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FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of ASTBURY (A. and R.)

Evatt CJ, Asche SJ and Bell J

24 November 1978; 1 May 1979

(1978) 34 FLR 173; 4 Fam LR 393; [1978] FLC 77,559 (¶90-494)

FAMILY LAW – MAINTENANCE – VARIATION OF EXISTING ORDER – ORDER FOR WIFE'S MAINTENANCE MADE PRIOR TO COMMENCEMENT OF FAMILY LAW ACT – WIFE'S CONTINUING ENTITLEMENT TO MAINTENANCE DEPENDENT ON WHETHER SHE CAN ADEQUATELY MAINTAIN HERSELF – WHETHER WIFE OBLIGED TO ENDEAVOUR TO FIND EMPLOYMENT – WHERE ONUS LIES TO SHOW WHETHER WIFE CAN OBTAIN EMPLOYMENT: FAMILY LAW ACT 1975-1976, SS72, 83.

H. and W. separated in 1973. Shortly after separation orders were made by consent at the Wollongong Court of Petty Sessions granting W. custody of the two children of the marriage and maintenance for herself in the sum of \$20 per week and \$10 per week for each child. Six months later W.'s maintenance was reduced to \$15 per week. In November 1976 H. applied to the Family Court of Australia at Parramatta for care and control of the younger child and a discharge of the maintenance order. W. cross-applied for an increase in maintenance. Maxwell J increased the maintenance payable for the child to \$20 per week and discharged the order for W.'s maintenance from 31st December 1977. Although W. had not been in the workforce for some years, her Honour found that she had the capacity to engage in gainful employment which she should reasonably be expected to do and in all probability if she sought employment she would find a job. W. appealed from the order discharging her maintenance.

HELD:

1. Upon an application to increase or decrease the amount of maintenance to be paid under an existing order the court must be satisfied that there is an entitlement to maintenance under s72 of the *Family Law Act 1975-1976 (Act)*.

In the Marriage of Conn, unrep (Family Court of Australia, FC 12th September 1977), and *In the Marriage of Lyall* (1977) FLC 76,170, followed.

2. Where a court is called upon to review an order for maintenance made prior to the commencement of the Act, even if there has been no change in the financial circumstances of the parties since the making of the order, the court should ensure that the continuing order is in conformity with Pt. VIII of the Act. Therefore, when there is an application to discharge an order it is open to the applicant to claim that the person in receipt of maintenance does not come within the requirements of s72 of the Act and if the court is then satisfied either that the person in question is able to support herself or himself adequately or that the other party is not reasonably able to contribute to maintenance, the order may be suspended or discharged.

3. Section 72 of the Act seemingly implies that each party should attempt to support himself or herself where this is reasonable having regard to the factors listed in s72 and s75(2).

4. In the absence of persuasive evidence one way or the other it is for the court to determine whether in all the circumstances the party whose maintenance is under consideration is able to adequately support himself or herself. It may be appropriate to decline to make an order for maintenance beyond a fixed period bearing in mind that the matter can be subsequently reviewed by the applicant for maintenance producing to the court evidence of attempts that have been made to obtain employment.

THE COURT: Her Honour found that there was such a change of circumstances as would give her jurisdiction under s83. The main issue she considered was the wife's ability to secure suitable employment. She had been registered with the local unemployment office since 30th June 1977, but nothing was available. The husband alleged that she could find employment in Wollongong. She alleged difficulties in regard to employment and scarcity of work, transport difficulties and her desire to be with the children after school. Her Honour found that she had worked in a garage prior to her marriage (in 1963) but had worked little since, apart from two periods as a shop assistant. In her evidence the wife agreed that she had done nothing to get a job prior to June 1977.

Her Honour referred to ss72, 73 and 74 of the Act and found as follows: "I am satisfied that the wife has the appropriate capacity for gainful employment once she has applied her mind to overcoming certain slight difficulties in this regard, and once she has obtained employment should be able to support herself adequately."

When there is an application to discharge an order (whether made under the repealed Act or the *Family Law Act*) it is open to the applicant to claim that the person in receipt of maintenance does not come within the requirements of s72. If the court is satisfied either that the person in question is able to support herself or himself adequately or that the other party is not reasonably able to contribute to maintenance then the order may be suspended or discharged.

