

46/82

FAMILY COURT OF AUSTRALIA AT ADELAIDE

In the Marriage of MAIORANO and MAIORANO

Gun J

3 November 1981 — (1981) 7 Fam LR 580; [1981] FLC 76,693 (¶91-099)

FAMILY LAW – ENFORCEMENT OF ORDER – GARNISHMENT – FUTURE PAYMENTS OF MAINTENANCE – WHETHER ORDER FOR GARNISHMENT OF WAGES TO SECURE FUTURE PAYMENTS OF MAINTENANCE CAN BE MADE: FAMILY LAW ACT 1975, S106; FAMILY LAW REGULATIONS, RR132(1), (5); 133; 134(1), (5), (9), (21); 135; MATRIMONIAL CAUSES ACT 1959, S106; THIRD SCHEDULE - MAINTENANCE ORDERS (COMMONWEALTH OFFICERS) ACT 1966, S6(1).

The Family Court of Australia made an order that the husband pay certain child maintenance. The husband had failed to comply with that order. Subsequently, the wife applied to a court of summary jurisdiction for garnishment orders against the husband's employer for (a) payment of the arrears of maintenance and (b) payment of future maintenance. The court of summary jurisdiction refused to make an order for garnishment of the husband's wages to secure future payments of maintenance payable by the husband. In the present proceedings, the wife appealed from that refusal to make the order sought as to future maintenance—

HELD: Appeal allowed.

(a) Unless there is a statutory provision to the contrary, a garnishee order cannot be made in respect of future payments of wages because such payments would not, at the date of the making of the garnishee order, be presently due and payable to the judgment debtor. Furthermore, in relation to maintenance payments, the debt is not due by the debtor until the day on which the maintenance is required to be paid. The question for determination was whether the *Family Law Act* and regulations extend the power of the Court to make garnishment orders in respect of payment of wages to be made in the future to the person liable to make maintenance payments.

(b) The provisions of reg 132(1), 132(5) and 134 of the *Family Law Regulations* make it clear that garnishment orders can be made in respect of future earnings to secure future payments of maintenance.

In the Marriage of Paleopoulos 38 FLR 171; [1979] FLC 90-704; 5 Fam LR 461, discussed; *Boyle and Boyle* (Family Court of Australia (Baker J) unreported, judgment delivered 2 October 1979) not followed.

GUN J: This is an appeal from an order made by a Special Magistrate on 3 June 1981 refusing to make an order for garnishment of the husband's wages to secure future payments of maintenance payable by the husband. The proceedings before the learned Special Magistrate were to enforce an order for maintenance which had been made by me in this Court on 10 September 1980 that the husband pay the sum of \$12.50 per week for the maintenance of each of the two children of the marriage. The husband had not complied with that order and, at the time of the hearing, before the learned Special Magistrate, the arrears of maintenance which had accrued under my order amounted to \$950. The proceedings were taken on behalf of the wife by the Department for Community Welfare. An officer of that Department, who represented the wife before her Honour, sought garnishment orders against the husband's employer for:

1. Payment of the arrears of maintenance at the rate of \$10 per week.
2. Payment of future maintenance of \$25 per week pursuant to my order dated 10 September 1980.

The learned Special Magistrate found that the husband owed the total sum of \$1,075 pursuant to my order and a previous maintenance order and made the following order in respect of that amount;

- "1. That the said employer make out of the respondent's earnings payment of \$10.50 weekly payable to the Director-General for Community Welfare, 50 Grenfell Street, Adelaide, such payment being \$10 for transmission to Suzanne Joy Maiorano and 50c expenses, the first such deduction to be made within 14 days of the service of this order on the garnishee.
2. That the 'protected earnings rate' be set at \$120 per week."

In relation to the garnishment order sought by the wife to secure payment of future maintenance, the learned Special Magistrate said:

"As to the application for a garnishment order in respect of the future maintenance payable under the order of 10 September 1980, I am bound by the judgment of the Honourable Mr Justice Baker in the matter of *Boyle and Boyle* No P29 of 1978 in the Family Court of Australia sitting at Parramatta and delivered on 2 October 1979. Mr Justice Baker held that under the regulations as they exist the Court does not have the power to order garnishment in respect of future maintenance. Therefore that part of Mr Walters' application is refused."

