31/78

FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of GAMBLE and GAMBLE

Fogarty J

3, 12 May 1978

(1978) 32 FLR 198; [1978] FLC 77,298 (¶90-452)

FAMILY LAW – APPLICATION BY WIFE FOR MAINTENANCE FOR HERSELF AND THREE CHILDREN OF THE MARRIAGE – ORDER MADE BY MAGISTRATE – ONE SON AGED 21 YEARS UNDERTAKING COURSE OF EDUCATION – WHETHER HUSBAND SHOULD BE REQUIRED TO PAY FOR EDUCATION OF SON OF THE MARRIAGE – WHETHER MAGISTRATE IN ERROR IN MAKING AN ORDER FOR SUCH SON'S MAINTENANCE – WHETHER AMOUNT ALLOWED FOR WIFE EXCESSIVE: FAMILY LAW ACT 1975, SS72, 75(2)(g).

HELD: Appeal in relation to the wife's maintenance varied. Order in respect of the son discharged.
1. The cases appear to emphazise two significant features about s76(3) of the Act namely firstly that the provision of the maintenance must be necessary as distinct from being desirable and secondly that there is a distinction to be drawn between the imposition of a legal liability upon a father in such circumstances and the question of whether as between father and son or daughter the providing of some such assistance may be the socially proper thing to do.

2. In the present case it was impossible for a court to conclude that the provision of maintenance by the father for the son Allan was necessary to enable him to complete his education. Indeed one may doubt whether it was even desirable on either social or economic grounds. He was in employment for almost half of the relevant period on an income of over $100 per week, he could obtain other vacation employment, he owned a motor car and a catamaran and intended to spend almost $1,000 going to Perth later in the year. It would appear that a 21 year old part-time student in that situation had no possible claim for maintenance against his parent under the Act. The Magistrate did not properly exercise the powers under s76(3) in making an order in respect of the son and the appeal to that extent should be allowed.

3. An order under s76(3) is required to be made for a prescribed period. The magistrate specified it to continue "for 3 years or until the son completes his course of education and obtains permanent employment, whichever is the sooner". The requirement that to bring the order to an end within 3 years, the son should have completed his course and obtained permanent employment was inappropriate.

FOGARTY J: This is an appeal under s96 of the *Family Law Act*. The Stipendiary Magistrates ordered as follows:

> 1. That the husband pay the sum of $80 per week maintenance for the Wife to the Clerk of the Magistrates' Court at Box Hill.
> 2. That the husband pay the sum of $20 per week maintenance for the child of the marriage Allan Ronald Gamble born on 5th January 1957 to the Clerk of the Magistrates' Court at Box Hill.
> 3. Such order in respect of the said child to continue for 3 years or until such child completes his present course of education and obtains permanent employment, whichever is the sooner.
> 4. First payment to be made on 9th February, 1978.
>
> From that decision the husband has appealed to this Court. By his Notice of Appeal the husband sought to in effect seek the discharge of both of the orders.

Frequently, and especially in Victoria where there is normally no transcription of the evidence given in proceedings in Magistrates' Courts under the *Family Law Act*, considerable procedural difficulties occur on an appeal under s96. Those problems were referred to by the Full Court in the case of *Newland* (1977) FLC 90-236. In addition to that *Newland's case* identified a disparity of approach by members of that Court to the hearing of appeals under s96.

Fortunately, however, this appeal is not bedevilled by either of those problems. The parties through their solicitors have set out in affidavit form a precise recording of the relevant evidence that was given before the Stipendiary Magistrate.

The marital facts constituting the background to the application for maintenance can be briefly summarised in this way: The parties were married on 9 January 1954. The wife is presently aged 46 and the husband 47. The parties separated on 5 September 1977 when the husband left the matrimonial home. Since that time the wife has continued to live in the home and at the time of the application the three children of the marriage were also living in the home with her. Those children were Lynne who is aged 22 and is a nurse; Allan, the subject of one of the orders under appeal, who is aged 21 and who is a part-time civil engineering student, and John who is aged 18 and who is employed in an occupation associated with a band.

After the parties separated the husband made certain maintenance payments and payments towards outgoings on the property for a period of time but subsequently he reduced those amounts and as a consequence the wife in January 1978 issued an application seeking orders for maintenance for herself and Allan. In her application as amended at the hearing she sought $90 per week in respect of maintenance for herself and $30 in respect of Allan. The application in respect of the wife was put at $90 upon the basis that the wife bear the sole responsibility for the outgoings on the jointly owned property to which I will refer hereafter.

