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FAMILY COURT OF AUSTRALIA — FULL COURT at ADELAIDE

In the Marriage of McCARNEY (BJ and S)

Asche and Marshall S JJ and Joske J

3 February 1977

(1977) 29 FLR 78; 16 ALR 220; 2 Fam LR 11,670 [1977] FLC 76,051 (¶90-200) (Noted 52 ALJ 384; 8 Fed LR 494)

FAMILY LAW – ACTION TAKEN BY THE WIFE IN RELATION TO THE MATRIMONIAL HOME – THERE WERE NO PRINCIPAL PROCEEDINGS FOR RELIEF AFOOT IN THE FAMILY COURT – APPLICATION BY THE HUSBAND IN THE FAMILY COURT FOR AN INJUNCTION TO PREVENT THE WIFE FROM PURSUING HER ACTION IN THE SUPREME COURT – WHETHER JURISDICTION IN THE FAMILY COURT TO GRANT THE INJUNCTION: *FAMILY LAW ACT* 1975, SS79, 114.

A wife appealed successfully from injunctions restraining her from dealing in any way with her interest in the matrimonial home and from pursuing a claim relevant to it in the Supreme Court of South Australia under the *Law of Property Act*. There were no proceedings for principal relief afoot. There were differences between the spouses concerning the contributions of each to the acquisition of the home. The principles by which title to or possession of the property would be decided under that Act differ considerably from those that would be applied under s79 of the *Family Law Act*. The husband believed it would be to his advantage to pursue the matter under the *Family Law Act* and so sought the orders he did.

The Full Court held that there was no jurisdiction to grant the injunctions that were granted insofar as they attempted to preserve the right of the husband to make a claim, under s79 and prevented the wife from proceeding in another court of competent jurisdiction to seek relief to which she was entitled by law. Their Honours examined several cases concerning the problem of reconciling the injunctive power with the power to make orders in respect of property: *Russell v Russell*; *Farrelly v Farrelly* (1976) FLC 90-039: *Davis and Davis* (1976) FLC 90-062; *Farr and Farr* (1976) FLC 90-133; *Mazein and Mazein* (1976) FLC 90-053; *Mills and Mills* (1976) FLC 90-079. They found significant differences between s114(1) and s114(3), the latter being ancillary to a matrimonial cause, the former being a specific matrimonial cause in its own right. The Court summarised its own conclusions as follows:

1. An injunction under the *Family Law Act* can only be granted if it arises out of the marital relationship. s114(1) *Mills and Mills*; *Farr and Farr* – or in aid of the exercise of the court's jurisdiction, s114(3). In many cases there will be an overlapping of jurisdiction under these sub-sections.

2. There is no jurisdiction to grant an injunction solely to protect or preserve a prospective right under s78 or s79 where that right has not been invoked by the issue of an application for divorce, nullity or declaration.

3. Subject to (2), an injunction may be granted in relation to property before proceedings for divorce, nullity or declaration have been instituted if it can be shown to arise out of the marital relationship or be in aid of the Court's jurisdiction under the Act provided it does not purport to exercise powers referable only to s78 and s79.

4. In determining whether or not an injunction should be granted in the type of circumstances set out under (3) the Court in exercising its discretion must *inter alia*, bear in mind that a drastic interference with rights duly and properly granted under State law may be involved.

THE COURT: The relevant facts are that the parties were married on the 31st January 1966 and finally separated on the 25th December 1975. The parties are and were at all material times the joint owners of the property at 23 Grant Avenue, Lockleys. The wife issued her summons under the South Australian *Law of Property Act*, in the Supreme Court, on the 15th July 1976.

The husband's application for the injunctions referred to above was made in the Family Court on the 27th August 1976. By his affidavit in support, he acknowledged that the parties were joint owners of the property but he alleged that substantially all the payments by way of deposit, initial payment and mortgage instalments in relation to the property, were made by him. He further alleged that, in effect, the wife had deserted him; that he had remained in the home; that he desired the return of the wife and their child to the home; and that he had access to the child at the home where the child was in familiar surroundings with friends nearby. He maintained that it was in the best interests of the child that regular overnight access be continued at the home. In the last paragraph of his affidavit he stated:

> "It is my desire upon the applicant taking proceedings for dissolution of marriage in this Court to seek a settlement re-adjusting our respective interests in the home and payment to the applicant of such sum as the Court considers just and equitable in the circumstances".

