16/76

FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of SMITH

Asche J

18 February 1976

FAMILY LAW – POWER OF VARIATION OF A FAMILY LAW CUSTODY ORDER – ORDER MADE IN THE SUPREME COURT – WHETHER ORDER CAN BE REGISTERED – APPLICATION FOR VARIATION MADE IN THE FAMILY COURT – WHETHER FAMILY COURT HAS POWER TO CONSIDER APPLICATION – POWER OF VARIATION OF EXISTING ORDER: *FAMILY LAW ACT*, SS3(2), 83; *FAMILY LAW REGULATIONS*, R129.

HELD:

1. The question in the present case was whether a decree made before the commencement of the Act and in another Court, namely the Supreme Court of Victoria, was in fact a decree made under the *Family Law Act* ('Act').

2. The expression 'as if the decree had been made under this Act' is merely designed to ensure that earlier decrees remain in force so far as is consistent with their terms and are not rescinded or rendered null and void by the passing of a new Act. But it is a further step to say that they should be treated as decrees made under the Act. In other words, there is a significant difference between the expression 'as if a decree had been made under this Act' and the expression 'a decree made under the Act'.

3. Having regard to the provisions of the Act and regulations, the decree of the Supreme Court of Victoria made before the passing of this Act, was not 'a decree made under the Act' for the purposes of registration. It can be relied on 'as if it had been made under this Act' for the purpose of preserving it to be enforced by the Court which made the decree. But as it was not a decree made under the Act, it could not be registered under r129.

cf *Pelbart v Pelbart* MC15/76.

ASCHE J: I have before me an application by the wife that the amount of maintenance paid for the child of the marriage, be varied from $10 per week to an amount to be determined by the Court. The maintenance was originally ordered by the Supreme Court of Victoria and was one of the orders in a decree nisi pronounced on 23 October 1972 wherein the husband obtained a decree nisi against the wife on the ground of adultery. The maintenance being ordered by the Supreme Court of Victoria, it becomes necessary to examine whether this Court has the power to vary the maintenance. I should say that Counsel for the husband and wife have both appeared before me and have indicated their consent to orders if the Court has the power to make them.

The power to vary or discharge or suspend a maintenance order is contained in s83(1) of the *Family Law Act*. That section, so far as is relevant, reads that:

> 'In proceedings with respect to the maintenance of a party to a marriage or of a child of a marriage, if there is in force an order (whether made before or after the commencement of this Act) with respect to the maintenance of that party or child by the other party to the marriage—
> (a) made by the Court; or
> (b) made by another Court and registered in the first-mentioned Court in accordance with the Regulations.'

The Court may then discharge, suspend, revive or vary the earlier order.

It is clear that the order sought to be varied is an order made by another Court and it then becomes necessary to see whether that order is registered in this Court so that the necessary variation may be obtained. I can find no provision in the Regulations for registration of maintenance orders made by Courts other than the Family Court, save a possible reference in Regulation 129.

Regulation 129 sub-regulation (1) reads:

> '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.'

The question therefore, is whether a decree made before the commencement of the Act and in another Court, namely the Supreme Court of Victoria, is in fact a decree made under the Act.

On the face of the words in r129, the order of the Supreme Court of Victoria would not appear to be a decree made under the Act. But there is a section in the Act which might assist in a wider interpretation. That section is s3(c) of the *Family Law Act*. So far as is relevant, that sub-section provides that a decree of the Supreme Court made before the commencement of this Act in the exercise of jurisdiction invested or conferred by the *Matrimonial Causes Act*, shall continue to have effect throughout Australia. This is a necessary clause to preserve the validity of decrees made by Courts under the earlier Act. But the sub-section goes on to say that except in certain cases, which do not apply here, 'this Act applies to and in relation to, the decree as if the decree had been made under this Act.'

Now it may be argued that within the meaning of r129 the earlier order of the Supreme Court of Victoria is a decree made under the Act because of the expression in s3(2)(c) that the Act applies to and in relation to the decree as if the decree had been made under this Act. In my view, it was not the intention of this section to equate decrees made before the Act as if they were in all respects similar to decrees made under the Act. In my view, the expression 'as if the decree had been made under this Act' is merely designed to ensure that earlier decrees remain in force so far as is consistent with their terms and are not rescinded or rendered null and void by the passing of a new Act. But it is a further step to say that they should be treated as decrees made under the Act. In other words, in my view, there is a significant difference between the expression 'as if a decree had been made under this Act' and the expression 'a decree made under the Act'.

Consequently, I am unable to hold that the decree of the Supreme Court of Victoria made before the passing of this Act, is 'a decree made under the Act' for the purposes of registration. It can, of course, be relied on 'as if it had been made under this Act' for the purpose of preserving it to be enforced by the Court which made the decree. But as it is not a decree made under the Act, it cannot be registered under r129.

In the event, I find that this Court is in the rather absurd position of having before it, an application to vary an earlier maintenance order made by the Supreme Court and where the parties have very sensibly resolved their differences and desired a consent order to be made and because there is no provision for registration of the earlier order, this Court cannot do so. I have, however, suggested that the same effect can be achieved by a different procedure and although that procedure is a rather awkward one.

I have been able to meet the wishes of the parties so far as this application is concerned. However, it is obvious that it will be necessary very soon to provide in the Regulations, for registration of orders made before this Act was commenced where it is sought to bring those orders into the Family Court so that they can be varied, discharged or suspended.
