

24/1980

FAMILY COURT OF AUSTRALIA at BRISBANE

In the Marriage of OSTROFSKI (DL and JA)

Lambert J

2 November 1979 — (1979) 5 Fam LR; [1980] FLC 78,933 (¶90-730)

FAMILY LAW - MAINTENANCE – ENFORCEMENT OF ARREARS - WHETHER EX-HUSBAND'S SUPPORT OF DE FACTO WIFE A RELEVANT CONSIDERATION IN DETERMINING HIS ABILITY TO PAY MAINTENANCE FOR THE CHILDREN OF HIS FIRST MARRIAGE: FAMILY LAW ACT 1975, ss43, 72, 73, 74, 75(1), (2), (2)d, (e).

The wife sought enforcement of payment of arrears of maintenance owing and unpaid and totalling \$4,280, under orders made against the husband in a Magistrates' Court in favour of the five children of the marriage. The husband claimed to have been without the financial resources over the last three years to make any payments under the maintenance orders, the main reason being that he had incurred considerable expense for payment of his de facto wife's hospitalisation and treatment commencing in 1976, which had resulted in her having a kidney transplant. He was in permanent employment and was making mortgage repayments of \$297 per month. At issue was whether and to what effect the law requires the Family Court in determining the obligation of one spouse to maintain the other, to take into account expenditure incurred by the spouse whose obligation is in question in the support of a de facto wife or husband.

HELD: The provisions of the *Family Law Act* bearing upon the question are ss43, 72, 73, 74 and 75. The Court cannot, in its maintenance jurisdiction, take into account a so-called "moral" obligation assumed by a spouse which is incompatible with the principles set out in s43. The terms of s43 are mandatory and overriding. The institution of marriage (as therein defined) and the concept of the family resulting therefrom are to be preserved, protected and assisted. An interpretation of the term "responsibility" in s75(2)(e) which would have the effect of conferring a financial advantage to the de facto union of a man and a woman to the financial detriment of spouse and children of a marriage would be in conflict with the provisions of s43. Accordingly the financial responsibility that the husband had undertaken for the support of his de facto wife was not to be taken into account in the court's determinations in these proceedings.

LAMBERT J: ... If and when he remarries his circumstances will so change that the provisions of s83 of the Act may be available to him for relief in relation to continuing obligations under the orders that I propose to make. There is authority for the proposition that remarriage should not be taken into account until it is an actual fact. *Foster and Foster* (1948) NZLR 860.

"Legal" and "Moral" Responsibilities: The situations in which the parties to a marriage may be under a "legal" responsibility to support another person are of course determined by legislation. The so called "moral responsibility" situations are not so clearly recognised under the law. The Australian Parliament has in more recent legislation recognised a state of de facto marital relationship to exist for particular purposes. There is not any present legislation however, as far as I have been able to ascertain which confers any special rights or imposes any special obligations between the parties to a de facto marital relationship *inter se*; and no such rights or obligations exist at common law.

Concepts of morality within society are of course both subjective and subject to change and the legislature often is slow to reflect changes of public attitudes to moral questions out of a concern to cater for the wishes of an established majority. On the one hand we are each our brother's keeper, on the other, charity begins at home.

The Hon Mr Justice Lindenmayer held in *Lutzke's case* (*Lutzke and Lutzke* (1979) FLC 90-714), that there was an onus on the party alleging the "moral responsibility" or "obligation" to at least establish that there was no corresponding legal responsibility imposed on some other person, and if there was, to explain how such legal responsibility could not be enforced. He adopted the approach of Hutley J of the New South Wales Court of Appeal in *Thrift and Thrift* (1976) FLC 90-103 and cited his remarks at p75, 474 of that report and Lindenmayer J set out his understanding

of the responsibility recognised by s75(2)(e) in relation to step-children and children of a de facto spouse in the following passage of his judgment:

"Though a skilled workman in an industry where he enjoys the opportunity for much overtime, the respondent has heavy commitments which I think it has been shown have to be alleviated. He is at present supporting his present wife who cannot work and his child by her. He also supports his elder son and two of his present wife's children by her former marriage. Why he supports his wife's children by a former marriage is not cogently explained and the burden of establishing that he, rather than their father, should be supporting there lies on him. ...

For the purpose of this appeal in my opinion the support which he gives to his wife's children by her former marriage should be disregarded in determining what he can pay towards the maintenance of his own children. It may be that attempts to collect maintenance from Mr Attard would be futile, but as he is seeking to justify a variation of an existing order he should be required to prove this fact by cogent evidence. This has not been done."

Since the making of the original order, the husband had made some indirect payments towards the support of his family (telephone and grocery accounts etc.) and the matrimonial home had been transferred to the wife. Of the amount of \$4,280 claimed, Lambert J made an order for one year's arrears, \$1,042, for the reasons as stated:

The factors which I treat as significant to my determination of the competing claims with respect to past maintenance are:

- * The respective financial circumstances of the parties over the relevant period and at the present date, but disregarding the husband's contributions to the support of his de facto wife.
 - * The wife's persistent attempts to enforce payment of the accumulating arrears.
 - * The husband's periods of unemployment.
 - * The receipt by the wife of Social Service Benefits over the period and her non-accountability for the refund of those benefits.
 - * The stipendiary nature of maintenance orders.
 - * Payments made by the husband indirectly for the support of family.
 - * The provisions of the home to the wife free of encumbrance subsequent to the making of the maintenance orders.
 - * The husband's demonstrated capacity to meet payments of almost \$300 per month for his housing provisions between September 1977 and April 1979.
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