33/01; [2000] VSC 409

SUPREME COURT OF VICTORIA

DeANGELIS v DeANGELIS & ORS

O'Bryan J

8, 27 September 2000 — (2000) 153 FLR 331; 27 Fam LR 133

CONSTITUTIONAL LAW – INTERVENTION ORDER MADE – ALLEGED INCONSISTENCY OF LAW DEALING WITH DOMESTIC VIOLENCE – INJUNCTION POWERS UNDER *FAMILY LAW ACT* 1975, S114 – POWERS OF STATE COURT UNDER *CRIMES (FAMILY VIOLENCE) ACT* 1987 – TEST TO BE APPLIED – WHETHER COMMONWEALTH ACT INTENDED TO COVER THE FIELD – DIFFERENCES BETWEEN TWO ACTS – WHETHER MAGISTRATE HAD JURISDICTION TO MAKE INTERVENTION ORDER: *FAMILY LAW ACT* 1975, S114; *CRIMES (FAMILY VIOLENCE) ACT* 1987.

1. In enacting section 114 of the *Family Law Act* 1975, the Commonwealth Parliament did not intend to completely, exhaustively or exclusively make a law governing the conduct of one spouse to the other. In the context of threatened family violence a State court is authorised to make an order designed to keep family members apart and, if the order is disobeyed, a criminal offence is committed by the disobedient person and punished in the same court. The jurisdiction conferred on the Family Court has a purpose to protect a party of the marriage but it does so by means of an order or injunction.

2. The Commonwealth Parliament did not disclose a legislative intent to cover the field. Further, there is no inconsistency between the two laws concerned with family violence. Accordingly, a magistrate had jurisdiction to make an intervention order pursuant to the provisions of the *Crimes (Family Violence) Act* 1987.

O'BRYAN J:

1. The plaintiff issued an originating motion on 14 July 1999 in which his former wife, Gemma De Angelis, the Magistrates' Court of Victoria, Mark Fielding (a police member) and the County Court of Victoria are defendants.

2. In paragraph 1 of the motion the plaintiff seeks an order in the nature of certiorari quashing an order of the Magistrates' Court at Heidelberg made on 20 October 1997, alternatively (para 2) a declaration that the order of the Magistrates' Court is invalid, void and of no effect.

3. In paragraph 3 an order in the nature of prohibition restraining the Magistrates' Court from proceeding to hear and determine charges filed on 2 August 1998 against the plaintiff by the third defendant.

4. In paragraph 4 an order in the nature of *certiorari* quashing the order of the fourth defendant made on 13 July 1999.

5. In paragraph 5 an order in the nature of *mandamus* to require the County Court of Victoria to re-hear and determine the matter of the application for leave to appeal.

6. In paragraph 6 a declaration that the *Crimes (Family Violence) Act* 1987 is invalid, void or of no effect, alternatively (para 7) a declaration that the *Crimes (Family Violence) Act* is invalid, void and of no effect in respect of proceedings which are comprehended by s114 of the *Family Law Act* (Commonwealth) 1975 or otherwise fall within the jurisdiction of the Family Court of Australia.

7. The originating motion was issued pursuant to O.56 - Judicial Review, of the *Supreme Court Rules (General Civil Procedure) Rules* 1996. Notice of a Constitutional matter was given to the Attorneys-General for the States and Territories pursuant to s78B of the *Judiciary Act* 1903 on or about 9 February 2000.

8. When the proceeding was called on for hearing Mr Perkins of counsel appeared for the

plaintiff and Ms S. Brennan of counsel appeared on behalf of the Attorney-General for Victoria. The third defendant, who is a member of the Victoria police, and the first defendant did not appear.

9. A short history of the dispute will be sufficient. The plaintiff and the first defendant were married on 2 December 1985. Two children were born of the marriage, the eldest in November 1988, the youngest in January 1993. The plaintiff and the first defendant separated in August 1987 and the marriage was dissolved by the Family Court of Australia on 24 November 1998. The decree nisi of dissolution of marriage became absolute on 25 December 1998.

