

66/77

FAMILY COURT OF AUSTRALIA AT MELBOURNE

In the Marriage of LINDNER

Strauss J

13 May 1977 — (1977) FLC 76,295

FAMILY LAW – APPROVAL OF MAINTENANCE AGREEMENT – DUTY OF COURT WHEN ASKED TO APPROVE MAINTENANCE AGREEMENT – WHETHER MAGISTRATE CARRIED OUT HIS DUTY: FAMILY LAW ACT, S87.

On separation a wife retained the care of her three children and entered into an agreement whereby she covenanted not to seek maintenance for herself then or in the future – she also surrendered her interest in the family home for \$2,000. The agreement was approved by consent by a Magistrate before whom neither party appeared nor was represented; nor was there evidence that could have satisfied the court that the financial provisions were proper. Eight months later the wife appealed.

HELD: Appeal dismissed.

1. The appeal was out of time.

2. There was no evidentiary material before the Court upon which the Court could possibly have been satisfied that the provisions of the agreement with respect to financial matters were proper. Sub-section (4) of section 87 makes it clear that irrespective of the consent or agreement of the parties the Court must be satisfied that the provisions of the agreement with respect to financial matters are proper. It should be noted that regulation 109(2) of the *Family Law Regulations* inhibits the making of a consent order for the approval of a maintenance agreement under section 87.

3. Consequently, the Magistrate was in error in approving the agreement. He did not carry out a duty which the Act imposed on the Court, namely to refuse to approve an agreement when on the material before him he could not possibly have been satisfied that the financial provisions were proper.

STRAUSS J: *[His Honour refused the appeal on the ground that it was out of time, but as to approval of s87 agreements said:]*... There was no evidentiary material before the Court upon which the Court could possibly have been satisfied that the provisions of the agreement with respect to financial matters were proper. Sub-section (4) of section 87 makes it clear that irrespective of the consent or agreement of the parties the Court must be satisfied that the provisions of the agreement with respect to financial matters are proper. It should be noted that regulation 109(2) of the *Family Law Regulations* inhibits the making of a consent order for the approval of a maintenance agreement under section 87.

Consequently, the Magistrate was in error in approving the agreement. He did not carry out a duty which the Act imposed on the Court, namely to refuse to approve an agreement when on the material before him he could not possibly have been satisfied that the financial provisions were proper.

I am not suggesting that in a case in which parties are legally represented, or where an agreement has been reached between parties who had separate legal advice, the Court must examine the financial situation of the parties in minute detail. However, there should be available to the Court evidentiary material from which at least a broad conclusion can fairly be drawn that the statutory right to support of each of the spouses against the other, either by way of maintenance or by means of an alteration of interests in property has been dealt with in the agreement in a manner which is "proper" in the particular circumstances of the case.

The word 'proper' in section 87(4) means, I think, proper from the point of view of both spouses having regard to all relevant matters including his and her financial circumstances and earning capacity, his and her age and his and her needs and obligations and family responsibilities. The word 'proper' includes, also a consideration of the interest of the community at large in the sense

that a spouse who is or may be in need of support should not be deprived of his or her statutory right to support, unless the Court is reasonably satisfied that the agreement makes provision which is fair and just in all the circumstances.

As I have already said I consider that the Magistrate was in error in approving the agreement under section 87. I am further satisfied that if there had been material before the Court bearing on the question whether the agreement was a proper one, the Court should in all probability have refused to approve the agreement. The wife, then aged 34 years and about to undergo an operation for cancer, and who had the care of the three young children, covenanted not to seek maintenance for herself at any time in the future. In order to obtain sufficient money for the medical fees and hospital expenses for the operation, and in order to tide her over the period during which she might not be able to work after the operation, she agreed to accept \$2,000 for her joint interest in the home. That amount of the deposit paid jointly by the parties for the purchase of the home was \$10,000. The joint equity of the parties when the agreement was approved was likely to have been in excess of \$15,000.

No good reason appeared, why, if there had been an adjudication of the rights of these parties, the wife should have received less than one half of the value of the joint equity in the property. At best, a case might have been made out that the husband and wife should each pay one half of the amount of \$2,000 owing in respect of a loan from the husband's father. The husband has not suffered any real detriment in reliance upon the agreement except that he borrowed \$3,000 after the agreement was made, and part of that sum was used by him to pay \$2,000 to the wife. Even if he had to pay some interest for what he borrowed he secured to himself the occupation of the home since April 1976 by the payment of this amount. There is also the fact that section 87(4) is obviously intended to give parties the protection of the Court against their depriving themselves improperly of their rights under Part VIII of the Act. I am satisfied that the wife did not know until shortly before she made her application in November 1976 that the Court had failed to carry out its duty when it approved the agreement. In all the circumstances, I would have no hesitation in granting leave to appeal out of time if I had the power to grant such leave.

The next matter is whether this agreement is effective to debar the wife from claiming a settlement of property. Section 87(1) provides as follows:

'Subject to the section, a maintenance agreement may make provision to the effect that the agreement shall operate, in relation to the financial matters dealt with in the agreement, in substitution for any rights of the parties to the agreement under this Part'.

Section 87(3) provides that:

'If—

- (a) a maintenance agreement makes provision as mentioned in sub-section (1); and
- (b) the agreement has been approved by the court and the approval has not been revoked, any order having effect under this Part or any order made under Part VIII of the repealed Act and continued in effect by virtue of paragraph 3(2)(c) ceases to have effect in so far as it relates to the financial matters dealt with in the agreement and, subject to sub-section (9), no court having jurisdiction under this Act may make an order with respect to those financial matters.'

A question which arises at the outset is whether this agreement makes provision to the effect referred to in sub-section (1) of section 87.

In *Shaw v Shaw* [1965] HCA 39; (1965) 113 CLR 545 both Barwick CJ and Menzies J appear to have been of the view that an agreement might be validly sanctioned under section 87(1)(k) of the *Matrimonial Causes Act 1959* if an intention can be implied that the rights of a spouse under the agreement should be in lieu of that spouse's rights under an order or seek an order under Part VIII of that Act, even if there was no express stipulation to this effect. See also *Sparks v Sparks* (1971) 19 FLR 54 at p61-62 and 66.

In my view, an agreement makes provision to the effect referred to in section 87(1) if on the proper construction of the agreement it appears either expressly or by implication that the parties intended that it should operate in relation to financial matters dealt with in the agreement in substitution for rights of the spouses under Part VIII.

The rights which spouses have for themselves as distinct from the rights of children under Part VIII of the *Family Law Act* 1975/76 are of three kinds:

- (i) to seek maintenance;
- (ii) to seek a declaration of interests in property;
- (iii) to make claims for alterations of interests in property.

The recital to which I have already referred demonstrates an intention to deal with all these three matters. The declared intention is to resolve these matters, and to render the terms of the agreement irrevocable pursuant to sections 86 and 87 of the Act. The wife covenanted not to seek maintenance, and to accept \$150 in full discharge of her claim to certain chattels and to transfer her interest in the home to the husband for a payment of \$2,000 and in consideration of certain other payments and undertakings by the husband.

Whilst the use of the word "irrevocable" is not altogether appropriate, it does appear to me that what the parties intended was that there should be no further litigation between them regarding the wife's rights with respect to maintenance or property under the provisions of Part VIII of the Act, for that is what the reference to section 87 in conjunction with the use of the words "resolve matters" and the word "irrevocable" must have been intended to achieve.

The word 'property' appears to me to have been intended to refer to both real and personal property because the agreement deals with both real and personal property.
