

*Qin & Donato [2023] FedCFamC1A 223*

**Stacey Taylor, Barrister, Nationally Accredited Mediator & Accredited Arbitrator**

**A Full Court decision (Aldridge J sitting alone) regarding the appeal of a decision by a Judge in the Federal Circuit and Family Court of Australia (Division 2) who was hearing an Application for Review of a decision by a Senior Judicial Registrar, who had refused an application for lump sum and periodic spousal maintenance.**

## **Facts**

The parties had a de facto relationship of less than 2 years. There was 1 child of the relationship born in 2021. The child lived with the appellant de facto wife (“wife”) and spent 3 nights per fortnight with the respondent de facto husband (“husband”).

Prior to the wife’s application for maintenance that came before the Court for determination, the wife had filed four previous applications for spousal maintenance between October 2021 and April 2023.

The first of the wife’s previous applications had been resolved by consent with a partial property payment of \$30,000. The second application was dismissed, the third application was withdrawn and the fourth application was amended and became the application before the Court.

The wife’s application for maintenance was dismissed by a Senior Judicial Registrar and came before the primary Judge as an Application for Review of the orders made by the Senior Judicial Registrar.

## **Wife’s position**

The wife sought lump sum and periodic (ongoing) maintenance from the husband as follows:

- \$6,000 - being a bond and 4 weeks rent in advance to lease an apartment;
- \$8,404.40 - being a deposit for the purchase of a motor vehicle and associated costs (registration, CTP, comprehensive car insurance and a baby seat); and
- \$899 per week – periodic maintenance.

The wife argued at first instance that she was unable to adequately support herself by virtue of having the care and control of the child of the relationship; her health issues (which were varied); and the impact of these two issues on her income.

## **Husband's position**

The husband opposed the wife's application.

The husband argued that several of the wife's expenses set out in her financial statement had not been adequately explained or were not supported by evidence (including the amounts for household supplies, clothing and shoes, cleaning and other necessary commitments).

## **Legal Principles**

The legal principles with respect to spousal maintenance and de facto couples are set out in the *Family Law Act 1975* ("the Act").

Section 90SE of the Act provides that:

*(1) After the breakdown of a de facto relationship, a Court may make such orders as it considers proper for the maintenance of one of the parties to the de facto relationship.*

This is subject to at least one of the matters in section 90SB of the Act being satisfied which in this case was met by virtue of there being a child of the relationship.

Section 90SF of the Act provides that:

(1) *In exercising jurisdiction under section 90SE (after being satisfied of the matters in subsections 44(5) and (6) and sections 90SB and s90SD), the court must apply the principle that a party to a de facto relationship must maintain the other party to the de facto relationship:*

*(2) only to the extent that the first-mentioned party is reasonably able to do so; and*

*(3) only if the second-mentioned party is unable to support him or herself adequately whether:*

*(i) by reason of having the care and control of a child of the de facto relationship who has not attained the age of 18 years; or*

*(ii) a physical or mental incapacity for gainful employment or any other adequate reason; or*

*(iii) for any other adequate reason.*

## **Material before the Court**

Both parties had filed extensive affidavits and supporting material for the wife's application for maintenance. The wife had filed 648 pages of invoices in support of her application.

Aldridge J recorded on Appeal that the approach of the parties did not appear to be in accordance with their obligations pursuant to sections 67 and 68 of the *Federal Circuit and Family Court of Australia Act 2021* to conduct proceedings according to law and as quickly, inexpensively and as efficiently as possible.

Aldridge J stated at [6] that:

*"In hearing interim spousal maintenance, the Court does not conduct an audit of the parties' expenses or require extensive proof of every expense. Such a course would place an intolerable burden on those seeking maintenance, who after all, are doing so because they assert they are unable to support themselves adequately."*

In an interim maintenance application, the Court can take a reasonable broad-brush approach and does not have to address each and every item of expense claimed by an applicant (as per *Wilson & Wilson* [1989] FamCA 34).

His Honour recorded at [11] that the primary Judge was consistent with other authorities and had not been drawn into the vortex of minutiae adopted by the parties, particularly the Husband.

## **Primary decision**

The wife sought periodic maintenance of \$899 per week from the husband. The primary Judge held at [26] that the wife was able to establish a need for periodic maintenance based on her expenses being greater than her income by \$586 per week. There was no finding made that any of the wife's expenses were unreasonable.

However, the primary Judge held that despite exhausting the \$30,000 partial property payment in February 2022, the Wife “...appears to have been able to adequately support herself without additional support since February 2022” (at [29]).

The primary Judge accepted the wife's evidence that she was reducing her expenses but had been unable to afford various items. The primary Judge held that the evidence before the Court did not suggest the wife was at subsistence levels (as per *Brown & Brown* [2007] FamCA 151).

Accordingly, the wife did not meet the threshold test set out in section 90SF of the Act, as set out above.

The wife also sought lump sum maintenance by way of a bond and 4 weeks rent to enable her to rent an apartment. At the time of the application, the wife was living with her parents.

The wife had previously sought funds to allow her to rent a property in her first application for maintenance. The wife had received \$30,000 by consent in relation to that application but had not taken any steps to rent a property since that time. The primary Judge was not satisfied at [40] that the wife intended to rent a property.

The wife had reduced her working days from 4 days per week to 3 days per week. The primary Judge made a finding at [30] that the wife was not fully exercising her earning capacity.

The wife sought a lump sum of \$8,408.40 to assist with purchasing a car and related expenses. The primary Judge ordered the husband to pay the wife a lump sum of \$8,408.40 to assist the wife to purchase a car.

The primary Judge otherwise dismissed the balance of the Wife's Application for Review including her application funds to rent an apartment and periodic maintenance of \$899 per week.

The wife appealed.

## **Appeal**

The Full Court (Aldridge sitting alone) allowed leave and granted the wife's appeal.

Aldridge J held that the primary Judge erred in failing to make an order for periodic maintenance. The primary Judge found that the appellant's expenses exceeded her income but the primary Judge had failed to set out the reasons for the decision in circumstances where the wife could demonstrate a need for maintenance and where the evidence showed the wife's standard of living fell well short of what she had enjoyed during the relationship.

Aldridge J also considered whether the wife was fully exercising her earning capacity. The wife had reduced her working days from 4 days a week to 3 days a week because of the stress of the proceedings and the need to preserve her health for the sake of the child.

His Honour held that even if the wife increased her earning capacity by an additional day of work each week, she would still have a shortfall between her income and her expenses. It was held that the primary Judge erred by failing to consider this issue.

Aldridge J did not consider the issue of the wife's rent as there were sufficient errors to remit the matter after consideration of Grounds 2 and 5.

# Case Note – Family Law

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The orders dismissing the balance of the wife's Application for Review were set aside and the matter was remitted for rehearing by another Judge.



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Stacey comes to the Bar with over 15 years experience in family law and related jurisdictions. As a solicitor, Stacey was an Accredited Family Law Specialist (LIV) and an Adjunct Lecturer at The College of Law between 2012 and 2019.

Prior to specialising in family law in 2006, Stacey spent two years working in general practice in the areas of criminal law, wills & estates, property law & conveyancing. Stacey worked at a number of boutique and mid-tier firms in Melbourne before coming to the Bar. Stacey accepts briefs in all areas of family law and related jurisdictions in local, regional and interstate Courts.

Stacey is a member of the Family Law Section of the Law Council of Australia, Law Institute of Victoria (LIV), Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) and the Family Law Bar Association.

Stacey is a Nationally Accredited Mediator and Registered Arbitrator.

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