10. In 1997 disputes between the parties occurred over custody of the children and alleged violence and threatened violence. In mid August 1997 the plaintiff made an application to the Family Court for a custody order. On 29 September 1997 the plaintiff applied to the Magistrates' Court at Heidelberg for an intervention order pursuant to the *Crimes (Family Violence) Act*. The hearing was adjourned to 20 October 1997. On 30 September 1997 the first defendant applied for an intervention order alleging domestic violence by the plaintiff on 7 August 1997 and an abusive telephone call on 28 September 1997. On 20 October 1997 the Magistrates' Court at Heidelberg heard the applications together. The plaintiff's summons was dismissed. On the first defendant's summons an intervention order was made. A copy of the order made was not exhibited in this proceeding. No notice of appeal was given within 30 days after 20 October 1997. The appeal, notice of which was given out of time was heard in the County Court on 13 July 1999. The court refused to grant leave to appeal, being of the opinion that the failure to give notice of appeal within 30 days was not due to exceptional circumstances.

11. On 2 August 1998 charges were laid against the plaintiff for breaches of the intervention order made on 20 October 1997 which allegedly occurred on 16 July 1998.

12. The material does not make clear the final outcome of those charges. I shall assume the charges are outstanding and await the outcome of the present proceeding.

13. The order of the Magistrates' Court made on 20 October 1997 is attacked upon the basis that the *Crimes (Family Violence) Act* is inconsistent with the *Family Law Act* (Cth). By s109 of the Constitution when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. If this attack is well founded, the order made by the Magistrates' Court on 20 October 1997 is invalid and subsequent proceedings instituted against the plaintiff in August 1998 could not lawfully be instituted.

14. Mr Perkins submitted that at all material times there was on foot between the plaintiff and the first defendant a "matrimonial cause" within the meaning of s4(1) paragraph (e) of the definition of "matrimonial cause" and the only court with jurisdiction to make an order or grant an injunction with respect to the personal protection of a party to the marriage was the Family Court. The Family Court could do so pursuant to s114 of the *Family Law Act*. The applications made to the Magistrates' Court in September 1997, before the marriage was dissolved, was properly justiciable only in the Family Court because the proceedings were of a kind referred to in paragraph (e) of the definition of a matrimonial cause and the provisions of s114 covered the field, Mr Perkins argued.

15. It cannot be denied that only the Family Court can exercise the jurisdiction conferred by s114 to make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate. Pursuant to sub-s(4) the Family Court may impose a sanction under sub-clause (a), (b), (c), (d), (e) and (f).

16. Mr Perkins relied upon a decision of the Full Court of the Family Court *In the Marriage of English* (1986) 85 FLR 9; [1986] FLC 91-729; 10 Fam LR 808 which, he submitted, considered the proper limits of the application of the Family Court injunction power. The passage relied upon by Mr Perkins (at p20 of the joint judgment) was concerned with an undertaking given to the court by a wife in "vague" terms which covered conduct unrelated to the former marriage and not with inconsistency between State and Federal laws.

17. Mr Perkins submitted that the *Crimes (Family Violence) Act* 1987 (the State Act) created a jurisdiction, by Part 2 - Intervention orders, to adjudicate upon a class of cases which include

matrimonial causes. The remedy in the State Act, he argued, is the discretionary grant of injunctive relief, the same relief which the Family Court is empowered to grant arising out of a marital relationship.

18. The main purposes of the State Act are to provide for intervention orders in cases of family violence and to amend the *Crimes Act* 1958 (Section 1). Family Member is defined in relation to a person to include the spouse of that person (Section 3). Section 4 empowers the Magistrates' Court to make an "intervention order" in respect of a person in circumstances specified in paragraph s (a) or (b) or (c) of sub-section (1). By s5, an intervention order may prohibit or restrict a person from doing all or any of the things specified in sub-clauses (a) to (h) inclusive. The State Act contains in Part IV provisions relating to appeals and sanctions for breach of an order.

19. Since the State Act was enacted it has been cited in two reported cases in the Victorian Reports. The first of those decisions is *Fisher v Fisher* [1988] VicRp 93; (1988) VR 1028. In *Fisher*, Nathan J observed:

> "The nature and character of an intervention order is apparent. It is parallel to injunctive relief available in courts exercising equitable jurisdiction in civil matters".

