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FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of PALEZEVIC (J and N)

Asche, Watson and Wood S JJ

26 June 1978 — (1978) 34 FLR 321; [1978] FLC 77,771 (¶90-524)

NATURAL JUSTICE – ALLEGED BIAS OF TRIAL JUDGE – REMARKS BY TRIAL JUDGE MADE EARLY IN HEARING ALLEGED TO DISCLOSE BIAS – PROPRIETY OF JUDGE PRESSING TENTATIVE VIEWS DURING COURSE OF ARGUMENT WITH COUNSEL – NORMAL FUNCTION OF JUDICIAL PROCESS MAY INVOLVE JUDGE IN EXPRESSING TENTATIVE VIEWS – EXTENT TO WHICH TENTATIVE VIEWS MUST GO BEFORE ALLEGATION OF BIAS CAN BE SUSTAINED.

H. and W. married in 1959. At the time of the marriage H. was aged fifty and W. forty-seven. There were no children born of the marriage. Shortly prior to the marriage H. purchased a home in his own name which was occupied by the parties as their matrimonial home. The home was paid off during the subsistence of the marriage from moneys earned by H. and at the date of the hearing was valued at $30,000. W. left the matrimonial home in July 1975 although the parties lived separately and apart under the one roof from about 1969. During the period of cohabitation, W. took boarders and tourists into the home from time to time and retained any moneys she received from them for her own use. During the course of the marriage H. provided W. with funds to travel to Europe on two occasions. After W. left the matrimonial home she sought an order that the property be sold and the proceeds divided between the parties. At the date of hearing H. was a pensioner aged sixty-eight and the home represented his only asset. W. was aged sixty-five, in receipt of a pension and living in aged-persons accommodation.

Yuill J of the Family Court of Australia at Canberra dismissed W.'s application holding that any contribution that she had made towards the property in the role of a homemaker was offset by the generosity that H. had shown to her during the marriage and by the moneys which she had applied to her own use from taking in boarders. In the course of the proceedings the trial judge expressed the view that any contribution by H. of a financial nature to W. would result in H. being forced to sell his home and thereby work an injustice to H. W. appealed from the order and her counsel submitted (*inter alia*) that the trial judge had formed a specific view before completion of the hearing and before having heard all of the arguments.

HELD: Per Asche, Watson and Wood S JJ:
1. It not being shown that the trial judge had acted upon a wrong principle, had given weight to extraneous or irrelevant matters, had failed to give weight or sufficient weight to relevant considerations, had made a mistake as to fact, and it not being shown that the result was so unreasonable or plainly unjust that it could not stand, the appeal ought to be dismissed.

Aust Coal & Shale Employees' Federation v Commonwealth **[1953] HCA 25; (1953) 94 CLR 621, and**

Edwards v Noble **[1971] HCA 54; (1971) 125 CLR 296; 45 ALJR 682; [1972] ALR 385, followed.**

2. It is not unknown for a trial judge, in order to stimulate counsel or to obtain arguments for or against, to act as an *advocatus diaboli*. However it does not follow from comments falling from the bench acting in such a role that the trial judge should be taken as forever holding those views nor that he had in any way prejudged the case.

Per Watson SJ: Suggestions that comments of the trial judge amounted to prejudgment leading to bias misconceived the judicial process. Section 97(3) of the *Family Law Act* 1975–1976 places a duty both upon the court and counsel and it is common practice for judges in family law cases to make preliminary comments during the hearing as to what they are thinking at that stage. Judges are to be presumed to act with integrity and the rules of natural justice will not be infringed unless the suspicion that the judge has prejudged the case, or is biased, or will act unfairly is a reasonable one in all the circumstances. It must be a suspicion that a right-minded person would form.

R v Watson; Ex parte Armstrong **[1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, and**

R v Judge Leckie; ex parte Felman **(1977) 18 ALR 93; (1977) 52 ALJR 155, referred to.**

ASCHE SJ: Mr Williams for the appellant wife, made certain specific submissions to which I should refer. He makes much of certain observations which fell from his Honour at pp68 and 69 in the course of the hearing. At the bottom of p68 his Honour said that he would like some information as to whether the wife's occupancy of her present unit at Pearce was permanent, and he commented that, "if she does have permanent occupancy and she is getting the pension and, as well has $3,000 in the bank she is doing very nicely indeed, it would seem".

