

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

**IN THE FAMILY COURT
AT CHRISTCHURCH**

**FAM-2015-009-000670
[2017] NZFC 7502**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[NATHAN SCHOFIELD] Applicant
AND	[LEON HUTCHINSON] Respondent

Hearing: 18 September 2017

Appearances: Applicant appears in Person
Supported by McKenzie Friend
G McIntosh for the Respondent
Respondent supported by M Bongers Guardian ad Litem

Judgment: 18 September 2017

ORAL JUDGMENT OF JUDGE R J MURFITT

[1] On 10 June 2015 Mr [Schofield] filed an application seeking relief under the Property (Relationships) Act 1976 because of a relationship he claimed with Mr [Leon Hutchinson].

[2] The foundation of those proceedings was his sworn evidence that he was in a domestic relationship commonly known as a de-facto relationship with Mr [Hutchinson], albeit it that he, Mr [Schofield], and Mr [Hutchinson] are male. In his evidence Mr [Schofield] made claims that he and Mr [Hutchinson] were in a relationship from 1997 until [date deleted] 2014. It is certainly true and accepted that the two men occupied the same home during those years but the nature of that relationship was the major issue for me to decide today.

[3] In [date deleted] 2014 Mr [Hutchinson] had obtained a temporary protection order without notice against Mr [Schofield]. That provided another range of affidavits by each of these men which outlined the nature of their relationship.

[4] Mr [Hutchinson] suffers from [medical condition deleted], a condition that he has had since well before 1997. By 1997 he had become significantly disabled and was in need of support in his home at [address and location deleted]. Now Mr [Hutchinson] is assisted by a litigation guardian because his capacity has become so impaired that he is unable to conduct his own case or give instructions coherently.

[5] Last week or the week before, I granted leave to Mr [Schofield's] lawyer, Mr Maciaszek, to cease acting as Mr [Schofield's] lawyer. Although Mr Maciaszek was not explicit about the reasons, his explanation was that the relationship of trust between lawyer and client had so irretrievably broken down that he could no longer represent Mr [Schofield]. From Mr [Schofield] I have heard both in a pre-trial conference and to some extent today, that he believes Mr Maciaszek has betrayed him and has furnished others with private information relating to Mr [Schofield]. That is extremely unlikely. Mr Maciaszek is well recognised as a formidable advocate on behalf of clients in any jurisdiction and I think it simply incredible that Mr Maciaszek has acted in any way unprofessionally for Mr [Schofield]. I had emphasised to Mr [Schofield] that given Mr Maciaszek's withdrawal, there would be no prospect of an adjournment of these proceedings. Mr [Hutchinson] himself is seriously unwell. These proceedings have been in train for over two years and they must be resolved. So, today Mr [Schofield] attended Court as a self-representing litigant with the support of Mr[Roscoe] as his McKenzie Friend.

[6] Very surprisingly, during the course of his cross-examination Mr [Schofield] *denied* in evidence that he was in a de-facto relationship with Mr [Hutchinson]. At several times he alluded to the fact that he had adopted this version of events because [the hospice care association] had made unsavoury allegations to that effect about him and Mr [Hutchinson]. During the course of his affidavit evidence in the proceedings under the Domestic Violence Act, Mr [Hutchinson] who then did have capacity, had described his relationship with Mr [Schofield] as an “intense, close personal relationship” in which Mr [Schofield] had been his caregiver because of Mr [Hutchinson’s] [medical condition deleted] in exchange for free board.

[7] When Mr [Schofield] opposed the making of the final protection order, he gave evidence, recorded at page 124 of the bundle of documents, “I would not call our relationship intense, close and personal,” and he said, “That sounds somewhat improper.” He described himself at page 123 of the evidence as a “friend and live-in caregiver”. However, in his proceedings under the Property (Relationships) Act Mr [Schofield] gave a different slant to the proceedings. He said he had been very discreet about his homosexuality because he did not believe that was anybody’s business and he says at several points that he was in this de-facto relationship with Mr [Hutchinson].

[8] Several witnesses, family and professionals who have associated with Mr [Hutchinson] have sworn evidence that Mr [Hutchinson] had always denied that the relationship between him and Mr [Schofield] was in any way akin to a de-facto gay relationship of the kind which is the foundation for this action under the Property (Relationships) Act. Mr [Schofield] must establish, to have any prospect of success, that he and Mr [Hutchinson] are in a qualifying relationship with the characteristics identified in s 2D of the Act.

