

41/89

**FAMILY COURT OF AUSTRALIA at MELBOURNE*****In the Marriage of ELSUM, (TA and HH)*****Kay J****21 July 1989**

**FAMILY LAW – ORDER MADE FOR CHILD MAINTENANCE – IN ARREARS – ORDER REGISTERED WITH CHILD SUPPORT AGENCY – WHETHER ARREARS ACCRUING PRIOR TO REGISTRATION CAPABLE OF ENFORCEMENT BY PARTY: *CHILD SUPPORT ACT 1988* (CTH), SS4(1), 17, 23-25, 28, 30; *FAMILY LAW ACT 1975*, SS66N, 117(2A).**

**Arrears of maintenance accruing prior to registration of the order with the Child Support Agency are capable of enforcement by a party.**

**KAY J:** [1] In these proceedings on 14 May 1987, an order was made by Justice Walsh that the wife have the sole custody of the children, M.P., born 29 April 1978, and M.K., born 2 January 1980. It was further ordered that the husband pay to the wife for the maintenance of each of the said children a sum of \$40 per week, a total of \$80 per week, as and from the 22nd day of May 1987. That order was registered with the Child Support Agency, effective as at 27 September 1988 by an application which was made to the Child Support Agency in accordance with the provisions of Section 25 of the *Child Support Act 1988*. From 1 January 1988 until the present time, it is common ground that no moneys have been paid by the husband under the order. There are agreed arrears between 1 January 1988 and 27 September 1988 at \$3,040. The relevance of 27 September 1988 is created by the provisions of the *Child Support Act 1988* and, in particular, Section 30 of the Act which provides that:

"Where a registrable maintenance liability is registered under this Act:

(a) amounts payable under the liability in relation to the child support enforcement period are debts due by the payer to the Commonwealth in accordance with the particulars of the liability entered in the Register; and

(b) the payee is not entitled to, and may not enforce payment of, those amounts:."

The child support enforcement period referred to in s30 is defined in s4(1) as being, insofar as is relevant:

"The period commencing on the day on which the liability first becomes enforceable under this Act and ending on the day on which the liability first ceases to be so enforceable."

Section 28 provides that:

"A registered maintenance liability first becomes enforceable under this Act on whichever of the following days is applicable in relation to the liability:

[2] (a) If the liability is a transferred maintenance liability — the day on which the liability is transferred to the Child Support Register;

(b) if the liability is registered under Section 24 — the day on which the liability arose under, or was varied or otherwise affected by, the court order or maintenance agreement by virtue of which the liability is registered under that section;

(c) if the liability is registered under subsection 25(2) — such day as is determined, in writing, by the Registrar, (being a day not later than 60 days after the day on which the Registrar receives, under subsection 25(1), the relevant duly completed form from the payee of the liability)".

A "transferred maintenance liability" referred to in s28(a) is a transfer of an existing order registered with a State Collection Agency (s4(1)). There is some difficulty with the terms of s28(b) and s28(c), i.e. the reference to a s24 registration and a s25(2) registration. A s24 registration,

by the terms of s24 itself, relates back to an application made under s23. Section 23 imposes a positive liability on the payee of a registrable maintenance liability to fill in the necessary forms and forward them to the Registrar within 14 days after the order was made or registered in a Court.

It is clear from the terms of s23 that such a liability could only arise in respect of an order made or a registration occurring after the commencement of the *Child Support Act* itself. A s25 registration applies to registrable maintenance liabilities that were not registered under this Act. Section 25(1) provides:

"The payee of a registrable maintenance liability that is not registered under this Act may apply to the Registrar, in an approved form, for the registration of the liability under this Act."

A "registrable maintenance liability" is defined, *inter alia*, in s17 as being:

[3] "... a liability of:  
a parent of a child to pay a periodic amount for the maintenance of the child [arising under a court order]."

