First Wife First? A Husband's Obligation to His First Wife on His Remarriage

by

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Changing social attitudes have had a dramatic effect on the courts' approach to the question of maintenance to a first wife[1] when her husband remarries. Finlay J. in *Lyne* v. *Lyne*[2] in 1951 reiterated the firm rule at that time that the interests of the second marriage must yield to those of the first. But recently, the New Zealand judges have adoped a more liberal attitude and have been prepared to hold that, in certain circumstances, the second marriage should take priority over the first. It is the aim of this paper to record this change in attitude and to try to state the position to-day for a divorced man entering into his second marriage.

In *Lyne* v. *Lyne*,[3] the husband was granted a divorce after he and his wife had been separated for three years. He then married another woman. In this case, neither party could be said to have been guilty of any matrimonial offence. Yet, notwithstanding that fact, Finlay J. enunciated the following principle:[4]

> . . . [T]he obligation to provide for the first wife is the primary duty of her former husband, and . . . the obligations accruing from his second marriage must not be discharged or allowed to be in any substantial sense at the expense of the first wife.

[1] In this article, the term "a first wife" is used to connote "a former wife, from whom the husband is divorced"; similarly, "a second wife" means the husband's "present wife". No suggestion of bigamy is intended by the use of "first" or "second"!

[2] [1951] N.Z.L.R. 287.

[3] Idem.

[4] Ibid., 289.

This case undoubtedly stated the law correctly as it stood in 1951 and indeed it has since been approved, although its application has been markedly narrowed. A similar approach was followed in Australia. In *Davis* v. *Davis*,[5] Barry J., a highly respected judge on family law matters, adopted the traditional, hard-line attitude:[6]

> . . . [I]f a husband of means irretrievably destroys the reality of a marriage, and it appears that he contemplates marriage with another woman whom he prefers to his wife, the court should ensure that he pays to the spouse he is repudiating whatever, having regard to his means and his conduct towards her, and her conduct towards him, is fair and reasonable, recognizing that he is pursuing his own gratification in disregard of obligations he undertook. In doing so the court is not "punishing" the husband; it is merely insisting that before he shall have the gratification he desires, he shall make fair amends from his fortune for breaking the promise which marriage involves. . . .

Although Barry J. was concerned with a husband "of means", it is clear from the choice of words used that both he and Finlay J. intended that this principle of a husband's paying for his broken marriage vows before having the "gratification he desires" be of general application. But Mahon J. in *Newton* v. *Newton*[7] said that *Lyne* v. *Lyne*[8] was now applicable only where a husband could afford to support two households at a reasonable level. It is from the traditional position represented by *Lyne* v. *Lyne*[9] and *Davis* v. Davis[10] that the law has progressed in the 1960s.

The first definite departure from the "first wife first" policy came in 1967 in *Comp* v. *Comp*.[11] The parties were married in 1961, but separated the following year. There was one child. In September 1966 the husband, who was in the Royal New Zealand Navy, sought a divorce, which was granted. He later left the navy and married another woman, by whom he also had a child. Mr Comp soon ceased paying maintenance to his first wife because of lack of money; he earned $29.20 a week, of which rent, arrears of maintenance, and hire purchase agreements took $18.00, leaving him with $11.20 a week on which to support his second wife and child. As Speight J. said:[12]

> . . . [I]t goes without saying that this amounts to bare subsistence when it is realised that it is required to feed, clothe, and otherwise provide for the family of three.

Speight J. considered as very relevant the fact that the first wife received an emergency benefit from the Social Security Department,

[5] [1964] V.L.R. 278.
[6] Ibid., 282.
[7] [1973] 1 N.Z.L.R. 225.
[8] [1951] N.Z.L.R. 287.
[9] Idem.
[10] [1964] V.L.R. 278.
[11] Unreported, Supreme Court, Auckland, 16 October 1967.
[12] Ibid., 4.

as it then was. In so holding, Speight J. was taking a bold, new step for Gresson J. had held in *McGill* v. *McGill*:[13]

> It poses the question whether it is not the duty of the Court in an application for permanent maintenance made by an ex-wife against her former husband to make such an order as having regard to his means and to hers is proper, ignoring any Social Security benefit (other than universal superannuation) which she may be enjoying.

