55/77

FAMILY COURT OF AUSTRALIA AT ADELAIDE

In the Marriage of ZALENJUK

Gun J

5 April 1977

FAMILY LAW – INJUNCTION AS TO PROPERTY INTEREST/USE AND OCCUPATION OF MATRIMONIAL HOME – SON SUBMITTED THE COURT HAD NO POWER TO MAKE ORDER – WHETHER SUCH POWER EXISTS: *FAMILY LAW ACT* 1975, S114.

HELD:
1. Provided that there are proceedings between the parties in circumstances arising from the marital relationship, s114(1) gives the court wide power to deal with the use and occupancy of the matrimonial home and to make such order as it thinks proper. This power may be exercised even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home. Where dissolution proceedings are instituted it is appropriate that the question of occupation be considered together with any other maintenance and property issues.

2. It is clear from this passage that the court has power to make the order sought by the applicant in the present case, either where the property is in the joint names of the applicant and the respondent, or in the name of the respondent only. The question is whether or not the court has power to make the order where the property is owned jointly by the respondent and some other person (in this case his son).

3. If the Family Court has the power to make the order sought by the applicant in this case against the respondent, the fact that it may affect the position of a third party cannot limit the power. Accordingly, the submission that the Court does not have the jurisdiction to make the order sought by the applicant on the ground that the respondent's son is the joint owner of the property is not accepted.

GUN J: In this matter the applicant originally applied for an order than an injunction be granted restraining the respondent from selling or disposing of or otherwise dealing with his interest in the house property known as and situated at 9 Reo Road, Croydon Park in the State of South Australia. The parties are still married and there are no proceedings on foot for dissolution of the marriage.

The application came on for hearing before Marshall SM on 17 December 1976. On that day His Honour made an order in terms of the application, and adjourned further consideration until 12 January 1977. The order made by His Honour specified that the injunction was only to operate until 12 January 1977.

The order lapsed on 12 January 1977 and was not renewed although, on that day, the respondent undertook not to sell or dispose of or otherwise deal with his interest in the property. The undertaking was again renewed on 2 March 1977 and the application was adjourned to 16 March 1977. On that day the application came before me. It was clear at that time that I did not have the power to make the order sought by the applicant in view of the decision in *McCarney's case* (CCH 76,051). Miss Worth applied to amend the application by adding a claim for an order that the applicant should have the use and occupation of the premises. The application to amend was opposed but I intimated that I would be prepared to allow the application.

Mr Pertl for the respondent applied for an adjournment of the application as he had not been given notice of the proposed amendment. I acceded to Mr Pertl's request and adjourned the application to 25 March 1977. On that day, leave was formally given to the applicant to amend the application by adding the following sentence at the end of paragraph (a), namely:-

> 'Alternatively (an order) that the applicant have the use and occupation of the said house property and that the respondent be restrained from interfering with the applicant's use and enjoyment thereof.'

No oral evidence has been given on this application and the relevant facts are set out in affidavits filed by the parties. There are some areas of conflict in the affidavits filed by the parties. I cannot resolve these matters in the present application. There are, however, sufficient facts which are not in dispute to enable me to deal with the application.

The parties were married in Novi Sad, Yugoslavia, on 2 March 1958. Both had been married previously. The applicant had four children by her first marriage and the respondent had five children by his previous marriage. The applicant and the respondent had lived together in a *de facto* relationship for approximately 8 years prior to their marriage. There were two children of the marriage who were born prior to the marriage, and the younger is now 23 years of age. The applicant is 58 years of age. The respondent's age has not been given but he is in receipt of an age pension.

The parties migrated to Australia in about 1961 together with the two children of the marriage, and four of the respondent's children. The respondent alleges that one of the applicant's children by her first marriage also accompanied them.

