Certainty in de facto cases?

By Stuart Barr

Is life becoming easier for family lawyers? On 9 July 1997, the Full Court of the Family Court of Australia provided a detailed review of the 1996 *Family Law Act* when it handed down its decision in B & B: Family Law Reform Act 1995 (see *Balance*, July 1997).

Only a week earlier, a specially constituted Full bench of the Supreme Court of NSW handed down its decision in the case of *Evans v Marmont*, and in the process provided family lawyers with some respite from the uncertainity which has plagued the interpretation of de facto relationship to date.

Since the commencement of the NT *De Facto Relationships Act* 1991, Northern Territory practitioners have been able to rely upon decisions of the NSW Supreme Court because of the great similarity between the NSW and NT Acts. However, in recent years practitioners have been faced with two Full Court decisions which have proposed significantly different approaches to the manner in which property should be divided between de facto partners upon the breakdown of such a relationship.

The 1992 (2–1 majority) decision in *Dwyer v Caljo* proposed an approach which required a court to treat the overriding test as the requirement to do what is just and equitable. As well as setting out the factors set out ion section 20 of the Act, a court was entitled to make orders which would remedy any injustice a plaintiff might otherwise suffer because of his or her reasonable reliance on the relationship (a reliance interest) or his or her reasonable expectations (an expectation interest). A court could also make orders restoring to a plaintiff any benefits rendered to the defendant during the relationship or their value (a restitution interest).

The conflicting approach arose from the (2–1 majority) 1995 decision in *Wallace v Stanford* which disapproved of the *Dwyer v Caljo* approach and adopted a more literal interpretation of the Act. It was said that only the factors set out in Section 20 to which a court is required to have regard were the matters which determined what is just and equitable in any particular case.

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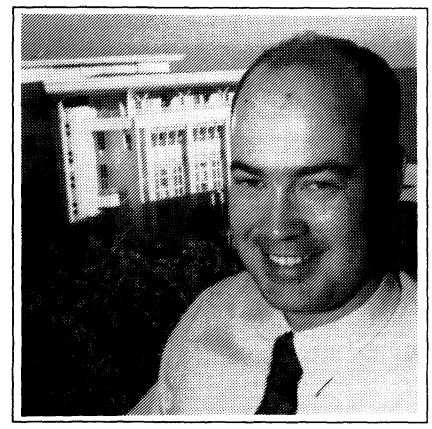
Since the decision in Wallace v Standford, practitioners have had to grapple with these conflicting approaches. In both cases, special leave to appeal to the High Court was refused. Not surprisingly, advising potential litigants in this area has been fraught with difficulty so it came as good news to learn that a Full bench of five judges was to hear the appeal in *Evans v Marmont* in an attempt to provide the certainty which has been needed for some time.

In short, it is the approach in *Wallace v Standord* which has been approved (by a 3–2 majority). The majority took particular note of the differences between the de facto relationships legislation and the *Family Law Act* in approving the more narrow approach.

A review of the separate judgment in Evan v Marmont may leave family lawyers with doubts as to how long the majority approach will remain an authority in this area. It is also perhaps regrettable that the court did not make a greater effort to explain its methodology in applying the law to the facts of the case since it deemed it appropriate to increase the amount awarded to the plaintiff.

Nevertheless, for the time being at last, the decision in Evans v Marmont represents better news for defendants than plaintiffs, and makes the tasks of advising clients in this area far easier than it has been for the past few years.



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BALANCE

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