In the case of *Boyle* referred to by the Magistrate, Baker J considered (*inter alia*) an application by the wife for the issue of a garnishment order against the husband's employer in respect of future payments of maintenance. In those proceedings, the wife was not represented and it appears that no argument was addressed to his Honour as to the construction of the relevant regulations under the *Family Law Act*. In relation to the wife's application for a garnishment order, Baker J said:

"The other order which the wife seeks is in relation to the garnishment in respect of future payments of maintenance due under the Court of Petty Sessions order above-referred to. A close perusal of the regulations leads me to the inescapable conclusion that this Court does not have the power to order a garnishment in respect of future maintenance either for children or for spouses. Garnishment orders can only relate either to pre-existing debts or to arrears under existing orders and I therefore regret that the order which the wife seeks in this regard cannot be made."

The wife's counsel submitted that the relevant section and regulations under the *Family Law Act* empowered the Court to make garnishment orders in respect of future payments of maintenance. She submitted that I should decline to follow the decision of Baker J in *Boyle's case*.

It is clear that, in other Courts, garnishment or garnishee orders cannot be made unless the debt due by the garnishee to the debtor is presently due and payable. Unless there is statutory provision to the contrary, a garnishment or garnishee order cannot be made in respect of future payments of wages because such payments would not, at the date of the making of the garnishee order, be presently due and payable to the judgment debtor. Furthermore, in relation to payments of maintenance, the debt is not due by the debtor to the creditor until the day on which the maintenance is required to be paid. The question to be determined is whether or not the *Family Law Act* and *Regulations* extend the power of the Court to make garnishment orders in respect of payment of wages to be made in the future to the person liable to make payments of maintenance pursuant to an order of the Court.

Section 106 of the *Matrimonial Causes Act* 1959 (as amended) provided as follows:

"106. An order under this Act for the payment of maintenance may be enforced in accordance with the Third Schedule to this Act and the provisions of that Schedule have effect in relation to the enforcement of such orders."

Paragraphs 3, 5 and 8 of the Third Schedule to the *Matrimonial Causes Act* were as follows:

"3 Subject to this Schedule, a person entitled to receive payments under a maintenance order may apply to—

- (a) the court that made the order; or
 - (b) the court in which the order is for the time being registered under section 103 or section 105 of this Act
- for an attachment of earnings order.

5. If the court is satisfied that the defendant is a person to whom earnings are payable or are likely to become payable and

- (a) that, at the time when the application was made, there was due under the maintenance order and unpaid an amount equal to not less than

- (i) in the case of an order for weekly payments – four payments; or
 - (ii) in any other case – two payments; or

- (b) that the defendant has persistently failed to comply with the requirements of the order
- the court may, in its discretion, by an order require a person who appears to the court to be the defendant's employer in respect of those earnings or a part of those earnings to make out of those

earnings or that part of those earnings payments in accordance with paragraph 13 of this Schedule.

8. The rate to be specified as a normal deduction rate shall be the rate at which the court considers it to be reasonable that the earnings to which the order relates should, or should on the pay-day or pay-days to which the rate is to be applicable, as the case may be, be applied in satisfying the requirements of the maintenance order but not exceeding the rate that appears to the court to be necessary for the purpose of

(a) securing payment of the sums from time to time falling due under the maintenance order; and

(b) securing payment within a reasonable time of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order that are payable by the defendant."

There is no doubt that the attachment of earnings provisions in the *Matrimonial Causes Act* were frequently invoked and that there was never any suggestion that such orders could not be made. It is worthy of note that the words "garnishment" or garnishee" do not appear anywhere in the *Matrimonial Causes Act*. The relevant provisions of the *Family Law Act* are sec 106, reg 132(1)(x), 132(5) and 134. Section 106 is as follows:

"106(1) The regulations may make provision for and in relation to the enforcement of decrees made under this Act including—

(a) provision for conferring jurisdiction on the Family Court or on courts of the Territories or investing State courts with federal jurisdiction; and

(b) in the case of a decree being a maintenance order under Part VIII— provision for an officer of a court exercising jurisdiction under this Act, a prescribed authority of the Commonwealth, of a State or of a Territory or the person for the time being holding a prescribed office under a law of the Commonwealth, of a State or of a Territory, in his or its discretion, to institute and prosecute proceedings on behalf of the person entitled to moneys payable under that order for the purpose of enforcing payment of those moneys.