Although there is no direct evidence on the matter, it seems clear that neither party had any money when they arrived in Australia. The house property at 9 Reo Road Croydon Park, being the land comprised in Certificate of Title Register Book Volume 2160 Folio 77 was purchased in August 1972. The property was purchased in the names of the respondent and his son, Vasilj Kalenjuk. The applicant and the respondent have lived together in the house since August 1962.

There is a dispute in the affidavits as to the reason why the property is registered in the names of the respondent and his son. The applicant claims that she worked as a dressmaker throughout the marriage and contributed towards the family finances. She says that the property was put in the names of the respondent and his son so that a bank loan could be obtained. She also claims that whatever moneys were put into the property by Vasilj Kalenjuk have been repaid to him, and that he has no further interest in the property as a trustee for the respondent. The respondent denies this and says that his son is a beneficial owner as joint tenant with the respondent.

When the matter came before me on 16 March 1977 Mr Pertl told me that the son wished to be heard in the matter. I suggested that Mr Pertl give notice to the son of the adjourned hearing, and that he inform the son that if he wished to put anything before me, he was at liberty to do so. The son Vasilj attended at the hearing and Mr Pertl tendered at the hearing an affidavit sworn by the son in which the son claimed that he is a beneficial owner. He also said that he wanted the house to be sold and to receive his interest in the property as he needed the money. In his affidavit, the son said that he opposed the making of the orders sought by the wife, as those orders would 'prejudice' him when dealing with the property.

Although Mr Pertl did not say so, and although I omitted to ask him, I gathered that he was acting for the son. The house is subject to a mortgage with the Savings Bank of South Australia. The balance due as at 25 January 1977 was $5,146.12. The respondent and his son are obliged to repay the mortgage by quarterly instalments of $165.50. Although the respondent and his son have deposed to the fact that the respondent has now made further arrangements for the property to be sold. She has nowhere else to live and no money, and wishes to remain in the matrimonial home until she can find alternative accommodation or until her rights in relation to the property have been resolved.

The respondent says that he cannot maintain the house out of his pension and other income, and that he cannot keep up the payments under the mortgage together with the rates, taxes and other outgoings in respect thereof. The respondent apparently wishes to sell the property. His counsel submitted that he should be free to sell it if he wished to do so.
On the facts set out above, I would be prepared to make the order sought by the applicant. However, the respondent contends (as I understand Mr Pertl's submissions) that I do not have jurisdiction to make the order sought by the applicant because —

> (a) the order which I make will affect the interest in the property of the respondent's son who is not a party to the marriage;
> (b) the procedure adopted by the applicant in this case is a ruse to circumvent the decisions in the cases of *Russell v Russell* (CCH 75,145) and *McCarney* (CCH 76,051) and that the real purpose of

the present application is an attempt to preserve the rights of the applicant for a property settlement until such time as she is able to make a claim under Section 79 of the *Family Law Act*.

The question of the court's power to grant injunctions in cases such as the present, was dealt with by the Full Court of the Family Court of Australia (Evatt CJ, Fawley and Ellis JJ) in the case of *Davis* (CCH 75,307). The following passage sets out the matter clearly:—

'Under s4 of the *Family Law Act* as amended there is power to entertain proceedings for a matrimonial cause, being "proceedings between the parties for an order or injunction in circumstances arising out of the marital relationship" (sec.4)

Section 114(1) provides that in proceedings of that kind the court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction "relating to the use or occupancy of the matrimonial home".

In addition s114(3) gives the court power to grant injunctions in proceedings under the Act where it appears just and convenient to do so. This subsection is based on s124 of the *Matrimonial Causes Act* which has been interpreted in a number of decisions which were referred to by Mr Broun for the respondent (*Earl v Earl* SC NSW, CA 26 March 1975, unreported; *Plowman v Plowman* 16 FLR 447; *Banks v Banks* (1970) 3 NSWLR 233). Under these decisions the Court may grant an injunction in relation to the use and occupation of the matrimonial home a part of its powers in proceedings for maintenance or for custody, where use and occupation is an essential element of maintenance or custody.

