# UNTANGLING DE FACTO RELATIONSHIP PROPERTY MATTERS

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## Introduction

The Property (Relationships) Act 1984 ("the PRA") provides for the adjustment of property interests and maintenance in domestic relationships. For the purposes of the PRA a domestic relationship includes a de facto relationship.

The 1999 amendments to the then De Facto Relationships Act 1984, and the renaming of that Act as the Property (Relationships) Act 1984, significantly extended the reach of that legislation in NSW. However, for the most part, the cases coming before the Courts continue to relate to de facto relationships rather than the more broadly defined domestic relationships.

It is also the case that the most common type of case brought under the legislation is for adjustment of property interests although the Act also provides for maintenance.

The aim of this paper is to discuss some of the many and varied areas of complexity in this part of the law, by a review of some of the recent cases determined under the PRA.

## The Nature of the Relationship

The definition of de facto relationship is found in s 4:

> (1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:
> (a) who live together as a couple, and
> (b) who are not married to one another or related by family.
>
> (2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
> (a) the duration of the relationship,
> (b) the nature and extent of common residence,
> (c) whether or not a sexual relationship exists,
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,

(e) the ownership, use and acquisition of property,
(f) the degree of mutual commitment to a shared life,
(g) the care and support of children,
(h) the performance of household duties,
(i) the reputation and public aspects of the relationship.

(3) No finding in respect of any of the matters mentioned in subsection (2)(a)–(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.

The definition of a domestic relationship is found in s5:

(1) For the purposes of this Act, a domestic relationship is:
(a) a de facto relationship, or
(b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of subsection (1) (b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
(a) for fee or reward, or
(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

(3) A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:
(a) a child born as a result of sexual relations between the parties,
(b) a child adopted by both parties,
(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:

(i) of whom the man is the father, or

(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996* , to be the father, except where such a presumption is rebutted,

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* ).

(4) Except as provided by section 6, a reference in this Act to a party to a domestic relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.

In the Minister's Second Reading speech to Parliament, on 26 May 1999, the Minister noted the types of relationships the amendments sought to cover:

> I also wish to highlight the types of personal relationship which this bill does not include within its ambit. Firstly, the bill does not attempt to provide for any form of marriage, this being a matter, by virtue of the Commonwealth Constitution, on which a State may not validly make laws. Secondly, the bill specifically excludes from its ambit relationships which may otherwise be regarded as close personal relationships where the care services rendered are provided in return for a fee or reward or in the carer's capacity as a servant or agent of another or of an organisation, including a government or government agency, a body corporate or a charitable or benevolent organisation.
>
> In establishing whether a relationship comes within the definition of a close personal relationship for the purpose of this bill, regard should be had to the requirements that the parties provide, one or both for the other, domestic support and personal care. Such support and care will commonly be of a frequent, ongoing and intense nature. Domestic support services will usually consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other. Taking into account factors I have just outlined it is easy to see that there is no intention to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way that flatmates might.

> On the other hand, the type of relationship which could easily be regarded as coming within the ambit of the bill is that which might exist between a daughter and elderly parent residing together for the purpose of obtaining and giving domestic support and personal care. In recognition of the fact that the bill will bring within its ambit children of domestic relationships. The definition of "child" in the bill is extended to include, "a child for whose long-term welfare both parties have parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1988)". This extended definition will ensure that the welfare of children being cared for in the domestic relationships contemplated by the bill is considered if the domestic relationship breaks down.

Subject to satisfying certain jurisdictional requirements (see ss 15 (residence within NSW), 17 (relationship of more than 2 years) and 18 (application made within 2 years of termination of relationship)), a party to a domestic relationship may apply to the court for orders for adjustment of property and/or maintenance.

However other rights of the parties at law or under any other Act are not affected by the PRA (s7). Therefore it is open to parties to take advice and consider what if any other remedies are available to them, and the advantages and disadvantages of pursuing those remedies in addition to, or instead of, an action under the PRA.

It can be seen from the definitions of domestic and de facto relationships that the class of persons to whom it may apply is large. In addition to the “traditional” heterosexual de facto relationship, the Act applies to same sex de facto and domestic relationships. A child (over 18) who lives with a parent or grandparent and provides care and domestic support falls into the class as does, potentially, a boarder or other resident in an elderly person’s home.

In some cases the very nature of the relationship is in dispute. One party may be asserting a de facto relationship, while the other asserts some other sort of relationship. In a recent Queensland case, the Queensland Court of Appeal found that for a period of one year, between December 1997 and December 1998, the parties’ relationship was a “courtship”, with the commencement of the de facto relationship occurring in December 1998. The trial judge had found the de facto relationship commenced in 1997 (*Fo v Haf* (2007) DFC 95-402)

See also *Delany v Burgess* [2006] NSWSC 1420 in which the Plaintiff was a boarder in the defendant's property but claimed a de facto relationship. Associate Justice McLaughlin found that it was a commercial arrangement and not a de facto relationship. The fact they had a sexual relationship alone did not make it a de facto relationship.

If the relationship itself is in issue, careful and specific evidence should be obtained to support the client's case, and where possible, corroborated. An example of this is the case of *Robinson v Thompson* [2007] NSWSC 1148, judgment delivered 17 October 2007. In that case, which involved a same sex couple, the Plaintiff asserted a de facto relationship while the Defendant asserted that they had lived in a close personal relationship. It is clear from the judgment that the evidence relied on to prove the de facto relationship included cards, photographs, superannuation documents, Qantas staff documents such as those nominating travel beneficiaries, the parties' wills, a deed they had entered into (and subsequently ignored), an authority given by the Defendant to his son's school, and the evidence of other witnesses as to the public nature of the relationship. Associate Justice McLaughlin had no difficulty, having considered that material, in concluding that the parties were in a de facto relationship.

