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FAMILY COURT OF AUSTRALIA — FULL COURT at PERTH

In the Marriage of RICHARDS

Evatt CJ, Asche and Pawley JJ

21, 23 April 1976 — (1976) 26 FLR 59; 10 ALR 23; [1976] FLC 75,138 (¶90-037)

FAMILY LAW – CONSIDERATION OF "CONDUCT" IN PROPERTY SETTLEMENT – EXTENT TO WHICH THE COURT CAN CONSIDER THE PARTIES' CONDUCT – WHETHER JUDGE IMPROPERLY EXERCISED HIS DISCRETION: *FAMILY LAW ACT* 1975, S79(4)(a), (b).

Appeal against property settlement made on dissolution whereby W. and children to have exclusive occupation of the former matrimonial home in Fremantle until youngest child attained 21, when property to be sold and proceeds divided between H. and W; a farm property at Byford was to be vested in H and he was to continue all mortgage payments meanwhile. W. admitted adultery; and the judge accepted that H. had provided all the finances for the purchase of both properties, had renovated both places with little assistance from W. and that she had performed minimal household duties.

Argued that the Court had given more weight than was proper to the conduct of the parties. The respective values of the two properties were agreed at the trial pursuant to valuations tendered in evidence as $33,500.00 for the Fremantle property and $41,000 for the Byford property. The Fremantle property was encumbered by two mortgages of a total approximate value of $10,600 which were being repaid by the husband at the rate of $1,200 per annum. The Byford property had the sum of $2,200 still owing under the Contract of Sale and was being paid by the husband. Mr Nesbitt for the Appellant wife pointed out that in addition to these assets, the husband disclosed other assets of approximately $6,281 and the wife disclosed other assets of approximately $2,461. The result of His Honour's decision was that the husband would immediately obtain an asset the net value of which would be some $38,696 while the wife would obtain the right to remain in the matrimonial home rent free and with mortgage payments met by the husband and at the end of approximately 12 years, when the youngest child would attain the age of 21, would obtain one half of the net value of that property. By that time it could be expected that substantially the whole of the mortgages would be repaid and on present values the wife would then obtain a sum of at least $16,000. Upon appeal—

HELD: Appeal dismissed.
There will no doubt be cases in which it will be necessary to examine how far the conduct of the parties can be brought into account in determining ancillary claims. However, this case was not one of them because it had not been shown that His Honour gave undue weight to the question. It was true that His Honour's comments at times encompassed what might be called a value judgment as to who caused the breakdown of the marriage; but it did not appear that His Honour used any view that he may have formed on marital fault to influence him in determining what was just and equitable as between the parties. He was basically concerned to determine the extent of each party's general conduct and contribution to the marriage on the whole and their contribution direct or indirect to the two properties.

THE COURT: ... In this case, the learned trial Judge is given power under s79 of the *Family Law Act* to make orders relating to Property of the parties and by virtue of s79(2) is directed not to make such an order unless he is satisfied in all the circumstances that it is just and equitable. By s79(4) he is directed to take into account a number of matters. Although His Honour does not set out specifically the sub-sections under s79(4) or s75 upon which he proceeds, it is clear enough in his judgment that he has taken into account the matters referred to in s79(4)(a) and (b) and by reasonable implication that he has taken into account the matters set out in s75(2)(a), (b), (c) and (d). As to any other matters under s75(2) it has not been suggested by the Appellant that it was relevant to take them into account or, perhaps, to put it another way, it has not been urged or established that His Honour's decision miscarried because of any failure to take any such matters into account save that complaint is made in respect of s75(2)(k). The Notice of Appeal confines itself in this context to alleging that he failed to give sufficient weight to matters referred to in s79(4)(b) and s75(2)(k).

We are not satisfied that His Honour did not give consideration to s75(2)(k). The duration of the marriage was an obvious fact which did not necessarily have to be referred to in the broad context

in which His Honour's orders were made and there is no evidence which suggests that the wife's earning capacity was affected.

It is fair to say that the main attack upon His Honour's decision made by Mr Nesbitt in the course of a very careful and able argument, was that the learned trial Judge gave undue weight to the conduct of the wife during the marriage. Perhaps it should be put more fairly to Mr Nesbitt that his submission was that His Honour made findings which could be considered findings of fault against the wife in the marriage and then made orders on that basis. For there is a distinction to be drawn between the word 'conduct' and the word 'fault'. Mr Nesbitt points to expressions in the judgment which, he says, can really only bear the inference that His Honour was determining who was to blame for the breakdown of the marriage and allowing that fact to influence him in his decision. The passage to which he refers can be found in pages 10 and 11 where His Honour speaks of the 'general conduct of the parties', her 'contribution to general family life', her conduct 'which boded ill for the marriage and finally caused it effectively to break down'.

Mr Nesbitt cites these passages as illustrating that His Honour had made an assessment of the parties on a fault basis and then proceeded to his decision on property matters. This, it is submitted, is an incorrect approach bearing in mind the emphasis of the *Family Law Act* on the non-fault ground for principal relief and the failure to spell out specifically any element of fault to be taken into account in s75 and s79. Mr Nesbitt cites a number of recent English authorities to establish the principle that fault should not operate in the area of ancillary claims save where, the conduct of one party is 'obvious and gross'.

It should be noted that the Notice of Appeal complains (at paragraph (b)(1)) that the learned trial Judge failed to give sufficient weight to the matters set out in s79(4)(b) of the Act. We consider that in fact His Honour gave considerable weight both to s79(4)(a) and (b) and examined the financial contribution direct or indirect of both parties to the properties, and any other contributions made directly or indirectly including contributions made in the capacity of homemaker and parent. In doing this, he was invited by both parties through their evidence to examine, *inter alia*, their respective contributions as homemakers and parents. In a conflict of evidence, he preferred that of the husband and, while making due allowance for the wife's contribution in raising the children, came to the conclusion that her contribution in the general context to the general family life and the assets of the family was minimal. In so doing he was applying generally the guidelines laid down by s79(2)(a) and (b) and it does not appear to us that he improperly exercised his discretion in this respect.

There will no doubt be cases in which it will be necessary to examine how far the conduct of the parties can be brought into account in determining ancillary claims. In our view, however, this case is not one of them because it has not been shown that His Honour gave undue weight to the question. It is true that His Honour's comments at times encompassed what might be called a value judgment as to who caused the breakdown of the marriage; but it does not appear that His Honour used any view that he may have formed on marital fault to influence him in determining what was just and equitable as between the parties. He was basically concerned to determine the extent of each party's general conduct and contribution to the marriage on the whole and their contribution direct or indirect to the two properties.

In our view, it has not really been shown that the exercise of the learned trial Judge's discretion miscarried within the meaning of the tests set out in the cases referred to. The order he made is one which provides substantial security for the Wife during the next 12 years and until the children might reasonably be expected to be able to earn their own living. She obtains a home rent free and she is herself capable of employment and indeed is earning approximately $117 gross per week. At the end of that period, she will receive a lump sum which she may either invest or apply as a substantial deposit in the purchase of a home in her own name. Accepting as we are bound to do in the circumstances, His Honour's finding, supported as it is by evidence that 'her contribution to the general family life and to the assets of the family was minimal' the order of His Honour and the reasons given by His Honour were not outside that area of discretion allowed to him and his discretion to make such an order has not miscarried to the extent that would impel this Court to interfere with his decision.
