67/78

FAMILY COURT OF AUSTRALIA at BRISBANE

In the Marriage of KAJEWSKI

Lindenmayer J

14 August 1978

[1978] FLC 77,422 (¶90-472); 31 FLR 500 (note)

FAMILY LAW – MAINTENANCE – DETERMINING WIFE'S MEANS – WIFE'S EARNINGS VALIDLY TAKEN INTO ACCOUNT – INCOME TAX CONSIDERATIONS CORRECTLY RAISED – PROCEDURE ESTABLISHED BY ACT IN RELATION TO MAINTENANCE SET OUT – PARTY'S ENTITLEMENT TO PENSION SHOULD NOT BE TAKEN INTO ACCOUNT TO SUCH AN EXTENT AS TO REDUCE THE LIABILITY OF THE OTHER PARTY BELOW WHAT HE OR SHE CAN REASONABLY AFFORD: *FAMILY LAW ACT*, SS72,74,75,75(2).

Husband appealed from a Magistrate's decision which increased his former wife's maintenance for herself from $2.00 to $20.00 weekly. On 12/2/74 the parties entered into an indenture in contemplation of the impending divorce. He to pay $8.00 weekly for each of 2 children's maintenance and $2.00 for the wife. Since the divorce the husband has re-married and there are two children of the marriage. He earnt $8847 gross in year 1976/77 and received $248 child endowment and $482 for other work. His wife is employed as a Nurse's Aid, and average gross weekly wage in $111.02. Evidence is she has worked continuously over last 6 months and probably will continue for the whole of financial year 1977/78. Though the husband gave evidence of her suffering asthma (without objection) that she had recently been advised by a specialist to "give up work on account of her asthma", the Magistrate was entitled to assume, as he did, that she would continue to work at least for the immediate future.

Former wife is employed part time by T.A.B. gross income 1977/78 is $2,340 Child Endowment $182, Widow's Pension $2,269, Board from one son $520 and maintenance received from husband $416. Total gross income $5,727.

The Magistrate then referred, apparently with approval and acceptance, to a submission which had been made to him by the wife's solicitor in relation to the combined incomes of the husband and new wife and in relation to some adjustments which he had contended should be made to the husband's expenses shown in his Form 19 in order to make them prospective, rather than retrospective, the net result of which has to show an excess of family income over family expenditure of $3,309.00 per annum. He then made the following comment:—

> 'Accordingly the husband on his own figures and testimony has presently $3,300.00 odd per annum from which he can pay further maintenance to his first wife, and certainly sufficient to pay her claim for $20,00 per week.' I am required to consider sec 72, 73 and 75 of the *Family Law Act*. If his first wife is not able to support herself and he is able to contribute towards her support she is entitled to live at a standard which in all the circumstances is reasonable. On her figures she requires $6671.00 minus $572.00 that is $944.00 is required by the wife to break even. In considering all the evidence before me I hold the view that the application by the wife is supported by the evidence and I award her $20.00 per week maintenance.'

HELD: Appeal allowed.

1. It is quite clear that the figures taken by the Magistrate as the wife's expenses are the expenses which relate not only to herself but also to the two children who reside with her. The Magistrate was in error in so approaching his task in the circumstances of this case. There were no proceedings before him in relation to the maintenance of either of the children, and his only legitimate concern therefore was with the needs of the wife in respect of her own maintenance. The wife chose to seek an increase in her own maintenance only, and not that of the child M.

2. The error which the Magistrate made in determining the means of the wife was in taking into account at that stage of the exercise her entitlement to receive a Widow's Pension. It is a misconstruction of sec 72, 74 & 75 of the *Family Law Act* 1974 to take the wife's pension entitlement into account in determining whether she is able to support herself adequately. Such an entitlement should be taken into account only at a later stage when, having determined, by reference to the wife's needs and her means (rather than the pension) that she is unable to support herself adequately, and that the husband has an ability to contribute towards her support, the question of the size of that contribution is under consideration.

3. Upon a proper application of the principles of the Family Law Act in relation to the maintenance of a party, and after the correction of the errors made by the Magistrate, the correct finding in relation

to the wife's means and her needs, and the one which the Magistrate ought to have made, was that her needs exceeded her means by approximately $400.00 per annum.

LINDENMAYER J: I am of the opinion that, on the whole of the evidence including that as to the wife's health, her work history and her responsibilities in relation to the care and supervision of the child, the Magistrate was perfectly justified in coming to the conclusion that, to the extent (if any) by which the wife's reasonable needs exceed her available means, the resultant inability to support herself adequately is attributable to one or other of the reasons set out in sec 72, or to a combination of more than one of those reasons.

Does the wife's reasonable needs in fact exceed her means? The Magistrate's findings as to the wife's needs consist solely of his recital, as to her annual expenses, which total $6,671.00. That the Magistrate accepted and acted upon those figures is apparent from his reasons which I have already set out wherein he found that the wife requires $944.00 to 'break-even'.

This acceptance by the Magistrate of the wife's Form 19 expenses was attacked by Mr Myers on two main bases. Firstly, he submitted that the expense of $1,393.00 shown in the wife's Form 19 for income tax is clearly wrong and greatly in excess of the taxation which in law is payable by the wife upon the income disclosed by her.

The wife was not cross-examined upon her assertion that her income tax for 1977/78 would be $1,393.00, and it would appear that no submissions were made to the Magistrate upon this point. Nevertheless, the rates of income tax are prescribed by statute, and the courts are required to take judicial notice of the statute law. It is therefore permissible and proper for the husband to raise this point on appeal even though not taken before the Magistrate. This is so because the evidence as to the wife's income and the sources of it was quite clear, and the maximum amount of income tax payable thereon is discoverable simply by reference to the statute.