In many cases the existence of a relationship is not in dispute, but it is not uncommon to find disputes as to the dates of commencement and termination of the relationship. Other questions that frequently arise and may present difficulties are: did the relationship exist for the necessary 2 years or for a lesser time and what if any difference does that make; has there been one continuous relationship or a series of relationships and does it matter; does it matter if they didn't live together; can a person be in 2 relationships simultaneously?

For a decision concerning a relationship of less than 2 years see *Loibner v Owens* [2006] NSWSC 410.

In *Stanley v Ward* [2006] NSWSC 789, another decision of Associate Justice McLaughlin, the question was whether the relationship had ended, as the parties continued to reside under the one roof and, although engaged in the litigation, maintained a social relationship. Describing the domestic arrangements as "somewhat unusual", the Associate Justice made the point that the termination of a de facto relationship is not a prerequisite to the Court determining the matter under s20 of the PRA.

Once the criteria for the relationship, and the other jurisdictional requirements are satisfied, then s20 and in certain circumstances s27 are available.

**Applications and Orders**

Regardless of the nature of the relationship, the orders the court can make are the same, that is, for adjustment of property interests and or maintenance. In assessing what if any order to make, whether the applicant is relying on a de facto or a domestic relationship, the court is required to take account of the same matters.

Section 20 is in the following terms:

> (1) On an application by a party to a domestic relationship for an order under this Part to adjust interests with respect to the property of the parties to the relationship or either of them, a court may make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to:
> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and
> (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:
> (i) a child of the parties,
> (ii) a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties.
>
> (2) A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a party to a domestic relationship in respect of the property.

There is no general right to maintenance (s26) however s 27 is in the following terms:

> (1) On an application by a party to a domestic relationship for an order under this Part for maintenance, a court may make an order for

maintenance (whether for periodic maintenance or otherwise) where the court is satisfied as to either or both of the following:

(a) that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the parties to the relationship or a child of the respondent, being, in either case, a child who is, on the day on which the application is made:

(i) except in the case of a child referred to in subparagraph (ii) under the age of 12 years, or

(ii) in the case of a physically handicapped child or mentally handicapped child—under the age of 16 years,

(b) that the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court:

(i) an order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a course or programme of training or education, and

(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

(2) In determining whether to make an order under this Part for maintenance and in fixing any amount to be paid pursuant to such an order, a court shall have regard to:

(a) the income, property and financial resources of each party to the relationship (including the rate of any pension, allowance or benefit paid to either party to the relationship or the eligibility of either party to the relationship for a pension, allowance or benefit) and the physical and mental capacity of each party to the relationship for appropriate gainful employment,

(b) the financial needs and obligations of each party to the relationship,

(c) the responsibilities of either party to the relationship to support any other person,

(d) the terms of any order made or proposed to be made under section 20 with respect to the property of the parties to the relationship, and

(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.

(3) In making an order for maintenance, a court shall ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant to a pension, allowance or benefit

The terms “property” and “financial resources” are defined in s3 in the following terms:

"property", in relation to parties to a domestic relationship or either of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.

"financial resources", in relation to parties to a domestic relationship or either of them, includes:

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided,

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the parties to the relationship or either of them,

(c) property, the alienation or disposition of which is wholly or partly under the control of the parties to the relationship or either of them and which is lawfully capable of being used or applied by or on behalf of the parties to the relationship or either of them in or towards their or his or her own purposes, and

(d) any other valuable benefit.

The orders the court can make are contained in s38:

(1) Without derogating from any other power of a court under this or any other Act or any other law, a court, in exercising its powers under this Part, may do any one or more of the following:

(a) order the transfer of property,

(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court thinks fit,

(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order,

(d) order payment of a lump sum, whether in one amount or by instalments,

(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum,

(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs,

(g) appoint or remove trustees,

(h) make an order or grant an injunction:

(i) for the protection of or otherwise relating to the property or financial resources of the parties to an application or either of them, or

(ii) to aid enforcement of any other order made in respect of an application,

or both,

(i) impose terms and conditions,

(j) make an order by consent,

(j1) make an order in the absence of a party,

(k) make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it thinks it is necessary to make to do justice.

(2) A court may, in relation to an application under this Part:

(a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law, and

(b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.

In addition the court has power to vary or set aside orders made under s20 or s27 in certain circumstances (s41) and power to make orders in circumstances where there are or may be transactions to defeat claims (s42).

The terms of an order was one of the matters considered in *Manns v Kennedy* [2007] NSWCA 217. The appellant claimed that the trial judge had failed to give adequate reasons for an order granting a particular parcel of real estate on which the home was constructed to the respondent. This was land adjacent to a parcel of land owned by the appellant's mother which was itself adjacent to another parcel of land on which the appellant conducted his business. The land the subject of the order had been gifted to the appellant by his father and was registered in his sole name.

In that matter, the primary judge had determined that the appropriate split of the pool of assets was 60/40 in the appellant's favour. He then determined that the respondent receive the title to the house and land, subject to mortgage, as part of her entitlement. The primary judge had taken into account not only the contributions to the land and house asserted by the appellant (it being a gift and so on), but also other relevant factors such as the fact it had been the family home for seven and a half years, the relatively young age of the children of the relationship and those accepted as part of the household, that both parties had made contributions to the cost of improvements, and the improvements contributed more to the value of the property than the land itself.

Campbell JA at para 110 said:

> "If the judge has adopted that methodology [a global approach], and has decided what that proportion should be, I do not accept that it is outside the ambit of section 20 for the primary judge to take into account factors like those I mentioned in para 108 above in deciding what particular manner of division of the assets there should be to give effect to that proportion."

