15/76

FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of PELBART

Pawley J

25 February 1976

(1976) 25 FLR 296; 8 ALR 550; 1 Fam LR 11,124; [1976] FLC 75,059 (¶90-002)

FAMILY LAW – ORDER MADE IN THE SUPREME COURT – WHETHER ORDER PROPERLY REGISTERED – APPLICATION FOR VARIATION MADE IN THE FAMILY COURT – WHETHER FAMILY COURT HAS POWER TO CONSIDER APPLICATION – POWER OF VARIATION OF EXISTING ORDER – POWER TO GRANT A STAY OF PROCEEDINGS – POWER TO TRANSFER PROCEEDINGS – WHETHER MATTER SHOULD BE TRANSFERRED TO THE SUPREME COURT: *FAMILY LAW ACT* 1975, SS3(2), 45; *FAMILY LAW REGULATIONS*, RR16, 129.

HELD: [cf MC16/76]
1. Section 3(2)(c) of the *Family Law Act* invests the Family Court with jurisdiction to hear and determine the matters which are the subject of this application. Section 3(2)(c) provides that a Decree of the Supreme Court of a State shall continue to have effect throughout Australia and except in certain cases which are not relevant to this matter the *Family Law Act* applies to and in relation to such a Decree as if the Decree had been made under the *Family Law Act*.

2. Accordingly, the filing of copies of the Decrees of the Supreme Court, as was done in this case, was compliance with r129 in respect of the maintenance orders because by reason of s3(2)(c) those Decrees are for the purposes of r129, Decrees made under the *Family Law Act*. The Decrees were therefore registered within the meaning of s83 and the Family Court had power to deal with them as provided by that section.

3. There is nothing in s45 itself which limits its operation to transfer from one area to another area and s45(2) empowers the Family Court to transfer a matter to the Supreme Court of New South Wales Family Law Division if it is in the interests of justice to do so.

4. Having regard to all of the circumstances of this case it was in the interests of justice that such a transfer order should be made. Were the Family Court to continue to deal with the Application it would have been necessary for much of the evidence which has already been given and considered in the Supreme Court to be repeated in the Family Court.

5. Nothing had been put before the Family Court to persuade the Judge that the interests of either of the parties would be detrimentally affected if such order were to be made. On the balance of convenience therefore and in order to save time and further expense the matter would be returned to the Supreme Court of New South Wales in its Family Law Division.

PAWLEY J: This is an application by the Applicant Husband for orders for the discharge of a maintenance order, for the issue of a Writ of Attachment, for directions as to counselling, for leave to pay costs by instalments and for definition of access.

The parties were married on 7th August 1971, and that marriage was dissolved by a Degree of the Supreme Court of New South Wales, Family Law Division on 28th May 1975. At the time the Decree was pronounced by the Court, Allen J after a contested hearing, made orders with respect to the custody and access of the children of the marriage and for the maintenance for the wife and children. The maintenance order in respect of the wife provided for the payment by the Applicant of $12.00 per week until the 1st July 1975 and thereafter of $17.00 per week.

After a further contested hearing on 10 November 1975, Allen J varied the maintenance order in respect of the wife by reducing the amount of maintenance payable per week to the sum of $12.00 per week for a period of four months from 10th November 1975.

It is this order which the Applicant seeks to have discharged. Copies of the Degree and of the Order varying the maintenance order were filed in the Registry of this Court on 7th January 1976.

When the matter came on for hearing before this Court Mr Broun who appeared for the Respondent Wife took a preliminary objection on the ground that this Court had no jurisdiction to deal with the Application. He argued that as far as the Application to discharge the maintenance was concerned, this Court would have no power to discharge the order made by Allen J unless it had been registered in this Court in accordance with the regulations.

The relevant regulation is regulation 129(1) which is in the following terms:

> 129(1) 'A Decree made under the Act (other than a Decree for principal relief) may be registered in any Court having jurisdiction under the Act by filing a sealed copy of the Decree in that Court.'

Mr Broun submitted that the Decree of Allen J of the 28th May 1975, and the order varying that decree of 10th November 1975, were not decrees made under the Act and therefore no provision exists for their registration. If they are not validly registered they cannot be discharged by this Court because of the provisions of s83 of the *Family Law Act*, which invests the Court with power *inter alia* to discharge maintenance orders made by the Court or made by another Court and registered in the Family Court.

Paragraph 1(b) of the Application seeks that a Writ of Attachment Issue Against the Respondent Wife for Contempt of the Order for access made in favour of the Applicant by Allen J on 28th May 1975, and in relation to this part of the application, Mr Broun argued that the Court had no power to order such a Writ to Issue because the order for access which formed the basis of the application was not an order of this Court but an order of the Supreme Court of New South Wales in its Family Law Division.

As far as that part of the application which deals with counselling is concerned I understand that Mr Broun conceded that the Court had power under s14(5) of the *Family Law Act* to advise the parties to attend upon a marriage counsellor and both parties, through their counsel, expressed their willingness to accept such counselling.

