08/88

FAMILY COURT OF AUSTRALIA AT MELBOURNE

NICOLAOU v NICOLAOU

Kay J

1 March 1988

FAMILY LAW – INJUNCTION – FORMER MATRIMONIAL HOME – SOLE USE AND OCCUPATION SOUGHT – APPLICANT HAVING PREVIOUSLY SOUGHT AN INTERVENTION ORDER – SUCH PROCEEDINGS SUBSEQUENTLY DISCONTINUED – WHETHER APPLICANT PROHIBITED FROM SEEKING INJUNCTION IN FAMILY COURT – "MATTER" – EFFECT OF ORDER FOR SOLE USE AND OCCUPATION – WHETHER CIRCUMSTANCES APPROPRIATE FOR INJUNCTION: *FAMILY LAW ACT* 1975, S114AB; *CRIMES (FAMILY VIOLENCE) ACT* 1987, SS4, 5.

Section 114AB(2) of the *Family Law Act* 1975 provides:

> "Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a matter in respect of which he would, but for this sub-section, have been entitled to institute a proceeding under section 114 or 114AA, the person is not entitled to institute a proceeding under the section concerned in respect of that matter."

The word "matter" in its widest term denotes controversy which might come before a court of justice. Where a person sought an *ex parte* intervention order from a Magistrates' Court pursuant to the provisions of the *Crimes (Family Violence) Act* 1987 but later discontinued the proceedings, that person had instituted a proceeding in respect of a controversy and accordingly, was not entitled to institute any further proceedings under s114 of the *Family Law Act*.

***Obiter:* The removal of a person from the former matrimonial home is a most Draconian measure and is a matter that ought not be treated lightly. In the present case, if the Court were empowered to grant the wife the sole use and occupation of the former matrimonial home to the exclusion of the husband, the facts were not sufficient to justify the granting of the application.**

KAY J: [1] The wife is 44 and the husband 46. They have three adult sons aged 20, 21 and 23. At least one of the children presently resides in the matrimonial home, and there is some argument *inter partes* as to whether a second child is living permanently in the home or just using it on an occasional basis as his place of residence. On either 2 or 9 February there was a dispute between the parties arising out of the husband's reaction to the intended marriage of a female person with whom the parties are acquainted.

The wife says in her material, and the husband does not expressly deny it in his material although it is now denied by his counsel from the bar table, that the husband admitted that he had been conducting an illicit affair with the lady in question, and he was distressed about her forthcoming marriage. He then took an overdose of drugs and was admitted to hospital temporarily. She says that since that time he has absented himself from the matrimonial home overnight on all but four occasions, whilst he alleges that he has been present at the matrimonial home overnight on all but three occasions.

She says that the situation at home has become intolerable. The wife removed, for reasons of her own which are not fully explained, her jewellery and her furs from the home. The husband, it would appear from the material, not being content with the situation, then removed all of the wife's clothing and the telephones from the home, and held out the return of those items upon the return to the home of the wife's jewellery and furs. The husband justified his removal of the telephones on the basis that the wife was informing members of their community and their relatives of her perception of his misdeeds. The wife says that there was a dispute between them on or about 11 February, which led to the husband assaulting her. She describes the assault in terms that would have been no doubt distressing to her, but in the overall context of assaults seen by this Court as a fairly minor one.

The husband says it was the wife who got upset on that occasion and had to be restrained by friends of the family, and that he did not partake in the assault. There was a general allegation by the wife of previous assaults with no particulars provided. The wife says that her economic situation is such that she cannot afford to leave the matrimonial home and find accommodation elsewhere. The husband says she could go and live with one of the parties' children. The husband says his economic situation is such that he cannot afford to leave the home, but in any event the wife counters that by saying the husband is in fact not at the home at the moment. I have not heard from the parties and have not been able to determine the correct factual version of what has occurred.

The matter is further complicated by the wife having brought proceedings in the Magistrates' Court at Melbourne on an *ex parte* basis on 12 February 1988 pursuant to the provisions of the *Crimes (Family Violence) Act* 1987 (Victoria), wherein she sought and obtained an "intervention order", the conditions of which restrained the husband from assaulting, harassing, threatening or intimidating the wife. It is common ground from the bar table that those proceedings were never served on the husband, and that the wife has now discontinued them.

Her application before this Court was filed on 18 February 1988, and the relief that she is seeking to have me grant today is a restraint on the husband from entering in or upon the grounds of the former matrimonial home at 4 Alfred Street North Melbourne, and that she and the children of the marriage have the sole use and occupation of the property to the exclusion of the husband pending further order.