Section 114(1) on the face of it gives a wider power, since the proceedings in regard to use and occupancy stand in their own right and do not depend on the existence of proceedings for any other form of relief. Mr Sheldon, for the appellant, argued that the Court could not, under s114 make orders which had the effect of altering or creating proprietary interests, since this would have the effect of evading the limitations placed on the property provisions by the High Court's decision in *Russell v Russell*; *Farrelly v Farrelly* (1976) FLC 90-039).

This case is typical of many in which there is a need to determine certain issues between parties relating to their matrimonial property after they have separated but where the time for institution of proceedings for dissolution has not yet elapsed. The present position is that in conformity with the High Court decision the Act confers no power to deal with declarations of property interests or transfers of property except in relation to proceedings for dissolution. There is an area of overlap between the power to alter property interests and the power to make orders about the use and occupancy of the matrimonial home under s114(1). However, in our view it does not follow that the restrictions on s79 should lead to restrictions on the court's power to deal with the use and occupancy of the matrimonial home in proceedings between the parties to the marriage at any time during the marriage. There is nothing in the majority decision in *Russell v Russell* to suggest that s114(1) should be given a restricted meaning. On the contrary, Mason J's judgment implies that the marriage power may support wider powers than those now conferred by ss78 and 79 to deal with the property of the parties to a marriage, provided that the property is clearly defined as matrimonial property, e.g. property acquired during or in contemplation of the marriage for the benefit of the parties to the marriage. There is nothing to suggest that the power to deal with use and occupancy of the matrimonial home itself would fall outside the marriage power may support wider powers than those now conferred by ss78 & 79 to deal with the property of the parties to a marriage, provided that the property is clearly defined as matrimonial property, e.g. property acquired during or in contemplation of the marriage for the benefit of the parties to the marriage. There is nothing to suggest that the power to deal with use and occupancy of the matrimonial home itself would fall outside the marriage power (s51(xxi)). Different considerations may apply to that part of s114(1) which gives the court power to make orders in relation to the property of a party to the marriage.

In our view, provided that there are proceedings, between the parties in circumstances arising from the marital relationship, s114(1) gives the court wide power to deal with the use and occupancy of the matrimonial home and to make such order as it thinks proper. This power may be exercised even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home. Where dissolution proceedings are instituted it is appropriate that the question of occupation be considered together with any other maintenance and property issues.

Mr Sheldon argued that an order granting "exclusive occupancy" amounted to the creation of a proprietary interest in the matrimonial home and was therefore outside the jurisdiction of the court. He referred to *National Provincial Bank v Ainsworth* (1965) 2 All ER 472 in which a distinction was drawn between a person's right of occupation enforceable only by one spouse against another and a proprietary interest enforceable against third parties.

> The order in this case was "That ... until further order of the court the wife and the said child of the marriage have exclusive occupancy of the premises ...". Such an order affects the husband's proprietary interest in the home, but it does not, in our view, take it outside the power conferred by s114(1).'

It is clear from this passage and, in particular, the passages which I have underlined, that the court has power to make the order sought by the applicant in the present case, either where the property is in the joint names of the applicant and the respondent, or in the name of the respondent only. The question is whether or not the court has power to make the order where the property is owned jointly by the respondent and some other person (in this case his son).

In the case of *Antonarkis and Anor v Delly and Anor* (CCH 75,310) the High Court considered the powers of the court under s124 of the *Matrimonial Causes Act*. The headnote in that case is as follows:—

> 'A wife started proceedings for dissolution under the repealed Act in the A.C.T. Supreme Court and obtained an order for the vacation of the matrimonial home by the husband and his mother and stepbrother. The husband complied but the mother and stepbrother did not. Separate legal action was taken to remove them but at the time of the final hearing of the dissolution proceedings they were still in residence and appealed against a further order made then that they vacate the home within 12 hours and that the mother remove a caveat she had placed on the title. They argued that the court had no power under s124 of the *Matrimonial Causes Act* to grant an injunction which affected the rights of strangers to the matrimonial cause. The High Court approved its decision in *Sanders v Sanders* (1967) CLR 366 in which it held that the wide words of s124 could not be limited by importing any restriction other than that the power be used to aid, enforce, or protect the proper exercise of the matrimonial causes jurisdiction. It held that that principle applied to permanent as well as interlocutory injunctions. Section 124 allowed the trial Judge to order the removal of the caveat as this was necessary to enable the husband to settle the property on the wife as he had been validly ordered to.'

