29/78

FAMILY COURT OF AUSTRALIA at LAUNCESTON

In the Marriage of LEE (DE and BA)

Butler J

20 December 1977

(1977) 30 FLR 224; 3 Fam LR 11,609; [1977] FLC 76,673 (¶90-314)

FAMILY LAW – APPEAL – *EX PARTE* INJUNCTION EXCLUDING HUSBAND FROM MATRIMONIAL HOME – PRINCIPLES TO BE APPLIED – NEED TO PROVE URGENCY: *FAMILY LAW ACT* 1975, S114(1); *FAMILY LAW REGULATIONS*, R42.

A husband appealed against a Magistrate's orders excluding him from the matrimonial home. The wife had obtained the orders *ex parte* under s114(1) and reg 42 having presented the following evidence: a certificate giving the wife's medical history and the doctor's opinion; evidence that the husband had a drinking problem and that the parties had sought counselling though not crisis counselling; evidence that he had struck her some months before; that the children were unhappy and that for some weeks, she had slept in a different room from her husband. Butler J examined the nature of such s96 appeals and following *Sutton and Clark* (1976) FLC (90-121)proposed to examine both the facts and the law.

His Honour found that while the *Family Law Act* injunction powers in urgent matters are of unique and extraordinary extent, the Court must nevertheless consider whether injustice may result to one party. Furthermore the applicant is under an obligation to reveal to the Court all that is material to the injunction.

The Magistrate need not have given reasons for making the orders that he did. However, he had erred in taking into account the medical certificate. It did not relate to the immediacy of the matter and insofar as it consisted of the doctor's opinions it was based on hearsay. The evidence concerning counselling gave no indication of urgency either. There was no evidence that either the wife or the children were in immediate fear of life or limb. No sufficient case of urgency within the meaning of s42 had been made out to justify an order having the serious effect of excluding the husband from his home.

HELD: Orders concerning the exclusion of the husband from the home dissolved. The non-molestation order to continue.

1. Having regard to the facts in this matter, the Magistrate erred in and exceeded his discretion in that the application had not made out a case of urgency within the meaning of r42 sufficiently to justify the Order to disentitle the husband from coming back to the family home, moreso without him first being heard.

2. So found, bearing in mind the provisions of s43(a) and 43(d), and that the applicant did not state the marriage to be at an end. She found the situation extremely difficult to bear. But, that was not such a case of urgency as to justify the exclusion of a party from his home and it was accordingly found that the situation was not so intolerable or impossible that the Magistrate was justified in making the grave Order that he did; that he did not have proper and full regard of the possibility of the preservation of the marriage; the reconciliation of the parties; and the eventual possible outcome of counselling with a Family Court counsellor; or indeed the possibility of aid to the husband for his drinking problem.

3. In addition, the Magistrate was wrong in law in not having regard to the provisions of s43(d) in that he did not require to be served upon the husband the documents required by r19. That is a clear indication that the Magistrate did not consider s43(d).

BUTLER J: This is an appeal under s96 of the *Family Law Act* in respect of the Magistrate's Orders made on the 18th November 1977 against a husband at Ulverstone in respect of an application by the wife as follows:—

(a) That the Respondent be ordered not to enter the matrimonial home at 85 Lovett Street Ulverstone aforesaid or its surroundings until further order.

(b) That the respondent not molest or have any association with the applicant until further order.

The application had been made *ex parte* under the provisions of r421 for the injunctions under s114(1). The affidavit of the wife filed disclosed the following facts:

(1) A marriage celebrated on the 3rd May, 1958.

(2) Six children, the last two being twins born in 1967.

(3) That the husband consumed alcohol to excess throughout most of the married life and that this had adversely affected his own life and behaviour and his relationships to his wife and children to such an extent that she believed he should no longer be allowed in the matrimonial home.

(4) That as a result of alcohol consumption the husband frequently and without cause swore at and verbally abused the children; habitually drove too fast endangering the wife and the children; that he had few if any interests and devotes little time to his family; that he assaulted the wife on the 1st May, 1977 resulting in a visit to a doctor.

(5) That one of the children had become deeply depressed and the other abnormally withdrawn.