20. His Honour had recourse to the Parliamentary debates to analyse intervention orders and the mischiefs intended to be remedied by the operation of such orders. The Minister, when introducing the *Crimes (Family Violence) Bill* in the Legislative Assembly on 29 April 1987, said:-

> "The major object of the Bill is to provide for intervention orders in cases of family violence. There orders are intended to complement rather than replace existing criminal law remedies, an intervention order is a civil remedy in the nature of an injunction; designed to provide ongoing protection to a victim of violence in the house. It is quite separate from criminal proceedings which may, and should, be taken if there is sufficient evidence to secure a conviction."

21. Nathan J concluded that the Act "introduces a novel but civil remedy in the form of intervention orders whilst preserving the existing remedies (albeit inadequate) to cure or prevent acts of family violence, namely the criminal offences of assaults and binding over orders".

22. I accept, with respect, and adopt His Honour's analysis of the operation of an intervention order in the civil jurisdiction of the Magistrates' Court in Victoria. Being a form of injunctive relief, the jurisdiction must be exercised only when the court is satisfied on the balance of probabilities of the matters required in paragraphs (a) or (b) or (c) in s.4(1). It should be noted that for breach of an order a person is guilty of an offence punishable summarily (s22). Breach of an order must be proved beyond reasonable doubt.

23. The second authority in which the State Act was considered, is *Kingsland v McIndoe* [1989] VicRp 22; [1989] VR 273; (1988) 12 Fam LR 460. The court was there concerned with an originating motion seeking an order absolute for a writ of *certiorari* and a writ of *mandamus* because the Magistrates' Court had dismissed applications under the State Act for want of jurisdiction. The issue raised in this proceeding was not addressed in Kingsland. My attention was not directed to any authority since the State Act was enacted in which a challenge has been made to its validity. Similar legislation exists in every State, the ACT and the Northern Territory.

24. Mr Perkins argued that the *Family Law Act* was intended by Parliament to cover the field when it enacted s114 and made it applicable to a matrimonial cause.

25. Ms Brennan submitted that the provisions in the State Act have a different scope and operation to the provisions in the Federal Act, s114. The State Act is mainly directed to protecting against family violence and includes, but is not limited to, spouses. Section 114 empowers the Family Court to grant injunctions in a wider range of circumstances than the State Act. This is clearly so. Section 114(1) of the *Family Law Act* empowers the court to grant an injunction; for the personal protection of a party to the marriage; restraining a party to the marriage from entering or remaining in the matrimonial home etc; restraining a party to the marriage from entering the place of work of the other party to the marriage; for the protection of the marital relationship; in relation to the property of a party to the marriage; relating to the use or occupancy of the matrimonial home. Whilst personal protection is akin to protection against family violence, the

two laws can operate concurrently and independently in relation to parties to a marriage.

26. No argument was raised against the power of the Commonwealth Parliament to enact s114. The only basis upon which the *Crimes (Family Violence) Act* 1987 can be invalidated is s109 of the Constitution. The State of Victoria has legislative powers to enact the *Crimes (Family Violence) Act* but s109 can operate to affect its validity in whole or in part.

27. The first test of inconsistency is whether the Commonwealth Parliament evinced its intention to cover the whole field when it enacted the *Family Law Act*. "That is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field". *Clyde Engineering Co Ltd v Cockburn* [1926] HCA 6; (1926) 37 CLR 466 at 489; 32 ALR 214. The second test of inconsistency was also expressed in *Cockburn's case* by Isaacs J at CLR 490:

> "Where that wholesale inconsistency does not occur, but the field is partly open, then it is necessary to inquire further and possibly to examine and contrast particular provisions. If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent. It is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is a palpable inconsistency."

28. In the present case there is no inconsistency in the second sense. The State Act creates a criminal offence, if a family member is proved to breach an intervention order the purpose of which is to prevent family violence. The Federal Act does not create a criminal offence. The sanctions for breaching an injunction are set out in s114(4) and include imprisonment for contempt of court. But, no inconsistency of the kind enunciated by Isaacs J arises out of the two enactments, in any opinion.

