Lower Your Expectations, Girls

By Sally Gearin, Barrister, William Forster Chambers

Any of you women out there who believed that there might be a reward for being a life support system for some bloke without the sacrament of matrimony had better think again.

A recent decision of the Supreme Court of NSW Court of Appeal in a specially constituted Court consisting of five Justices including Gleeson CJ and McLelland CJ in Equity, split 3-2 on the question of the meaning of the property adjustment section (sec 20) in the NSW Defacto Relationships Act.

see **Evans v Marmont** (1997) 42 NSWLR 70

The background

The Northern Territory De Facto Relationships Act came into law in October 1991. For the purpose of property adjustment, section 18 is in the same terms as section 20 of the NSW Act, which came into existence in 1984.
The relevant section reads as follows:

sec 18. THE ORDER FOR ADJUSTMENT

(1) The order which a court may make under this Division with respect to the property of de facto partners or either of them is such order adjusting the interests of the partners in the property as the Court considers just and equitable having regard to

(a) the financial and non financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and

(b) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and one or more of the following:

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners; whether or not the child is a child of either of the partners; or

(iii) any person dependant on the partners who has been accepted by the partners or either of them into the household of the partners.

(2) A court may make an order in respect of property whether or not it has declared the title or rights of a defacto partner in respect of the property.

The issue to be determined was the meaning and effect of this section on which there were conflicting authorities namely Dwyer v Kaljo (1992) 27 NSWLR 728 and Wallace v Stanford (1995) 37 NSWLR 1.

The High Court refused special leave to appeal in both cases but indicated in the later case that the conflict of judicial opinion should be resolved by a specially constituted court of the NSW Court of Appeal.

The most convenient way to indicate the nature of the question of principle is to go directly to the earlier decisions.

Dwyer v Kaljo

The Plaintiff who sought an order under sec 20, was a young woman who lived for 6 years in a defacto relationship with a middle aged man. He was wealthy. The parties did not even attempt to inform the court of the full extent of his assets. It was agreed that they were not less that $11 million. Whilst the plaintiff and the defendant were living together, she gave the whole of her time to the home, looking after him and his children, and entertaining his guests. Their lifestyle was luxurious. At the end of the relationship, when they parted, the plaintiff was left with assets worth about $50,000, including a substantial quantity of jewellery and furs. She claimed pursuant to sec 20, an order for the payment of the sum of $400,000.

Hodgson J, at first instance, made an order in favour of the plaintiff in an amount of $50,000.

In his reasoning his Honour said

".... if one considers the plaintiffs contributions and nothing else, this cannot conceivably lead to what is just and equitable in the circumstances. However it seems to me that the other factors can have no independent bearing on what is just and equitable. Their relevance is only by reason of such relevance as they may have to the question: what is just and equitable having regard to the Plaintiffs contributions?"

On appeal, the majority Priestly JA and Handley JA, allowed the appeal and ordered the payment to the appellant of the amount claimed by her, $400,000.

The majority reasoned thus;

'the power to make a just order must therefore authorise orders to remedy any injustice the applicant would otherwise suffer

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because of his or her reasonable reliance on the relationship (the reliance interest) or his or her reasonable expectations from the relationship (an expectation interest). The section would also authorise orders which restored to the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest). Circumstances which gave practical content to an applicant's reliance interest may also establish a restitution interest. Compare the expectation and reliance interests as alternative bases for awards of damages for breach of contract and see:
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64"

The bloke appealed and the High Court (Mason CJ, Toohey and Gaudron JJ) refused special leave for the following reasons

"Without endorsing what was said by Mr Justice Handley, having regard to the width of the discretion conferred by the section we are not persuaded that the applicants prospects of success in challenging the amount awarded by the Court of Appeal are sufficient to warrant the grant for special leave to appeal"

Wallace v Stanford

The parties lived together for nearly 14 years. There was one child of the relationship who after the parties separated lived with his mother. During the time of the relationship the mother kept house, was the primary caregiver for the child, and did some work around the property caring for stock and raising poddy calves. For the first half of their time together, the parties lived in rented accommodation, and thereafter on a rural property owned by the fathers parents who lived in the original house on the property. With his parents consent the father built another house on the property in which the parties lived. The mother assisted in the building of the house. The property was left to the father by his parents, and together with savings the total assets were about $320,000. The master at first instance awarded the woman $30,000. The majority, Mahoney and Sheller JJA dismissed the appeal, holding that the expression 'just and equitable' was limited to the contributions referred to in sec 20 (1) (a) and (b) and it should not have regard to other and wider considerations.

The High Court refused special leave.

Evans v Marmont

This latest full Court decision, following Wallace v Stanford, narrowed the interpretation to what is just and equitable having regard to actual, identified contributions, and no expectations or reliances will be relevant.

Although the parties had known one another for some years previously, their relationship commenced in 1977. They were both then in their mid-forties. (At the time of the hearing at first instance the appellant was sixty-two and the respondent was sixty-one). They were both in full time employment, and both continued to work full time throughout most of the period of the relationship. The respondent was a superannuation consultant, and later a loss adjuster. It appears that he spent substantially the whole of his working life with National Mutual Life Insurance 'company. He commenced employment with that company in 1951. The appellant worked at a hotel or club, and later as a dispatch supervisor.

There were no children of the relationship. The appellant had two children from her marriage, which had broken up, and for a few years after the commencement of the relationship the appellant's children lived with the couple.

The relationship came to an end in September 1992.

At all material times the respondent owned a house at Croydon Park. At the beginning of the relationship the parties, and, for a time, the children of the appellant, lived in that house. In 1989 the parties retired and went to live together in a house at Swansea which had been purchased as a weekender in 1979, but had been let out to tenants. Upon their move to Swansea the Croydon Park house was let.

The parties planned carefully for their retirement. Part of the plan was that the appellant would become entitled to a pension when she turned sixty. Consistently with that intention, to the extent to which there was a choice, assets were accumulated by the respondent rather than the appellant. The Master referred to a conversation in which the parties discussed title to the house at Swansea when it was acquired. The purchase price was $28,000. They agreed that the house should be acquired in the name of the respondent so that there would be no interference with the appellant's ultimate entitlement to a pension. However, it was to be regarded as belonging to them both.

Master Macready noted that it was acknowledged that the appellant cooked all the meals, and did all the cleaning of the house, and she was a good cook and housekeeper. The performance of the respondent in and about the house was the subject of some criticism by the appellant, **but this was not a matter to which the Master attached particular importance.**

The total asset pool at the end of the relationship was approximately $800,000. The full Court awarded the female partner 25% that is $200,000.

The decision was split 3-2 which seems to mean that 'luck's a fortune'

However, Justice Gleeson (who was in the majority) has recently been appointed as Chief Justice of the High Court so it's probably safer to keep your finances separate and tell him to do his own washing and cleaning (and possibly yours) whilst you get some justice and equity by opening your own business or doing your doctorate.