

FAMILY LAW SPOUSAL MAINTENANCE interim where wife has primary care of children where wife's income is less than expenses where discretionary spending can be reduced where husband has capacity to pay pending sale of family home pending final property proceedings Family Law Act 1975 (Cth) ss 72, 74, 75 Brown and Brown [2007] FamCA 151; (2007) FLC93-316 Clauson and Clauson (1995) FLC 92-595 Curnow and Curnow (Unreported, Sydney 28 April 1997) Eliades and Eliades (1981) FLC91-022 In the Marriage of Bevan (1995) FLC 92-600, (1993) 19 FamLR 35 N & N (1997) FLC 92-782 Nutting and Nutting (1978) FLC 90-410 Robinson and Willis (1982) FLC 91-215

APPLICANT: Ms Salazar RESPONDENT: Mr Salazar FILE NUMBER: SYC 4458 of 2013 DATE DELIVERED: 15 October 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Sydney JUDGMENT OF: Hannam J HEARING DATE: 9 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Eldershaw SOLICITOR FOR THE APPLICANT: Newnham's Solicitors RESPONDENT SELF-REPRESENTED: Mr Salazar

ORDERS (1) The respondent husband pay to the applicant wife by way of spousal maintenance the sum of \$750 per week from the date of completion of sale of the family home pursuant to the orders made on 25 June 2014, pending further order. It is ordered by CONSENT: (2) The husband be restrained from doing or allowing to be done any act or thing to prevent the wife from having sole use and enjoyment of the 2004 BMW ...registration number ..., pending further order. IT IS NOTED that publication of this judgment by this Court under the pseudonym Salazar & Salazar has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth).

FAMILY COURT OF AUSTRALIA AT PARRAMATTA

FILE NUMBER: SYC 4458 of 2013 Ms Salazar Applicant And Mr Salazar Respondent

REASONS FOR JUDGMENT INTRODUCTION In an application in a case Ms Salazar (the wife) seeks interim maintenance from her former husband Mr Salazar (the husband). The parties commenced living together in December 2002 and married in the same month. They separated on a final basis in October 2012 and were divorced in January 2014. There are two children of the marriage, M who is ten and Z who is eight, (the children). Parenting orders for the children were made by consent in August 2014. The wife's position is that upon the completion of the sale of the family home, which is due to occur soon, she will not be able to afford housing for herself and the children, pending the

finalisation of the substantive property proceedings, which have not yet been fixed for hearing. She says that her income is less than her reasonable expenses. The husband says that the sum the wife seeks is beyond his capacity to pay and that her expenses are not reasonable. He seeks that the application be dismissed. The question for me to determine is whether it is appropriate for an order to be made that the husband pay maintenance to his former wife.

BACKGROUND The wife was born in 1969 and is currently 45 years of age. The husband was born in 1972 and is currently 42 years of age. After a ten year marriage the parties separated in October 2012. The children continued living with their mother and spend time with their father five days per fortnight. When the parties separated in October 2012, the husband moved out of the family home and started living with his brother at a unit in Suburb B which is owned by his parents. In August 2013 the brother moved out of the unit to give the husband and the children (when they visited) more room. The husband continues to live in this property and pays his parents \$500 per week by way of rent. The husband asserts that the market value rent is closer to \$1000 per week for this property. In January 2013, the wife and children moved into a rental property at Suburb C. The rent was \$1200 per week. The husband agreed to pay the wife's rental accommodation expenses, including payment of the bond, for one year. The parties signed the joint lease in January 2013 for one year. During this year the former family home was leased for \$1100 per week to neighbours who were renovating their home. The plan was to sell the home and then to finalise the property settlement, and divorce proceedings between the parties. During 2013, the husband was depositing his income into the parties joint account to cover the mortgage over the family home. The rent earned on the family home was also paid into this joint account. The rent for the wife and children's accommodation also came out of this joint account. The husband ceased making mortgage payments in January 2014, and accumulated arrears of \$30 000. He later repaid this amount utilising a loan for this amount from his parents. The wife and the children moved back to the family home in February 2014, upon the expiry of both leases. On 25 June 2014 orders were made by consent in relation to the sale of the family home. Under those orders, \$10 000 is to be paid from the proceeds of sale to the wife as lump sum interim spousal maintenance. The home was due to be sold at Auction in September 2014, with an

expected completion date in early November 2014. The parties' eldest child M who is ten started at a private school in 2012, when he was in year three. The husband has been paying and continues to pay the child's private school fees. The wife is content for M to attend at a local public school at the beginning of the school year in 2015, when he is in year six. This will reduce the parties' discretionary spending, and make a further \$400 per week available to the husband. The parties' daughter, Z, who is aged eight, attends a local public school. The wife has received child support from the husband of \$433 per week since October 2013. The wife works part time as a customer service officer and the husband is professionally employed. The wife works approximately 48 hours per fortnight. This work is completed in a single period, once per fortnight on alternate weekends, Friday to Monday, at a time when the children are in the care of the husband. The husband currently works four days per week, and does not work on a Friday. He does this so he can spend extra time with the children on Thursday evenings and Fridays.

