

15/1980

## FAMILY COURT OF AUSTRALIA at BRISBANE

*In the Marriage of BRADY (AP and EB)*

Bulley J

4, 25 July 1978 — (1978) 34 FLR 422; [1978] FLC 77,696 (¶ 90-513)

**FAMILY LAW - MAINTENANCE - VARIATION OF EXISTING ORDER - APPLICANT IN RECEIPT OF SOCIAL SERVICE BENEFITS - INCREASE OF PERIODIC MAINTENANCE PAYMENTS DIRECTLY REDUCING SOCIAL SERVICE BENEFITS - RESPONDENT UNABLE TO PAY ANY SUBSTANTIAL AMOUNT WHICH WOULD RESULT IN ANY REAL INCREASE OF AVAILABLE INCOME TO APPLICANT - PROVISION OF LUMP SUM IN LIEU OF PERIODICAL PAYMENTS SO AS TO MAXIMISE SOCIAL SERVICE BENEFITS: FAMILY LAW ACT 1975-1976, SS75, 83.**

In November 1974 H. was ordered by the Supreme Court of Queensland at Rockhampton to pay \$10 per week for the maintenance of W. and \$15 per week for the maintenance of a child, K. The parties had two other children, one of whom, a child, D., was mentally retarded and required, and would continue to require in the future, W.s full-time care and supervision. W. applied for an increase in her maintenance to \$80 per week. As the child K. had turned eighteen W. was in receipt of \$10 per week maintenance and \$51.45 per week by way of a special benefit from the Department of Social Security paid to her by reason of her need to care for the child D. She also had the use of an invalid pension paid to the child D. in the sum of \$54.30 per week. Under the terms of the payment of the special benefit any income received by W. over \$6 per week reduced the special benefit on a dollar-for-dollar basis. H. was employed as a manager with an annual gross salary of \$14,712. A close examination of H.'s outgoings indicated a surplus of income over expenditure of approximately \$50 per week plus the \$10 he was already paying to W. by way of maintenance.

**HELD:**

**1. An order for the payment by H. to W. of \$60 per week maintenance would have a net effect of reducing H.'s income by that amount whilst only benefiting W. by \$2.55 per week. Such an order would not realistically improve W.'s financial position and she would lose the security of regular pension payments.**

**2. An applicant for maintenance who is in receipt of social benefits should not be held to be able to support himself or herself adequately unless that person ought to enter the workforce or attempt to do so.**

**Remarks of Evatt CJ in *In the Marriage of Hamilton* unreported Full Court judgment delivered 4th May 1978, followed.**

**3. H. should be ordered to pay a lump sum of \$10,000 by annual instalments of \$2,000 together with \$6 per week until the whole of the lump sum has been paid.**

**BULLEY J:** The parties were married on 18th December 1954. There were three children of the marriage, C. now aged 22 years, D. now aged 21 years, and K. now aged 18 years. It appears that the parties separated in about 1972. The decree of dissolution of the marriage was pronounced on 18th November 1974, at the same time as the subject maintenance orders were made; the maintenance order in respect of K. being expected to continue until she was in a position to provide adequately for herself. It is not disputed that K. has been in employment since she turned 16 years. It was further ordered by consent in such proceedings that certain land held jointly by the parties at the Gold Coast be sold and the net proceeds be divided equally between the parties. It seems that, in fact, the husband paid the wife \$6,000 in December 1975 for her share in the Gold Coast land by agreement in lieu of the said property order. It further appears that the wife received a share of the proceeds of the former matrimonial home which was sold in June 1972, and with such proceeds purchased in her own name a dwelling house secured by mortgage at 392 East Street, Rockhampton: on receipt of the said sum of \$6000 the wife was able to discharge this mortgage in full.

The wife's usual income amounts to \$57.45 per week consisting of \$10 per week maintenance from the husband and \$47.45 being the reduced special benefit. D.'s income on a weekly basis is \$54.30 so that the combined income of the wife and D. on a weekly basis is

\$111.15, or on an annual basis \$5,811.00. The wife in recent times has spent the small sums of money on furnishings and small items of furniture for her home which she referred to in her oral evidence.

