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## FAMILY COURT OF AUSTRALIA — FULL COURT

*In the Marriage of PULS*

Evatt CJ, Asche and Pawley JJ

21, 23 April 1976 — (1976) 25 FLR 152; 9 ALR 503; [1976] FLC 75,1345

**FAMILY LAW – CONSIDERATION OF LUMP-SUM ORDERS REGARDING PERIODIC MAINTENANCE – MATTERS TO BE BORNE IN MIND WHEN MAKING SUCH ORDERS: FAMILY LAW ACT 1975, SS75, 79.**

Appeal against decree wherein H. ordered to pay lump sum of \$21000; and W's joint interest in property at 1 Hay Street, Albany to be vested in H. and H. to indemnify W. against any claims by mortgagee. Upon appeal—

**HELD: Appeal allowed. Order varied.**

1. The trial judge made an error of fact in relation to the money amounts payable which was sufficiently grave to warrant intervention by the Appeal Court.

2. The Trial Judge in assessing the Appellant's ability to pay did not give sufficient weight to the fact that the partnership property was not owned by the Appellant and his brother in equal shares but was more nearly in proportion to three parts to one in favour of the brother. The asset position of the Appellant as disclosed by the evidence may well be such that he would find it difficult to raise the sum ordered without prejudicing his own ability to continue to earn at his present rate, for it would seem that the Hay Street property alone would not provide the required sum or indeed anything closely approaching it.

3. These errors led to a result which was not just and equitable in all the circumstances.

**THE COURT:** At the hearing evidence was adduced on behalf of the wife that her assets consisted of the one half interest as joint tenant with her husband in 1 Hay Street, Albany, which at the date of the hearing was said to be valued at approximately \$20,000.00 and subject to a mortgage of some \$7,500.00, certain furniture, a motor vehicle and an entitlement to the proceeds of an insurance policy on the husband's life the surrender value of which was agreed to be about \$2,000.00.

Further evidence was adduced that she was in ill health and expected shortly to undergo surgery and would probably be prevented from earning any money for some months, that her last employment had been as a barmaid from which occupation her nett wages amounted to some \$80.00 per week and that she had been in various employments since 1965 and whilst the parties continued to live together had contributed to household expenses from her earnings.

At the date of the hearing she was in receipt of a Social Service Pension of about \$40.00 per week. It was also claimed, and this in fact was conceded, that the husband was some twelve months in arrears in his maintenance payments. Evidence was adduced on behalf of the husband that apart from his interest in the former matrimonial home he owned in partnership with his brother a farm property, the stock and plant upon it and a fishing business. From documents produced and evidence given by the Appellant it would seem that as at 9th March 1975 the value of the property including live stock was in the vicinity of \$94,000.00 but that the husband's share of this amount was limited to approximately \$26,000.00 by reason of the fact that his drawings in the past had been in excess of those of his brother. The nett income of each of the partners for the year 1975 from the farming and fishing venture was \$8,300.00. Evidence was also given by the husband that his health was failing, that he suffered from a heart condition and from high blood pressure.

It was against this background that His Honour made the orders referred to and it was the calculations upon which His Honour arrived at the figure of \$21,00.00 which came most seriously under attack.

In dealing with the question of maintenance His Honour said:

"If I had been asked to do so, I would have had no hesitation in the circumstances here, in ordering a periodic maintenance in or about the sum of \$25.00 per week ..."

and he went on to say:

"If maintenance were ordered at \$25.00 per week and continued for approximately fourteen years (that is until the wife attains the age of sixty years at which time the husband will be some 62 or 63) capitalised and discounting at the rate of 8% of the present payment, the sum arrived at is \$21,440.00. I am going to make the Order that the husband pay to the wife the round sum by way of maintenance and conditional on the wife transferring to him or submitting to the transfer from her to him all her interest in the Albany residential property, of the sum of \$21,000.00."

And referring to the argument raised on behalf of the husband that his financial position did not enable him to pay any substantial lump sum His Honour said:

"I am not impressed by the husband's protestations nor by the arguments of his Counsel that he simply has not the money available except by the sale of the Albany house, and can't get it. The plain facts are that he is the co-proprietor with his brother of a property which is probably conservatively valued at \$78,000.00 (that is the land plus stock which equally conservatively is valued at \$700.00 in the balance sheet, although the Respondent himself says that they are worth currently some \$12,000.00, if I understand his evidence correctly ... it would be news to me that a party in this position could not raise a reasonably substantial sum of money on the security of his interest in such a property."

His Honour went on to say referring to the former matrimonial home:

'He can do with that property what he likes. If he does not want to sell it, I have no doubt that he will be able to raise the necessary money in some other way. If he does not want to, or thinks he cannot raise it in another way, then he can sell the Albany house.'

At the outset Mr Nisbett who appeared for the Appellant took up the burden of satisfying this Court that the Trial Judge was wrong within the definition laid down in a series of cases such as *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296 and *House v The King* [1936] HCA 40; (1936) 55 CLR 499. He relied, as we understood it, on two main propositions:

- (i) That the Trial Judge made a demonstrable and critical error of calculation in arriving at the lump sum order to be paid; and
- (ii) That he was wrong, within the definition, in attributing to the Appellant an ability to pay the amount ordered.