In that case, the wife had asked for only £2 ($4) a week as permanent maintenance, a figure to which the husband consented. If Mr McGill had paid his wife more than this she would have lost her social security benefit. Gresson J. increased the amount of maintenance to £4.2.6 ($8.25) a week, believing it to be bad law that the taxpayer should subsidise errant husbands. The amount of the benefit received and the conditions on which it was given were to be ignored for the purpose of setting the maintenance payable.

Speight J. was reluctant to make Mr Comp pay more than a nominal amount for, as he said:[14]

> The situation . . . is that even with the generous assistance of the Social Security Department, both these two families are at bare subsistence level. The problem which I face is that I cannot make any order directing a worthwhile contribution by the petitioner to his first wife without literally taking the necessities of life away from the second wife and child. . . . [I]t is common experience that domestic harmony is strained by financial difficulties and any deduction from the immediate income of the second family would, I think, be quite likely to inject a strong element of disharmony into the second marriage, which is undesirable.

Further, Speight J. considered that it was in the public interest, "as it is interpreted today",[15] that young men should be free to remarry and support a second family in respectability rather than live in conditions of immorality.

It is submitted with respect that Speight J.'s judgment was correct, particularly in the light of the way in which emergency benefits operated in 1967. If a husband had to pay maintenance to a first wife, the state would pay a corresponding amount less towards her benefit; thus, the first wife would not be one cent better off, while the second family's income (and therefore standard of living) would be reduced.

> In these circumstances, it would be unrealistic to imperil the second marriage and the standard of living of the second wife and her child for no gain to the first wife.[16]

Speight J. ordered the husband to pay a token sum of $1 a week to his former wife.

Crucial to this decision was the fact that the state's contribution towards the upkeep of the first family would have decreased as the

[13] [1958] N.Z.L.R. 145 at 146.
[14] Loc. cit., 6.
[15] Ibid., 8.
[16] Ibid., 9.

amount of maintenance paid increased and also that any major contribution by the husband would "literally" have taken away the necessities of life from the second family. In these circumstances, Speight J. said it would be senseless to risk upsetting the second marriage when the only benefit of so doing would be to alleviate the burden of the taxpayer. In other words, Speight J. weighed two matters of public policy—the desirability of stable, happy marriages and the desirability of a husband's maintaining his first wife—and decided that the first was paramount.

This is not to say that the first proposition will always be paramount. Richmond J. stressed in *Spanjerdt* v. *Spanjerdt*[17] that, as a matter of general public policy, persons who can afford to perform their statutory obligations under the Domestic Proceedings Act 1968 (and no doubt under the Matrimonial Proceedings Act 1963) should not be permitted to throw the burden of maintenance on to the Social Security Fund.

Comp v. *Comp*[18] was distinguished by Richmond J. in *Gaspar* v. *Gaspar*.[19] In that case, the husband was earning at least $48 a week and maintenance was only $3.50 a week. Nonetheless, the husband asked for a variation of the maintenance order on the ground that his and his second wife's health had deteriorated and his business had failed. His application for relief was denied in the Magistrate's Court and the appeal was dismissed by Richmond J. The first wife received a deserted wife's benefit of $13.75 a week under section 26 of the Social Security Act 1964. Section 25 of that Act provides that during the currency of such a benefit any money payable under a maintenance order shall be paid to the Consolidated Revenue Account and used for reimbursing the amount of the benefit paid to the deserted wife. In other words, the end result is that the husband pays to relieve the burden on the general taxpayer.

Richmond J. said *Comp* v. *Comp*[20] was not relevant because of the difference in the husbands' wages. Although Mr Gaspar had suffered some detrimental changes in circumstances, he could still afford to pay the existing maintenance order without reducing his second family's standard of living to a mere subsistence level. Nonetheless, in obiter Richmond J. did accept Speight J.'s modification to the basic principle of Finlay J. in *Lyne* v. *Lyne*.[21] He said:[22]

[17] [1972] N.Z.L.R. 287.
[18] Loc. cit.
[19] [1972] N.Z.L.R. 174.
[20] Loc. cit.
[21] [1951] N.Z.L.R. 287.
[22] [1972] N.Z.L.R. 174 at 178.

> . . . [I]t appears to me that in *Comp v. Comp*,[23] Speight J. accepted the principle that a husband who has remarried should not be called upon to pay maintenance to his former wife if the only result of his doing so would be to benefit the general taxpayer at the expense of reducing the circumstances of the husband's second family below a reasonable level of subsistence.

