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FAMILY COURT OF AUSTRALIA at HOBART

In the Marriage of PATTERSON and PATTERSON

Wood SJ

22 May 1979 — [1979] FLC 78,755 (¶90-705)

FAMILY LAW - APPLICATION FOR MAINTENANCE OF WIFE AND CHILDREN - MATTERS TO TAKE INTO CONSIDERATION WHEN DEALING WITH APPLICATION - APPROPRIATE GAINFUL EMPLOYMENT OF WIFE RELEVANT TEST - CAPACITY FOR EMPLOYMENT NOT AN APPROPRIATE TEST - NEED TO CONSIDER WIFE'S ROLE AS MOTHER - CIRCUMSTANCES OF HUSBAND - REASONABLE STANDARD OF LIVING OF WIFE TO BE CONSIDERED: FAMILY LAW ACT 1975, S75(2)

The relevant facts of this application for maintenance of a wife and children after separation and before divorce, may be summarised as follows: The parties were married in December 1966. They separated in September 1978. The husband went to reside with another woman, Mrs B. There were two children, D born August 1971 and B born November 1973, who remained with their mother in the matrimonial home. Both parties were secondary school teachers, the husband being a subject master. The wife having worked quite extensively during the marriage, was at the time of separation working part-time, and at the date of the hearing was in receipt only of social security pension, child endowment and child maintenance paid by the husband for the children of \$30.00 per week total. The following points arose in the hearing of the application:

(a) The woman (Mrs B) with whom the husband was living was not contributing to the rent of the husband's accommodation. **HELD:** that Mrs B's earning capacity should be taken into account to the extent of half the rent.

(b) The husband and wife were both school teachers and had been working, teaching in the same department at the same school. **HELD:** the wife's unwillingness to work so closely with the husband was reasonable.

(c) The husband argued that the wife could free herself for employment by using her relatives to look after the children. **HELD:** there is no general responsibility upon the extended family to give such assistance. If the wife, for good reason, did not wish to call upon her family for such help there was no reason why a court should take the view that such help is available.

(d) That the reasonable standard of living which the wife and her children should be able to demand is that which is as near as possible to the one which they enjoyed while the parties cohabited.

(e) The case provides a useful checklist of figures held by the court to be reasonable for various items of expenditure, and provides an example of the judicial process in a maintenance application, namely consideration of the wife's reasonable needs and the extent to which her income fell short of meeting those needs; and consideration of the reasonable needs of the husband and the extent to which his income exceeded those needs; and consideration of what adjustments should be made to either.

(f) The order for wife maintenance was made for a term of three months.

WOOD SJ: *[After setting out the facts, His Honour continued]* ... The greater part of the consideration of the evidence in this case will relate to the matters which are set out in s75(2). It seems to me that two points emerge from the argument which has been addressed to me by counsel for the husband. The first point that he makes, leaving aside his argument that the wife has not demonstrated need, is that she has a capacity for employment. In putting that as counsel's submission I do so deliberately, because it seems to me that he did not address himself to the question of what is appropriate gainful employment within the meaning of the Act, but rather relied with some vigour upon the fact that the wife had a capacity for work. I drew his attention during the course of his argument, and indeed during the course of the evidence to the fact that what the Act envisages is appropriate gainful employment, a phrase which it uses in both s72 and 75(2)(b), and not merely a capacity for employment.

The other matter which has to be taken into account, and on which some emphasis was placed by the wife, ie the need to protect her position, in so far as she wishes to continue her role as a mother, and this desire must be considered under the provisions of s75(2)(l).