The husband's cross-claim filed 26 February is to have the wife's application dismissed, and he seeks some property orders which would, on one reading of them, result in a sale of the home in March 1989. **[4]** One matter particularly troubles me in this exercise apart from the general law applicable under applications under Section 114. The provisions of Section 114AB of the *Family Law Act* came into effect in 1983, but had particular effect in Victoria until the commencement of the *Crimes (Family Violence) Act* 1987 in December of 1987. Section 114AB (1) provides:

> "Sections 114 and 114AA are not intended to exclude or limit the operation of a prescribed law of a State or Territory that is capable of operating concurrently with those sections."

Section 114AB(2):

> "Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a matter in respect of which he would, but for this sub-section, have been entitled to institute a proceeding under section 114 or 114AA, the person is not entitled to institute a proceeding under the section concerned in respect of that matter."

Section 114AB was enacted after the decision of the Supreme Court of South Australia in *Tape v Pioro* (1983) 67 FLR 219 where Mitchell J held that the South Australian state legislation involving questions of domestic violence and in particular Section 99 of the *Justices Act* (1982) (South Australia) had to give way to any proceedings brought under the *Family Law Act*. Her Honour held that if the jurisdiction of the Family Court is invoked by an application to it by a spouse a court of summary jurisdiction would cease to have jurisdiction to make an order under s99 of the *Justices Act* upon a complaint which related to the behaviour of either spouse towards the other or towards the children of the marriage.

[5] The Family Law Council in its 1982/3 *Annual Report* in commenting upon the proposed draft section 114AB, indicated that the 1983 amendment had been drafted so as to ensure that it does not render inoperative the relevant State provisions. In the explanatory memorandum to the introduction of the Bill in the Senate circulated by the then Attorney-General, the Honourable Gareth Evans, it was said:

> "The clause also inserts a new subsection 114AB to enable preservation of the operation of State or Territory domestic violence law."

In my view Section 114AB(2) goes a lot further than appears to have been intended by the legislation. The section is clear in its words. It talks about the institution of a proceeding "in respect of a matter". "Matter" has been judicially defined on a number of occasions. An extensive

discussion of what is a "matter" may be found in the judgment of Gee J in *Saba v Saba* (1984) ¶FLC 91-579 and further reference in the Full Court decision of *McKay v McKay* (1984) ¶FLC 91-573. In *South Australia v Victoria* [1911] HCA 17; (1911) 12 CLR 667 at 674; 17 ALR 206, the Chief Justice in determining what was intended by section 75 of the Constitution as to the words "All matters between the States" held that the word "matters" in common use in the widest term denotes controversies which might come before a court of justice. If one substitutes the word "controversy" for "matter" in an interpretation of section 114A6(2) it then reads:

> "Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a controversy in respect of which he would, but for this sub-section, have been entitled to institute a proceeding under the section concerned in respect of that controversy."

The proceeding instituted by the wife in the Magistrates' Court, on the limited material I have before me, was instituted arising out of the controversy between the husband and the wife that had occurred when the husband allegedly made an admission as to adultery and then subsequently assaulted the wife on 11 February. The only additional matters that have occurred between that date and this in respect to the wife's material is the continued partial absence of the husband from the home and removal of the telephone sets and clothing. In my view those actions together with the earlier actions, are part of a continuing controversy between the husband and wife arising out of the events that commenced to occur either on 2 or 9 February.

The wife has discontinued her action in the Magistrates' Court, but in my view it is the institution of the proceedings which prohibits any further proceedings being brought under section 114 of the *Family Law Act* by the wife. The paradox is that the husband is free to bring such proceedings if he likes. Section 114AB(2) only prohibits an application being instituted in this Court by the person who has instituted it in another court.

[7] It has been urged upon me by counsel for the wife that the only relief she sought in the Magistrates' Court or apparent on the fact of the documents, was a non-molestation order or the equivalent thereof. However the relief she sought from the Magistrates' Court was an intervention order under the provisions of s4 of the *Crimes (Family Violence) Act* 1987 and s5 of that Act enables the Magistrate without limiting the generality of s4 when making such an order to do many things, one of which is to prohibit the husband from coming in to a particular locality or from entering upon any particular premises. The fact that he gave different relief does not, in my view, in any way lessen the fact that the proceedings which were instituted were proceedings brought under a prescribed law of a State or Territory in respect of the personal protection of the wife.

