

## Lecture 9 – Spousal & Child Maintenance

### *Introduction*

- “Child maintenance” v “child support”
  - Maintenance in terms of providing one of more of payment of monies/providing accommodation/providing services – it does not fall within the ambit of child support; an order can be made by the Family Court which is not an administrative order, for example –
    - the exclusive occupation of the home whereby the mother and the three children are living there rent free;
    - or might be an order by the Family Court that the mother who is the family breadwinner pay the school fees of the child,
    - or that the father pay the health insurance of the whole family and not himself etc.
- Maintenance does not only mean a subsistence type living, but means something more than that in trying to bring the parties back to a position that they were as much as possible prior to the marriage
- Justification for the provision of maintenance
- More in terms of the *general maintenance of the family*.
  - i.e. not restricted to child or spousal maintenance.
- **Scope of maintenance**
  - The term maintenance is a term of very wide scope, signifying any form of material provision that will enable an adult to live a normal life and a child to be brought up properly.
  - *Re Borthwick (deceased); Borthwick v Beauvais* [1949] CH 395:
    - “Maintenance does not only mean the food [a wife] puts in her mouth; it means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket....Maintenance cannot mean only mere subsistence”.
- **Types of maintenance orders**
  - Maintenance can be provided in many ways, including:
    - Paying money (regular payments or lump sum) – *most common*
    - Providing accommodation e.g. exclusive occupation
    - Providing services e.g. health insurance
  - The usual maintenance - “periodic maintenance” or “lump sum maintenance”
  - Note, although these examples provide for the maintenance of one party, they may be in the form of property orders, injunctions or maintenance orders
  - Distinction between a property order, injunction and maintenance order
  - ***Distinction between a maintenance order and a property order under the FLA***
    - A property order can only be subsequently varied in very limited circumstances, whereas a maintenance order can more readily be varied.
    - Nature of order may be obvious - however, problems can arise with some orders
    - *Mullane v Mullane* (1983) 58 CLR 436
      - Exclusive occupation of former matrimonial home property order or maintenance order?
      - High Court - not a property order - order did not alter husband’s legal or equitable interests in former matrimonial home - merely affected his personal right to enjoy the property.
      - Accordingly, this order could be characterized as a maintenance order.
  - ***Current requirements for property orders to constitute maintenance orders***
    - Any maintenance order which involves the transfer or settlement of property must be expressly identified as a maintenance order – see sections 66R(1) and 77A(1).
    - A maintenance order which involves the payment of a lump sum must now also be specifically identified as such – see sections 66R(1) and 77A(1).

- **Development of the law**
- **Current situation**
  - In all jurisdictions except WA, the FLA covers maintenance of virtually all children, the maintenance of parties to a marriage, and the provision of child-bearing expenses for the mothers of ex-nuptial children.
  - In WA, the FLA covers the maintenance of virtually all children of a marriage and the maintenance of all parties to a marriage. State law still covers the maintenance of ex-nuptial children and the provision of child-bearing expenses for their mothers.
  - Throughout Australia however, State and Territorial law still covers maintenance of defacto partners (other than with respect to child-bearing expenses), and provision for any person from a deceased's estate.
  - In 1989, the Commonwealth Parliament created a new form of maintenance for children called "child support", established by the *Child Support (Assessment) Act 1989*. Child Support is usually determined by way of an administrative assessment using a statutory formula, rather than by a court.
  - Child support established - administrative assessment using a statutory formula.

### *Spousal Maintenance*

- Spousal maintenance provisions are contained in Part VIII of the FLA. Part VIII is divided into three main subjects:
  - Liability of one party to maintain the other party (s72)
  - Enforcement of this liability (ss74 and 75), and
  - Variation of an existing maintenance order (s83) – *in practice, this is the most difficult aspect*
  - Note however, Part VIIIA of the FLA enables parties to enter into a binding financial agreement concerning their property, financial resources and maintenance
- **Section 72 – sets out the basis upon which one spouse can obtain SM over another spouse**
  - The liability of one spouse to maintain the other spouse, and thus the entitlement of the latter spouse to be maintained by the former, is determined by s.72(1) of the FLA, which provides:
    - (1) "A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
      - (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
      - (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
      - (c) for any other adequate reason,
  - having regard to any relevant matter referred to in subsection 75(2)."
  - Thus, the liability of one spouse to maintain the other spouse depends on two conditions being satisfied. ***These are the two limbs that must be satisfied in order to obtain SM. These are:***
    - **(1) That one spouse be "unable to support herself or himself adequately" for one of the stated reasons, and**
    - **(2) The other spouse be reasonably able to maintain the former spouse.**
  - Unless both of these conditions are met, there is no maintenance liability between the spouses – *In the Marriage of Kajewski* (1978) 31 FLR 500.
  - **"Unable to support himself or herself adequately"**
    - Nygh J *In the Marriage of Murkin* [1980] FLC 90-806 stated:
      - "In my opinion the issue is not whether the wife is receiving sufficient funds, but whether she is able to support her adequately, that is whether she can generate funds from her own resources or earning capacity to supply her own needs. A woman who is dependent on

*payments of social security benefits, voluntary payments by a former husband or by friends and relatives is not able to support herself. She has to be supported by others...The threshold test in terms of s.72 is ability to support one's self, not need."*