The amount of income tax payable by the wife in respect of 1977/78 financial year upon her income of $4,609.00 (composed of her salary of $2,340.00 and her pension of $2,269.00 which is taxable) is $343.80 only, whilst her prospective taxation upon the same income for the 1978/79 financial year is $274.88.

It is not clear how the figure of $1,393.00 in the wife's Form 19 was arrived at. At any event, however, the figure of $1393 was arrived at, it is clear that it is an erroneous figure and is an over-estimate of the income tax payable by the wife to the extent of at least $1,000.00. In fact due to the sole parent rebate of $388.00 to which, on the evidence, the wife is clearly entitled under sec 159K of the *Income Tax Assessment Act*, she would be liable for no tax at all for the 1977/78 year.

It is also quite clear that the figures taken by the Magistrate as the wife's expenses are the expenses which relate not only to herself but also to the two children who reside with her. In my opinion, the Magistrate was in error in so approaching his task in the circumstances of this case. There were no proceedings before him in relation to the maintenance of either of the children, and his only legitimate concern therefore was with the needs of the wife in respect of her own maintenance. The wife chose to seek an increase in her own maintenance only, and not that of the child M. If, as a result of the strict approach which I propose the wife were to feel herself disadvantaged, the remedy would lie in her own hands in the form of an application for increased maintenance for M.

The error which, in my opinion, the Magistrate made in determining the means of the wife was in taking into account at that stage of the exercise her entitlement to receive a Widow's Pension. In my opinion, it is a misconstruction of sec 72, 74 & 75 of the *Family Law Act* 1974 to take the wife's pension entitlement into account in determining whether she is able to support herself adequately. Such an entitlement should be taken into account only at a later stage when, having determined, by reference to the wife's needs and her means (rather than the pension) that she is unable to support herself adequately, and that the husband has an ability to contribute towards her support, the question of the size of that contribution is under consideration. In this regard I adopt with respect the interpretation of s72 which was enunciated by Carmichael J of the Supreme Court of New South Wales in the case of *Wong v Wong* (1976) 2 Fam LR 11, 164 concluding with the words, 'I cannot see that the present requirement under sub-sec 75(2) of the *Family Law Act* to take into account a party's eligibility for a pension as authority for the Court to adjust the property and incomes of the parties so as to create a pension entitlement for one of them.'

In my opinion, the procedure established by the Act in relation to the maintenance of a party to a marriage is as follows:

(1) (a) Firstly, there is an enquiry under s72 to determine whether the party seeking maintenance is unable to support herself or himself adequately for one or other of the specific reasons set out in that section (and for no other reason), namely the care and control of a child of the marriage, age, physical or mental incapacity for appropriate gainful employment or 'any other adequate reason having regard to any relevant matter referred to in sub-sec 75(2).' (The emphasis is mine) In my opinion, not all of the matters referred to in s75(2) are relevant as possible reasons for the applicant's inability to support herself or himself adequately, and in particular the fact that he or she is or may be entitled to a pension or other Social Security payments the entitlement to receive which is dependent upon need, is not so relevant. To hold otherwise is to make nonsense of s72.

(b) If the answer to this first enquiry is 'no' then the application must fail and no further enquiry is necessary.

(2)(a) Next, if the answer to the first enquiry is 'yes' there is then an enquiry as to the means and reasonable needs of the other party, and the extent of his or her ability to contribute towards the support of the applicant.
(b) If this enquiry reveals that the other party has no such ability, then again the application must fail and no further enquiry is necessary.

(3) Finally, if the second enquiry establishes that the other party has an ability to contribute towards the maintenance of the applicant then there is a further enquiry as to the extent to which it is reasonable that he or she should do so, and it is only at this stage that any entitlement of the applicant to receive a pension of the type which I have mentioned becomes relevant. No doubt if the other party is comfortably able to contribute a sum sufficient to ensure the adequate support of the applicant, any question of the applicant's entitlement to such a pension should be ignored. If there is likely to be involved some hardship to the other party in contributing to that extent to the maintenance of the applicant, then the applicant's entitlement to receive such a pension may be taken into account to the extent that it is necessary to do so to avoid such hardship. In my opinion, however, such entitlement should not be taken into account to such an extent as to reduce the liability of the other party below what he or she can reasonably afford, and thus to cast an unnecessary burden upon the public purse.

In coming to the opinions expressed above in relation to the relevance of the entitlement of an applicant for maintenance to receive a pension of the type referred to, I have been fortified by and drawn heavily upon the opinions of Lambert J as expressed, *inter alia*, in his judgment in *Atkinson v Atkinson* (No. 10394 of 1975 — unreported judgment delivered 2nd March 1978). In that judgment, in reference to the eligibility of a wife to receive Sickness and Unemployment Benefits, His Honour said:—

> 'The eligibility should not be taken into account in assessing the quantum of an order, where the spouse against whom the order is sought has the clear capability of contributing such support as is necessary to fulfil the adequate needs of the other spouse; and be left with more than sufficient to provide for his or her own adequate needs.'

Returning then to the evidence it appears to me that upon a proper application of the principles outlined above, and, after the correction of the errors to which I have referred, the correct finding in relation to the wife's means and her needs, and the one which the Magistrate ought to have made, is that her needs exceed her means by approximately $400.00 per annum.