Regulation 19 of the *Family Law Regulations* prescribes the *Crimes (Family Violence) Act* 1987 to be such prescribed law within the meaning of s114AB(2). Those proceedings arose out of the controversy between the parties; namely the apparent breakdown of the marriage. Section 114AB(2) is a grossly unsatisfactory piece of legislation in my view. It limits very much the actions that this Court can take. It places on parties a very heavy burden of election as to which jurisdiction they need to go to. The intention of the legislature, as I perceive it, was to ensure that a party who needed the protection of State domestic violence legislation could freely go to seek a cheap and rapid remedy without the need to come in to the Family Court, and that is a most laudable situation.

[8] However, to then preclude the Family Court when taking a global look at all of the matters involved in the marital breakdown from exercising any of its jurisdiction under s114 ought not to have been the intention of the legislation. I find myself, however, unable to read the legislation so that I can achieve the result that the legislation ought to have intended to achieve; namely overcoming the problem of the decision of the South Australian Supreme Court in *Tape v Pioro*. For those reasons I propose to dismiss the wife's application.

If I am wrong about my interpretation of s114AB(2) and the wife does have the right notwithstanding having already chosen to take proceedings under the *Crimes (Family Violence) Act* 1987 to still come to this Court to seek relief under s114, then in my view, given the facts of this controversy as they have developed to date, it would not be proper within the meaning of s114 for me to grant the injunction sought. The removal of a person from their home is a most Draconian measure. Next to an exclusion of persons coming into contact with their own children,

in my view it is almost the most serious order that this Court can make. It is a matter that ought not be treated lightly. These parties have lived together for 25 years. They are presently undergoing some turmoil. The behaviour of the husband deserves no commendation whatsoever.

[9] In the decision of the Full Court in *Fedele v Fedele* (1986) FLC ¶91-744 reference is made to the decision of Lindenmayer J in *Price's case* (unreported) and referred to in the decision of the Full Court of *Davis v Davis* (1983) FLC ¶91-319. His Honour held that all that is necessary is that the Court should regard the situation between the parties as being such that it would not be reasonable or sensible or practicable to expect them to continue to remain in the home together.

The words of the section are that the Court may make such order as it thinks "proper". Whilst there is disharmony and whilst it remains to be seen whether it is presently practicable to enable these parties to continue to live in the same home together, the conduct of the husband in my view falls considerably short at this time of justifying his expulsion from the home.

It may be that with the continuation of the crisis between the parties matters will reach an intolerable level where the Court has no option but to remove one or other party from the home if the party who feels aggrieved, is unable to remove themselves from the home. There is a significant underlying air in this case of jockeying for position in the property settlement.

There is an Order 24 conference to take place very shortly. The wife may feel strengthened in her resolve to hold out for a better settlement if the husband is out of the home. **[10]** If the husband is in the home, the wife may be weakened in her resolve to hold out for a better settlement, wanting to rapidly remove the husband from the home. I am conscious of the conflict that is occurring in that situation. I think it is appropriate that these parties obtain counselling as to their present crisis situation as rapidly as possible, and it may be that a mature decision needs to be made by one or other of them as to the future of the marriage. If there is no future in the relationship then there should be a civilized withdrawal of one or other or both of them from the present situation. The only order I propose to make now, apart from the dismissal of the application at this time, is an order for counselling pursuant to s14 of the *Family Law Act*.

I propose to have this judgment drawn to the attention of the Attorney General of both the State of Victoria and the Commonwealth, as I find the present situation and uncertainties created by the implementation of the *Crimes (Family Violence) Act* and the enactment of s114AB(2) to be a most unsatisfactory situation for the community. There will be orders by consent as per the Minutes tendered. I dismiss the wife's application in paragraphs (a) and (b) of her application filed 18 February 1988. **[11]** I make an order pursuant to s14 that the parties attend counselling, and that that take place as a matter of urgency. If I am correct in my interpretation of s114AB(2), then the wife's remedies lie in the Magistrates' Court under the State legislation. The paradox is that if the husband feels the position to be most unsatisfactory in the home, he can come here and seek an order for sole use and the wife cannot. That seems to me to be an absurd result.

It may be that the urgent repeal of s114AB(2) will remedy the situation as s114AB(1) appears to have cured the defect mentioned in *Tape v Pioro* 67 FLR 219. At the very least once proceedings under the State law have been discontinued or have expired by effluxion of time, there should be no bar to this Court offering an effective remedy. The evil of "forum shopping" can be well enough overcome by courts declining to act where there are existing proceedings or orders providing suitable remedies.