I turn now to the question of the financial position of the parties at the time of the hearing. I preface that by saying that before me it was not argued that the husband did not have the capacity to make the payments that had been ordered. The argument was that in respect of the wife there was no relevant need justifying the order that was made or any order and in respect of Allan that his claim did not fit within the provisions of s76(3) and accordingly should have been dismissed.

It is therefore unnecessary to refer in detail to the husband's financial position. It is sufficient to say that he is employed by the Education Department as a School Principal at a gross salary of approximately $21,500 and had, aside from his interest in the jointly owned matrimonial home, savings of approximately $5,000.

A closer analysis however, is required of the wife's financial position. She was employed as a kindergarten assistant and received a nett income of approximately $96 a week. She owned a motor car and $3,000 on fixed deposit which she said she was in the process of transferring into the joint names of herself and son Allan. As I indicated the eldest child Lynne is a nurse earning $120 - $130 per week clear. She pays her mother $15 per week board. The evidence indicated that this daughter was planning to go overseas shortly and was saving money with this in mind. John the youngest of the three children and who is aged 18, was employed in an occupation associated with a band from which he apparently received an income which varied from nothing to $90 per week and he also paid board of an equivalent amount. There was also apparently some suggestion that he was also saving to go overseas. I will refer to the financial position of Allan subsequently but add that all three children owned their own motor cars.

It was agreed that up to the date of the hearing that the husband had been paying the electricity and heating accounts, H.B.A. mortgage payments and the rates and insurance on the property and these averaged $33.50 per week.

It also seems to have been argued after discussion during the course of the hearing that the most convenient course for the future would be to determine the matter upon the basis that the wife would thereafter be solely responsible for those amounts, and that appears to me to be a convenient approach to continue this notwithstanding that Mr Abraham indicated to me that the husband was prepared in any event to pay one half of those amounts for the future.

The wife gave evidence of other ordinary domestic outgoings of the household which, excluding the amount of $5 per week in respect of clothing for Allan, came to approximately $115 per week. This did not include one or two other small items which the Magistrate would have been entitled to have, in my view, considered as reasonable and proper outgoings for a person in this situation. In round figures this would have indicated outgoings of approximately $120 per week by way of general household expenses together with approximately $34 per week for the outgoings on the property making a total of approximately $154. As against that the wife was in receipt of an income of approximately $96 per week and received board from two of the three children totalling $30 per week. It seems to me in addition to that several other matters are clear namely:

(a) The Magistrate was entitled to have regard to the reasonably high standard of living at which the parties had lived prior to separation. Although the actual evidence of this was relatively scanty, it is nevertheless I think clear from the whole of the evidence. In my view it is a matter which the Court is clearly entitled and indeed obliged to take into account in assessing maintenance under s72. Section 75(2)(g) requires the Court to take into account "where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable". That does not necessarily mean the standard of living to which the parties were accustomed during the time that they were living together, since, as Mr Abraham pointed out, obviously a situation where there are now two households rather than one it makes it, in most cases, impossible to sustain the previously existing standard of living in both those new households, and, in any event, there may be other reasons why this is so. But within that limitation it is in my view significant to have regard to what the Act refers to as a standard of living that in all the circumstances is reasonable.

In this case, as in many others, attention is generally focused upon the question of "need" under s72. It seems sometimes to be thought that there is some absolute level beyond which an applicant's need would not go, that is that once it is shown that his or her income from other sources has reached some designated level that there would no longer be any need for maintenance under s72. Whilst that may be broadly true of what might be described as the general run of cases, the measure of need is a variable factor which must take into account a variety of circumstances not the least of which is the appropriate standard of living of the parties.

Where the capacity of the husband is such that he is able to provide maintenance for the wife at a level which enables both of them to continue to enjoy a standard of living equivalent to that which they enjoyed for some time prior to the separation or which enables the wife to enjoy a standard of living which may be higher than the average in the community it may be proper to make an order which broadly achieves that result, provided that in the process the Court takes into account and gives relevant weight to all the other varying factors which s72 requires to be taken into account in determining a claim for maintenance.

Clearly tied up in the wife's general household expenses were expenses which were really applicable to the three children, and the amounts of board being paid by the other two children fell short of the cost of keeping them. It is in fact almost impossible to disentangle these matters in an arithmetic way but they are factors which need to be taken into account. The obligation of the husband in a case such as this is an obligation to provide reasonable maintenance for support for his wife but does not include an obligation to supplement adult working children or to enable the wife to do so if that is her choice.