He then goes on to discuss the problem of construction presented by the wording of s20 – that is, of making an adjustment *"having regard to"* the factors in s20 (1) (a) and (b). What role do the listed factors have in the decision making process? To what extent are factors other than those listed in the legislation to be taken into account? He notes that *Evans v Marmont* (1997) 42 NSWLR 60 did not altogether resolve the question, but because it had not been argued in detail he did not determine the issue in this appeal on anything but a narrow basis.

Campbell JA notes that, because of sections 20(1)(b), 17(2), 27 and 30, the existence of a child and who shall have the care and custody of that child, are matters within the scope of the legislation. He also notes that any adjustment is to be made in the context of the totality of the property of the parties and that sometimes a consideration of contributions alone will not identify the particular assets that each party should receive. At para 115 he says:

> "In circumstances where consideration of the contributions is not enough, by itself, to arrive at an order that deals with the specific assets that the specific parties have, it must, it seems to me, have been the intention of the legislature that the court can complete the task of arriving at an order by taking into account factors other than the contributions, provided that those other factors are themselves not foreign to the overall structure and purpose of the legislation. Proceeding in that way can, in my view, properly be described as adjusting the interests of the parties in property in a manner that seems just and equitable having regard to the factors listed in paragraphs (a) and (b) of section 20."

Having reviewed *Evans* and the case of *Powell v Supresencia* [2003] NSWCA 195, Campbell JA concluded that (at para 125):

> "Consideration of the contributions alone was not sufficient to decide who should receive which particular assets, so it was legitimate for the primary judge to turn to other matters to complete the task of deciding what adjustment of property seems just and equitable having regard to the factors in paragraphs (a) and (b) of section 20."

For a case in which the court considered an application to set aside consent orders under s41(unsuccessfully), see *Sands v Henderson* [2007] NSWSC 1200. It is interesting to note in that case Associate Justice McLaughlin's identification of the difference in the exercise of making consent orders under the Family Law Act and the PRA, that being the court under the PRA is not required to consider whether the consent order is just and equitable.

**The Pool**

The most significant recent development in this area of the relevant law is in the treatment of superannuation.

Lawyers dealing with family law matters under the Family Law Act would now be familiar with the amendments to that Act treating superannuation as property and allowing for superannuation to be split. It may not be easy or straightforward but it can be and is done.

However the amendments to the legislation in the Federal forum do not apply at the State level.

In *Chanter v Catts* [2005] NSWCA 411 the Court of Appeal considered the decision of Master Macready at first instance. In that decision the Master had had regard to *Green v Robinson* (1995) 36 NSWLR 96 and *Gazzard v Winders* (1998) 23 FamLR 716 and discussed the plaintiff's contributions to the defendant's superannuation. The Master did not include the defendant's significant superannuation fund in the calculation of the parties' net assets available for division under s20. Hodgson JA said:

> "… if the judgments of Powell JA and Cole JA in *Green v. Robinson* (1995) 36 NSWLR 96 are interpreted as deciding that a party's superannuation entitlements either (1) are not property that can be directly affected by an order under s.20 of the Act, or (2) can be taken into account in determining what order is appropriate only if and to the extent that the other party had contributed to that entitlement, then in my opinion those judgments are wrong and should not be followed." [para 21]

He went on to say (at paras 22- 25):

> "It is accepted that the exercise of jurisdiction under s.20 of the Act involves three steps:
> (1) identification and valuation of the property of the parties;
> (2) identification and valuation of the respective contributions of the parties, of the types referred to in s.20;
> (3) determination of what if any order is just and equitable having regard to these contributions.
> See *Lyman v. Lyman* (1989) 13 FamLR at 18, *Jones v. Grech* [2001] NSWCA 208, 27 FamLR 711 at [29].]

> In my opinion, superannuation entitlements should be included in the assets considered in step (1) of that process; and a determination in step (3), concerning whether and to what extent the order should affect superannuation entitlements, does not depend on contributions considered in step (2) being identified as direct or indirect contributions to those superannuation entitlements.
>
> There may be good reasons for treating superannuation entitlements somewhat differently from other assets, inter alia because of limitations in a beneficiary's control over and access to this asset; but that may depend upon the circumstances. There may be a difference between (1) an employee whose wages have been reduced to the extent of compulsory deductions, giving rise to superannuation entitlements in a large fund in which the employee has no control, on the one hand, and (2) a self-employed person who has considerable control over what amounts are invested and perhaps over the fund itself, as well as over what may be withdrawn, at least after passing the age of 55, on the other hand. In the case of the latter, the superannuation entitlements may not be very different from other investments.
>
> In this case, the respondent's superannuation entitlement is in a fund called Peter Catts Superannuation Fund, the principal assets of which appear to be a little over 2 million units in McIlwraith Unit Trust, said to be worth a little over $2.3 million. Other beneficiaries of this fund appear to include the appellant to the extent of about $120,000.00, the respondent's second wife to the extent of about $845,000.00, and each of the respondent's children from his first marriage to the extent of about $196,000.00 each. Other unit holders in the McIlwraith Unit Trust include the respondent himself (a little over $255,000.00) and something called Catts Super Fund (just under $435,000.00); and the only other major unit holder is a company called Athelstane International (to the extent of a little over $463,000.00). In those circumstances, it would seem that the respondent has considerable control over what can be put in or taken out of the fund and over the conduct of the fund; and there is little reason for treating his superannuation entitlements as different from ordinary investments."

The final orders dealt with the discharge of the mortgage by the respondent, rather than any order specifically directed to his superannuation.

In practical terms, how superannuation will be dealt with remains to be seen and indeed will depend on the particular circumstances of each case, unless the super splitting law applicable under the Family Law Act is extended to de facto matters.