106(2) Without limiting the generality of sub-section (1), regulations made by virtue of that sub-section may provide for—

(a) the attachment of moneys payable by the Commonwealth, a State, a Territory or the Administration of a Territory, or by an authority of the Commonwealth, of a State or of a Territory, other than money as to which it is provided by any law of the Commonwealth, of a State or of a Territory that they are not liable to attachment; and

(b) matters of priority as between the execution of order made under the regulations, or under the repealed Act, for the attachment of such moneys and the execution of orders made in accordance with the *Maintenance Orders (Commonwealth Officers) Act 1966*."

Regulations s132(1)(a) and 132(5) are as follows:

132(1) This regulation applies to—

(a) an order that a party to a marriage pay maintenance or other money for the benefit of the other party to the marriage or of a child of the marriage and an order referred to in section 109 of the Act; ..."

"(5) An order to which this regulation applies may be enforced by one or more of the following means—

(a) garnishment;

(b) seizure of property;

(c) sequestration of estate."

In my opinion, the fact that an order that a person pay maintenance can be enforced not only by seizure of Property and sequestration, but also by garnishment, is an indication that the garnishment power was intended to apply to future payments of maintenance. Regulation 134 sets out the appropriate procedure in relation to proceedings for garnishment and the powers of the Court upon the hearing of such applications. In reg 134(1) "garnishee" is defined as follows:

"'garnishee' means a person or corporation, the Commonwealth, a State, or an authority or institution constituted by or under a law of the Commonwealth, a State or Territory, from whom the applicant claims that money is due or accruing to the respondent,"

The use of the words "or accruing to the respondent" suggests to me that it was intended that the Act should apply to amounts which will accrue to the respondent in the future. If it had been intended that the Court should only have power to make garnishment orders in respect of maintenance payments which were due at the date of the hearing of the application, it is unlikely,

in my opinion, that the words "or accruing to the respondent" would have been included in the regulation.

Regulation 134(5) is as follows:

"(5) An application for a garnishment order shall state—

(a) particulars of the moneys payable by the respondent;

(b) efforts made by the applicant or any other person to obtain payment of those moneys;

(c) details of any relevant information furnished by the respondent in response to a notice under sub-regulation 133(1) or obtained in an examination under regulation 133;

(d) particulars of the moneys referred to in sub-regulation (4); and

(e) the order sought against the garnishee."

(Emphasis added.)

The first comment I make about this regulation is that it has been poorly drafted. Indeed, I endorse the criticism made of this regulation by Smithers J in the case of *Paleopoulos* 38 FLR 171; [1979] FLC 90-704 at p78,753; 5 Fam LR 461. The words "moneys payable" which appear in para (5)(a), and which I have emphasized, are ambiguous in that they could be construed as referring to moneys presently due and payable or to moneys which may be payable in the future. Sub-regulation 5(b) would seem, however, to qualify the words used in para 5(a) in that the application must state the efforts made by the applicant or any other person to obtain payment of 'those' moneys. Clearly, the applicant would not be able to state what efforts he had made to collect moneys which had not become due. This could lend some support to the view taken by Baker J. On the other hand, it would seem to me to be pointless to require an applicant to state what efforts he or she had made to obtain payment if the powers of the Court under the regulation were limited to arrears of maintenance which had already accrued. If it had been intended that the regulation should only apply to maintenance not paid at the date of the application, one would have expected that the regulation would merely require the application to state the amount of the arrears.

Counsel for the wife, however, pointed to other regulations and submitted that they clearly show that the intention of the legislature was to give the Court power to make garnishment orders in respect to future orders. She referred firstly to reg 134(21) which provides as follows:

"(21) For the purposes of the *Maintenance Orders (Commonwealth Officers) Act* 1966, an order made under this regulation in relation to the enforcement of a maintenance order shall have the same force and effect as an order made under the Third Schedule to the repealed Act."

Section 6(1) of the *Maintenance Orders (Commonwealth Officers) Act* (No 59 of 1966) provides as follows:

"(1) Subject to this Act and the regulations, where a law of a State or Territory contains provisions (whether enacted before or after the commencement of this Act) for or in relation to the enforcement of maintenance orders by means of attachment of earnings orders directed to persons who are employers within the meaning of that law, those provisions apply, by force of this Act and as a law of the Commonwealth in relation to the enforcement of maintenance orders against persons to whom moneys of a kind referred to in those provisions as earnings are or may become payable by the Commonwealth or a Commonwealth authority and so apply as if a reference in those provisions to an employer included a reference to the Commonwealth and to every Commonwealth authority, but otherwise in like manner as those provisions apply as part of the law of the State or Territory."