In its judgment the High Court (Barwick CJ, Gibbs and Mason JJ) said:—

> 'In *Sanders v Sanders* (1967) 116 CLR 366 this court held that the Supreme Court had power in matrimonial proceedings to grant an interlocutory injunction restraining an insurer from paying to the husband any moneys in respect of any claim arising out of fire damage to the matrimonial home. Barwick CJ, speaking of the power given by s124, said (at p372):
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> > "That power may be exercised to maintain an existing situation until the Court can decide what should be done upon the substantive application for maintenance, even though its exercise involves third parties, and the rights of any such party or parties in relation to one or both of the parties to the matrimonial cause, or in relation to the property of one or both of those parties. But, of course, it must be exercised in a proceeding under the *Matrimonial Causes Act* and must be in aid of the exercise of the Court's jurisdiction in those proceedings: see *Horne v Horne* (1963) SR (NSW) at p135 ..."

And —

> 'In our opinion the statement of Barwick CJ in *Sanders v Sanders* was correct. The wide words of s124 cannot be limited by importing a restriction that the order made shall not affect the position of third parties. However, the section gives power to grant an injunction only to a court exercising jurisdiction under the Act, that is, in a proceeding properly brought under the Act, and clearly the injunction can only be granted in aid of an exercise of jurisdiction under the Act. As Wallace P said in the passage in *Horne v Horne* (1963) 63 SR (NSW) 121 at p135, which is referred to in *Sanders v Sanders*, "this power is limited to aiding, enforcing or protecting the proper and due exercise of the matrimonial causes jurisdiction or the provisions of the Act". In *Sanders v Sanders* Barwick CJ was speaking of an interlocutory injunction, since the injunction there in question was interlocutory, and it was submitted in the present case that his remarks should be confined to the case of an interlocutory injunctions — in express terms it extends to orders which are not interlocutory — and the principle stated applies also to permanent injunctions.'

In my opinion, the same reasoning can be applied in relation to s114 of the *Family Law Act* as was applied by the High Court to s124 of the *Matrimonial Causes Act*.

It follows that if this court has the power to make the order sought by the applicant in this case against the respondent, the fact that it may affect the position of a third party cannot limit the

power. I do not therefore accept the submission that I do not have the jurisdiction to make the order sought by the applicant on the ground that the respondent's son is the joint owner of the property.

I do not accept the submission that the present application is a ruse to circumvent the result of the decisions of the High Court in the case of *Russell v Russell* and the Full Court of the Family Court in *McCarney's case*. It is clear from the decision in the case of *Davis* (*supra*) that the court has power to make the order sought by the applicant. If that is so, and if I consider that I should exercise my discretion and make the order, then the fact that the order may have the result of circumventing the decisions in *Russell v Russell* and *McCarney* is not, in my opinion, a relevant consideration.

As previously indicated, I consider that I should make the order sought by the applicant in the facts of this case. I can see no reason why I should not do so and I accordingly make the following orders:-

1. That until further order the applicant have the use and occupation of the house property known as and situated at Reo Road, Croydon Park in the State of South Australia.
2. That the respondent be restrained and an injunction is hereby granted restraining him from interfering with the applicant's use and enjoyment of the said house property and from assaulting, molesting, harassing or otherwise interfering with the applicant.
3. It is a condition of the said orders that the applicant shall henceforth pay to the respondent half of the mortgage instalments payable in respect of the said premises.