29. In *Ex Parte McLean* [1930] HCA 12; (1930) 43 CLR 472; 36 ALR 377, Dixon J (at CLR 483) considered inconsistency when a State law and a Federal law legislated upon the same subject matter and prescribed punishment, somewhat different in each Act for the same conduct. His Honour said:

> "If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed."

30. Another authority, *R v L* [1991] HCA 48; (1991) 174 CLR 379; [1991] FLC 92-266; 103 ALR 577; 15 Fam LR 122; 66 ALJR 36, is relied upon by Ms Brennan to illustrate that the *Family Law Act* does not show an express or implied intention to completely, exhaustively, or exclusively express the law governing personal protection against family violence between spouses. In a joint judgment, Mason CJ, Deane and Toohey JJ considered a State Act which provided that "no person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person" and s114(2) of the *Family Law Act* which provided: "In exercising its powers under sub-section (1), the Court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights" for inconsistency within s109 of the Constitution and found no inconsistency. The court said:

> "Whatever the scope of the power of the Parliament to make laws with respect to marriage it is apparent that the Commonwealth Act does not attempt comprehensively to regulate the rights and obligations of the parties to a marriage."

31. I am satisfied that in enacting s114 the Commonwealth Parliament did not intend to completely, exhaustively or exclusively make a law governing the conduct of one spouse to the other. In the context of threatened family violence a State court is authorised to make an order designed to keep family members apart and, if the order is disobeyed, a criminal offence is committed by the disobedient person and punished in the same court. The jurisdiction conferred on the Family Court has a purpose to protect a party of the marriage but it does so by means of an order or injunction. Because an injunction is granted in the exercise of equitable jurisdiction all the rules of equity apply.

32. However, s114AB clearly shows that the Commonwealth Parliament did not intend s114 to exclude or limit the operation of a prescribed law of a State or Territory that is capable of operating concurrently with it. The *Crimes (Family Violence) Act* 1987 (Vic) is a prescribed law under Regulation 19 (aa) of the *Family Law Regulations* 1984. Dawson J observed in *R v L* (*supra*, at 404):

> "The sections mentioned in s114AB(1) deal with the injunctions and powers of arrest in situations of domestic violence and regulation 19 of the *Family Law Regulations* (Cth) prescribes a member of State and Territorial enactments dealing directly or indirectly with remedies for domestic violence."

33. Mr Perkins attempted to argue that s114AB was an invalid exercise of Federal law making power because it effectively conferred Federal jurisdiction upon a State court. I did not entertain the argument because no notice was given to the Federal Attorney-General of the invalidity of s114AB before the hearing began.

34. In my opinion, the Commonwealth Parliament did not disclose a legislative intent to cover the field. Further, there is no inconsistency between the two laws concerned with family violence. The State Act does not impair or detract from the Commonwealth Act which conferred jurisdiction upon the Family Court to make an order or grant an injunction in the circumstances specified in s114.

35. It follows that I find the Magistrates' Court at Heidelberg had jurisdiction to make an intervention order on 20 October 1997. No appeal was taken from that order to the County Court pursuant to s20 of the *Crimes (Family Violence) Act* 1987. The plaintiff said in the County Court that he was unaware until mid May 1999 that he had a right of appeal. On 13 July 1999, in the County Court, the trial judge found that the failure to give notice of appeal in the time prescribed by the *Magistrates' Court Act* 1989 was not due to exceptional circumstances and dismissed the appeal.

36. Unless the plaintiff can persuade this court that the trial judge in the County Court erred in law on 13 July 1999 the orders sought in paragraphs 4 and 5 of the motion cannot be made.

37. The declaration sought in paragraph 6 is refused. It follows that the orders sought in paragraphs 2 and 3 of the motion are refused.

38. I propose to hear Mr Perkins on the remaining issue why the order of the County Court on 13 July 1999 should be quashed and a re-hearing of the appeal be granted.

39. Costs are reserved.

APPEARANCES: For the Plaintiff: Mr DA Perkins, counsel. Kuek & Associates, solicitors. For the Defendant: Ms S Brennan for the Attorney-General of Victoria. Victorian Government Solicitor.