Wild C. J. took a harsher line in *Lindsay* v. *Lindsay*,[24] where he emphasised that *Lyne* v. *Lyne*[25] was still good law, but the facts of the case show clearly the reason for this approach. The first wife was described as a responsible and morally upright mother of six children and a regular, salaried member of the N.Z.B.C. Symphony Orchestra, of which her husband was the concert master. He left her and went to live with a much younger member of the same orchestra, whom he later married. *Comp* v. *Comp*[26] was not considered because Mr Lindsay was on a very high income. Wild C. J., giving judgment in the Court of Appeal, said that the rule in *Lyne* v. *Lyne*[27] —that the obligation to the first wife is greater than that to the second —was still true, even where neither party was guilty of a matrimonial offence. He said:[28]

> This has been described as a more rigid line than that taken in England but, even there, an innocent wife is generally entitled to be supported at a standard as near as possible to that which she enjoyed before cohabitation was disrupted by the husband's wrongful conduct (*Roberts* v. *Roberts*[29]). But that does not in any way limit the discretion of the Court to make whatever order it thinks just if the standard of comfort of the first wife is in fact lower than it should be.

Rees J.'s judgment in *Roberts* v. *Roberts*[30] would probably be followed in New Zealand. A husband left his wife and child for no just reason and went to live with a married woman and her three children. Rees J. had held that it would be wrong for the second woman to take priority over his wife. However, with respect, Wild C. J.'s statement cited above seems to ignore the trend of the New Zealand Bench in this area, although *Lyne* v. *Lyne*[31] had been regarded by Richmond J. as good law in cases where the husband earned a good income and could afford to maintain two households. It is submitted that the learned Chief Justice's decision must be read in light of the high income Mr Lindsay enjoyed. Two judgments delivered in the Supreme Court in 1972, however, show how the courts have modified Finlay J.'s rather sweeping principle.

[23] Loc. cit.
[24] [1972] N.Z.L.R. 184.
[25] [1951] N.Z.L.R. 287.
[26] Loc. cit.
[27] [1951] N.Z.L.R. 287.
[28] [1972] N.Z.L.R. 184 at 185-186.
[29] [1970] P. 1.
[30] Idem.
[31] [1951] N.Z.L.R. 287.

The first was given by McMullin J.[32] Mr and Mrs Gould entered into a separation agreement whereby Mrs Gould was to receive $16 a week from her husband, reducible to $12 if and so long as she could continue to be employed for not less than 20 hours weekly, during her life or until her remarriage. After the divorce became absolute the wife gave up her job as a full-time receptionist and began working nearly full-time for her church, for which she was not paid. Although fit to take up and retain full-time employment, she now performed only twelve hours of remunerative work a week. Consequently, she claimed the full $16 from her now remarried husband.

McMullin J. held that if the wife chose to be in gainful employment less than 20 hours a week and to spend the greater part of her working time in unremunerative work, she could not invoke the higher rate. The wife was, therefore, under an obligation to work and to help herself. Once again, *Comp* v. *Comp*[33] was distinguished, again on the question of the husbands' salaries. Mr Gould earned $80 a week plus irregular fees and the second wife $45 a week net. He could, therefore, afford to maintain both households, the only detriment being that he would be the longer in obtaining the complete equity of the home he had recently bought. McMullin J. ordered the husband to pay his first wife $12 a week.

The second crucial judgment, this time by Mahon J.,[34] concerned a man who left his wife and two children and went to live with another woman and her child of an earlier marriage. Later, she gave birth to his child. At the time of the hearing, their relationship was stable (and had been so for three years) and the husband was earning $66 a week.

Lindsay v. *Lindsay*,[35] Mahon J. said, must be read in the light of its own facts; it was essential to that decision that the husband was guilty of wrongful conduct and also that he could afford to keep two wives. *Lyne* v. *Lyne*[36] was applicable now only where the husband could afford to pay. But, His Honour said, in *Comp* v. *Comp*,[37] *Gaspar* v. *Gaspar*,[38] and in this case, different considerations must apply because the husbands were on lower income levels. In actual fact, Richmond J. had held that Mr Gaspar's income of $48 a week was a "high" income for the purposes of the *Comp* rule and had,