Paragraph 1(e) of the application seeks an order varying the order for access made on 28th May 1975, and Mr Broun again submitted that this Court had no jurisdiction to make such a variation and relied upon his earlier submission that the order for access was not an order of this Court and consequently could not be varied by it.

I cannot accept these submissions because I am satisfied that s3(2)(c) of the Act invests this Court with jurisdiction to hear and determine the matters which are the subject of this application.

Section 3(2)(c) provides that a Decree of the Supreme Court of a State shall continue to have effect throughout Australia and except in certain cases which are not relevant to this matter the *Family Law Act* applies to and in relation to such a Decree as if the Decree had been made under the *Family Law Act*.

It seems to me therefore that the filing of copies of the Decrees of the Supreme Court, as has been done in this case, was a compliance with r129 in respect of the maintenance orders because by reason of s3(2)(c) those Decrees are for the purposes of r129, Decrees made under the *Family Law Act*. The Decrees are therefore registered within the meaning of s83 and this Court has power to deal with them as provided by that section.

I am satisfied also that the Court has jurisdiction to deal with the other matters contained in the Application because by reason of s3(2)(c) the *Family Law Act* applies to and in relation to the access orders and the costs orders made by the Supreme Court of New South Wales in the Family Law Division as if those orders had been made under the *Family Law Act*.

Mr Broun then submitted that even if the Court did have jurisdiction it should not deal with this application but should exercise its powers under s45(2) of the *Family Law Act* and transfer those proceedings to the Supreme Court in its Family Law Division.

He argued that because Allen J had already spent considerable time in investigating the financial position of the parties and their relationship to each other that it would be in the interests of justice for the present application to be dealt with by him.

Mr Ryback who appeared for the Applicant Husband, submitted that his client had chosen the Family Court as his forum and that this choice should not be taken from him. He argued that this Court has counselling facilities which are not available to the Supreme Court and that it is probable that this matter could be dealt with more expeditiously by the Family Court than by the Supreme Court.

He also argued that s45 of the *Family Law Act* corresponds closely to s26 of the repealed Act and that s26 had only a geographical application and that therefore s45 should be read down in such a way as to limit its application to geographical location and that consequently the Court had no power under s45 to transfer the proceedings from one kind of Court, that is the Family Court to another being the Supreme Court of a State.

At the completion of the argument I indicated that I was minded not to transfer these proceedings nor to deal with them but to order a stay. I also indicated that I wished to give the matter further consideration and having done so I am satisfied that this is not a proper case in which a stay of proceedings should be ordered.

Regulation 16 provides that a Judge or Magistrate may, at any time, after the institution of proceedings, direct a stay of proceedings upon such terms as he thinks fit. I am satisfied after having had the opportunity of considering the authorities that an indefinite stay of proceedings should only be granted in exceptional circumstances and that the circumstances of this case are not exceptional.

I am therefore brought to the problem of whether the matter should be allowed to continue in this Court or whether I have power under s45(2) to transfer the proceedings to the Supreme Court and if I have such power whether it would be a proper exercise of my discretion so to transfer them.

It is true that s45 corresponds closely to s26 of the repealed Act. It is also true that s26 of the repealed Act related only to what I have called geographical transfer. Indeed, it could not have related to any other kind of transfer since the only courts exercising jurisdiction under the repealed Act were Supreme Courts of States or Territories.

It was not therefore a case of transferring the matter from one kind of Court to a different kind of Court but only a question of transferring a matter from one area to another area. From, for instance, the Supreme Court of New South Wales to the Supreme Court of Victoria. The matters to be taken into consideration were relating to the availability of witnesses and such like matters which rendered it in the interests of justice that a matter instituted in one State should be dealt with in another State. The position which arises in this case therefore could not have arisen under the repealed legislation and it is for this reason that one must look at s45 anew.

There is nothing in that section itself which limits its operation to transfer from one area to another area and I am satisfied that s45(2) empowers me to transfer this matter to the Supreme Court of New South Wales Family Law Division if it is in the interests of justice to do so.

In all the circumstances of this case it appears to me that it is in the interests of justice that I should order such a transfer. Were this Court to continue to deal with the Application it would be necessary, as I see it, for much of the evidence which has already been given and considered in the Supreme Court to be repeated in this Court.

Before this Court could discharge the maintenance order made by Allen J it would be necessary for it to have before it all the considerations which applied both when the original order was made on 28th May 1975, and when that order was varied on 10th November 1975. Were the matter to be transferred to the Supreme Court that Court would have the great advantage of having already dealt with those considerations.

Moreover, in transferring the matter to the Supreme Court it seems to me that I would be acting in

accordance with the provisions of s47 of the Act. As far as Counselling is concerned the facilities which this Court offers for counselling may of course also be used by the Supreme Court and indeed I understand that the parties will be making arrangements in respect of such counselling wherever this application is heard.

Nothing has been put before me to persuade me that the interests of either of the parties would be detrimentally affected if such order were to be made. On the balance of convenience therefore and in order to save time and further expense I am satisfied that this matter should be returned to the Supreme Court. I therefore order that the application of the applicant of 7th January 1976 be transferred to the Supreme Court of New South Wales in its Family Law Division.