The *viva voce* evidence supported the facts in the affidavit above, referred to and added that the parties had sought counselling with a marriage guidance counsellor. There was no evidence to show whether he was a counsellor attached to the Family Court. It was a Reverend Bateman. Further, that she feared an assault if the husband knew that the present application was being made and that he ill-treated the children 'mentally', not physically, that she had not shared a room with him for the last three or four weeks, that he had been on drunk driving charges up until two weeks ago, that she could not leave the house because he could not look after the children.

The orders made were as follows:

> (1) That the respondent husband be ordered not to enter the matrimonial home at 85 Lovett Street, Ulverstone, or its surroundings.
>
> (2) That the respondent husband not molest or have any association with the applicant wife.
>
> (3) That the applicant wife will deliver to the respondent husband his personal belongings to a third party authorized by the respondent.
>
> (4) That copies of the application, affidavit and this order be served on the respondent as soon as possible.
>
> (5) That this order shall operate only until a further order of the Court is made.

The principle to be kept in mind so far as the jurisdiction of this Court is concerned on an appeal of this nature is that it is not sufficient to say that this Court might have made some different sort of Order, but that it must be satisfied that the Magistrate exceeded his discretion, or applied the wrong principles, or gave too much weight to irrelevant matters or not sufficient weight to relevant matters.

The application was made under s114(1). The application was also made urgent and *ex parte* under r42. The law in these matters prior to the *Family Law Act* was that the Court would not exercise its power to hear an application *ex parte* where to do so might occasion injustice (*Rush v Rush* L.J (NS) (1920) Vol 89 at p129; However the situation under the *Family Law Act* is unique in the sense that an *ex parte* application in relation to the use of the matrimonial home and the personal situations between a husband and wife may require 'urgent' Orders to be made where the relationship between them makes the living of daily life so intolerable or so impossible as to be unbearable. Many and varied those situations may be and similarly, many and varied will be the Orders to be made in urgency and alleviation of those difficult personal situations. Hence, the broad wording of s114(1) in relation to such injunctions as the Court thinks proper. While those injunctive powers in urgent matters are of unique aid extraordinary extent, it does not follow that the requirement of urgency removes all the restraints from the Court in dealing with injunctions *ex parte* and one of the considerations that the Court will have before it is whether an injustice may result to a party. Where there is a possibility of an injustice occurring to a party, it is always open to a Court exercising the Family Law jurisdiction to summons the other party to the Court to show cause why the Order applied for might not be made against that person — such is a matter of discretion for the Court. There are indeed many other avenues open to the Court in making Orders *ex parte* — as indeed is recognised by r42 in that it provides that Orders made operate until a specified time or until further Order. Hence, the necessity for the party seeking the interlocutory injunction to reveal to the Court all that is material to that injunction (*Dean and Dean* (1977) FLC 90-213). Only by having a full disclosure of the facts as known to the applicant party will the Court be able to decide whether or not the particular injunction applied for should be granted.

Under the *Matrimonial Causes Act* the Courts declined to use the injunctive powers unless more than matters of convenience to one party were considered. (*Banks v Banks* (191 SR (NSW) 223; *Crombie-Brown v Crombie*-Brown (1962) 2 NSW SR 458).

I turn now to a consideration of r42. Regulation 42 refers to 'matters of urgency'. *The Shorter Oxford Dictionary* defines 'urgency' as, 'the state, condition, or fact of being urgent, of pressing importance'. The word 'urgent' is defined as, 'present, demanding prompt action marked or characterised by urgency'.

There are two degrees of urgency recognised by the regulation – that of urgency already referred to namely, sufficient to make an application *ex parte*; and of extreme urgency (sub-reg 3), whereby the Court can deal with an oral application where by reason of the extreme urgency it is necessary to do so.

The state of extreme urgency would apply where there is insufficient time for an affidavit to be drafted, engrossed and filed. For example, where a very young baby is removed, without consent from the care of its mother. The state of extreme urgency envisaged by the Regulation is as to the getting of the matter before the Court with the least possible delay.

It is significant that the Court is empowered but not obliged in the granting of injunctions *ex parte* irrespective of whether the application is urgent (sub-reg 1) or of extreme urgency (sub-reg 3) to give directions as to filing of a written application (sub-reg 4) and as to service and further hearing.

The Court's mandatory obligation is as to the term of the Order only (sub-reg 5) and within this obligation the court's discretion is (apparently) unlimited.

