live together as a couple,—

(a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and

(b) a Court 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.

(4) For the purposes of this Act, a de facto relationship ends if—

(a) the de facto partners cease to live together as a couple; or

(b) 1 of the de facto partners dies.

Analysis

[85] The plaintiffs submit that any "emotional bond" between the deceased and the defendant ceased to exist in April 2009 when the deceased told the defendant to leave because of his heavy drinking, his failure to look after his health and the emotional abuse. The plaintiffs submit that thereafter, the relationship between the deceased and the defendant was on a friendship basis only. Further, the parties each retained ownership of their own property, including their homes, motor vehicles and they operated separate bank accounts.

[86] The plaintiffs submit that the deceased and the defendant were not in a de facto relationship for three years or more prior to the deceased's death. The plaintiffs accept that, at best, there was a de facto relationship between December 2007 and July 2008 (eight months duration), and again between December 2008 and April 2009 (five months duration).

[87] Based on the affidavit evidence, there did seem to be a de facto relationship between the deceased and the defendant from December 2007 to July 2008 and again from December 2008 to April 2009. During the first period, the deceased and the

defendant frequently entertained guests at the deceased's property in Whangaroa and presented themselves as a couple. They often went on weekend trips together, indicating some commitment to a shared life (s 2D(2)(f)). In mid-2008, the parties split up over an argument about the defendant's granddaughter. The defendant moved out and there was little to indicate that a de facto relationship persisted from July to December 2008.

[88] The next period of time when the deceased and the defendant lived together was from December 2008 to April 2009. They travelled together in the South Island in early 2009, indicating to their friends and family that they were in a romantic relationship again. However, shortly after their return, the relationship ended due to the defendant's personal issues. The evidence is clear here that the deceased was initially depressed over the ending of the relationship but had worked through her depression by late 2009.

[89] Whilst the defendant moved back into the deceased's house in April 2011, the evidence is that the relationship with the deceased had changed to a platonic one. The defendant moved into the flat downstairs, and though he spent most of the time upstairs, the other indicators of a de facto relationship were not present. Evidence of the defendant paying the deceased rent is suggestive that the parties remained financially independent (s 2D(2)(d)). Further, payment of rent is more consistent with the deceased treating the defendant as a boarder rather than a de facto partner.

[90] Strong evidence that there was no de facto relationship leading up to the deceased's death are the representations that the defendant and the deceased made to others to the effect that they were no more than friends. On more than one occasion the defendant introduced himself as a friend of the deceased. Further, the defendant did not take part in the organising of the deceased's affairs. The evidence is that in the last few weeks of the deceased's life, the defendant became more withdrawn and spent less time at the house. This behaviour does not suggest an intention or commitment to being in a de facto relationship.

[91] Since a de facto relationship is at an end when the parties cease to live together as a couple (s 2D(4)(a)), what occurred here is best viewed as two discrete

de facto relationships of short duration; with the last such relationship ending in April 2009. Even if the two periods are added together (which I do not consider that they can be), the total duration of the relationship still falls short of three years.

[92] In assessing the evidence, I find that there was no de facto relationship of three or more years' duration. Further I am satisfied that the deceased and the defendant were not in a de facto relationship at the time of her death. My findings on the evidence support the plaintiffs being granted a declaration that recognises their right and the right of the beneficiaries of the deceased's will to have the estate distributed. The terms of the declaration are not the same as those sought by the plaintiffs. This is because I do not consider that this Court can make a declaration under s 2 on the existence, or non-existence of a de facto relationship. However, in line with the approach in *Johnston*, I consider that the findings that I have made regarding the absence of a de facto relationship and the other relevant circumstances outlined above refer to the existence of underlying rights. Those rights relate to how the plaintiffs can presently deal with the estate, including recognition of the beneficiaries' rights to receive a distribution. I consider that it is open to me to frame declarations that recognise those underlying rights.

[93] It follows that I am also satisfied that the defendant's defence and his counterclaim for a declaration that he and the deceased were in a de facto relationship for a period of approximately five years prior to the deceased's death must fail.

Summary of factual and legal findings

[94] The factual findings that I have come to are:

(a) The defendant and the deceased were in two discrete de facto relationships; one between December 2007 and July 2008 and a second between December 2008 and April 2009;

(b) Each de facto relationship was of short duration; and

(c) The defendant and the deceased were not in a de facto relationship for the period from April 2009 until the death of the deceased in November 2012.

[95] The legal findings are:

(a) This Court has jurisdiction to make a declaration under s 2 of the Declaratory Judgments Act in this case;

(b) A declaration falls outside the exclusive jurisdiction of the Family Court where such a declaration does not involve the division of property;

(c) A declaration in this case has some utility and it is appropriate to exercise the discretion to grant a declaration; and

(d) The defendant is out of time to make an application under the Property (Relationships) Act and has not applied for an extension of time.

[96] Accordingly, the factual and legal findings that I have made establish that the plaintiffs are entitled to a declaration on their rights to distribute the estate and the beneficiaries' rights to receive a distribution of the estate in accordance with the terms of the deceased's will.

[97] The defendant's defence and his counterclaim must fail, and accordingly the counterclaim is dismissed.

Result

[98] In view of the findings that I have already made, I make the following declaration under s 2 of the Declaratory Judgments Act:

(a) The plaintiffs are presently entitled to distribute the deceased's estate in accordance with the terms of her will, and the beneficiaries are presently entitled to receive their bequests under the deceased's will.

Duffy J