The wife agrees that her dwelling would now have a significantly greater value than the \$10,000 purchase price but does not estimate its current value. She points out that the house which is high set is in a generally flood prone area and that there was 18 inches of water in the yard during the flood early this year. The wife's only property apart from the house and its contents consists of \$150 in the bank and \$15 cash in hand.

The wife is aged 43 years. She referred in her affidavit filed 4th April 1977, to suffering from a nervous condition brought about by the constant care and supervision of D.; but that her health is otherwise satisfactory. She has sought part-time employment since separation but her opportunities of obtaining such work are very much limited by the fact that she must have D. with her virtually the whole time. The wife has the responsibility of continuing to care for D. There is no suggestion that the wife will remarry in the foreseeable future: the wife did present to me as an attractive, pleasant, intelligent and well-groomed lady – she has demonstrated her strength of character by her past performance. The wife freely admitted in oral evidence that she brought and pursued her current application at the exhortation of the Department of Social Services. However, she adds "I would like to live better than I am", she points out that she has been unable to afford a holiday, and she says "I can't afford a motor vehicle: I would love, a vehicle for me and D".

The husband is divisional manager of Tickle Wholesale Distributors Ltd. As his recent form 19 reveals, his annual gross salary is \$14,712. He resides in a dwelling in Brisbane owned by a "Mr Riley's daughter"; she lives there too. The husband pays \$15 per week towards rent. His expenses as set out in this form 19 total \$12,565, that is \$1,607 less than his annual gross salary or nearly \$31 per week. The husband is aged 45 years. There is no suggestion that his health is other than good. He has not remarried and there is no evidence that he intends to do so in the foreseeable future. There is no suggestion that he will not continue in his present employment, or that he will not continue to earn income at his current rate. He has no responsibility to care for or support any other person save for the existing maintenance order in favour of the wife.

In par. 3 of her affidavit filed 4th April 1977, the wife alleges that since the making of the original order her financial circumstances have changed, and that the cost of living has changed to such an extent as to justify a variation. Changes which have occurred in the consumer price index published by the Commonwealth Statistician are revealed in the consumer price index table set out in par. 35-510 of CCH, *Family Law and Practice*. This index placed a figure for Brisbane for the December quarter 1974-1975 at 166.6 (the order was made in November 1974) and a figure for the same city for the March quarter 1977-1978 (the latest published figures) at 240.6. Based on those figures I declare that I am satisfied that since the order was made the cost of living has changed to such an extent as to justify my varying the original order.

I am obliged pursuant to s83(7) to have regard to the provisions, *inter alia*, of ss72 and 75 of the Act. Section 72 provides:

"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 by reason of having the care or control of a child of the marriage who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75(2)."

In this context it is also apposite to refer to certain views of the Chief Judge expressed in her judgment in the Full Court in *In the Marriage of Hamilton* as follows:

"... I would like to add just one comment that, in my opinion where a wife is in receipt of a social security pension, whether it be a widow's pension or supporting mother's benefit, I myself would incline to the view that she is not able to support herself adequately, unless the court took the view that she ought to enter the workforce or attempt to do so. The court would then have to consider the extent to which it is reasonable to require the other party to contribute to the maintenance of the party whose maintenance is in question. In this regard the receipt of the pension may be a matter of great significance as it is part of the income available to the party in question."

It is necessary to take into account those matters referred to in s75(2) of the Act. A strenuous attack was made by counsel for the wife on the extent of certain of the husband's expenses as alleged in his form 19, particularly in comparison with the expenses claimed by the wife as hereinbefore set forth. In dealing with counsel's submissions I think it should be borne in mind that the husband is a single man holding an executive position. In such circumstances I consider that his claim in his form 19 for food and household supplies is reasonable, that the claim for household replacements should be reduced by say \$300, his claim for laundry and cleaning should be reduced by say \$150, his claim for clothing should be reduced by say \$200, his claim for cigarettes should be reduced by say \$200, and his claim for *Readers Digest* subscriptions and records reduced by say \$140. His total annual expenses then would be reduced to \$12,565 less \$990, a sum of \$11,575, giving him an excess of income over expenses of \$2597 on an annual basis, or nearly \$50 per week.