Turning to the evidence relating to the son, Allan, that evidence indicated that at the time of the application he was a student in civil engineering at Swinburne Technical College and he had been a student there for the past three years and the course had a further three years to run. He stated that he was enrolled as a part-time student for 1978 and would be a full-time student for the first six months of 1979. The evidence also indicated that he was commencing employment with Telecom Australia the week after the hearing and this employment would last four weeks and he would be paid $100 - $120 per week. He also stated that he hoped to obtain another, presumably similar job, after that. He also said in evidence that for the next two years he would do two periods of cadetship each of six months as part of his course and that his salary as a cadet engineer would be $100 - $120 per weak gross. He also said that at the present time his mother was giving him $20 per week by way of allowance and that he was running a car and he presently owed his mother some $600 - $700. He also said that he owned a racing catamaran which he had bought from savings whilst working in the 18 months prior to the hearing and he hoped to take the catamaran to Perth for the national titles in December 1978 and that he was planning to drive over and the total cost of this trip would be about $900. He said that he was entitled to $8 per week student allowance while a full-time student but no allowance while he was part-time. He also said that he had worked during part of the recent school vacation and had earned about $150 for this period but that he had made no particular efforts to look for work. According to the material, the Magistrate in his reasons for judgment said that the maintenance order for Allan was made on the basis that he would be working for 18 months of the next 3 years as a cadet and in a part-time capacity and that in fixing the quantum ($20 per week) he took this into account and indicated that this maintenance should be paid at the same rate during the time that Allan was working during this period.

I turn firstly to the claim in respect of the child, Allan.

The liability of a parent for the maintenance and education of a child has had a somewhat chequered history. It appears that at common law there was no actual legal obligation in a father to support his child and that such legal obligation must be found in Statute.

It appears that the first legislation in Australia to give directly to the child the right to claim maintenance against a parent was the *Family Law Act* 1975 (see para.(cb) of the definition of "matrimonial cause" in s4).

In some of the State Acts an age limit was fixed at which age an order automatically ceased to operate or after which it may not be made. Upon reaching that age the child had no legally enforceable claim for support against either parent. When a specific age limit was not fixed it appears that, unless the order was otherwise terminated, it would continue while the child remained "a child", that is to 21 years or more recently 18 years.

The present situation is now covered by the specific provisions of s73 and s76 of the *Family Law Act*.

As to the legal duty of a father to provide education for a child in his custody the common law adopted a similar robust approach, an approach summarised by *Eversley op cit* at pp368-9 in the following terms:

> "As long as the father causes his child to receive what may be called a statutory elementary education, his legal duties towards the child from a legal standpoint are complete. A rich man is not bound to send his son to an expensive public school, or employ a governess for his daughter, or do more than afford elementary education. Education by a parent according to station in life is a moral and not a legal obligation".

Lord Kenyon put the matter even more vigorously in the case of *Hodges v Hodges* (1796) Peake, App Cas 79 where he said:

> "A father was bound by every social tie to give the children an education suitable to their rank, but it was a duty of imperfect obligation and could not be enforced in a court of law. The richest man in the Kingdom might say to his heir apparent, 'Go and earn your daily bread by your own daily labour', and the law could not interfere. There is no further obligation that which nature has implanted in his breast. The law obliges him to do nothing but nurture which duty expired when the child reached the age of seven."

That however is not necessarily the situation where the child is in the custody of the other parent or a third party. Ordinarily, but subject to the ultimate control of the court, the custodian may determine the mode of education of a child but by doing so the custodian cannot impose the financial liability of that on the father. But the provision of education is an aspect of maintenance and what provision a father is required to make in that regard depends upon the particular circumstances of the individual case.

Turning now to the present legislation s76(3) provides so far as relevant that the court may make an order in the circumstances of this particular case, the child having already attained the age of 18 years,

> "if the court is satisfied that the provision of the maintenance is necessary to enable the child to complete his education ..."

That provision has been considered by Watson, SJ in *Mercer v Mercer* (1976) FLC 90-033 and by Asche SJ in *Oliver v Oliver* (1977) FLC 90-227.

Those cases appear to me to emphazise two significant features about s76(3) namely firstly that the provision of the maintenance must be necessary as distinct from being desirable and secondly that there is a distinction to be drawn between the imposition of a legal liability upon a father in such circumstances and the question of whether as between father and son or daughter the providing of some such assistance may be the socially proper thing to do.

It may be possible that *Mercer's case* suggests a third matter namely that one may take into account as a factor the filial conduct or attitude of the child towards the father. At FLC, at p75,131 His Honour said:

> "However that is another factor – that of his own conduct towards his father. Here is an adult who has been granted by legislation the right to seek the financial support of another adult – his father. If he says to his father that the latter has forfeited all paternal rights and is only a good friend – nothing more or less – does he not himself destroy the very basis upon which his claim can be founded? An adult son cannot demand a slice of the paternal cake with one breath and spew out filial abnegation with the next. I hold this to be a fact or circumstance which, in my opinion, the justice of the case requires to be taken into account."

