CASE NOTE*

BLACK v BLACK[1]

Black v Black is significant in the area of family law. It is the first time the New South Wales Court of Appeal[2] has considered in detail property adjustment under the *De Facto Relationships Act* 1984 (NSW).[3] The case advances the position of the partner who is the homemaker in a de facto relationship by valuing his or her contributions in a similar manner to the contributions of the homemaking spouse in a marriage. More generally, the case suggests a closer relationship between the *Family Law Act* 1975 (Cth) and the *De Facto Relationships Act* in regard to problems common to both Acts.

I. FACTS

The parties were in a de facto relationship lasting 11 years. It began in 1976 when the appellant moved into the respondent's home in Bronte. They both worked until 1980. In this period the appellant's wages contributed to the family purse out of which household expenses and mortgage repayments were paid.

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* Ben Zipser, BA LLB (NSW).

1 (1991) 15 Fam LR 109.

2 Kirby P, Clarke and Handley JJA.

3 The Court of Appeal has referred to property adjustment under the *De Facto Relationship Act* in two other cases. *Miller v Barker* (1990) 14 Fam LR 303, and *Scott v Briggs* (1991) DFC 95-106. However, there is little discussion of the issues in either case.

In 1980 the appellant had the first of two children and from that time, until the relationship terminated, she stopped working and tended to the respondent, the children and the home. Also the appellant looked after the two children of the respondent's previous relationship who came to stay on weekends.

Between 1978 and 1980 the appellant's father made substantial improvements to the Bronte property, increasing its value.

In 1983 the parties purchased a property in Ultimo as joint tenants for $50000. The appellant contributed $19000 and the respondent supplied the balance. That property was sold at about the time the parties separated in 1987. The net proceeds of the property, in addition to rent, came to about $100000 and was invested.

At the termination of the relationship, the assets of the relationship included the house in Bronte registered in the name of the respondent, valued at $355000, and the invested $100000.

The trial judge awarded the appellant $120000.

II. THE COURT'S APPROACH TO S 20 OF THE DE FACTO RELATIONSHIPS ACT

The major issue in *Black v Black* was the court's approach to the application of s 20 in a property adjustment between de facto partners. There have been several single judge decisions on this issue in the Supreme Court of NSW,[4] and two cases in the Court of Appeal touched the problem,[5] but this was the first time the Court of Appeal gave the problem detailed attention.

The first question was the extent to which the approach under s 79 of the *Family Law Act*, which deals with property adjustment between the parties to a marriage, can be applied to s 20 of the *De Facto Relationships Act*.

Section 79(1) of the *Family Law Act* provides that, in proceedings with respect to the property of the parties to a marriage, the court may make such order as it considers appropriate altering the interests of the parties in the property.

Section 79(2) requires that the court shall not make such an order "unless it is satisfied that, in all the circumstances, it is just and equitable to make".

Section 79(4) then lists the considerations the court "shall take into account":

1. the financial and non-financial contributions made directly or indirectly by or on behalf of a party to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage;

4 For example *Dwyer v Kaljo* (1987) 11 Fam LR 785, *D v McA* (1986) 11 Fam LR 214, *Roy v Sturgeon* (1986) 11 Fam LR 271, *Wilcock v Sain* (1986) 11 Fam LR 302.

5 See note 3 *supra*.

2. the contribution made by a party to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;
3. the effect of any proposed order upon the earning capacity of either party to the marriage; and
4. the matters referred to in s 75(2) so far as they are relevant.[6]

Section 20 of the *De Facto Relationships Act* reads:

> On an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partner or either of them, a court may make such order adjusting the interests of the partners in the property as to it seems just and equitable having regard to:
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> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of a de facto partner or either of them to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and
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> (b) the contributions, including any contribution made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely:
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> 1. a child of the partners
> 2. a child accepted by the partners.... into the household....

Clarke JA noted that s 79 requires the court to "take into account" a number of listed factors, while s 20 requires the court to "have regard to" the listed factors.

The specification of the matters to which regard is to be had in s 20 is significantly different from s 79 of the *Family Law Act*. Section 79 requires the court to take into account past contributions by the parties as well as present and future needs and abilities. Section 20 requires the court to have regard only to past contributions.

For these reasons Clarke JA concluded that "it is quite inappropriate uncritically to apply an approach evident from decisions concerning the *Family Law Act* to applications under s 20".[7]

However, he continued that the Court may be assisted by Family Law decisions concerning aspects of problems that are common to both Acts. Alternatively, observations in the Family Court may assist, by way of analogy, in determining the approach that should be adopted to problems encountered under the *De Facto Relationships Act*.

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6 Section 75(2) lists a wide range of matters, which refer to the present and future needs and resources of the parties. Clarke JA delivered the main judgement. Kirby P and Handley JA concurred.

7 Note 1 *supra*.

Clarke JA also adopted the approach taken in *Dwyer v Kaljo*[8] which was to take into account factors beyond those laid out in s 20 in order to determine what, in circumstances is just and equitable. In *Dwyer*, Hobson J gave examples of other factors that might be relevant: "the length of the relationship, any promises or expectations of marriage, and also I think opportunities lost by the plaintiff by reason of the plaintiff's contributions".[9] More generally, the needs and resources of the parties may be taken into account in order to determine what is just and equitable.

