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## FAMILY COURT OF AUSTRALIA AT PARRAMATTA

*In the Marriage of MALCOLM*

Watson J

26 April 1977 — (1977) 28 FLR 125; [1977] FLC 76,143 (¶90-220)

**FAMILY LAW – "IMMEDIATE NEED OF FINANCIAL ASSISTANCE" – WHETHER MAGISTRATE IN ERROR IN MAKING ORDER FOR INTERIM MAINTENANCE OF WIFE: FAMILY LAW ACT, S77.**

Proceedings for maintenance commenced on 16 November 1976 and were adjourned three times. On the third adjournment interim maintenance was sought under s77. The wife earned \$40.00 per week part time, lived in the matrimonial home and had \$5000 savings. The Magistrate made an interim order saying that in the circumstances the wife could show a present need for financial assistance notwithstanding that she had cash in the bank because s77 does not require an applicant to deplete her assets for an uncertain period.

**HELD: Appeal allowed.**

1. **The wife living rent free in the matrimonial home and having some income from employment with \$6000 in the bank was not 'in immediate need of financial assistance'. In these circumstances the suggested dissipation of her savings was not a relevant consideration. Section 77 is meant to serve a different purpose — it is to provide emergency funding in those cases where the court is unable to determine immediately what order should be made.**

2. **When the court comes to consider what order should be made under section 72 there is nothing to prevent it taking into consideration the fact that the applicant has been without sufficient income for some time and has had to use part of her savings to support herself.**

**WATSON J:** [*His Honour referred to s77 and continued*] ... "This is the only statutory basis for His Worship's order, although from the length of the hearing before him it seems to me that if the legal representatives had devoted their talents to the task in hand rather than skirmishing as to whether there had been a settlement it would have been practicable for His Worship to determine 'immediately what order, if any, should be made'. It is a pity that the parties were put to additional costs by having their cases mishandled in the manner disclosed by the depositions.

In the spirit of the *Family Law Act* interim applications of this sort with consequent legal manoeuvring should be discouraged. However, I am bound to consider the appeal upon the basis of hearing before the magistrate. His Worship said:

In my view it was never intended that a person otherwise in immediate need of financial assistance should without receiving any assistance deplete her assets for what might be an uncertain period.

With respect to His Worship that statement begs the question. This particular wife living rent free in the matrimonial home, having some income from employment with \$6000 in the bank was just not 'in immediate need of financial assistance'. In these circumstances the suggested dissipation of her savings was not a relevant consideration. Whatever may have been the proper view under the superseded law, section 77 is meant to serve a different purpose — it is to provide emergency funding in those cases where the court is unable to determine immediately what order should be made.

When the court comes to consider what order should be made under section 72 there is nothing to prevent it taking into consideration the fact that the applicant has been without sufficient income for some time and has had to use part of her savings to support herself. I allow the appeal. There will be no order for costs. Any moneys pending under the order should be credited towards any order finally made. If no order is finally made they should be refunded to the husband.