Mr Rose submitted that it was the husband's application to discharge the maintenance order and that it was therefore for him to satisfy the court that she was able to support herself adequately. He would have to put evidence to show her capability for employment in order to satisfy the court that she was no longer entitled to maintenance. The alternative to this proposition, he submitted, must be that if a husband seeks to challenge a current maintenance order he need only bring an application to that effect and the wife is once again required to satisfy the court of her entitlement to maintenance under s72. This was, in fact, the submission put for the respondent husband. Mr Davidson argued that the husband's application put her upon proof of s72 factors.

In considering these submissions there may be a distinction between maintenance orders made under the repealed Act and those made under the *Family Law Act*. In the former case it cannot be assumed that the court has made any finding as to whether a party to a marriage is able to support himself or herself adequately, though there may of course be such a finding in some cases. When an application is made to discharge the order, the court may be called on and consider and decide that issue for the first time. Where the original order had been made under the *Family Law Act* then that issue should have been determined already, and in the absence of any evidence of a change of circumstances affecting that finding, the court need consider only the appropriate amount of maintenance.

In the present case the husband's application to discharge the maintenance order no doubt put him to proof that there was just cause for discharging the order: s83(1)(c). As part of that proof he was entitled in the circumstances of this case to put forward s72. The principal issue was whether she could, or should, rejoin the workforce. This issue is often difficult to determine, especially when the applicant is not in employment and has no recent history of employment. The wording of s72 seems to imply that each party should attempt to support himself or herself where this is reasonable having regard to the factors listed in s72 and s75 (2). These include; the responsibility for the care of children under eighteen years; the age and health of the party whose maintenance is in issue; the standard of living of the parties during marriage and the ability of the parties to maintain that standard of living; the skills and workforce experience of the party whose maintenance is in issue; the duration of marriage and its effect on the earning capacity of that party; and the employment prospects open to the party in question.

These factors are not separate and independent but relate to each other. For example, if the parties have enjoyed a high standard of living and the husband has ample resources it may be unreasonable to expect the wife to seek unskilled and low-paid employment, especially if the marriage is of long duration and she has no recent work experience. On the other hand, where the husband is an average wage earner and the wife is in good health and has not responsibility for young children it may be unreasonable for her to decline to exercise such workforce skills as she may possess. A wife's ability to support herself adequately depends in part on a number of external factors. The generally depressed level of wages paid to women, their lower level of training in workforce skills and their relatively high unemployment level may need to be considered. In some situations it might be appropriate for a party to seek to improve his or her skills or to acquire further qualifications and to ask for maintenance as an interim measure.

Even in a case where it is thought appropriate for a party to seek employment rather than to rely upon maintenance from the other party this may not conclude the matter if it proves impossible to get a job. Women without skills and with no recent work experience competing in a tight job market may not be able to secure any job at all. The court may need to consider whether the party in question has made genuine efforts to seek work. The fact that a person is in receipt of

unemployment benefits would go some way to establishing that he or she is seeking employment. It might be unfair in some situations to cut off maintenance abruptly without giving a party an adequate opportunity to test the market and to satisfy the court that despite efforts it was impossible to secure employment.

Her Honour considered that once the wife had overcome "certain slight difficulties" (which were not specified) and once she had obtained employment, she should be able to support herself adequately. She extended the existing order until 31st December 1977, to give the wife an opportunity to overcome any difficulties. Her Honour's decision contains the following elements: the wife, despite her absence of skills is able to engage in gainful employment; it is reasonable having regard to the circumstances of the parties to expect her to do so; if she seeks employment actively the probabilities are that she will be able to get a job.

As to the last of these elements it is equally difficult to establish that a person cannot get a job as to establish that a person can get a job. The court has to reach a decision on the balance of probabilities; the evidence of actual available jobs was slight, but so was the evidence of the wife's efforts to seek employment.

We are not satisfied that her Honour erred in reaching the conclusion she came to. Her Honour was entitled to take into account the wife's apparent lack of effort since the filing of the husband's application. While the period fixed by her Honour for bringing the order to an end was short it was within her discretion and not so short as to warrant interference by this Court. If in the result the wife is unable to obtain a job after the exercise of due diligence it remains open to her to approach the court again.
