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FAMILY COURT OF AUSTRALIA at PARRAMATTA

In the Marriage of TAYLOR

Asche, Demack and Dovey JJ

25 May 1977 — (1977) 30 FLR 17; 15 ALR 266; 3 Fam LR 11,220; [1977] FLC 76,187 (¶90-226); overruled by 143 CLR 1; 53 ALJR 629; 25 ALR 418; 5 Fam LR 289; [1979] FLC 78,587 (¶90-674)

FAMILY LAW – MODIFICATION OF ORDER – SUCH ORDER RELATING TO PROPERTY: *FAMILY LAW ACT* 1975, S83.

The Supreme Court under the *Matrimonial Causes Act* had made an order including matters in respect of matrimonial property. The question that arose on appeal was whether a Court had power under s83 *Family Law Act* (Act') to vary or modify an order which included an order for settlement of property. It was argued that such original "order must be embraced by the term order with respect to maintenance".

HELD:

1. The giving of a wife an occupancy in the matrimonial home, can be an order with respect to maintenance. Since it does not purport to alter the interests of the parties in the property, it does not fall within the powers given under section 79 but can be part of that broad spectrum of the meaning of the word maintenance.

2. Section 83 of the Act uses the term "proceedings with respect to maintenance"; it is not using it in that broader sense which has been mentioned but rather in the narrower sense of what Barwick CJ has referred to as "maintenance in the ordinary sense".

3. In the context of section 83 the phrase "or in any other manner" relates only to changing the incidence of maintenance in the sense mentioned and does no more than give the Court power in an appropriate case to vary the terms of the order by substituting, say, monthly for weekly payments, or ordering that the payments be made elsewhere than previously or the like.

ASCHE and DOVEY JJ: ... Can it be said, however, that the expression, "orders with respect to maintenance" can cover an order that the husband make a settlement of property on the wife? Since this appeal was argued, there has been a decision handed down by McCall J of the Western Australian Family Court which has considerable relevance to this question. This is the decision of *In the Marriage of King* (1976) 2 Fam LR 11,398; FLC ¶90-113; CCH 90-113.

In that case, orders were made by the Supreme Court of Western Australia in its matrimonial jurisdiction on the 21 November 1973. *Inter alia*, it was ordered (and by consent), that the wife have sole and exclusive occupancy of the former matrimonial home until her re-marriage or further order. On the 16 March 1976 the wife filed an application in the Western Australian Family Court seeking that "the post-nuptial settlement ... be varied by vesting in the Applicant solely all the right title and interest of the Respondent or such alternative order as the Court deems fit". An order for maintenance for the wife and children was also made. In her affidavit in support, the wife deposed that she had continued to reside in the home, paying all outgoings, that the husband was in arrears with maintenance which the Court had ordered and that she was prepared to forego all claims to past and future maintenance and outgoings on the home if the husband's interest was vested in her.

In a detailed and careful judgment, His Honour came to two important conclusions:

1. That the provision in the order giving the wife a right of occupancy was an order with respect to maintenance made in proceedings with respect to maintenance.

2. That the expression "or in any other manner" appearing at the end of section 83(f) permits applications to vary by increasing or decreasing amounts ordered to be paid or by varying the order in any other manner the Court may see fit and consequently the wife's application for a vesting in her of the husband's interest in the matrimonial home was maintainable.

As to the first conclusion, we are inclined to agree that the giving of a wife an occupancy in the matrimonial home, can be an order with respect to maintenance. Since it does not purport to alter the interests of the parties in the property, it does not fall within the powers given under section 79 but can be part of that broad spectrum of the meaning of the word maintenance which is referred to in *Acworth v Acworth* [1942] 2 All ER 704; [1943] P 21 at 22; *C v C* [1963] VicRp 21; (1963) VR 131 at 135; [1963] ALR 481; (1962) 4 FLR 461 and *Lumsden v Lumsden* [1964] VicRp 30; [1964] VR 210; [1964] ALR 836; (1963) 5 FLR 388. But His Honour, in part, based his conclusions on certain passages in *Sanders v Sanders* [1967] HCA 33; (1967) 116 CLR 366; [1968] ALR 43; 41 ALJR 140 and we feel we should emphasise that we could not agree that an order under section 79 is an "order with respect to maintenance" susceptible of variation under section 83. In *Sanders v Sanders* [1967] HCA 33; (1967) 116 CLR 366; [1968] ALR 43; 41 ALJR 140, His Honour Barwick CJ drew attention to the complementary nature of the powers under sections 84 and 86 of the *Matrimonial Causes Act* and McCall J quotes the well-known passage (CLR at p375):

> "Section 86(1), with the great width properly to be given to the word 'settlement', gives an extensive and flexible power to the Court to 'settle' property upon a wife as a means of providing for her maintenance and for that of the children of the marriage. In this respect, in my opinion, it is evidently intended to be and is aptly expressed and so placed in the Act, as to be complementary to Sec.84. Consequently I can see no reason to doubt that a court exercising jurisdiction in proceedings for maintenance under the *Matrimonial Causes Act* can exercise the powers given by Sec 86(1) though there be no greater claim made by the petitioner in the petition than a claim for maintenance, without specifying a settlement as the desired means or as a component of the desired means of the provision of such maintenance".