It is clear that this section was passed to ensure that persons employed by the Commonwealth were subject to orders which could be made under the Third Schedule of the *Matrimonial Causes Act*. The intention of reg 134(2) is clearly to extend the liability of Commonwealth employees to have orders made against them for attachment of their earnings so that such orders could be made under the *Family Law Act*. It is therefore clear that it was intended that attachment of earnings orders could be made under the *Family Law Act* in respect of Commonwealth Officers. It would be extraordinary if the legislature had intended to limit the operation of the regulations so that the only persons whose earnings could be attached were persons employed by the Commonwealth.

Counsel for the wife then drew my attention to the differences in wording of reg 134 on the one hand, and reg. 133 and 135 on the other. Regulation 133 deals with and provides a summary procedure on the refusal or failure of a person to comply with (*inter alia*) an order for maintenance.

Regulation 133(2) is as follows:

"(2) Where a person against whom an order referred to in paragraph 132(1)(a), (b) or (e) was made *has refused or failed to comply with the order*, the person entitled to moneys payable under the order or the authority or person entitled to take proceedings on behalf of the person so entitled for the purpose of enforcing payment of those moneys may apply to the registrar of the court that made the order or of a court in which the order is registered for the issue of a summons under this regulations." (Emphasis added.)

Regulation 135 deals with the powers of the Court to order seizure of personal property. Regulation 135(1) provides as follows:

"(1) In matters to which regulation 132 applies, the registrar or other authority of person entitled under that regulation to take proceedings for enforcement may apply to the court for an order for seizure of personal property belonging to a person who *has failed or refused to comply with an order* of the court specified in that regulation." (Emphasis added.)

Both regulations clearly envisage proceeding only against a person who has failed to comply with an orders. In other words, the proceedings could only relate to maintenance then due and unpaid. Regulation 135(3)(a) provides that an application for seizure of property shall state particulars of the moneys not paid by the person against whom the order is sought. In contrast, reg 134(5) uses the expression "moneys payable by the respondent". Counsel for the wife submitted that I should draw the inference that the words 'Moneys payable' used in reg. 134(5) must therefore refer to moneys which are payable in the future, although they are not yet due. She also pointed out that reg 134 makes no provision for the amount of arrears to be specified.

Regulation 134(9) provides as follows:

"(9) Where the court makes a garnishment order attaching the earnings of the respondent, it shall—
(a) specify the periodic amount to be deducted from the respondent's earnings in satisfaction of the order, that is to say, the 'normal deduction rate';
(b) specify an amount fixed by the court as the amount below which the respondent's earnings shall not be reduced by compliance with the order, that is to say, the 'protected earnings rate';
(c) specify the person to whom, the place at which and the manner of payment of amounts to be paid by the garnishee under the order;
(d) specify the amount that the garnishee may deduct from the normal deduction rate referred to in paragraph (a) for administrative expenses; and
(e) specify the date from which the payments shall commence."

Counsel for the wife pointed out that that sub-regulation makes no provision for including in a garnishment order the date when payments by the garnishee shall cease. She submitted that if garnishment orders could only relate to arrears of maintenance, then one would have expected the order to specify the total amount payable so that the garnishee would know when to cease making payments. She submits that this is a clear indication that it was intended that the regulation should apply to future payments.

In the case of *Paleopoulos*, to which I have already referred, Smithers J said at p78,752:

"The provisions in reg 134 are, as has been pointed out, quite different from the traditional garnishment provisions. The latter have been included in the regulation but together with further provisions. That in itself suggests to me that it was intended to widen the scope of moneys which are to be subject to garnishment."

Although in that case Smithers J was dealing with a different aspect of reg 134, I believe that his remarks can be applied generally to the regulation. When one looks at reg 132(1) and (5) and the provisions of reg 134, it is clear, in my opinion, that the legislature intended that garnishment orders could be made in respect of future earnings to secure future payments of maintenance. In my opinion, this view is supported by the other matters to which I was referred by counsel for the wife. For these reasons, I respectfully disagree with the decision of Baker J in the case of *Boyle*. I therefore allow the appeal.