

9/79

FAMILY COURT OF AUSTRALIA — FULL COURT

In the Marriage of BAILEY

Evatt CJ, Murray and Simpson JJ

6 April 1978

20 ALR 199; (1979) 33 FLR 10; 4 Fam LR 86; [1978] FLC 77,141 (¶90-424)

FAMILY LAW – MAINTENANCE – ALTERATION OF PROPERTY INTERESTS – CLAIM BY WIFE TO RETAIN MATRIMONIAL HOME – PARTICULAR CIRCUMSTANCES – OBLIGATION OF HUSBAND TO PROVIDE WIFE WITH MEANS TO RETAIN HOME – HUSBAND'S ENTITLEMENT TO SUPERANNUATION – PRINCIPLES APPLICABLE: FAMILY LAW ACT 1975 (CTH) SS75, 79.

W. applied for alteration of property interests and maintenance. H. was an airline pilot – his superannuation entitlement, if he retired immediately was \$56,000, and he gave evidence that if he retired in July he would expect to receive \$127,390, and if he served his full time and retired in 1992 he expected to receive \$250,000. There was no other evidence as to the nature of his entitlement, any contingencies thereon, or the terms of the superannuation trust. The wife, who worked part-time as a teacher during the marriage proposed to complete a University course over four years to increase her earning capacity.

The parties had agreed to divide equally all property held jointly or individually by them – these included a house owned by wife purchased from an inheritance valued at between \$16,000 to \$20,000, in which her aged parents were residing rent free; the matrimonial home valued at between \$63-65,000, after deduction of mortgage debt. The Husband agreed that wife and children should continue to live in this house. The trial judge found:

" ... that the wife was entitled to the whole of the property occupied by her parents. He made no order in respect of the husband's superannuation, though he held that he should take the husband's eligibility for such payments into account when assessing whether or not the wife was entitled to maintenance. He found that the wife should receive some support from her husband during the time when she was studying for her university degree but that she could obtain part-time employment during that period in the result, the husband was ordered to pay maintenance for the wife at the rate of \$75 a week for a period of four years from the date of the judgment – ie 8 May 1977. The maintenance payable by the husband for the two children was assessed at \$20 per week per child, together with school fees, the cost of school clothing and medical, hospital and dental expenses."

Both parties appealed as to the maintenance sum, the wife seeking a lump sum order of \$28,000 being half of the amount the husband would be paid by superannuation if he retired immediately.

HELD:

1. **The Full Court: Because of uncertainty as to or when the husband would receive such superannuation payment, it was unable to determine if such entitlement was an interest in property within s79, but it was a matter that should be taken into account in considering what order should be made as maintenance under s75(2)(b) and (f).**

In the Marriage of Stacy, Fam Ct, McGovern J, 21 December 1977, adopted.

2. **In fixing periodical maintenance payments for the wife at \$75 per week during the period of her studies the judge at first instance did not give full consideration to the financial resources of each party, to the discrepancy between their incomes, to the standard of living of the family before the breakdown of the marriage or to the husband's large excess of income over outgoings. In addition, his decision that the wife should engage in part-time employment during the period of her university studies was unreasonable.**

3. **Per Evatt CJ and Murray J: The Judge at first instance failed to give proper consideration to the overall effect of the property and maintenance orders he proposed to make. The wife had insufficient means to keep up the mortgage repayments on the former matrimonial home so as to continue living there and therefore the husband should be required to make additional provision for her maintenance either by substantially reducing the amount of the mortgage debt or by meeting the mortgage repayments.**

EVATT CJ and MURRAY J: Turning to the question of maintenance his Honour was prepared

to take the husband's eligibility for superannuation into account when assessing whether or not the wife was entitled to maintenance. This was in accordance with the provisions of the Act which require the court to have regard to the factors set out in s75(2) including:

"(b) the income, property and financial resources of each of the parties and the physical and mutual capacity of each of them for appropriate gainful employment.