There is, as I have indicated, some difficulty with the language of ss23 and 25, in that both of them talk of "registrable maintenance liabilities" and the only distinction between the two, it would seem, is that s23 imposes a positive obligation to register within 14 days an order made after the commencement of the Act, whilst s25 enables the registration of an order already in existence. That the Act itself has retrospective application to orders in existence before its commencement appears to be clear by implication from sections such as s31, which talks of garnishee orders or attachment of earnings orders made under the *Matrimonial Causes Act* 1959, which of course must have been made well before the *Child Support Act* came into existence, and there is a similar reference in the definition of court order (s4(1)) which includes:

"... An order: (a) that was made by, or registered in, a court under the *Family Law Act* 1975; the *Matrimonial Causes Act* 1959 or the law of a State or Territory..."

The order that is sought to be enforced here was an order made under the *Family Law Act* 1975. It was made prior to the commencement of the *Child Support Act* 1988. It was not an order to which s24 could have applied. By process of elimination it is an order to which s25 may apply. Section 25 was applied to it and by application of s28(c), the liability arises from the day advised by the Registrar, which in this case was agreed to be 27 September 1988.

I understand that there has been a judgment obtained in another place in respect of arrears that have accrued since that time and that judgment is as between the Commonwealth, as the collecting agency, and the husband. The wife is not party to those proceedings. [4] The Court has power to vary or suspend any maintenance order by reason of the operation of s66N of the *Family Law Act* 1975, but it shall not vary or increase or decrease any amount ordered to be paid unless the Court is satisfied that the circumstances (so far as are relevant to these proceedings) of the person liable to make the payments under the order have so changed to justify it so doing.

The husband's case is that he is a graphic artist. He is a man who requires motivation to carry out the work that he does, which is of an artistic nature. The breakdown of the marriage was something that occurred contrary to his desire and has had a detrimental effect on his capacity to earn because he has lost motivation to do so. The wife made some expansive claims as to the husband's earning capacity prior to the breakdown of the marriage, suggesting that he was earning as much as \$100,000 per annum. The husband has, from at least the floor of the Court, taken significant objection to that being within the realms of the norm. Be that as it may, the husband's own material would indicate that he was earning at least \$440 a week in May 1987, when these orders were made. His evidence is that he stopped work in late 1987. He returned to some work with the Phillip Institute in March 1988. He worked there for some seven or eight months, receiving \$15,000 clear of taxation for his efforts, that is, a net take home pay of about \$400 a week. He has since had self-employment. He has received another \$7,000 for another job that he did.

My view is that his circumstances have not so changed as to justify me varying the order.

He has had at all times, in my view, an earning capacity to meet the rather modest order of \$80 per week. He has stated that he has no intention of getting into any reasonable level of employment whilst he is the non-custodial parent. Paradoxically, if he were only to become the custodial parent, he would be able to work at a much improved level and provide for the support for his children that he acknowledges [5] that they need. Whilst he remains a non-custodial parent, which it would seem on the material to be for the predictable future he does not feel he is so motivated. I am not to be concerned with his motivation. I am to be concerned with his earning capacity, and in my view, not only has he had enough money to meet the maintenance more than adequately and provide for himself, he has an earning capacity to earn more if he tries.

That then brings us to what to do with the order. There are arrears agreed at \$3,040 and they should now be paid. Mr Fookes has asked that I make an order that the husband's motor vehicle be seized. His Form 17 discloses that he had \$6,500 cash at the bank, and a motor vehicle worth \$8,000. He now says that his cash at the bank has dwindled to \$900, and that he has domestic bills to pay. He is capable of rendering an account to the SEC, for work that he is presently doing, for \$4,000, which he thinks he can get within 30 days.

I propose to make an order in accordance with the provisions of O33, R3(9) of the *Family Law Rules* for the seizure of the motor vehicle should he default in paying the money within 30 days, and I propose to make an order restraining him from disposing of, dealing with, or encumbering the motor vehicle pending the payment of the moneys.

I further propose that the wife be at liberty then to sell the motor vehicle and to apply the proceeds of sale in reduction of the husband's obligations to her, and to draw the existence of any surplus to the attention of the Child Support Agency to wait to see what they want to do with that. If they want to do nothing then the moneys will be returned to the husband subject to any costs orders I may make in these proceedings.