In the case of *Robinson v Thompson* referred to earlier, whether or not the Defendant's superannuation could be the subject of an order under s20 was argued but ultimately the Associate Justice determined that it was not necessary because there were sufficient assets to satisfy an order without a charge on the superannuation fund. He noted however that had it been necessary to do so, he was satisfied, on the authority of *Catts v Chanter*, that the court had power to make an order in respect to the superannuation entitlements of one of the parties which entitlement had not vested. The only guidance on the form of any such order in this judgment was a reference to "some form of charge upon the superannuation entitlement" of the defendant.

**Assessment of Contributions and related issues**

1. Contributions Pre and Post relationship – in or out?

The short answer? Depends, but probably in.

For pre-relationship contributions see *Jones v Grech* (2001) 27 FamLR 711 in which the Court of Appeal had regard to contributions made prior to the commencement of the relationship. See also *Bowden v Foster* [2007] NSWSC 29, a decision of Associate Justice Macready in which he reviews the relevant case law concerning breaks in de facto relationships and contributions made during earlier periods.

For post-separation contributions see *Chanter v Catts* (supra) in which both parties sought to rely on post separation contributions. Hodgson JA at para 37 discusses some of these post separation contributions to the parties' children and specifically seeks to give value to the appellant for those contributions. Bryson JA, who dismissed the appeal, accepted the proposition for the purposes of the appeal (at para 74):

> "The Master then dealt with contributions from separation to the trial. In explaining why he took into account post-separation contributions the Master referred to **Foster v Evans** (unreported, Supreme Court of New South Wales, 31 October 1997) (Bryson J) where I decided that s 20(1)(b) does not limit consideration to contributions to the welfare of the family made during the period when there was a de facto relationship. The effect of

> what I said there was that contributions, including contributions made in the capacity of homemaker or parent, to the welfare of the family constituted by the parties and a child or children can be regarded although the contributions were made after the end of the relationship. In **Jones v Grech** (2001) 27 Fam LR 711 the Court of Appeal had regard to contributions made prior to the commencement of a de facto relationship. Observations and references to authority by Ipp AJA at [77-82], with which Davies AJA agreed - see [24-26] - have established that contributions made before commencement and after the end of the relationship may come under consideration. It should be understood that the dictum of Powell JA in **Roy v Sturgeon** (1986) 11 NSWLR 454 at 466 to the effect that it is not open to the court to have regard to contributions made prior to the commencement of the relationship has been disapproved. See too **Nguyen v Scheiff** (2002) 29 Fam LR 177 at 182 (Campbell J).
>
> **Foster v Evans** related to contributions under s 20(1)(b). In the present case each party put forward for consideration contributions made since separation to acquisition conservation or improvement of the Foss Street house which would fall within s 20(1)(a), and it was not disputed that regard should be paid to them. As the assumption that contributions within s 20(1)(a) made after separation are relevant was not disputed, I accept it for the purpose of disposition of this appeal…."

See also *Townsend v Townsend* [2006] NSWCA 352, per Hodgson JA para 16.

On the other hand, there are numerous cases where post separation contributions, particularly to the children, are not taken into account on a narrow interpretation of s20(1)(b), see for example *Thompson-Grandou v Thompson* (2003) DFC 95-266.

2. Initial Contributions

The weight to attach to one party's initial contribution, often in the form of real estate, has occupied the courts in proceedings under both the PRA and the Family Law Act recently. There has also been consideration of the concept known in family law matters as the "erosion" principle.

The first case for consideration is *Howlett v Neilson* [2005] NSWCA 149. In that matter there was a de facto relationship of some 17 years, with one child. At the commencement

of the relationship the appellant (male) had assets of $110,000, including a home in which the parties lived. The respondent's assets at commencement were about $2,000. The trial judge found the assets of the parties had a value at the date of hearing of $312,516 and awarded the respondent 42% or $131,256.

Issue was taken on appeal to the valuation, and the treatment of the appellant's initial contribution of the home.

There was no finding of error on the valuation issue.

In considering the initial contributions, Hodgson JA reviewed the erosion principle by reference to the matter of *Pierce v Pierce* [1999] FLC 92-844, a decision of the Full Court of the Family Court of Australia. Essentially the erosion principle provides that *".. an initial contribution by one party may be "eroded" to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party"* (per Fogarty J in *Money and Money* (1994) FLC 92-485). In *Pierce* the Full Court said (at para 28)
*"In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use by the parties of that contribution. In the present case that use was the substantial contribution to the purchase price of the matrimonial home."*

In *Howlett*, Hodgson JA notes that there is no clear statement of the erosion principle in proceedings under the PRA but expresses the opinion that it is by no means clear the principle would apply in those proceedings to the same extent as under the Family Law Act. However he also notes that it is not the case that orders are to be made only in respect of the increases in value of assets over and above initial contributions. A party is not necessarily entitled to a return of their initial contributions but those contributions should be evaluated and assessed.

Hodgson JA also discusses the evaluation of contributions having regard to the cost of the contribution to the person making it, in addition to the benefit of those contributions to the relationship and the property. He gives the example of a woman in a 10 year relationship providing homemaker and parenting contributions at the cost of developing her skills and advancing her career.

His Honour turns to mathematical calculations to assist him in resolving the matter. He makes it clear that matters cannot be determined by the maths but mathematical calculations can be of use in providing guidance, transparency and consistency.

Having decided that the contributions during the relationship were equal, he returns to each party their initial contributions but without any interest or CPI increase, and then having deducted that amount from the overall pool, divides the balance equally. With other adjustments the amount awarded to the respondent was reduced to a payment of $97,000.