(f) the eligibility of either party for a pension allowance or benefit under any law of Australia or of a State or Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party."

Superannuation entitlements are often of such a nature that the party concerned may reasonably expect to receive a substantial interest at a future date. The existence of the entitlements may have no effect upon the party's resources at the present time, but give considerable security for the future and reduces the party's present need to build up capital assets to provide such security. As such the entitlements are relevant to the question of maintenance.

In this regard it is appropriate to adopt the general approach of McGovern J in *Stacy* (No A3639 of 1976, 21 December 1977) where he contrasted the position of the portions follows.

"I have mentioned the disproportion between the eligibility of each for superannuation benefits. So long as the husband does not render his entitlement in the superannuation fund liable to forfeiture which is unlikely to happen, and does not leave the employ of the company before either becoming totally and permanently incapacitated or reaching the retirement age, which again I find that he is unlikely to do, he stands to become the recipient of the very substantial benefits that I have mentioned. His future in other words has every prospect of being securer and in the meantime he has income and resources that far exceed his needs. The wife on the other hand has no security in the way of superannuation benefits except for the bare possibility in the event of the husband's death."

His Honour was of the view that the wife would be able to supplement her income by part-time employment. There is no firm evidence about this and it seems to us that it may be unrealistic for her to assume this burden in the immediate future. In determining the maintenance issues a number of factors arise for consideration under s75(2). While not excluding other factors, it seems to us that paragraphs (g), (h), (j) and (n) are of particular relevance in this case.

His Honour did not make specific findings about the income of each spouse or about their current commitments or about other factors. It may not, as a result, have been clear that the wife would, have insufficient means to keep up the mortgage repayments and therefore to continue living there, an option which we consider should be open to her provided it is reasonably within the means of the parties. In our view his Honour failed to give proper consideration to the overall effect of the property and maintenance orders he proposed to make. While the dispute about the superannuation may have clouded the issues to some extent, the end result is one which in our view does not make proper provision for the maintenance of the wife.

In our view it would be proper to require the husband to make additional provision for the maintenance of the wife, either by substantially reducing the amount of the mortgage debt on Coopernook Avenue or by meeting the mortgage repayments. It is well within his means to do this.

There are, however difficulties confronting this Full Court. The original application was for \$250 per week. His Honour ordered \$75 per week. The amended Notice of Appeal seeks \$100 per week maintenance. This would not in our view be sufficient to enable the wife to meet the mortgage payments and other outgoings and to maintain herself for the period of the order.

The question before us is one of the exercise of discretion. If it was open to his Honour to order lump sum maintenance in addition to periodical payments on the material before him, then it is open to us to consider that issue, even though no specific application was made. We do not know whether his Honour was invited to consider the question of a lump sum payment in the final submissions of the parties as these are not available to us. As mentioned the application before him was for periodical maintenance of \$250 per week. He took the view that the wife was entitled to maintenance for a limited period of four years to enable her to complete a course of study.

To make proper provision for the wife he ought in our view, to have considered what additional

provision was needed by the wife to enable her to stay in the former home with the children. Having regard to s81 and to his Honour's finding that the wife should receive maintenance only for a specified period this result could have been achieved either by ordering an additional lump sum to enable the mortgage commitment to be reduced or by ordering additional periodical payments for the period of four years or both. The precise amount of the wife's commitment may not be known until the property division has been effected.

It is well within the husband's means to make further provision for the wife's maintenance to help reduce her overall liability in respect of the matrimonial home and to provide additional security for his family. He should not necessarily be called on to discharge the whole mortgage (now standing at \$19,000 approximately) as the home will become a considerable asset in the wife's hands in due course.

In our view the proper course to take is to increase the order for periodical maintenance in favour of the wife from \$75 to \$100 per week as an interim provision and to remit the matter for a rehearing limited to the question of whether the wife is entitled to further provision for her maintenance by way of increased periodical payments for the term specified in our order or a lump sum or both, within the framework indicated.