[9] Mr [Schofield] led evidence from one [Alex Holmes] whose pastime it seems had been to introduce gay men to one another. He confirmed in his evidence that he had indeed introduced Mr [Schofield] and Mr [Hutchinson] but he had little or no contact with them during the course of their life after 1997 and expressed only a “belief,” that they were a couple. Three other witnesses who had seen Mr [Schofield] and Mr [Hutchinson] generally at [shopping location deleted] had also expressed a “belief,” that this pair who they had often seen together were a gay pair. However,

they had little evidence to offer of actual observation to support that belief and even allowing for the fact that they had not been cross-examined in these proceedings, they contributed little to Mr [Schofield's] case.

[10] Today Mr [Schofield] has been cross-examined by Ms McIntosh. The evidence he has given completely undermines the basis of his claim for relief. He has in his affidavit evidence said at page 124 of the bundle, "We are good mates ... that is all". In his evidence today he has confirmed that he and Mr [Hutchinson] did not have sexual relations. That is a direct reference to the "somewhat improper" allusion that I have earlier made. He emphasised this exclaiming it was, "Not like that!"

[11] When I questioned him as to whether he himself was homosexual he was extremely evasive diverting on to other topics, saying he was not married, and then suggesting that we were all homosexual to some extent. He confirmed, however, there was no sexual intimacy in the relationship between him and Mr [Hutchinson].

[12] There is ample evidence to indicate, as Mr [Schofield] himself acknowledged, that they had separate bedrooms. In his affidavit evidence he had implied that there were occasions when he and Mr [Hutchinson] shared a bed. However, to me he said this would only have been at times when Mr [Hutchinson] was [medical details deleted]. That certainly would not substantiate behaviour in the nature of a de-facto relationship.

[13] It is clear also that the two men have maintained separate bank accounts and there is evidence that in his applications for benefits from Work & Income New Zealand, Mr [Schofield] described himself as a single person and not one who was in a relationship.

[14] Ultimately, in cross-examination it was put to him that he was not in a gay relationship with Mr [Hutchinson]. His answer was, "We didn't go down that road." Again, Mr [Schofield] has denied the very existence of the fundamental element that could possibly substantiate his claim. He has acknowledged there is no qualifying relationship.

[15] I have to record that during the course of the evidence at Ms McIntosh's indication before she began to cross-examine Mr [Hutchinson] about his declarations to WINZ, Mr [Schofield] was warned as to the prospects of self-incrimination and of the opportunity to decline to answer questions. He did not avail himself of that opportunity. I reinforced the warning after the morning adjournment. At that stage, Ms McIntosh raised the strike out application under rule 193. Rules 193 and 194 Family Court Rules 2002 both address the power of the Court to strike out pleadings or any part of those pleadings if there is no reasonable basis for them. Rule 193, in particular, provides that:

The Court may order that all or part of an application or defence or other pleading be struck out of the pleading or part of it:

- (a) discloses no reasonable basis for the application or defence or other pleading; or
- (b) is likely to cause prejudice, embarrassment, or delay in a proceedings; or
- (c) is otherwise an abuse of the Court's process.

[16] Subclause (2) provides that:

An order under subclause (1) may be made by the Court:

- (a) on its own initiative or on an interlocutory application for the purpose;
- (b) at any stage of the proceedings;
- (c) on any terms it deems fit.

[17] I am quite clear that there is no possible prospect of Mr [Schofield's] claim proceeding. He has today acknowledged that there was no qualifying relationship between him and Mr [Hutchinson]. He has instead described it as more like father and son. That completely accords with the respondent's account that Mr [Schofield] was a caregiver for Mr [Hutchinson], a flatmate for Mr [Hutchinson] and a friend for Mr [Hutchinson] but without any of the indicia that would enable a Court to classify this as a qualifying relationship so as to describe this pair as living together as a couple.

[18] Four days had been set aside for the hearing of this proceeding. I am of the view that Mr [Schofield] has been lying at various stages of his evidence. It is clear that he considered this was an application open to him simply because somebody in

[the hospice care organisation] had been making aspersions about his relationship with Mr [Hutchinson]. Indeed, there is no evidence before me as to those rumours being expressed by anybody in [the hospice care organisation]. Mr [Schofield] is a completely unreliable witness. However, on the basis of his own admissions during his cross-examination today, it is clear that there is no prospect of this application proceeding. The application is struck out.

[19] This is a case in which solicitor/client costs are likely to lie against the applicant. I invite Ms McIntosh to file a memorandum setting out the extent to which Mr [Hutchinson] has been put to cost and I will consider the matter then.

[20] Mr [Schofield] is to be served with notice of that application and he will have seven days to reply.

R J Murfitt
Family Court Judge