24/79

FAMILY COURT OF AUSTRALIA at MELBOURNE

McPHEE v McPHEE

Lusink J

2 April 1979

FAMILY LAW – MATTERS HEARD IN THE MAGISTRATES' COURT – APPLICATION FOR NON-COMPLIANCE WITH A MAINTENANCE ORDER – APPLICATION FOR DISCHARGE OR REDUCTION OF ORDER MADE BY FAMILY COURT – APPLICATION FOR NON-COMPLIANCE ADJOURNED TO A DATE NOT EXCEEDING FOUR YEARS – APPLICATION FOR A DISCHARGE VARIED BY SUSPENDING THE ORDER FOR FOUR YEARS – JURISDICTION OF MAGISTRATES' COURT IN FAMILY LAW MATTERS – WHETHER MAGISTRATE IN ERROR: *FAMILY LAW ACT* 1975, S45, 83.

HELD: Appeal allowed.

1. Section 39 of the *Family Law Act* 1975 ('Act') sets out jurisdiction in matrimonial causes. Parties are given the right to institute proceedings, save for proceedings for principal relief, in courts of summary jurisdiction by sub-section (2). Sub section (6) invests inferior courts with federal jurisdiction, albeit a limited one. Section 39(6)(c) specifically relates the ambit of power to enforcement. Section 83 deals with the modification of maintenance orders made in respect of a party or child by the other party of the marriage. Registration, once effected, gives a Court, other than the Court which made the order, jurisdiction to modify.

2. Accepting that registration of the order made by Strauss J was effected according to the provisions of Regulation 129 there is no doubt that the inferior court was placed, as it is intended to be, in a position to enforce payment of the maintenance ordered by the Family Court. With this proposition there is no quarrel. The question still remains, however, as to whether it is appropriate for an inferior court to have the power, as it undoubtedly has at present, by the terms of Section 83, to modify an order of this Court with no restrictions, save as to those inbuilt into the Section itself.

3. There is merit in the proposition that the Magistrate should have decided, that even if the interests of justice did not demand a transfer, it would have been wiser not to continue the hearing. On the other hand, the Magistrate was properly entitled to proceed, he was not asked by either party to take such a course and there was no obligation, let alone a duty to order a change of venue of his own volition.

4. The question of the needs of a second as against the first family have recently been traversed by the Full Court of the Family Court of Australia *In the Marriage of White* (unrep, Brisbane 23.8.78). The learned Chief Judge stated:

> **"It is a question of balancing the needs of each family having regard to the needs of the person who has the obligation to provide for their maintenance. It is a matter of degree and a matter for exercise of discretion."**

5. It would appear that upon the whole of the evidence the Magistrate did not properly consider and evaluate the relevant provisions in the Act nor did he give sufficient weight to the circumstances under which the wife and the children were living. Further that the Magistrate placed too much weight on the financial obligations which the husband had voluntarily incurred to the detriment of his first family, and thereby erred in the exercise of his discretion. It is ordered that the appeal be allowed.

LUSINK J: Mrs Pamela McPhee, the appellant in these proceedings, is by her Notice of Appeal, seeking orders that the maintenance order made in the Family Court on the 10th day of November 1976, be reinstated, that the application for non-compliance of the maintenance order be heard and that the husband pay arrears of maintenance. The appeal is from orders made at the Magistrates' Court at Moonee Ponds on the 22nd day of February 1978. In this Court on the 10th day of November 1976, the husband had agreed to pay maintenance for his two children. The wife registered the order of the court of summary jurisdiction for the purpose of collecting payments through that court. The husband fell into arrears and the wife issued a summons to

enforce the terms of the consent order. Immediately the husband was served with the summons he filed an "application for discharge or reduction of an order made at the Family Court dated the 10th day of November 1976". This application was heard by the Magistrate as a defended matter concurrently with the application for enforcement of arrears of maintenance filed by the wife. The orders made are the subject of this appeal and are as follows:

> (1) The summons for non-compliance of the maintenance order alleging arrears of $225 as at the 23rd day January 1978, was "adjourned to a date not exceeding four years from this date."
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> (2) The application for discharge or reduction of an order of the Family Court made by consent on the 10th day of November 1978 was "varied by suspending the Order for four years from this date. Liberty either party to apply."

A preliminary question of interest is raised. It is the Magistrate's jurisdiction to entertain a defended application under Section 83 of the Act, such application seeking an alteration to a consent order made by this Court.