There is a third matter which I think is to be taken into account, and which was not

envisaged by counsel in the course of their addresses, and that is the circumstances under which the husband is presently cohabiting with Mrs B. [*His Honour then went on to consider aspects of evidence going to the credit of Mrs B. which included:*] ... She made comments concerning what she conceives to be no obligation on her part to make any contribution to the rental of the flat that the husband in these proceedings lives in. She tartly pointed out that he would have to pay the rent for the flat whether she were there or not and so she did not see why she should be required to contribute to the rent of the flat. [*Having dealt with other aspects of credit His Honour continued:*] ... She has been working as a part-time sales assistant at Myers for approximately one year and says that she has a take home pay of \$75 a week. I take the view that she has an earning capacity in the sum of \$75 a week and that the husband is entitled to require that she make some contribution towards the menage he has set up with her. If he does not do so, that is his business, but the Court is entitled to take this potential into account and I am of the view that Mrs B. could, at least, pay \$28 a week to the husband by way of half the rent.

So far as the application for maintenance is concerned, the wife and the children have to be kept adequately. The question of what is adequate in the circumstances was discussed by his Honour Goldstein J in the case of *Evans v Evans* [1978] FLC 77,206 (¶90-435). With respect, I adopt what his Honour says. The reasonable standard of living which the wife and her children should be able to demand is that which is as near as possible the one which they enjoyed while the parties cohabited.

So far as the question of the wife's entitlement to maintenance at all is concerned, it is a question of considering what is her capacity for appropriate gainful employment. Since the case of *Lyall and Lyall* (1977) FLC 90-223 there is no question but that a party who seeks maintenance bears the onus of establishing that that party cannot adequately maintain himself or herself, by reason of the matters set out in the Act. During the time the parties cohabited, and in fact prior to and subsequent to their separation, the wife worked as a specialist remedial teacher, and from that employment, which was two hours a day, she was able to earn some \$75 a week. The employment which she had was at the high school where the husband is the Master of the Subject Department. She has expressed a disinclination to resume employment at that school. The question is therefore whether in refusing or discontinuing to work at that school, the wife can be said to have rejected the opportunity for appropriate gainful employment, and disentitled to maintenance for herself.

I am of the view, however, that the particular work involved at this school in the husband's subject department is not appropriate gainful employment for the wife. I think the wife, so soon after marriage breakdown, is entitled to have her real feelings, as distinct from any pretended feelings, taken into account by the Court in these circumstances. She is entitled to feel humiliation. She is entitled to feel hurt. She is even entitled to feel bitter, on the evidence which I have. She is entitled, in my view, to take the course of saying that the work at that school, although it would be gainful employment, is not appropriate employment.

Quite a lot was made of the availability to her of the services of her father and her sister to help with that care. I do not think that there is any general responsibility upon the extended family to give any aid in circumstances of this sort. If a party, for good reason, expressed the view that that party does not want to call for help from extended family, then I see no reason why the Court should take the view that such help is a resource open to that party and because no advantage has been taken of it, the Court should conclude that a capacity for appropriate gainful employment exists. The Court cannot thrust upon a party an obligation to twist the arms of relatives in order to have them embark upon child minding to free that parent for employment.

I am of the view that the wife has a capacity for gainful employment, but I am not of the view that at this present stage of the proceedings she can reasonably be said to have rejected the opportunity of using that capacity towards her own support.

I will now deal with the order. My calculation is that if I take what the wife has, that is \$104.80, and I subtract the payment of \$30 maintenance, she has \$74.80 from sources other than the husband. What she needs is \$140. The balance then to make up the short fall is \$65.20. What resources has the husband to find \$65.20 a week? He has the \$30 of maintenance, which he has been paying. He has in addition \$26, which, I have found on my analysis of his earnings,

is available to him by reason of his having to cut his suit to fit his cloth, and which is what every party in these sort of proceedings has to do. He has, in my view, also Mrs B's earning capacity, which I quantify as a contribution of at least half the rental, that is \$28 a week – in all \$84 a week, so it follows from that that the husband does have the means to pay. I have borne in mind the benefit which the wife has of approximately \$20 a week represented by rates of \$391 per annum and the mortgage instalments of \$804 per annum and I have also borne in mind the benefit to her from the health cover which the husband has. I therefore think that \$66 is a reasonable order in the circumstances. She asked for \$70. I order him to pay \$30 for the wife and \$18 for each of the two children, the first of such payments to be made on Friday of this week.