The wife, in her affidavit in support of her summons under the *Law of Property Act* did not concede that the husband made substantially all the contributions to the property; and indeed maintained that she worked throughout the marriage, and contributed to the maintenance of the home, the housekeeping expenses and the maintenance of herself and the child. She stated at para 6 of her affidavit.

> "I have no intention of returning to live with the respondent and intend to institute proceedings for dissolution of marriage as soon as the appropriate time has accrued. I would like to obtain my share of the house as soon as possible to provide me with some security for myself and my daughter in the future."

It is not in doubt that the principles guiding a Court in determining a question between husband and wife as to title to or possession or disposition of property in proceedings under the South Australian *Law of Property Act* 1936 (as amended) are different from the principles applying in a claim for alteration of interests and settlement of property under s79 of the *Family Law Act*. In the former case the rights of the parties must be determined according to ordinary legal principles, the discretion vested in the Judge being limited to the summary remedy to be granted: *Wirth v Wirth* [1956] HCA 71; (1956) 98 CLR 228; *Martin v Martin* [1959] HCA 62; (1959) 110 CLR 297; 33 ALJR 362; *Pettitt v Pettitt* [1969] UKHL 5; [1970] AC 777; [1969] 2 All ER 385. In the latter case an "extensive and flexible" power is given to make orders which are just and equitable having regard to the matters defined for consideration by s79.

The starting point in considering any argument on this matter must be the decision of the High Court in *Russell v Russell, Farrelly v Farrelly* (1976) FLC ¶90-039. Following the decision in that case the terms of s4(1)(c)(ii) of the *Family Law Act* were amended so that the relevant definition of "matrimonial cause" now appears as:

> "(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them being proceedings in relation to concurrent pending or completed proceedings for principal relief between those parties".

It is within the confines of that definition that we must examine the question of jurisdiction in this case. It is clear that at the time of the hearing no application for dissolution of marriage could have been issued by either party. It is equally clear that, following the expiration of the one year period of separation such an application, if supported by a claim under s79 of the *Family Law* Act, will render further proceedings in the State Court untenable. (See *Denniston v Denniston* [1970] VicRp 70; (1970) VR 535. However, in the particular circumstances of this case, the Court is prepared to adjudicate despite a likely future event which, however highly probable, remains conjectural.

In plain terms the orders made by the learned trial Judge would seem to be orders "with respect to" the property of the parties. The wife is restrained from "selling, transferring, assigning or otherwise dealing with" the property and is further restrained from taking proceedings in another Court with respect to the property; proceedings which she would otherwise have a clear right to take, such right being granted to her by a Statute which it is not suggested is outside the power of the State Legislature. Yet these restraints are imposed on the wife without there being filed an application in the Family Court seeking dissolution or annulment of the marriage. These

are drastic measures which cannot be supported by the amended definition of "matrimonial cause" given in para 4(1)(ca).

But the argument is put in another way. It is said that the power to grant such injunctions lies in s114 of the *Family Law Act* and reliance is placed on that section and the definition of "matrimonial cause" contained in s4(1)(e) of the Act. This definition of "matrimonial cause" was also considered by the High Court in *Farrelly v Farrelly*; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495; [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594.

With its consequent amendment, para 4(1)(e) now reads:

> "(c) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship".

This definition does not restrict injunction proceedings between the parties to cases where an application for principal relief has issued.

The area of power within which an injunction can be granted is set out in s114(1) of the Act which reads:

> "(1) In proceedings of the kind referred to in paragraph (e) of the definition of 'matrimonial cause' in sub-section 4(1), the Court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage or of a child of the marriage, or for the protection of the marital relationship or in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home."

It is of course important to note the words "in relation to the property of a party to the marriage".

The difficulty then becomes plainly apparent. The expression "matrimonial cause" as defined in s4(1)(ca) uses the phrase "with respect to the property of the parties" and by its terms prohibits such a cause being instituted unless proceedings for principal relief are on foot. But the same expression is defined in s4(1)(e) as encompassing proceedings between the parties for an order or injunction and by reference to s114(1) these proceedings include proceedings "in relation to the property of a party to the marriage", without the necessity of first instituting proceedings for principal relief.