The arguments went this way: For the wife it was stated that whilst the effect of Section 83(1)(b) and (d) read together with Regulation 129 of the *Family Law Act* 1975 appears on the face of it to give a Magistrate a discretionary power to suspend an order, that power must be read subject to an examination of the whole Act. In particular to be read subject to s45(2) of the Act, where it appears to a Court "to be in the interests of the justice to do so," to transfer the proceedings to another Court.

In the circumstances of this case it was put that the interests of justice should be the dominant consideration rather than the balance of convenience of an immediate hearing. It was further put that the Magistrate had not only a discretion but a duty to transfer the hearing back to the Superior Court, where, not only had the previous proceedings been held, but where all documentation and pleadings relevant to the financial situation of the parties, still reposited.

It was suggested that the discretionary power to transfer, lying with the Magistrate, cast upon him a heavy onus and in fact a duty, to consider the wisdom of his hearing the matter, the interest of justice demanding that a transfer should be effected under Section 45(2).

The approach by Mr Rosen of Counsel for the husband was a pragmatic one. He submitted that the Act was clear, simple and easy to read. Directions are given for registration of orders in other courts. Such registration bestows jurisdiction. It was the clear intention of the Act that an inferior court should in circumstances such as the present, take up the mantle and deal with the dispute. His Worship was only giving effect to the expressed provisions of Section 83. There was no suggestion from either Counsel or from the Bench that the hearing should be transferred to the Family Court and there was no reason why such transfer should be contemplated.
It is on this material together with an invitation by Professor Finlay to construe "may" as "shall" in Section 45(2) that the Court is asked to decide on the preliminary question of whether the Magistrate had the power to make the orders which he did and in the event that he did have such power, whether he should have declined to proceed and then exercised the discretion vested in him pursuant to Section 45(2) and transferred the proceedings back to the Family Court.

Under the Commonwealth *Matrimonial Causes Act* 1959-1966
The Magistrates' Court had no power to vary an order for Maintenance made in the Supreme Court, that tribunal retaining the sole right to vary or discharge the order. This was consistent with the then State/Commonwealth apportionment of power.

Family Law Act 1975.
Section 39 sets out jurisdiction in matrimonial causes. Parties are given the right to institute proceedings, save for proceedings for principal relief, in courts of summary jurisdiction by sub-section (2). Sub section (6) invests inferior courts with federal jurisdiction, albeit a limited one. Section 39(6)(c) specifically relates the ambit of power to enforcement.

Section 83 deals with the modification of maintenance orders made in respect of a party or child by the other party of the marriage. Registration, once effected, gives a Court, other than the Court which made the order, jurisdiction to modify. Accepting that registration of the order

made by Strauss J was effected according to the provisions of Regulation 129 there is no doubt that the inferior court was placed, as it is intended to be, in a position to enforce payment of the maintenance ordered by the Family Court. With this proposition there is no quarrel. The question still remains, however, as to whether it is appropriate for an inferior court to have the power, as it undoubtedly has at present, by the terms of Section 83, to modify an order of this Court with no restrictions, save as to those inbuilt into the Section itself.

There is merit in the proposition that His Worship should have decided, that even if the interests of justice did not demand a transfer, it would have been wiser not to continue the hearing. On the other hand, if Mr Rosen's argument is accepted, the Magistrate was properly entitled to proceed, he was not asked by either party to take such a course and there was no obligation, let alone a duty to order a change of venue of his own volition.

It is not proposed to traverse the question of what the "interests of justice" referred to in Section 45(2) require or the desirability of consolidating all proceedings between the same parties in one Court. I would refer only with great respect to the decision of Pawley SJ *In the Marriage of Pelbart* (1976) FLC 9002 where His Honour transferred proceedings to the Supreme Court on the balance of convenience, and in order to save time and further expense, since the Supreme Court had already spent considerable time in investigating the financial position of the parties and their relationship to each other.

This to my mind illustrates a preferable interpretation of the legislative intention rather than the proposition put to the Court that the Stipendiary Magistrate not only acted within the provisions of Section 83 but also had Section 47 in mind. The substantive question turns on whether the Magistrate's discretion miscarried in making the order which he did.

At the time of the hearing the husband was living in a de facto relationship with a Mrs Judith Buchanan who he was supporting together with her two children. They were buying a property as tenants in common but Mrs Buchanan, having supplied the greater portion of the deposit, had an agreement entered into between them protecting her financial contribution. The weekly commitment on the property was $113. Mrs Buchanan did not work and although her former husband was obliged under order to pay maintenance to her in the sum of $30 per week each for the two children of the marriage he was not complying with the order. The husband agreed that Mr Buchanan was a substantial earner and in the event that he resumed employment he would resume maintenance payments and he, the husband would be in a position to recommence paying maintenance for his own children. Mr Buchanan is pursuing some further education at this time. The husband is a fire officer who was earning at that time $14820 per annum.