Reference to actuarial tables contained in Britts' *Comparable Verdicts in Personal Injury Claims*, discloses that in order to produce the equivalent of \$25.00 per week over a period of fourteen years, at an interest rate of 8%, which was His Honour's aim, the amount payable by way of lump sum would not be \$21,440.00 as calculated by His Honour but would be approximately \$11,000.00.

Mr Nicholis who appeared for the Respondent to the Appeal argued that in finding as he did the Trial Judge was making a value judgment within the meaning given to those words by Windeyer J in *Da Costa v Cockburn Salvage and Trading Pty Limited* [1970] HCA 43; (1970) 124 CLR p192 at p213 and that this judgment should not be disturbed.

With this submission we find ourselves unable to agree. In our view the error was an error of fact and sufficiently grave to warrant intervention by this Court.

We consider also that the learned Trial Judge in assessing the Appellant's ability to pay did not give sufficient weight to the fact that the partnership property was not owned by the Appellant and his brother in equal shares but was more nearly in proportion to three parts to one in favour of the brother. The asset position of the Appellant as disclosed by the evidence may well be such that he would find it difficult to raise the sum ordered without prejudicing his own ability to continue to earn at his present rate, for in spite of His Honour's words quoted above it would seem that the Hay Street property alone would not provide the required sum or indeed anything closely approaching it.

These errors in our view led to a result which was not just and equitable in all the circumstances and consequently we propose to exercise our own discretion in the matter.

The parties are agreed, as we understand it, that this case is a proper one for the ordering of property settlement and a lump sum payment rather than periodical maintenance and the Respondent wife is not unwilling that she be ordered to transfer her interest in the Hay Street property to the Appellant provided that proper recognition of this transfer be given in the Order for lump sum maintenance.

In determining what this sum should be consideration should be given to the matters referred to in Section 75 and 79 of the Act and in particular to the following:

The Respondent Wife's entitlement to maintenance, her contribution within the meaning of section 79(4)(b) as found by the Trial Judge, her ability to earn, her pension entitlement, her need for a residence of her own, and on the other hand the assets and income of the Appellant and his ability to raise the amount awarded and the effect of any order on his earning capacity.

Mr Nesbitt relied on the formula enunciated by Lord Denning MR in *Wachtel v Wachtel* (1973) [1973] Fam 72; 1 All ER 829 at pp840 to 841 where in dealing with the position of a wife transferring interest in the matrimonial home to her husband His Lordship said:

'But the wife should be compensated for the loss of her share by being awarded a lump sum. It should be a sum sufficient to enable her to get settled in a place of her own, such as by putting down a deposit on a flat or a house. It should not, however, be an excessive sum. It should be such as the husband can raise by a further mortgage on the house without crippling him.'

Mr Nisbett argued that applying the formula to the circumstances of this case the Court should order that the Appellant pay to the Respondent the sum of \$6,500.00 and allow her some amount by way of maintenance for the rest of the year 1976.

However, when His Lordship used the words referred to he was dealing with a situation which he had described as follows:—

'But, the question of a lump sum needs special consideration in relation to the matrimonial home. The house is in most cases the principal capital asset. Sometimes the only asset.'

This is not the case here since the Appellant has another substantial asset namely his interest in the farming and fishing partnership. More relevant to the circumstances before us are His Lordship's words on page 840 where in dealing with the assessment of a lump sum provision he said:

'The circumstances are so various that few general principles can be stated. One thing is, however, obvious. No order should be made for a lump sum unless the husband has capital assets out of which to pay it, without crippling his earning power.'

The Court proposes to order that the Respondent transfer to the Appellant her interest in the former matrimonial home. The value of this share is approximately \$6,250.00. In the circumstances of this case we are satisfied that there should be added to this a sum to cover her entitlement to maintenance both past and future. Bearing in mind that the Appellant is in arrears for about a year in respect of payments due under a current order in the amount of \$25.00 per week we consider a reasonable sum in all the circumstances for the Respondent's maintenance would be \$40,000.00. The Order proposed then is that upon the transfer by the Respondent to the Appellant of her interest in the Hay Street property the Appellant is to pay to the Respondent the sum of \$16,250.00.

This amount has been determined after a consideration not only of the matters to which we have already adverted but also to the provisions of Section 81 of the Act.

Upon the transfer to the Appellant of the Respondent's interest in the former matrimonial home he will have assets amounting to approximately \$47,500.00 and liabilities of about \$8,000.00 being made up of the mortgage on the house and of his share of the partnership overdraft. From

a nett asset basis of \$39,000.00 he is in a position to raise an amount of \$16,250.00 without in any way crippling himself or damaging the affairs of the partnership.

However, so that he may have time to order his affairs it is proposed that the payment should be in two instalments, the first of \$10,000.00 within three months from this date and the balance by the 1st January 1977.

The Order of the Court is therefore as follows.

The Appeal is upheld. It is ordered that in lieu of the order contained in paragraph 5(b) of the Decree Nisi, the following order be substituted:

"The husband do pay to the wife as and by way of lump sum maintenance the sum of \$16,250.00, such payment to be made as to \$10,000.00 on or before 23rd July 1976, and as to the balance of \$6,250.00 on or before 1st January 1977."

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