So far as we can ascertain there is no particular mystique in the use of the phrase "with respect to" in s4(1)(ca) as opposed to the phrase "in relation to" in s114 and both appear to mean much the same thing. We must look elsewhere to see if a reconciliation of the provisions can be found. The problem of reconciling the injunctive power with the power to make orders in respect of property has already come under consideration by the Family Court. In *Davis and Davis* (1976) FLC ¶90-062 the Full Court had to consider an order made by the trial judge giving a wife exclusive occupancy of the matrimonial home. At the date of the order no application had been made for principal relief.

The Full Court examined the injunctive power of the Act and in the course of its judgment stated:

> "In our view, provided that there are proceedings between the parties in circumstances arising from the marital relationship, s114(1) gives the court wide power to deal with the use and occupancy of the matrimonial home and to make such order as it thinks proper. This power may be exercised even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home. Where dissolution proceedings are instituted it is appropriate that the question of occupation be considered together with any other maintenance and property issues."

This reasoning would allow injunctions relating to use and occupation of the matrimonial home, irrespective of whether or not an application for principal relief had been issued. But the Full Court was careful to say that "different considerations may apply to that part of s114(1) which gives the court power to make orders in relation to the property of a party to the marriage".

In *Mills and Mills* (1976) FLC ¶90-079 Demack J pointed out that injunctions are no longer matters which are ancillary to "matrimonial causes" but are defined as "matrimonial causes" themselves. By this we would understand him to be referring to s4(1)(e) and s114(1) rather than s114(3).

Murray J in *Farr and Farr* (1976) FLC 90-133 agreed with the observations of Demack J on this aspect. We consider that these latter two decisions point to a significant difference between sub-s. (1) and (3) of s114. The latter sub-section is ancillary to a matrimonial cause; the former, arising out of s4(1)(c) and governed by it, defines the boundaries of a specific and separate matrimonial cause in its own right. This distinction is further emphasised by the phrase "in proceedings other than proceedings to which sub-sec. (1) applies" appearing in s114(3). Section 4(1)(e) uses the expression "marital relationship".

While we would agree that in most cases the question of the ownership of the matrimonial home can be placed in the category of questions arising out of the marital relationship it does not follow that the injunctive power can therefore be exercised in all such cases when no application for dissolution, nullity or declaration can be filed. The ambit of the power is not restricted by its own definition but by external limitations arising out of the fact that until proceedings for dissolution, declaration or nullity are issued no orders pursuant to s78 and 79 can be made.

It is clear that, because of the prohibition contained in s4(1)(ca) the rights conferred by s79 do not arise until that section can be invoked and further, that section can only be invoked by first instituting proceedings for dissolution, nullity or declaration. Until then such rights do not exist. And if this is so can there be granted an injunction to protect a non-existent right?

In the present case, the husband can fairly be said to have placed his case substantially on his claim in future under s79. In our opinion, his Honour was wrong in holding that the Court could "preserve" rights which had not yet arisen and could not arise until one or other party took proceedings for dissolution of marriage. The rights under s79 are not "created" in any particular case until the filing of an application for dissolution. They may never arise. One or other of the parties may die; they may become reconciled; they may never issue an application for dissolution.

To grant an injunction on the ground that the Court might subsequently have power under s79 to alter property rights is to assume prematurely a power the Court does not then have and in our view is beyond the jurisdiction of the Court as spelt out in *Russell v Russell*; *Farrelly v Farrelly* [1976] HCA 23; (1976) 134 CLR 495; [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594.

The learned trial Judge stated that he was not "altering" property rights but merely "suspending" them; but one can neither alter nor suspend rights to claims which have not been called into being.

We do not, however, suggest that there can be no instances where an injunction under s114(1) in relation to the property of the parties can be granted even where there are no proceedings for nullity, dissolution or declaration. As pointed out by Demack J in *Mills and Mills*, injunctions are no longer ancillary to other matrimonial causes but are now defined as a "matrimonial cause" in their own right. If a claim can be shown to arise out of the marital relationship and yet not depend upon prospective rights under s79, could it be supported in proper cases by the injunction power even if it affects but does not alter property interest?

In such cases although the power may exist, the exercise of the power remains a matter for the Court's discretion and one matter which would obviously concern the Court is to ensure an injunction be not granted where the application is not made *bona fide*, i.e. where the real or substantial purpose is to delay proceedings until the applicant can issue an application for dissolution and thereby make claims under s79. However desirable this ultimate aim may seem, it is a drastic step in effect to deprive one party of rights to which he or she is legally entitled under State law. In our view such a course cannot be justified by the urbane assumption that ultimately the federal jurisdiction will prevail.