Counsel for the wife argued that the wife is entitled to enjoy an equal standard of living as the husband. For this proposition he relies on remarks by the Full Court in *In the Marriage of Lusby*. I do not disagree with this proposition; the difficulty in this case is as to the manner in which it can be implemented. When one looks at s75(2)(f) of the *Family Law Act* it is seen that the eligibility for pension is to be taken into consideration, and although this Act has only been in force now for about 17 months, a whole new line of judicial thinking has emerged. Courts often make maintenance orders in such a way that a wife will be entitled to the full amount of the pension.

I am, of course, obliged by virtue of s73(2)(f) of the Act to take the special benefits pension into account. I am also under duty by virtue of s81 of the Act to "... as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them". If I ordered the husband to pay \$6 per week for the wife's maintenance this would mean that the wife would retain the full amount of pension on a regular basis and the security of it. Her own total separate income would remain at \$57.45. However, this would also mean that her standard of living would remain substantially less than the husband's, who on my aforesaid findings would then have an excess of income over expenses, of \$2,805 per annum.

I have given considerable thought to the definition of "income" as used in the *Social Services Act* 1947-1975. The definition is contained in s106 of that Act. My interpretation of that definition is that a lump sum payment of maintenance by a husband to a wife (as distinct from a periodical payment) is not included in the definition, so that such a payment would not, by itself, affect the quantum of a pension receivable by a claimant therefor. Of course, for example, if such a payment were invested, the dividends therefrom would constitute "income".

In my opinion the wife even then, on the findings I have made, and bearing in mind the extent of the surplus of the husband's income over his expenses, and on my interpretation of the relevant provisions of the Act hereinbefore referred to aided as I am by the aforesaid reported judicial views, would be "unable to support herself adequately" as that phrase is used in s72. In this regard I receive further assistance from the remarks of Lindenmayer J in *In the Marriage of Nutting* [1978] FLC 77,094 (¶90-410); 30 FLR 555 (note) set out in the report as follows:

On the question of an award of permanent maintenance, Lindenmayer J considered those matters made relevant by s75(2) of the Act to hold that the standard of living which the wife was entitled to expect in the future was one which was reasonable in all the circumstances, and not necessarily that to which she was accustomed during the marriage. Further on the point of maintenance, his Honour said:

"By s72 of the Act, the husband is liable to maintain the wife only to the extent that she is incapable of supporting herself adequately, and again "adequately" imports a standard of living which is reasonable in the circumstances, including the circumstances 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."

It follows from my previous remarks that, *a fortiori*, I am of the view that currently the wife is certainly "unable to support herself adequately" (s72). In all the circumstances I think that the best practicable solution is to order that:

- (a) the husband pay \$6 per week for the wife's maintenance; and
- (b) by way of lump sum maintenance the husband pay the wife the sum of \$10,000;
- (c) on payment of the whole of the amount of \$10,000, order "(a)" immediately cease to have effect and be discharged;
- (d) the said sum of \$10,000 be paid by instalments of \$2,000 per annum with liberty to the husband to pay the whole of such sum of \$10,000, or such balance of such sum as may be owing at any time within five years at such earlier date as he deems fit.

I am enabled to make orders in the aforesaid form by virtue of s80 of the Act. On my aforesaid findings and interpretation of the relevant law I reason that the aforesaid orders should have the following effects:

- (a) the wife will receive the maximum benefit of her pension whilst the \$6 per week maintenance order remains in existence and when that maintenance order is discharged the wife will be in a position by investment to achieve an income of \$6 per week therefrom to retain the maximum benefit from her pension;
  - (b) the lump sum maintenance will enable the wife to maintain a standard of living approximating the husband's and in addition enable her, by reason of her continued reasonable budgeting, to accumulate a great deal of it for the future.
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