Detailed evidence was given as to his commitments which exceeded his income by approximately $6000 per year. He included in his affidavit expenses for Mrs Buchanan's car, a Myers account for her children's clothing at $7.50 per week and $5 per week orthodontal expenses for James, the younger Buchanan child. The husband and wife on the sale of the former matrimonial home had both received approximately $11,000 from the proceeds of sale. The wife has purchased a block of land which has marginally appreciated in value. The husband with commendable honesty stated that he had been extravagant with his share, had now totally dissipated the proceeds and had a personal loan commitment of approximately $10,000 being monies expended largely on items purchased and debts incurred by Mrs Buchanan.

In his affidavit in reply the husband stated that his financial situation had deteriorated to a substantial degree since the order made for maintenance of the children and he submitted that he would be unable to meet any commitments in relation to maintenance for a period of four years. The wife was living in a de facto relationship with a Mr Bennett at Craigieburn and had been doing so since November 1976. Two children of Mr Bennett together with two McPhee children also live in that home. Mr Bennett is on a wage of $135 per week and has been totally supporting this family since the husband stopped paying maintenance.

Paragraph eight of the wife's affidavit set out the Magistrate's findings. These were at no time challenged and they read this way:

> "He then said that he at first had reservations about the husband's income position. He now found it was established that the husband's circumstances had changed but in circumstances that did him no credit. He said that the husband had acted imprudently in taking on the loan obligations that he had, but that in so doing his financial circumstances had changed. He said that he found that whilst the husband was repaying the personal loan over the ensuing four years he would not be in a financial position to pay maintenance. This situation would change however if the husband of Mrs Buchanan regained employment and recommenced maintenance payments ...

Professor Finlay submitted that His Worship made a number of errors. In particular the following:

> (a) He confused the provision relating to suspension because whilst purporting to suspend the order under Section 83(1)(d) he used as basis for suspension matters referred to in Section 83 2(a)(i) (ii) and (iii).
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> (b) He failed to give sufficient weight to the provisions of Section 73 of the Act. The husband's allegation that his commitments to assist and support Mrs Buchanan and her children left him in no position to comply with the order made in respect to his own children was accepted as a valid reason for suspending the order.
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> (c) It was accepted that apart from the excessive amount due and payable under the two mortgages, the personal loan debt was a major factor in crippling the husband's finances. The Magistrate according to Counsel for the wife, acknowledged that the expenses incurred and met by the personal loan were characterised and admitted as largely debts of an extravagant nature, His Worship was in error in allowing them as a legitimate ground upon which to suspend the children's support.
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> (d) There was no proper evaluation by the Magistrate as to the relative financial position of the parties. On the one hand the husband was living in a home valued at more than $40,000 he had spent large amounts of money on flying lessons and a holiday, there were two motor cars in his new family and he was admittedly not careful with money. On the other hand Mrs McPhee is living in a house jointly owned by Mr Bennett and his wife, in which she has no equity, there is no guarantee that she and Mr Bennett will marry when the latter is free to do so, and on a weekly income of approximately $140, two adults and four children have to be kept.

With these submissions I find myself in substantial agreement. The question of the needs of a second as against the first family have recently been traversed by the Full Court of the Family Court of Australia *In the Marriage of White* (unrep, Brisbane 23.8.78). The learned Chief Judge in an *ex tempore* judgment having referred to the cases under the earlier legislation of *Hampson* 5 ALR 359 and *McOmish* [1968] VicRp 67; (1968) VR 524; [1969] ALR 80; (1968) 12 FLR 370 and the case of *Van Dongen* [1976] FLC 90-084; 10 ALR 178; [1976] Tas SR 156 then stated:

> "It is a question of balancing the needs of each family having regard to the needs of the person who has the obligation to provide for their maintenance. It is a matter of degree and a matter for exercise of discretion."

It would appear that upon the whole of the evidence His Worship did not properly consider and evaluate the relevant provisions in the Act nor did he give sufficient weight to the circumstances under which the wife and the children are living. I find further that the Magistrate placed too much weight on the financial obligations which the husband had voluntarily incurred to the detriment of his first family, and thereby has erred in the exercise of his discretion. It is ordered that the appeal be allowed.