In *Burgess v King* [2005] NSWCA 396, the Court of Appeal, in another decision by Hodgson JA, considered a case involving a 13 year relationship in which the respondent had at the commencement of the relationship a one half interest with her former husband in a home. The other half was subsequently acquired for the sum of $50,000. At first instance the trial judge did not take into account when assessing the appellant's entitlements and contributions, the capital gain in that property, although recognised that the appellant made contributions to its renovation. He considered whether there should be interest on the amount to be credited to the appellant but did not allow him to participate in the capital gain.

Hodgson JA found that this was an error on the trial judge's part. The contribution of money by the appellant at the commencement of the relationship effectively saved the property from being sold. This should have resulted in the court considering the appellant sharing in the increased value of the property in proportion to their respective contributions.

The appellant was awarded an additional $50,000.

We then have the cases of *Kardos v Sarbutt* [2006] NSWCA 11, judgment delivered 14 February 2006 and *Bilous v Mudaliar & 1 Or* [2006] NSW 38, judgment delivered 27 April 2006. The Courts were differently constituted and as we shall see the results are somewhat conflicting.

In *Kardos*, the relationship was of 3 year duration and there were no children. At commencement the appellant's assets were valued at $289,112 and the respondent's $241,000. At separation the respective financial positions were $683,500 and $405,378

respectively. The parties lived in one of the appellant's properties and the other properties were rented.

At first instance the judge took the values at date of separation, returned to each their initial contribution and apportioned the growth in value equally between them. With an adjustment for notional rent, this resulted in a payment by the appellant to the respondent of $100,000. On appeal, this amount was reduced to $36,075.

In *Bilous*, the relationship was of 11 years duration and during the course of the relationship the parties adopted a child. The parties acquired and developed a number of properties during the course of the relationship. At trial, the appellant was awarded 20% of the total pool. On appeal this was increased to 32%. (The appellant wanted 40-45%)

The judgments take different views on the applicability of the erosion principle in proceedings under the PRA, and to the decisions in *Howlett* and *Burgess*.

In *Kardos*, Brereton J said (at para 59):

> …… I do not think that, in *Howlett v Neilson*, Hodgson JA was purporting to state a rule of general application. His Honour was describing a method of evaluation of the contributions which was appropriate to the facts of that particular case [see, for example, at [41]]. That it was not intended to be a rule of general application is evident from his Honour's later judgment in *Burgess v King* [2005] NSWCA 396 (18 November 2005).

He went on to say (at para 61):

> The approach which was adopted in *Burgess v King* is one which gives due weight to the time value of money, and recognises that capital gains are the product of the initial introduction of the property, rather than of ongoing contributions. On the other hand, the approach adopted in *Howlett v Neilson*, in my respectful opinion, may, in at least some cases, result in the serious undervaluation of initial contributions. It treats any increment in capital value of an asset held at the outset of the relationship as if it were part of the fruits of the relationship, when it is not: it is the result of the asset having been held by one of the parties at the commencement of the relationship, and not the result of joint efforts of wage earning, homemaking and parenting, and mutual support of the type described by Deane J as

> producing “fruits of the relationship”. It disregards the “time value of money”. It is likely to produce erratic results, because under it the significance of any particular asset in the ultimate evaluation will depend on its value when it was introduced. If one party has a house worth $250,000 at the outset, and it appreciates during the relationship to be worth $750,000, the contribution is of a house which at separation is worth $750,000 – not of money worth $250,000.

Having then discussed the Family Court case of *Pierce*, His Honour said (at paras 66 and 67):

> In *Howlett v Neilson*, Hodgson JA referred to that passage [in Pierce] and, observing that there was no clear statement concerning the “erosion principle” in cases under the *Property (Relationships) Act*, suggested that it was by no means clear that it would apply to the same extent as under the *Family Law Act* where matters other than contributions can be taken into account and where the relationship involves a public commitment to mutual support for life [*Howlett*, [34]]. However, as the Full Family Court pointed out in the passage just cited, it is really a matter of weighing initial contributions with all other relevant contributions. In a short marriage, the other contributions may be relatively insignificant. In a long marriage, ongoing income contributions and contributions as a homemaker and parent, if they have not resulted in the acquisition of assets sufficient to recognise them, may warrant the “erosion” of initial contributions so that all contributions can be satisfied to some extent, though not in full, out of the available property. There is no reason why this approach would apply to any less extent under the *Property (Relationships) Act* than under the *Family Law Act*; it does not involve taking into account matters other than contributions, but is part of the methodology for weighing and balancing the different contributions.
>
> Significant factors affecting the application of the “erosion principle” are the length of the relationship and, in particular, the extent to which there have been other or off-setting contributions which also have to be satisfied from the available pool. It is to accommodate those contributions that the initial contributions are “eroded”.

In *Bilous*, the leading judgment was that of Ipp JA. Addressing the question of the erosion principle and Brereton J’s decision in *Kardos*, he said (at paras 55 - 62):

In my opinion, the erosion principle should not be applied in cases under the *Property (Relationships) Act* as it tends to distract the mind from the express wording of s 20 which provides that:

> "… a court may make such order adjusting the interests of the parties in the property [of the parties to the relationship] as to it seems just and equitable having regard to …"

Under s 20, the sole consideration of the court in adjusting the interests of the parties in their property is the justice and equity of the case, having regard to the contributions that fall into the category of those described in ss 20(1)(a) and (b). Under the erosion principle, on the other hand, the inquiry commences with a determination whether an initial contribution by one party has been made and this is followed by a consideration as to whether that contribution was eroded by later contributions of the other party. On this basis there appears to be an onus on the other party to prove that the initial contribution should be eroded. This approach is contrary to s 20.

