

A wider view of 'family' contributions under de facto relationships legislation

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A general feature of State and Territory de facto relationships legislation is that a court may adjust the entitlement of the partners to the property of either or both of them if they have lived together for a certain period, or if there is a child of the relationship. To reach a 'just and equitable' result, the court is to take account of both contributions to the parties' property and financial resources, and their contributions to the welfare of the family.

Early interpretations of de facto statutes in cases such as *Roy v Sturgeon* (1986) 11 Fam LR 271, and *Lipman v Lipman* (1989) 13 Fam LR 1 in New South Wales, and *Conn v Matusevicius* (1991) 14 Fam LR 751 in Victoria, set the tone for how courts approached disputes. Even though the plain words of the laws do not automatically require a restrictive approach, these cases decided that the court would not have regard to contributions made before or after the parties started living together in a de facto relationship. (For a comparison with cases under the Family Law Act see *Wand W* (1997) FLC 92-723, and the discussion in Sandor 1997).

The rationale for taking a narrow focus rests on a particular reading of certain sections of the legislation, and a view that the underpinning policy was not to elevate de facto relationships to the same status as marriage. The resulting legal framework places a de facto partner at the disadvantage of having to claim under general law rather than statute for contributions made outside the period of the relationship. While homemaker and parent contributions have been taken into account in such claims when there have also been financial contributions, no reported case has so far been successful on the basis of non-financial contributions alone (Finlay et al. 1997:321-325).

This conservative approach to de facto legislation is not, however, binding on other judges, and two recent cases under the De Facto Relationships Act 1984 (NSW) are noteworthy for refusing to take a

similar tack. Both decided that the Act covers contributions made before and after as well as during what the law recognises as a 'de facto relationship'. In doing so, the judgments disconnect the making of contributions from whether the family is living together or not.

Griffith v Brodigan (1996) DFC 95-177 was a de facto property case decided in the Family Court under the De Facto Relationships Act 1984 (NSW) pursuant to cross-vesting legislation. Ms Griffith and Mr Brodigan commenced a relationship in 1983 and had two children before they established what the law recognises as a de facto relationship in mid-1987, which lasted until 1991.

A question that arose at the hearing was whether Ms Griffith's contributions to the children and Mr Brodigan before they all lived together on a consistent basis should be taken into account in determining her share of the parties' property. Chisholm J ruled that such contributions were relevant in order to give effect to the requirement that an order under the Act is 'just and equitable'. He added, however, that prior contributions do not necessarily carry the same weight as those made during the relationship.

The question of contributions after the end of a relationship arose before Bryson J in *Foster and Evans* (1997) DFC 95-193. Ms Foster and Mr Evans lived in a de facto relationship for nine months in 1987. A child was conceived during that time and born three months after they separated. From then on, the mother had sole responsibility for the child and the father had contact with the child. Mr Evans paid no maintenance but from the time of separation until January 1991 the mother and child lived in accommodation for which he paid the rent. Thereafter, they lived in a unit (with a rental value of \$170 at the time of the trial) which Mr Evans built for the mother and child to live in. These consensual arrangements broke down in October 1995 when Mr Evans gave the mother notice to quit and she, in response, made a claim under the NSW Act.

After comparing each party's contributions, Bryson J found that Ms Foster was entitled to \$50,000 in recognition of her disproportionately greater contributions to the welfare of the child. In reaching that conclusion his Honour expressly disagreed with the restrictive approach to assessing contributions and took the post-separation contributions of both the mother and father into account.

Both judgments clearly reject the notion that the parties and children must be living together for contributions to the 'family' under the legislation. As put by Bryson J:

'Family' is a word of very wide meaning and connotes many kinds of connections among persons, and many of these connections are irrespective of whether they form one household . . . The possibility of a contribution to the welfare of a family including a child of the partners after the de facto relationship has ended can be clearly seen. I do not see what purpose would be served by limiting the contributions to family welfare which may be considered so as to exclude contributions made after a separation . . . In my opinion a family there referred to could be a group of persons who do not live in the same household. (*Foster v Evans* 1997) DFC 95-193 at 77,681. See also *Griffiths v Brodigan* (1996) DFC 95-177 at 77,527.)

The common-sense approach of these decisions can and should be adopted in similar cases in New South Wales and elsewhere that there are statutory schemes. Unfortunately, partners who do not meet the applicable legislative definition of 'de facto relationship' will not directly benefit.

References

- Finlay, H., Bailey-Harris, R.J. & Otlowski, M.F.A. (1997), *Family Law in Australia* (5th edn), Butterworths, Melbourne.
- Sandor, D. (1997), 'Accounting for care contributions before cohabitation in property settlements', *Australian Journal of Family Law*, vol. 11, no. 2, pp. 223-230.

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