A significant aspect of Justice of Appeal Clarke's approach to s 20 is unstated. In a number of decisions about property adjustment under the *De Facto Relationships Act*, the courts approached the matter in terms of a four-step test:

1. to identify and value the assets of the parties;
2. to determine the contributions of each partner of the type contemplated by s 20;
3. to determine whether the contributions of the applicant have been sufficiently recognised and compensated; and
4. to determine what order needed to sufficiently to compensate the applicant.[10]

In *Black*, this four-step approach was not taken. Instead, the approach resembles more that taken by the Family Court when dealing with a s 79 application. The major difference between the two approaches is that step 3 is effectively left out and step 4 is significantly altered . The court no longer looks to compensate one party only, but looks for an order which is just and equitable with regard to the contributions of both parties.

Step 3 disadvantages a home making applicant by assessing that applicant more as an employed housekeeper than as a partner in a relationship. Benefits received by that person while they perform their contribution are treated as a form of compensation rather than as something one expects when living in a de facto relationship. Meanwhile the other partner providing the financial contributions, does not have the benefits that he or she receives from the homemaker offset from these financial contributions.

Step 4 exacerbates this bias. An order might sufficiently recognise and compensate the applicant's contributions, but it will not necessarily be just and equitable having regard to the contributions of both parties.

The apparent removal of step 3 and the refocus in step 4 in the new approach places the partner who is the homemaker on a more level playing field when it comes to property adjustment.

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8 (1987) 11 Fam LR 785.

9 *Ibid* at 793.

10 *Ibid* at 793-4.

III. ASSESSING THE CONTRIBUTION OF THE DE FACTO PARTNER AS HOMEMAKER

Contributions of a de facto partner as homemaker and parent are not to be regarded as inferior to the contribution of a married spouse as homemaker and parent. The suggestion that a de facto partner should in some way be treated as inferior to a married spouse as expressed in *Wilcox v Sain*,[11] an earlier Supreme Court decision by Young J.

The value of the contribution of a homemaker and parent as the High Court made it clear in *Mallet v Mallet*,[12] in proceedings under s 79, should be recognised in a substantial, not merely a token, way. Thus it is open for a court to conclude that the indirect contribution of one party as homemaker or parent is equal to the financial contributions of the other party, on the footing that that party's efforts as homemaker have enabled the other to earn an income by means of which the property was acquired.

Black clearly establishes that a similar approach is to be applied to contributions of a de facto partner as homemaker and parent.

A second important point in *Black* is that the value of the contribution of a de facto partner as homemaker cannot be calculated by basing it on the commercial cost of providing housekeeping services. The trial judge seems to have taken this approach. Clarke JA strongly disapproved, stating that a homemaker's contribution to the family unit will usually be infinitely greater than the value of domestic service.[13]

It is worth noting that Justice of Appeal Clarke's language is stronger than that used by Hodgson J, where in *Dwyer* said the homemaker's contributions to the defendant and his son were only worth "something more" than contributions a housekeeper would have made.[14]

IV. THE AMOUNT OF THE APPELLANT'S ENTITLEMENT TO THE VALUE OF THE ASSETS

The relevant assets of the parties at the termination of the relationship were the invested money and the Bronte house. Clarke JA took an asset by asset approach in calculating the appellant's entitlement.

The proceeds of the sale of the Ultimo property and rent invested was about $100000. The trial judge calculated the appellant's proportionate share of this amount as $35000. He reasoned that the appellant contributed $19000 to a property the purchase price of which was $55000. Therefore she should be

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11 (1986) 11 Fam LR 302.
12 (1984) 9 Fam LR 449.
13 Note 1 *supra* at 117.
14 Note 8 *supra* at 794.

given a similar percentage of the net proceeds, that is 35 per cent of $100000, or $35000.

This procedure involved a number of errors on the part of the trial judge.

First, the trial judge made an error regarding the purchase price. In his calculations he adopted a price of $55000 when it was in fact $50000.

Second, the applicant, as joint owner, should was entitled to half the proceeds from the sale and investment account anyway. Yet the trial judge only awarded her a proportion equal to the proportion of her contribution to the purchase price. While the trial judge is entitled to adjust property interests in order to make a just and equitable order, he did not suggest that he was following such a course. The trial judge should have explained why the applicant's legal entitlement to half the proceeds of sale was to be put aside.

For these reasons, Clarke JA substituted an order that the appellant was entitled to half the proceeds of the investment account, that is $51000, rather than $35000 as assessed by the trial judge.

The Bronte property was valued at $355000 but the trial judge assessed the appellant's entitlement to be only $85000. Clarke JA found two errors in the trial judge's determination of this figure.

The less significant error was that the trial judge failed to value part of the appellant's contributions to the conservation and improvement of the Bronte property and to the financial resources of the parties. First, the appellant's father had carried out renovations on the property, increasing its value significantly. Secondly, the appellant, when she was working, had provided wages to the family purse.

These contributions can be classified as a direct non-financial contribution and an indirect financial contribution respectively. Section 20 of the *De Facto Relationships Act* requires that the court, in determining a just and equitable order, have regard to them in a manner similar to direct financial contributions.

The more significant error is that the trial judge undervalued the contributions of the appellant as homemaker and parent.[15]

Clarke JA, on taking these two errors into account, adjusted the appellant's entitlement in the Bronte property from $85000 (25 per cent) to $135000 (40 per cent). It is clear from the judgement that most of this increase is due to the reassessment of the value of the contributions of a homemaker and parent.

VI. CONCLUSION

The nature of s 20 of the *De Facto Relationships Act* gives the court a wide discretion and this makes it difficult to predict an outcome in any given case. However, *Black v Black* is important for two reasons. First, the contribution of a homemaker and parent in a de facto relationship will now be more highly

15 See Part III *infra*.

valued, and secondly, the *Family Law Act* and the *De Facto Relationships Act* more consistently reflect the value placed on the contribution of homemakers.