Then there was further discussion between his Honour and counsel who appeared for the wife, and from what Mr Williams suggested that his Honour in that discussion took the view that if there were to be any contribution by the husband of a financial nature, it would result in the husband being forced to sell his home, and that would thereby work on injustice to the husband. As I understand Mr Williams, he puts it to us that his Honour there was looking solely from the husband's viewpoint and not taking into proper account the situation of the wife, and that his Honour was so concerned with the injustice which might flow to the husband if he had to sell the home that he failed to observe the injustice which might flow to the wife if she did not receive a financial return from the matrimonial home.

It is perfectly true that it would be erroneous to determine a property application purely because one party happened to be in the matrimonial home and the other party happened to be out of it, and the only way in which the party out of the home could receive a financial settlement would be by the sale of the matrimonial home and the consequent inconvenience to that party who occupied the matrimonial home. But it does not seem to me that his Honour was basing his judgment on those principles. Indeed, it seems to me, reading those remarks of his Honour, that his Honour was doing little more than thinking aloud, and it would be wrong to assume that his Honour thereby formed a specific view before completion of the hearing and before having heard all argument for and against. It seems to me that his Honour was doing no more than highlighting one particular aspect of the case which appealed to him at that time and inviting counsel to take cognizance of that factor. But to suggest that his Honour thereby formed and never resiled from a specific point of view, which point of view was wrong and which point of view coloured the whole of his subsequent judgment, seems to me too far much of what could be little more than stichomythia. Mr Williams, in my view, has an almost impossible task to suggest that by those remarks, his Honour can carry possible error in hypothetical remarks into firm judgment after having heard all the evidence and having heard the arguments.

It is not unknown for a judge to go much further than his Honour went and it is not unknown for a judge, in order to stimulate counsel or to obtain arguments for or against, to act as an *advocatus diaboli*; and to suggest that when a judge does that to obtain guidance and instruction he is thereby to be taken forever as holding those views, which he put forward for argument, in my view does not show proper realization of the sort of remarks which do come from the bench from time to time. In my view, it does not appear that his Honour prejudged the case, as was suggested by Mr Williams in another of his submissions, and it does not appear that his Honour acted on a wrong principle.

WATSON SJ: I agree that the appeal should be dismissed for the reasons given by Asche SJ. I wish to add a comment on one of the amended grounds of appeal, namely that his Honour pre – judged the issue before the court. This ground, squarely put, alleges that his Honour did not come to his final judgment in this matter with an unbiased mind. Reliance was placed upon certain remarks made by his Honour appearing at pp68 and 69 of the appeal book.

At this stage, I agree with my brother Asche that his Honour was obviously thinking aloud, and bringing to the attention of counsel matters which were troubling him. To attribute such comments to prejudgment leading to bias misconceives the judicial process . Section 97(3) places a duty upon both court and counsel, and counsel in family law cases are frequently subjected to preliminary comments during the hearing as to what the judge is thinking at that stage. In my twenty-seven years at the Bar, I welcomed pertinent judicial observations, particularly in family law matters. At least I knew what the judge saw at that stage as being matters which were meaningful to him. Of course, different judges perform their judging duties differently. The process of judging is a human process performed by a human being, with all the flexibility of assessment, fact appreciation and final judgment that such humanity essentially involves. Certain qualities are presumably brought to it, having regard to the general principles of judicial appointment, and to particular matters referred to in s22(2) of the *Family Law Act*. In my opinion, public confidence in the judging process will be weakened unless full weight is given to what was said by Jacobs J in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; 9 ALR 551; 50 ALJR 778; [1976] FLC 75,265 (¶90-059) where his Honour said this:

> "The lesson to be learned is that the dialogue commonly accepted between Bench and Bar has dangers which no doubt make silence the counsel of perfection. It is counsel which is hard to learn and, to

speak of my own experience, is never fully learned. But it will be a sad day when the comments of a judge during pre-trial procedures or during the course of a trial, are taken to reflect on that integrity which has fitted him for the office which he holds. He is justified in proceeding upon the basis and in the confidence that his integrity is beyond question."

In the same case Jacobs J said:

"There is no rule that, when information about a matter outside the evidence or prior to a hearing *inter partes* is made known to a judge, that judge is or even may be disqualified upon the ground that there may be a real and reasonable suspicion that the information may create prejudice in the mind of the judge. It may be different in some circumstances when the tribunal is a quasi-judicial one because its members are not necessarily trained to act free of prejudice. It may be different again when a judicial tribunal is composed of lay persons. But a judge is selected for judicial office because of his learning and training in law, his integrity and capacity for impartiality. The combination of these factors results in a judge being assumed to be able to bring a detached mind to his task of judgment even if material may have been placed before him which results in a *prima facie* view being formed by him on these facts."
