

COMMISSIONER FOR TAXES v GEORGE KAILIS LIVERIS & ORS

Court of Appeal of the Northern Territory of Australia

21 August 1989 and 25 September 1990 at Darwin

FAMILY LAW - Maintenance agreement - definition of -
whether "provision with respect to the property of"
the parties - Family Law Act 1975 (Cth.) s.90

FAMILY LAW - Maintenance agreement - definition of -
"financial matters" - whether transfer of property
exempt from stamp duty - Family Law Act 1975 (Cth.)

STATUTORY INTERPRETATION - "Maintenance agreement" -
"financial matters"

Cases followed:

Baker v Archer Shee [1927] A.C. 844
Charles v F.C.T. (1953-54) 90 C.L.R. 598
K & S Lake City Freighters Pty Ltd v Gordon &
Gotch Ltd (1984-85) 157 C.L.R. 309

Cases referred to:

Gazzo v Comptroller of Stamps (Victoria) (1981-82) 149
C.L.R. 227

Statutes referred to:

Family Law Act 1975 (Cth.) s.90

Counsel for the Appellant:	T. Pauling QC with G. Nicholson
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No.AP6 of 1989

ON APPEAL FROM THE
SUPREME COURT OF THE
NORTHERN TERRITORY OF AUSTRALIA
No. 69 of 1985

IN THE MATTER of the
TAXATION (ADMINISTRATION) ACT

BETWEEN

COMMISSIONER FOR TAXES
Appellant

AND:
GEORGE KAILIS LIVERIS
First Respondent

AND:
FLORENCE LIVERIS
Second Respondent

AND:
LIVERIS NOMINEES PTY LTD
Third Respondent

CORAM: KEARNEY, RICE AND ANGEL JJ.

REASONS FOR JUDGMENT

(Delivered the 25th day of September 1990)

KEARNEY J: I have had the benefit of reading the
opinion of Angel J. I concur in his Honour's opinion,
for the reasons he states, that the judgment and
reasons of the learned Chief Justice were correct, and
that the appeal should be dismissed with costs.

RICE J: I would dismiss this appeal with costs for the reasons given by Angel J.

ANGEL J: The question on this appeal from a judgment of the Chief Justice dated 21 April 1989 ((1989) 60 N.T.R. 12) is whether an agreement under seal between the respondents is a "Maintenance Agreement" for the purposes of the Family Law Act 1975 (Cth.) and thus exempt from Northern Territory stamp duty by virtue of section 90 of the Family Law Act.

The agreement in question contains a provision for the future transfer of certain real estate from the first and second respondents, who are husband and wife, to the third respondent, the trustee of a unit trust established by a deed dated 18 December 1981. The unit holders in the trust are the first and second respondents and their adult children.

At the time the agreement in question was registered with the Family Court, that is on the 15 January 1982, "Maintenance Agreement" was defined as follows:

" 'Maintenance Agreement' means an agreement in writing made, whether before or after the commencement of this Act, and whether within or

outside Australia, between the parties to a marriage, being an agreement that makes provision with respect to financial matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other matters, and includes such an agreement that varies an earlier maintenance agreement;".

The expression "Financial Matters" is defined as follows:-

" 'Financial Matters', in relation to the parties to a marriage, means matters with respect to -

- (a) the maintenance of one of the parties;
- (b) the property of those parties or of either of them; or
- (c) the maintenance of children of the marriage;".

Does the agreement under seal between the respondents make "provision with respect to the property of (the) parties or of either of them"? Plainly, in my view, it does. The first and second respondents agreed to transfer their land to the third respondent subject to the provisions of the unit trust. In equity they thereby divested themselves of their property. The unit trust is in common form, providing, inter alia, by clause 7(1) thereof:

"...the beneficial interest in the trust fund as originally constituted and as existing from time to time shall be vested in the unit holders for the time being."

A unit thus confers a proprietary interest in all the property which for the time being is subject to the trusts of the deed; cf. Baker v Archer Shee [1927] A.C. 844, Charles v F.C.T. (1953-54) 90 C.L.R. 598, 609. The agreement provides for the divestment and acquisition of interests in the real estate, which in my view is sufficient to constitute "provision with respect to the property" for the purposes of the legislation.

That is enough to dispose of this appeal.

However, as is evident from the reasons for judgment of the learned Chief Justice, with which I respectfully agree, it was argued that the definition of maintenance agreement must somehow be read down either by virtue of the other provisions of the Family Law Act or alternatively by reference to the applicable heads of Commonwealth legislative power under the Constitution, in particular section 51 (xxi). To hold that the agreement in question was a maintenance agreement as defined was argued to be an application of the "broadest" literal view. It was said that such an intention could not be imputed to Parliament. The issue in this case was therefore said to be whether a literal interpretation of the definition of "maintenance agreement" is correct in law.

I have no doubt that it is. As Brennan J. said in
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd
(1984-85) 157 C.L.R. 309 at 319:

"In choosing between a primary, broader meaning of words in a section and a secondary, narrower meaning that corresponds with the subject matter dealt with in surrounding sections, it is relevant to consider whether the particular section has an operation independent of the operation of the surrounding sections or whether the operation of the particular section affects or is affected by the operation of the surrounding sections."

Here, the stamp duty exemption granted by section 90 stands on its own and is operative apart from the other provisions of the Family Law Act. I respectfully agree with the learned Chief Justice that the literal meaning of "maintenance agreement" and the consequential stamp duty exemption provided by the Family Law Act cannot be narrowed by reference to other provisions of that Act as a whole.

I am unable to understand an argument that the literal meaning of an unambiguous provision in a Commonwealth Act of Parliament is somehow to be confined by reference to the legislative power of the Commonwealth. The provision, in so far as it relates to the Northern Territory, is within the Territories power (s.122 Constitution) however it is construed. In relation to the

States, it was held in Gazzo v Comptroller of Stamps
(Victoria) (1981) 149 C.L.R. 227 to be outside the
marriage power (s.51 xxi Constitution). I do not
understand, however, how that affects the construction of
the statute; if the legislation was to be confined
within the marriage power it would seem the High Court
would have held it intra vires.

I agree with the reasons for judgment of the learned
Chief Justice and his answers to the questions posed, and think
this appeal should be dismissed with costs.