I would add that the erosion principle, if adopted, would tend - in the same way - to affect the onus in regard to other property assets acquired by a party at a later time in the relationship. Consistently with that principle, it might be said that, once a property is registered in the name of one party, that party should be entitled to the full value of that property at the date the relationship is terminated unless it can be shown that his or her right to that property was eroded by the contributions of the other party. That would plainly be inconsistent with the express words of s 20.

In ***Burgess v King*** [2005] NSWCA 396 Hodgson JA (with whom Mason P and Campbell AJA agreed) gave the principal judgment of the Court in another matter under the *Property (Relationships) Act*. The respondent in that case had a 50 per cent interest in her former home at Diggers Avenue, Gladesville. At the commencement of the relationship that interest was worth $120,000 less a $20,000 mortgage. A year after the relationship commenced the respondent purchased the other 50 per cent interest in the Diggers Avenue property for $50,000. The value of the Diggers Avenue property at the time of the hearing was $780,000. The appellant had undertaken renovations to the property worth about $120,000. The primary judge found that the capital increase in the value of the Diggers Road property, apart from any increase in value due to the renovations, was about

$420,000. Hodgson JA said that, prima facie, it would be just and equitable that the appellant participate in the $420,000 increase to the extent of about $100,000. Because of other factors in favour of the respondent that the primary judge did not take into account, Hodgson JA concluded that the appellant be awarded an additional sum of $50,000 representing his participation in the $420,000 capital value increase.

Nothing in ***Burgess v King*** is inconsistent with ***Howlett v Nielson***. The facts in the two cases were different and the claims made by the respective parties in each case were also different. Hodgson JA did not refer to ***Howlett v Nielson*** in his reasons in ***Burgess v King*** and there was no reason whatever for him to do so. Nothing in ***Burgess v King*** detracts from the views his Honour expressed in ***Howlett v Nielson*** with regard to the approach to be adopted in relation to the evaluation of contributions and the determination of adjusting orders under s 20.

In ***Kardos v Sarbutt*** Brereton J said at [59] that in ***Howlett v Nielson*** Hodgson JA was not "purporting to state a rule of general application". If all his Honour meant was that Hodgson JA was not intending to suggest that a 50 per cent apportionment of the increase in value of the assets was of general application then I agree entirely. In fact, Hodgson JA made it plain that this was simply the order that was appropriate in the particular circumstances. But, in ***Howlett v Nielson***, Hodgson JA did state rules of general application, namely those that I have set out above in regard to the evaluation of contributions, generally.

Brereton J went on to say in [61]:
"The approach which was adopted in **Burgess v King** is one which gives due weight to the time value of money, and recognises that capital gains are the product of the initial introduction of the property, rather than of ongoing contributions. On the other hand, the approach adopted in **Howlett v Neilson**, in my respectful opinion, may, in at least some cases, result in the serious undervaluation of initial contributions. It treats any increment in capital value of an asset held at the outset of the relationship as if it were part of the fruits of the relationship, when it is not: it is the result of the asset having been held by one of the parties at the commencement of the relationship, and not the result of joint efforts of wage earning, homemaking and parenting, and mutual support of the type described by Deane J as

producing ‘fruits of the relationship’. It disregards the ‘time value of money’. It is likely to produce erratic results, because under it the significance of any particular asset in the ultimate evaluation will depend on its value when it was introduced. If one party has a house worth $250,000 at the outset, and it appreciates during the relationship to be worth $750,000, the contribution is of a house which at separation is worth $750,000 – not of money worth $250,000.”

Brereton J expressed the opinion that in at least some cases ***Howlett v Neilson*** may result in “serious undervaluation of initial contributions”. He went on to comment on the approach in ***Howlett v Neilson*** in a way that could be construed as a departure from the views expressed by Hodgson JA.

By “the approach adopted in ***Howlett v Neilson***” Brereton J appears to have meant the apportionment of the increase in value of the assets initially contributed. His Honour appears to have stated a rule to the effect that, for the purposes of determining what order should be made under s 20(1) of the *Property (Relationships) Act*, any increase in value in assets initially contributed should be regarded, in all circumstances, as entirely a contribution by the party who contributed those assets. If that is what his Honour intended, I do not agree.

Despite the apparent conflict on the question of erosion, and the treatment of initial contributions, *Kardos* provides useful discussion on other points. These may be summarised as:

1. Although valuation of the pool is usually at the time of trial, the appropriate time for valuation may be at time of separation particularly when there have not been ongoing contributions.
2. Contributions before cohabitation and those made after separation are relevant considerations.
3. While the court is required to take a holistic approach in the exercise of discretionary power, mathematical calculations are a useful guide and promote consistency and transparency (as stated in *Howlett*).
4. A discussion of the appropriateness of the asset-by-asset approach as opposed to the global approach.

5. A discussion of adjustments for notional rent when the parties have resided in the home of one party and the overall effect on contributions.

In many respects, the decision in *Bilous* agrees with the other points made in *Kardos*, the significant difference between the two cases being the treatment of initial contributions.

It was agreed in *Bilous* that the appropriate time for assessment of contributions and values was the date of hearing and not separation.

On the question of asset-by-asset vs global approach, the Court in *Bilous* recognised that some cases do not lend themselves to either approach, and it may be necessary to have regard to the particular contributions to individual assets, and then weigh up the overall contributions and make differing apportionments in relation to the parties' interests in particular assets. Ipp JA said (at para 43):

> If a global approach is adopted, regard must still be had to the origin and nature of the different assets. If an asset-by-asset approach is adopted, care must be taken to avoid the risk of undervaluing domestic and non-financial contributions and regard must be had to the overall result: ***Kardos v Sarbutt*** at [51] and [54].