But it does not appear that His Honour was thereby suggesting that the power to make orders for maintenance and the power to make orders for settlement of property were one and the same. His judgment continues at CLR p375-6:

> "But of course section 86(1) covers other situations than the provision of maintenance. As is rightly pointed out in *Horne v Horne* (1962) 3 FLR 381; [1963] ALR 288; (1963) 63 SR (NSW) 121; [1963] NSWR 499; 80 WN (NSW) 169 disputes between the parties to the matrimonial cause as to the beneficial ownership of property vested in one or both of them, or in a trustee or one or both of them, can be, and indeed can only be, determined in the matrimonial causes. Further, in my opinion, in an appropriate case, although one of the parties has no legal or equitable right to property vested in the other, or to any greater interest in, property that is already wholly or partially vested in him or her, the Court hearing the matrimonial cause may make orders settling that property on that one or increasing the beneficial interest of their one in property already wholly or partially vested in him or her as the case may be. No doubt cogent considerations of justice founded on the conduct and circumstances of the parties would need to be present if such orders were to be made. But, if those considerations are present, settlements beyond the provision of mere maintenance, or the determination and enforcement of rights, legal or equitable in my opinion, can be made. Doubtless, the extent of these powers and the far-reaching consequences of their exercise were among the factors which moved the Parliament to provide in substance that they should be exercised so far as practicable by the Judge who hears the proceedings for the principal relief in the matrimonial cause; see section 68(4)".

Similarly, Windeyer J considered that the powers under s84 and s86 were "not mutually exclusive. They overlap and may be exercised separately or in combination to produce a total result which in the circumstances is just and equitable".

In our view, the High Court in *Sanders v Sanders*, while emphasising the complementary powers of ss84 and 86, were not suggesting that there was no distinction between them. If one takes the word "maintenance" in the broadest sense it can, of course, "be widely construed and covers many forms of benefit". *Lumsden v Lumsden* [1964] VicRp 30; [1964] VR 210 at 214; [1964] ALR 836; (1963) 5 FLR 388, and in this sense as His Honour Barwick CJ says "the word 'settlement' gives an extensive, and flexible power to the Court to 'settle' property upon a wife as a means of providing for her maintenance and that of the children of the marriage. <u>In this respect</u>, in my opinion, it is evidently intended to be and is aptly expressed and is so placed in the Act as to be <u>complementary</u> to section 84".

The underlinings are ours and we draw attention to the fact that "complementary" does not mean "equal in all respects". Consequently, and following the directions of their Honours in

the High Court, it may still be open for a wife who has sought no more than maintenance in her application to claim that, using the term in the broad sense, she should be entitled to an alteration of property interests including, if she so desired, a settlement of property; but to obtain that relief she would still have to invite the Court to act under s79 not s72. We would comment that if she had not foreshadowed some such claim, she might stand in peril as to costs or adjournment or both; but if the Court were persuaded to act, it would then use the powers under ss72, 75 and 79 to achieve an overall result which might be considered to provide for her "maintenance" in this broad sense.

But the exercise of the jurisdiction would still depend on powers which, though complementary, are separate. If subsequently, the orders were sought to be varied, suspended or discharged, the orders made pursuant to s72 and the orders made pursuant to s79 would have to be examined separately. cf. *Slattery v Slattery* (1976) 2 Fam LR 11,251; FLC ¶90-110; CCH 90-110. If it were otherwise, then a party who was not yet in a position to apply for a dissolution of marriage might argue that it was within the Court's power under s72 to order a settlement of property by way of "maintenance". Such an argument would, in our view, run contrary to the distinctions drawn by the High Court 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; FLC ¶90-099; CCH 90-039 and would therefore be untenable.

In our view, then s83 uses the term "proceedings with respect to maintenance", it is not using it in that broader sense which has been mentioned but rather in the narrower sense of what Barwick CJ has referred to as "maintenance in the ordinary sense" (p381). The distinction is, if we may say so, very aptly put by Mr Porter QC in his argument before Watson J in *Weiss v Weiss* (unreported) which argument His Honour adopted in his reasons for judgment.

> "The meaning of maintenance order as distinct from property order has to be gathered from the definition of 'matrimonial cause' in s4 and from ss44, 76, 79A, 80, 82 and 83. A maintenance order is simply an order for the payment of money, usually at regular intervals for the support of the person to be maintained. The essential feature of such an order is that, unless ordered to be paid in one lump sum, it rises and falls with the need of the person to be maintained, having regard also to the means of the person paying the maintenance. It terminates automatically on the death of either the payer or the payee.
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> A property order on the other hand involves the transfer of property fixed in value, the payment of a fixed sum or the assumption of a fixed liability. It does not vary with the needs of the person receiving its benefit and its effects are intended to survive the death of either party. It is meant to be a permanent adjustment of the capital assets and liabilities of the parties; and of its essence it is based upon capital interests rather than on the income of the parties".

We have already commented that the very form of s83 of the *Family Law Act* when compared with s87(1)(j) of the *Matrimonial Causes Act*, is in itself a strong argument for assuming that orders made under section 79 were not meant to be varied suspended or discharged. That the expression "Maintenance" is used in its more limited sense in s83 can be also gathered from the context of those sections to which Mr Porter refers and also from s72. Indeed, a reference to s82 affords a particularly significant example of this for if an order with respect to maintenance ceases to have effect upon the death of a party, could it be argued that all property orders thereby ceases or, pursuant to s82(4) would the re-marriage of a wife destroy her rights gained pursuant to a property order.

The matter is really put beyond doubt in our view by the provisions of s79A which provides the specific circumstances in which an order under s79 can be set aside. It would seem a clear instance of the expression *expressio unius est exclusio alterius* that by these provisions the legislature has provided that orders under s79 can be set aside in no other way.

In our view in the context of s83 the phrase "or in any other manner" relates only to changing the incidence of maintenance in the sense we have mentioned and does no more than give the Court power in an appropriate case to vary the terms of the order by substituting, say, monthly for weekly payments, or ordering that the payments be made elsewhere than previously or the like. With all respect to McCall J, we are unable to accept the reasoning of *In the Marriage of King* (*supra*).