I am very doubtful myself whether the intrusion of such considerations is appropriate to s76(3). If one were to treat the measure of legal liability under s76(3) as proportionate to the extent or degree of deference being shown by an adult son or daughter to his or her father then in my view the sub-section would in most cases have little application. It seems to me that these doubts which I have were also in the mind of Asche SJ in his judgment in *Oliver's case* at p76,203, albeit couched in more classical terms.

Turning to the facts of this case it seems to me that it would be impossible for a court to come to a conclusion that the provision of maintenance by the father for the son Allan was necessary to enable him to complete his education. Indeed one may doubt whether it was even desirable on either social or economic grounds. He is in employment for almost half of the relevant period on an income of over $100 per week, he could obtain other vacation employment, he owns a motor car and a catamaran and intends to spend almost $1,000 going to Perth later this year. It seems to me that a 21 year old part-time student in that situation has no possible claim for maintenance against his parent under the Act. In my view the Magistrate did not properly exercise the powers under s76(3) in making an order in respect of the son and in my view the appeal to that extent should be allowed.

I add one further matter. An order under s76(3) is required to be made for a prescribed period. The magistrate here specified it to continue "for 3 years or until the son completes his course of education and obtains permanent employment, whichever is the sooner". The requirement that to bring the order to an end within 3 years, the son should have completed his course and obtained permanent employment is inappropriate.

I turn now to the order made in favour of the wife, namely for $80 per week. It was in effect submitted by Mr Abraham that whether this appeal was a consideration by an appellate court of the exercise of a discretion upon facts which were not in dispute or whether it was an exercise of one's own discretion upon undisputed facts, the Magistrate was in error, and in particular what he had looked at was not her need for her own support but what she was in fact spending upon herself and others. He argued further that when one looked at the way in which the wife's case was put, it was put on the basis that she was supporting not only herself but the three adult children as well who were making only trivial contributions to that situation and that if one confined her claim to the need to support herself only, then no order of the dimension that was in fact made was justified. Mr Beder, for the wife, submitted that the matter had to be approached upon the basis which was ultimately accepted by the Magistrate namely that the wife would thereafter be responsible for all household and other expenses (except H.B.A.) which amounted to $33.50 per week, and that having regard to the lifestyle of the family the other expenses of the wife were reasonable and proper. Mr Beder argued that her minimum household expenses were in the vicinity of $123 per week and to this should be added something for general social and other like activities. It seems to me clearly to be a case where it would be proper to take that additional factor into account for the reasons I have already referred to. This is not a subsistence case where there is not enough to go round (the usual situation) but a case of a reasonably high prior standard of living and an appropriate capacity in the husband to meet such an order.

The problem is that part of the wife's expenditure is really referable to the other members of the household but it is difficult to say precisely what, and it is necessary to make some arbitrary scaling down of her overall expenses in order to meet that circumstance. If one were to have general regard to her total cost one would also need to take into account reasonable board from the children (and not merely their $15 per week). That however is complicated further by the

fact that the eldest child may be leaving the house soon and the position of the youngest child is somewhat uncertain & general household expenses would not drop directly proportionately to those changes.

At the present time the wife is earning $96 per week and she would be required to pay admitted outgoings on the property of $33.50 per week which would leave a balance of only $62 to support herself. It seems to me clear that such an amount falls below the wife's reasonable need in the circumstances of this case. In my view, having regard to the wife's evidence and in particular to the figures which she supplied as to the outgoings an amount of not less than $120 per week would be a reasonable measure for the wife's own needs for her reasonable and proper support in this home and if that view is correct then to achieve that position it would be proper to order the husband to pay an amount of $58 per week (the wife to be responsible out of that for all the outgoings except H.B.A.). It was not disputed that the husband had a capacity to meet an order to that extent. This conclusion is somewhat strengthened by the circumstance that when the husband's solicitor opened the case for the husband in the court below he stated that his client had been paying the outgoings on the property ($33.50 per week) "but conceded that he had some liability to pay maintenance and would pay what the court ordered stating he thought it should be $17 per week" (that is $50 per week in all). It seems to me that the existing order of $80 per week would on the figures provide the wife with maintenance, after all outgoings were paid, of approximately $152 per week which would in my view be excessive and can I think only be explained on the basis that it involved a real supplementing of the children.

Accordingly in my view, the appeal in respect of the wife's maintenance should be allowed by varying it to an amount of $58 per week. I order that the appeal should be allowed in part. The order in respect of the son Allan is discharged and the order in respect of the wife should be varied to $58 per week as from 9 February 1978. I make no order as to costs.