On the matter of notional rent, Ipp JA said that the respondent's contribution of the home was a contribution made by her which should be taken into account, but it was wrong to then deduct from the appellant's side an amount for notional rent. This constituted double counting. In terms of the notional rent being deducted as against non-financial contributions, that is a negation of the value of the non-financial contributions which is neither just nor equitable.

In *Bilous*, the court also makes the point that simply because a property is registered in one party's name or there was an intention that it be the property of that party does not preclude the court from making an order in relation to the contributions made to it.

What does come from these cases is the need to carefully consider and analyse the particular contributions made in each and every case. As Ipp JA says in *Bilous*, "the question is always: what is just and equitable."

Both *Kardos* and *Bilous* have been cited in Family Court matters: see *Murphy and Murphy* [2007] FamCA 795, *Williams and Williams* [2007] FamCA 313; W and W [2006] FamCA 1368.

This brings us to the practicalities of preparing a matter for hearing in the Supreme or District Court.

In many of the judgments, the court makes comments about the state of the evidence presented in the hearing. Usually the comments are to some degree critical or negative. For example in Manns, Campbell JA described the evidence on one aspect of the case "*scrappy and incomplete*" and noted that "*the primary judge must work with such material as he is given.*"

The most common comment is to the effect that there is insufficient or no valuation evidence of relevant assets at different times, for example, a valuation at date of commencement of cohabitation, at date of separation, and again at date of trial. But to obtain valuations at all those times can be enormously expensive.

As we have seen, it is generally accepted that the relevant date of valuation is date of trial, but in *Manns (supra)* Campbell JA noted that it might be appropriate to value the property at one date (separation) for the purpose of assessing increase in value during the relationship, and at another (the date of trial) for the purpose of formulating an order.

At the risk of stating the obvious, it is clear from the available judgments that in de facto matters it is useful to provide the court with as much detailed evidence on contribution, income at various times and how it was spent, the source of property and whether it was brought into the relationship or not and any other factual matter on which your client proposes to rely as possible. More so than perhaps is common in the Family Court or Federal Magistrates Court where on occasion parties are criticised for "excessive" affidavit material. In *Manns* for example, the accounts of the business were poor and yet the appellant had complained about the primary judge's treatment of the valuation of the business.

**Costs Issues**

In these proceedings, unlike in proceedings under the Family Law Act, the usual rule is that one party gets his or her costs.

The relevant Rules applicable now to costs are the following, from the Uniform Civil Procedure Rules 2005:

> 42.1 General rule that costs follow the event
>
> (cf SCR Part 52A, rule 11)
>
> Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.
>
> 42.30 Property (Relationships) Act 1984
>
> (cf SCR Part 52A, rules 34 and 35)
>
> (1) This rule applies to proceedings in the Supreme Court or the District Court in which the plaintiff commences proceedings for an order or relief under the *Property (Relationships) Act 1984* and the court:
>
> (a) in relation to property, declares a right or adjusts an interest, or
>
> (b) makes an order for maintenance,
>
> of a value or amount that does not exceed the jurisdictional limit of a Local Court sitting in its General Division, as that limit was when the proceedings were commenced.
>
> (2) Unless the court orders otherwise, the plaintiff is not entitled to payment of his or her costs of the proceedings.
>
> (3) On the application of any person, the court may order that this rule does not apply in respect of any proceedings, including proceedings yet to be commenced.
>
> (4) If an order is made under subrule (3) in respect of proceedings to be commenced, the originating process by which the proceedings are later commenced must bear a note of the order made.

In *Vollmer v Hauber Davidson* [2006] NSWCA 79, the Court of Appeal considered the question of costs. In that matter, the Master at first instance had ordered the appellant to pay the respondent's costs of the proceedings. The respondent to the appeal was the plaintiff in the proceedings at first instance.

There had been offers made by both parties, before and during the proceedings. The Master determined that because the plaintiff had had to commence the proceedings, and if he had not done so then there would not have been a settlement of the matter, the respondent (the appellant) should pay the costs. This decision was overturned on appeal. Hislop J made the following comments:

1. in the absence of an agreement between the parties it was necessary for them to resort to the courts to obtain finality;
2. the parties were unable to reach agreement and neither was prepared to make a realistic settlement offer;
3. in those circumstances the commencement of the court proceedings was necessary from the perspective of each party;
4. the fact that the respondent issued a Statement of Claim and the appellant a Cross Claim was a chance event, and should not be regarded as a relevant factor in determining the costs issue;
5. each party was unsuccessful in that he or she failed to obtain the adjustment he or she sought, though each was successful in exceeding the adjustment that the other party offered.

The *Vollmer* decision was delivered on 12 April 2006. On 4 July 2006 the Court of Appeal delivered judgment on the question of costs in the matter of *Chanter v Catts (No 2)* [2006] NSWCA 179. The order at first instance provided that the respondent pay the appellant's costs to 1 September 2004, and that the appellant pay the respondent's costs from 1 September 2004, with each party bearing their own costs for an argument on 2 December 2004. The respondent had made an offer during the proceedings, which on appeal the appellant bettered. The Court of Appeal determined that although the proceedings had achieved less than the appellant claimed, the outcome was substantially better than that which she could have obtained without court proceedings. This counted as substantial success and meant that the Vollmer decision did not apply.

The issue of costs was again considered in *Kardos v Sarbutt (No 2)* [2006] NSWCA 206. In that matter, at first instance in the District Court, the respondent/plaintiff obtained an award of $100,000 with costs. On appeal, that amount was reduced to $36,075. There was then an appeal on the question of costs. Judgement on the costs issue was delivered on 27 July 2006.