THE LAW The Court must consider the spousal maintenance claim in accordance with the assessment process identified by the Full Court in the Marriage of Bevan^[1] which requires: A threshold finding under s 72 A consideration of the factors in ss 74 and 75(2) No fettering principle is to apply so that any pre-separation standard of living must not automatically be awarded where the respondent's means permit; and The Court to exercise its discretion in accordance with provisions of s 74 with reasonableness in the circumstances as the guiding principle

Section 72 of The Family Law Act 1975 (Cth) (the Act) provides as follows: (1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether: (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years; (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or (c) for any other adequate reason; having regard to any relevant matter referred to in subsection 75(2). It is not in issue that the wife has the care and control of children who are under the age of 18. The questions in issue are whether the wife is unable to support herself adequately and whether the husband is reasonably able to pay maintenance. The test of ability to support oneself in s 72(1) was interpreted in *Eliades and Eliades*^[2] as: [N]ot identical to the test of whether one is in

need but means whether the applicant is in a position to finance himself or herself from his or her own resources. That is to say, the test is whether by reason of earning capacity, by reason of capital or other sources of income which have accrued independently to the applicant, the applicant is in a position to look after herself ... The recipient of maintenance is entitled to be maintained adequately. The word adequately was interpreted by Lindenmayer J in *Nutting and Nutting*[3] as: A standard of living which is reasonable in the circumstances, including the circumstance that the parties are no longer husband and wife and that the assets and resources which were formerly available to them both in common have now been divided between them. The Full Court agreed with this interpretation in *In the Marriage of Bevan* (supra). The Full Court also said that a court is not bound by a principle that an applicant is entitled to the same standard of living as was enjoyed prior to separation whenever the respondent is able to pay. The respondent's capacity to pay is considered on income, property, financial resources and earning capacity. Capacity to pay is assessed by determining the respondent's surplus after paying their necessary commitments. In *Curnow*[4] Ellis J said: In my judgment, a party is only liable to maintain the other party to the extent that the first-mentioned party is reasonably able to do so. In determining whether a party is reasonably able to support or contribute to the support of another party, one should have regard to the income of the first-mentioned party and then the unavoidable, non-discretionary expenses of that party, including his or her reasonable living expenses. After that exercise, one can consider the amount, if any, from which the first party may be able to contribute to the maintenance of the other party. Section 74(1) further provides that in proceedings with respect to maintenance the court may make such order as it considers proper. The meaning of proper was considered in *Robinson and Willis*[5] where Asche J said: An order which is either insufficient or excessive in the circumstances, is not proper. In the former case because the burden of support may be thrown on the public; in the latter because an excessive order will result in inability to pay the accumulation of impossible arrears and, again, ultimately a probable recourse to the public purse. The Full Court in *Brown and Brown*[6] considered the meaning of proper and adequate, at paragraph 91-2, 94-95: Similarly, we think that what is meant by proper in s 74 is circumscribed by the provisions of the Act relating to maintenance.

Adequacy is the key concept in determining whether the threshold set by s 72 has been crossed. But that concept is not left behind once the step into s 74 enquiry as to what is proper is taken. Though application of the factors set out in s 75(2) may, in a given case, lead to a generous interpretation of needs that are adequate and of what is proper, the nexus between adequate and proper must remain. As Ache J said in *Robinson and Willis* (1982) FLC 91-215: An order which is either insufficient or excessive in the circumstances is not proper... The choice of the form of maintenance here involved in the identification and weighting of factors militating against or favouring one form or the other. Weight could only be expressed in qualitative terms, such as important or serious. In contrast, in the calculation of a specific sum, the opportunity was available to disclose the weight given to relevant factors in a quantitative manner by the attribution of a monetary amount. A failure to do so is likely to make demonstration of the nexus between the award and adequacy or appropriate in the circumstances more difficult to identify. Mullane J in *N & N*[7] stated that: [T]he interpretation of the expression unable to support herself or himself adequately is subject to the words having regard to any relevant matter referred to in subsection 75(2). Section 75(2) Factors Age and state of health of each of the parties The wife is 45 years of age and the husband is 42 years of age. Both are, so far as I am aware, in good health. Income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment The wife is reliant on her income as a part time customer service officer and the income she receives by way of child support from the husband. Her net income is \$943 per week and her weekly expenditure is \$463 in respect of herself and \$786 in respect of the children, a total of \$1249 excluding accommodation. If an amount for holidays, being discretionary spending of \$60 per week is not included, her expenses exceed her income by \$246 per week. The wife states in her updated financial statement, filed on 29 August 2014 that her parents have lent her money to pay her legal expenses and car expenses. The work arrangements for the wife were agreed between the parties when they were married. The final parenting orders of 11 August 2014 were made in this context and in practice mean that the wife works when the children are spending time with their father. The husband is professionally employed and is on a net weekly income of \$2395 and here receives