There is another issue before the court, and that relates to the question of injunctions. The wife opened through her counsel by seeking an injunction restraining the husband from coming within 200 metres of her home or her place of employment, or from [6] harassing or molesting her or assaulting her, or from attending at the children's day care centre. In the giving of the evidence those matters were watered down a little bit. It seems to me there is no evidence of an assault by the husband on the wife; there is no evidence that he has been harassing her at her place of employment. She feels extremely insecure as a result of the breakdown of the relationship. She feels threatened by the presence of the husband. He certainly attended at her home uninvited outside of access times, and he certainly stayed on unwelcome at the end of access periods when the wife has not wanted him there. Further, there is some rather strange correspondence that the husband has been writing.

Whether it is a subjective and over-sensitive position of the wife, or whether it is a justified position, I do not think is ultimately terribly important. She owns her own home, she is entitled to the sanctity of it. Whether it be the husband or any other person who is interfering with that sanctity contrary to her desires, they become a trespasser. She is entitled to the protection of the law to avoid such trespass taking place. She is entitled to protection of her own mental well-being. As I indicated, despite the fact that she happens to be unduly and reasonably sensitive to what may be, in other circumstances, not unreasonable behaviour of the husband, she is entitled in those circumstances to the privacy that she seeks.

I propose then to make the following orders:

(1) I dismiss the husband's application seeking suspension of or variation of or discharge of the existing maintenance order made by Justice Walsh on 14 May 1987.

(2) As to the arrears of maintenance accrued pursuant to the said order up until its registration with the Child Support Agency on 27 September 1988, I order that the husband pay to the wife within 30 days the sum of \$3,040.

[7] (3) Should the husband default in the payment of the said sum of \$3,040 within the said time then the wife is to be at liberty, via any person duly authorised in writing by her solicitors to seize the husband's motor vehicle registered No. CIS.884 and to realise same. Upon the wife realising the said motor vehicle there is to be paid to her the sum of \$3,040, and the balance is then to be

held by her for a period of 14 days, she to be at liberty to notify the Child Support Agency of the existence of the balance of proceeds of sale of the motor vehicle. Should the Child Support Agency take no action in respect of any funds held by the wife or the sheriff take no action in respect of the surplus of funds so held by the wife within 14 days after the vehicle is realised, the wife shall return the same to the husband.

(4) That until further order the husband be and is hereby restrained from:

(a) entering upon or loitering near the wife's home or any other place at which she may from time to time reside other than for the purposes of collecting or returning the children at the commencement of or conclusion of access periods;

(b) from attending at the children's after school care centre after 5 p.m. on any day.

Mr FOOKES: I seek an order for, your Honour, in my submission, half the wife's costs of these proceedings.

HIS HONOUR: How much are you seeking?

Mr FOOKES: Your Honour, I have not quantified an amount. Do you want – does your Honour wish me to obtain instructions about that?

[8] HIS HONOUR: Yes.

Mr FOOKES: Thank you. A figure which I would submit to be appropriate would be \$1,500, sir.

HIS HONOUR: Yes. Mr Curtain, what do you say on the question of costs?

RECORDED: NOT TRANSCRIBED

**KAY J:** There is an application before me for costs. Mr Fookes seeks half the costs of the proceedings, which he estimates at \$1,500 - i.e. half is \$1,500. In my view, these are proceedings in which costs ought to follow the event within the meaning of s117(2A). The proceedings were in part necessitated by the failure of the party to comply with previous orders of the Court. The financial circumstances of the parties are such that it is appropriate that the husband make a significant contribution towards the wife's costs. I propose to not quite be as generous as Mr Fookes would have it, but order that the husband pay \$1,200 towards the wife's costs. I do not make those subject to any time limit, save that if the wife is obliged to sell the car then she can take the moneys out of the moneys she has from the car. I make the following additional orders:

(5) That the husband pay \$1,200 towards the wife's costs.

(6) That the wife be at liberty to deduct from any surplus of funds received on the sale of the husband's motor vehicle, should she be required to realise it pursuant to these orders, the sum of \$1,200 towards her costs.

(7) I direct that the case be removed from the active pending cases listed.

(8) I certify for counsel.

---