Brereton J delivered the leading judgement. His conclusion is as follows:

> Under the Rules, the starting point is that Mr Sarbutt is not entitled to costs. Both parties determined how the proceedings were conducted, and in the absence of realistic offers of compromise both share responsibility for the costs of the proceedings. Neither party was more responsible than the other for the incurring of costs. Both were compelled to litigate: it was necessary from the perspective of both that their property interests be separated, and neither made an offer that was significantly more realistic than the other's. The proceedings, and therefore their costs, were an incident of the breakdown of the relationship. Given the context of the amount recovered and the competing forensic and negotiating positions of the parties, the overall justice of the case does not warrant a general costs order in respect of the first instance proceedings. Visiting the costs of a four-day trial on Ms Kardos would have a disproportionate impact on the overall justice and equity of the outcome. There is insufficient reason to depart from the starting point. There should be no order as to the costs of the proceedings at first instance (apart from the interlocutory and caveat proceedings), to the intent that each party bear his and her own costs.[para 58]

In his judgment, and having reviewed the relevant case law, Brereton J identifies four considerations in costs proceedings relating to de facto property adjustment matters. They are:

1. The quantum of the adjustive order. The general rule is that a successful plaintiff is not entitled to costs if the amount recovered is within the jurisdictional limit of the Local Court, unless the Court otherwise orders.

   > There are many reasons why the Court might "otherwise order". The amount of an adjustment ultimately ordered may not bear any relationship to the extent of the pool of property in issue in the case; a large pool of property, which involves complex valuation issues, may nonetheless ultimately produce only a small adjustment. Insofar as the rules of court are intended to promote selection of the appropriate forum, the wide ambit of the range of judicial discretion in this field means that such a rule should be applied with caution, except in the most obvious cases. [para 26]

2. The analogy with matrimonial proceedings, in which the starting point is that each party bear his or her own costs, when the costs of adjusting property interests are an incident of the failure of a joint relationship, usually without attributable fault [paras 29 and 32].

In this type of litigation, it is artificial to resolve liability for costs according to the accident of who is plaintiff and who is defendant, so as to leave a plaintiff free to litigate confident that he will receive costs however unreasonable his claim, unless the defendant betters her offer. There is no reason why the defendant should bear the risk of costs to the exclusion of the plaintiff where neither makes a realistic offer.

……

Moreover, proceedings for property adjustment almost invariably involve the division of an identified pool of property having regard to the considerations prescribed by s 20 of the Act, and costs orders made in isolation from that process have the potential to impact on the justice and equity of the overall result. As an illustration, using figures which might approximate the present case, if in the context of a pool of property worth $1 million, the plaintiff was held entitled to 40% (or $400,000), and each party had incurred costs of $100,000, then a costs order in favour of the plaintiff would result in the defendant bearing all the costs, and each party receiving 50% ($400,000) of the pool net of costs ($800,000), whereas if the costs came out of the pool first, the plaintiff would receive 40% of $800,000, or $320,000, and the defendant $480,000.

3. Whether any party has been wholly or substantially successful or has bettered an offer of compromise.

For this purpose, “substantial success” is not to be judged merely by the circumstance that a plaintiff obtains an adjustment in his or her favour. It involves an evaluation of the outcome, in the light of the forensic and negotiating positions of the parties, such that it can be said that one party has been clearly more successful than the other, to the extent that the costs of the proceedings can be seen to be attributable to the unsuccessful party’s opposition, rather than to the matters referred to by Hislop J in *Vollmer* – including, in particular, the necessity for both parties that their property interests be separated, and the failure of both parties to adopt a realistic position. [para 31]

4. The conduct of the parties to the proceedings, and in particular whether one party has been disproportionately responsible for the incurring of costs through the manner in which he or she has conducted the proceedings.

The issue of costs was most recently considered in *Dunstan v Rickwood (No 2)* [2007] NSWCA 266 in which the respondent sought an order that the appellant pay her costs of trial on an indemnity basis. The appellant argued that the Court's starting point should be, in accordance with *Kardos*, that each party pay their own costs or that the appellant should pay a percentage of the respondent's costs as the court saw fit.

McColl JA noted, firstly, the terms of s98(1) of the Civil Procedure Act 2005 and cl 42.1 of the Uniform Civil Procedure Rules which provides that the general rule is that costs follow the event. Secondly she referred to *Kardos* and noted that Brereton J had not referred to UCPR 42.1. It will be remembered that the respondent in Kardos was not entitled to his costs unless the court otherwise ordered because he had been awarded less than the jurisdictional limit. McColl JA thought this was possibly why Brereton J had not referred to UCPR 42.1. But she said, once you moved outside that set of circumstances, the general rule applied and UCPR 42.1 was a relevant consideration. She took the view that Brereton J's remarks purporting to lay down a starting position for costs were dicta and *Kardos* is not binding principle.

Having decided that the court should approach the question of costs on the basis of the general discretion established by s98 and UCPR 42.1, the court made an order that the respondent was entitled to her costs. However she was not entitled to indemnity costs and in making that determination the court considered the offers made by her during the proceedings (describing them as "desultory"), the terms of which were not always clear, and one offer was made on the day of the hearing and open for only a few hours. The court also had regard to the issues in the proceedings and the state of the evidence, noting that the case involved a "complex financial relationship". In all the circumstances it was not clear that the appellant had acted unreasonably in rejecting the respondent's offers when there were a number of factual issues to be resolved.

<u>Conclusions</u>

It has certainly been interesting times in litigation of matters concerning de facto relationships. In a reasonably brief period there has been a surge of cases raising important issues and it is perhaps ironic that with the referral of powers to the Commonwealth, whenever that might come to fruition, this line of cases will be subject to further review in the Family Court. Of course, if the Commonwealth legislation deals, as we anticipate, only with heterosexual couples, then there will remain for litigation in the Supreme or District Courts those matters which do not fall within that category.