further financial benefits from his employer which are not particularised and which he values at \$326 per week. The husband also has occasional employment with a government agency, but says he is not currently earning an income from this source, although there is no evidence that this is the case. I accept the wife's contention that the husband's parents should be considered a financial resource of the husband, as they have provided money to pay the mortgage arrears and in effect subsidise the husband's rent by charging considerably less than market rent. The husband now works four days per week. It was submitted on behalf of the wife that if he recommenced working five days per week, his income would increase by a further 20 per cent. The husband says that his salary has not been reduced and he maintains the same hours within four days a week. The husband was paying the mortgage on the family home but ceased doing so in January 2014. He has since paid the arrears by way of a loan from his parents, and has recommenced paying the mortgage. It can be assumed that the husband entered the agreement to pay the mortgage in good faith and has an ability to meet the repayments. The mortgage repayments will no longer be payable when the house is sold and the mortgage is paid out and the sum the wife seeks is less than the mortgage repayments. Whether either party has the care or control of a child of the marriage who has not attained the age of 18 years The wife has the principle care and control of the children of the marriage who are under the age of 18. The children live with her nine days per fortnight and this arrangement will continue under the parenting orders. Where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable When the sale of the family home is complete, the wife and the children will need to find new accommodation. The wife wishes to maintain living in the same area, but concedes that she may need to move further out to find cheaper accommodation. The wife provides evidence from real estate searches that three bedroom homes or apartments in the suburb which she currently lives would be about \$1000 per week rent. The wife provides evidence of three bedroom homes and apartments in surrounding cheaper suburbs for rent between \$750 and \$1000. The husband argues that this application for spousal maintenance is premature. He says that the wife has already received \$5000 and will receive \$10 000 upon the sale of the family home. He contends that upon the completion of the sale of the family home that the wife will receive about \$400 000.

I accept the wife's submission that it is appropriate for the Court to make an order relating to the husband's capacity to pay from his income rather than his capital. An order that the husband pay from his income would preserve both the capital that each will ultimately receive at the finalisation of the substantive proceedings.

DISCUSSION Since separation the wife has had the primary care and control of two primary school-aged children. She entered into arrangements concerning her employment when she was married and the parenting orders were made in that context. The wife works two days each fortnight while the children are in the care of their father. The wife's evidence, which I accept, is that she has tried to obtain additional employment as a customer service officer but has been unable to secure it. Although this is the employment for which she is trained, there seems no reason why she cannot gain some other employment especially during school hours or at some other time while the children are in the father's care. The wife is clearly well educated and in good health and it seems she has a capacity for further employment. The wife clearly has a need to house herself and the children at a reasonable standard. The accommodation that she has in mind appears to be of a high standard similar to that which she enjoyed during the marriage. The wife has conceded that it would be possible for her to lease a property in an adjoining suburb and having regard to this concession, and the principle that the court is not fettered by pre-separation standards of living, the reasonable expenses for her accommodation appear to be in the order of around \$750, rather than \$1000. The husband earns a significant salary and other benefits are available to him, in part due to the generosity of his parents. Although his weekly expenditure exceeds his income by \$400 per week according to his financial statement, there are in my view a number of expenses which could not be regarded as unavoidable or non-discretionary such as holidays, Foxtel and of particular significance, the payment of private school fees of \$420 per week. When discretionary spending and non-particularised other expenses in his financial statement are taken into account, the husband has available to him at least another \$700 per week. I am of the view that the husband has a greater ability to pay maintenance than he contends. For the reasons given I am also of the view that a sum less than which is claimed by the wife is required to support her adequately. Having regard to considering the meaning of an order which is proper, I make an order for maintenance which is

somewhat less than is sought by the wife but in my view that which the husband is reasonably able to pay. The orders that I make are as set out at the forefront of these reasons for judgment. I certify that the preceding forty eight (48) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hannam delivered on 15 October 2014. Associate: Date: 13 October 2014 [1] (1995) FLC 92-600 at 81,981 to 81,982, (1993) 19 FamLR 35 at 42 [2] (1981) FLC 91-022 at 76,232. Also see Clauson and Clauson (1995) FLC 92-595 [3] (1978) FLC 90-410, 77,094 [4] Unreported, Sydney 28 April 1997 [5] (1982) FLC 91-215, 77,157. [6] [2007] FamCA 151; (2007) FLC 93-316 [7] (1997) FLC 92-782 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/873.html>