Referring now to the Orders themselves, the granting of an injunction to enforce the removal from or the barring of entry to the matrimonial home is a grave and drastic Order and it should not be made unless it is impossible for the parties to live in the same house, there being on foot an imperative or inescapable or otherwise intolerable situation.

The principles as to any injustice likely to operate to a party on the hearing of an *ex parte* application for the consideration of the Court are to be found in s43 of the *Family Law Act* and in particular as to this case, in s43(a) and (d). I do not minimise or overlook the provisions of sub-sec (b) and (c) but they are not so pertinent to this appeal.

Referring to the Magistrate's decision, I note that there were no reasons given. It is not necessary to do so in interlocutory matters – *Carroll and Carroll* (a decision of the Full Court 160/77, as yet unreported)

'The need to preserve and protect the institution of marriage' and the 'means available for assisting the Parties to a marriage to consider ... the improvement of their relationship' require the Court to bear in mind that the barring of entry of a person from the matrimonial home might well be an irreversible step and harden the feelings and attitudes of one or both of the parties so as to effectively put an end to the use of the mechanisms in aid including the counselling facilities available under the *Family Law Act*.

I recognise that on an *ex parte* application, it is not often, if ever, open to a Court to decide whether counselling would or might be of some assistance, but it is a possibility that should be considered, being part of the consideration of the need to preserve and protect the institution of marriage.

Turning now to the decision of the Magistrate in general. There was a medical certificate filed with the Court dated the 17th October, 1977 which referred to the medical history of the wife back to 1969 but which in no way related to the immediacy of the matter before the Court other than an opinion by the medical adviser based on hearsay. As this matter was before the Court of first instance, I find that the Magistrate was wrong in taking the same into account as being firstly, not related to the immediacy of the matter before the Court and secondly, being an opinion based on hearsay.

The evidence was that there was one assault only in the history of this marriage and in May of

this year, some six months prior to the application. There is a continual drinking problem causing unhappiness and difficulties to all the family. There is evidence of counselling but not necessarily evidence of crisis counselling or evidence of counselling used by persons understanding the urgency of a crisis situation. There is no evidence as to the date of this counselling. The only evidence of urgency is that the wife could not bear the situation arising out of the husband's drinking habits any longer and sought legal advice.

There is no evidence that she or her children were in immediate fear of life or limb, but only when her husband received the Order that he might assault her — that is to put the cart before the horse. The Order must first be justifiable.

The evidence clearly is that the wife has for the past several weeks been leading a separate life, living in a separate room and has wished to be rid of the difficulties caused by her husband's presence and apparent drunkenness.

Having regard to the facts in this matter, I am satisfied that the Magistrate erred in and exceeded his discretion in that the application has not made out a case of urgency within the meaning of r42 sufficiently to justify the Order to disentitle the husband from coming back to the family home, moreso without him first being heard.

I so find, bearing in mind the provisions of s43(a) and 43(d), and that the applicant does not state the marriage to be at an end. She finds the situation extremely difficult to bear. But, that is not such a case of urgency as to justify the exclusion of a party from his home and I accordingly find that the situation was not so intolerable or impossible that the Magistrate was justified in making the grave Order that he did; that he did not have proper and full regard of the possibility of the preservation of the marriage; the reconciliation of the parties; and the eventual possible outcome of counselling with a Family Court counsellor; or indeed the possibility of aid to the husband for his drinking problem.

In addition, I find that the Magistrate was wrong in law in not having regard to the provisions of s43(d) in that he did not require to be served upon the husband the documents required by r19. That is a clear indication that the Magistrate did not consider s43(d). I also note in passing that there is no marriage certificate on the file, nor any undertaking from counsel to file such a certificate although the matter was heard over thirty days ago.

I therefore dissolve the following Orders—
'1. That the respondent husband be ordered not to enter the matrimonial home at 85 Lovett St., Ulverstone, or its surroundings.
3. That the applicant wife will deliver to the respondent husband his personal belongings to a third party authorized by the respondent.

The Order reading as follows—
2. That the respondent husband not molest or have any association with the applicant wife', will remain in force although I have some reservations as to the meaning of the word 'association'. However, the wife is entitled to some protection and the Order will remain for the time being. The parties occupied separate rooms in any event. The way remains open for the wife, the husband or both of them to forthwith return to the Court for further Orders as may be necessary.