- It is not simply enough that the person should remain dependent of payments of social security
  - i.e. a subsistence type living is not enough.
  - It is whether that person is able to live within a reasonable standard of living; and she or he is able to meet their own needs.
    - Needs – talking about needs over wants; i.e. being able to meet the normal day-to-day requirements of living.
- In summary – it is not a subsistence lifestyle, and it is NOT a reliance on social security; more than both of these things.
- **Meaning of “Adequately”**
  - ***In the Marriage of Nutting (1978) 30 FLR 555 - “adequately’ imports a standard of living which is reasonable in the circumstances”.***
  - **“Adequately” does not simply signify subsistence level – *In the Marriage of Evans (1978) 30 FLR 566.***
  - Court looks at standard of living of parties when they were together and the available resources. When financial resources limited post separation, both parties should enjoy a similar standard of living as to when they were married – *In the Marriage of Lusby (1977) 30 FLR 180.*
  - But note that there is no rule that one spouse should maintain the other to the pre-separation standard of living just because the other spouse can afford to do so - *In the Marriage of Bevan [1995] FLC 92-600.*
- **“Having regard for to any relevant matters referred to in subsection 75(2)”**
  - By virtue of the concluding words in s.72(1), “Having regard for to any relevant matters referred to in subsection 75(2)”, the 17 matters mentioned in s.75(2) have a controlling effect on the three specified reasons (s.71(1)(a), (b) and (c).
  - As a result, s.72(1) must be read in conjunction with s.75(2)(1)
- **Ability of one spouse to maintain the other**
  - The second requirement for maintenance (after the inability to support oneself) is that the other spouse have the ability to maintain the other.
  - Therefore, even if one spouse is unable to support themselves, the other spouse will be liable to pay maintain the former spouse if, and only if, the spouse is able to do so. Moreover, they will only be liable to the extent that they are reasonably able to maintain the other spouse.
  - The person being ordered/applying to make payment must be in a position where they can meet their own expenses as well as the projected expenses of the other party
    - It imports and connotes a reasonableness - .e.g if the party is unable to meet their own expenses, and those expenses must be reasonable, then they will not be required to pay the other party if they are unable to meet their own.
  - Consider this section within the term *reasonableness* for clarity
  - The way that it is determined practicably, is that the person who is sought to make payment must provide the court with form 13, which sets out his assets and liabilities as well as income and expenditure, and the court makes an accounting enquiry and an objective assessment is done based on his expenses, and the court goes through those expenses and determines what is reasonable based on his income and a reasonable standard of living based on that income.
    - i.e. travelling to Thailand every month – court may consider this unreasonable as the Court may consider it more important to support his wife in the short term; other examples include gambling & Casino debts, Food bill \$3000/week; \$500/night on drinks
    - ***Subjective assessment based on objective criteria to determine what is reasonable***

- **Duty on spouses to seek appropriate employment**
  - *If a person whom applies for a maintenance order from their spouse is able to work but chooses not to, the Court will not grant the order.*
  - *Reasonable exercise of capacity to work – four factors*
  - The Family Court takes the view that a spouse should engage in appropriate gainful employment where this is both possible and reasonable in the circumstances.
  - A spouse cannot claim, or decline to pay, maintenance in order to pursue some personal interest instead of entering the workforce, no matter how self-satisfying or worthy this may be.
  - For example, in *In the Marriage of Taguchi* [1987] FLC 91-836, the court refused to make an order Relfor the maintenance of the wife, even though the husband could afford to support her, because she was able to work but chose to pursue her artistic interests instead.
  - **Four factors**
    - The Family Court looks at four factors when considering whether, and the extent to which, a party to a marriage should be expected to work. These are:
      - 1. The party’s capacity for work – age, education, training and work experience, as well as physical and mental skills.
      - 2. Whether it is reasonable for this person to exercise their capacity to work, either fully or partially
        - *In the Marriage of Lusby* (1977) 30 FLR 180
        - *In the Marriage of Burton* [1979] FLC 90-610
      - 3. The form of employment that is appropriate for the person concerned - background, class or social standing may be relevant here.
        - *In the Marriage of Astbury* (1978) 34 FLR 173
      - 4. The ability of the spouse to obtain appropriate employment in the existing job market.
  - **Refusal to work**
    - *In the Marriage of Elsum* (1989) 98 FLR 123.
- **Relevance of income and financial resources of third parties**
  - *In the Marriage of Lusby* (1977) 30 FLR 180
  - *In the Marriage of Brady* (1978) 34 FLR 422
  - If either party to maintenance proceedings is cohabiting with another person, the court is required by s.75(2)(m) to take the financial circumstances relating to the cohabitation in account in considering what maintenance order it should make under s.74(1).
- **Relevance of capital and other financial resources**
  - Court also considers a party’s capital and other financial resources.
  - The test therefore is whether the spouse is in a position to finance themselves from their own resources – see *In the Marriage of Eliades* [1981] FLC 91-022.
  - In *In the Marriage of Beck (No.2)* [1983] FLC 91-318, the Full Court said ”Ability to pay...must be judged in light of all the circumstances, mental and physical resources, money at his disposal, capital position and current necessary expenditure”.
  - However, note *In the Marriage of Bevan* [1995] FLC 92-600.
  - Reasonable amount of capital be retained – *In the Marriage of Mitchell* [1995] FLC 92-601.

### *Spousal maintenance orders*

- **Enforcement of the liability to maintain – ss. 74(1) and 75 FLA**
  - ***Proceedings for spousal maintenance – relevant “matrimonial cause”***
    - Proceedings can be instituted for an order for spousal maintenance under s.74(1) only if they constitute a matrimonial case as defined in s.4(1).