[32] *Gould* v. *Gould*, unreported, Supreme Court, Auckland, 15 May 1972. See note in [1972] *Recent Law* 232.
[33] Loc. cit.
[34] *Newton* v. *Newton* [1973] 1 N.Z.L.R. 225.
[35] [1972] N.Z.L.R. 184.
[36] [1951] N.Z.L.R. 287.
[37] Loc. cit.
[38] [1972] N.Z.L.R. 174.

therefore, distinguished that case. But here, Mahon J. held that $66 a week was a "low" income, no doubt because of the rapid inflation in the year preceding this decision and because the husband had four children as dependants in this case, whereas Mr Gaspar had only one child to support; therefore, *Comp* v. *Comp*[39] was applied. Whereas Speight J. had considered as very important the fact that the only result of the husband's paying more maintenance would be to reduce the state's burden, Mahon J. seemed to dismiss this point. He simply said:[40]

> . . . [I]n such circumstances, it is hardly realistic to say that the husband's new domestic responsibilities must yield to his prior obligation to maintain his ex-wife.

For the first time, a de facto wife took priority over an earlier legal wife. Mahon J. said that section 27(2)(a) and (b) of the Domestic Proceedings Act 1968 covered de facto relationships, providing they were not fleeting nor semi-permanent unions. Paragraph (b) provides that the court, in assessing the amount of maintenance, must have regard to

> . . . the responsibilities of the husband, including his responsibilities to any other person whom he has a legal obligation to support [or] . . . *whom he is in fact supporting.* [Emphasis added]

He noted that the parties would probably marry when they were free to do so. In these special circumstances, the amount of maintenance was reduced from $20 to $12 a week.

This case is also interesting for the changes Mahon J. must have made to his decision between the time of delivering it and the time of its appearing in the *New Zealand Law Reports.* In giving judgment, he had said:[41]

> In *Gaspar* v. *Gasper,*[42] it was said that when a husband has remarried and is financially unable to support two households without reducing one to below an adequate level, the maintenance rights of a first wife must yield to those of the second.

Richmond J.'s proposition was in fact much more limited than that; it is to be noted that the above sentence is omitted from the official report.

The trend evidenced by these cases was confirmed in a decision last year by Beattie J. in *Taylor* v. *Taylor,*[43] the parties had separated in 1968. The wife immediately entered into a de facto relationship with a man, by whom she later had two children. After the divorce

[39] Loc. cit.
[40] [1973] 1 N.Z.L.R. 225 at 228.
[41] See unreported judgment, Supreme Court, 18 July 1972.
[42] [1972] N.Z.L.R. 174.
[43] [1974] 1 N.Z.L.R. 52.

became absolute in 1970, Mr Taylor remarried. The wife, who had ceased living with her lover, now sought maintenance from her husband under section 40 of the Matrimonial Proceedings Act 1963.

Mrs Taylor received $45.40 a week in benefits and lived in a state house; her outgoings, excluding the amount attributable to the two ex-nuptial children, were $32.00. The husband received $83.77 a week but after paying tax, superannuation, interest on two mortgages, his children's maintenance and his wife's housekeeping money, he was left with only $7.50. Beattie J. ruled that no order be made in favour of the first Mrs Taylor, because the court should not impose such a burden on the husband as to jeopardise the chances of his second marriage. This was particularly so seeing that his first wife had misconducted herself after the separation and that her financial situation and inability to work were self-induced by her liaison with the man with whom she had lived. (That is not to say a guilty wife will not generally be awarded maintenance). For the purposes of the *Comp* rule, a weekly wage of $83.77 was held to be a "low" income by Beattie J.

Conclusion

The present state of the law would thus seem to be that if the husband can afford to keep two families reasonably, then he must do so, his obligation to his first wife being greater than that to his second *(Gaspar* v. *Gaspar*,[44] *Lindsay* v. *Lindsay*[45]*)*. However, in some cases, especially where there are no children, there may well be now an obligation on the first wife to go out and work and to help herself to some extent *(Gould v. Gould*[46]*)*.

If the husband cannot afford to keep two families reasonably, then the court must consider the benefits the wife is drawing and whether payment of maintenance would simply ease the taxpayer's burden and further increase the hardship of the second family. If the benefits received by the first wife are sufficiently large, then the husband's obligations to his second wife will be greater than those to his first wife, on the grounds of public policy *(Comp* v. *Comp*[47]*)*. Mahon J. has extended this principle by looking only at the husband's income and ignoring the question of benefits. As well, in *Newton* v. *Newton*[48] he extended these propositions to include de facto relationships, providing that relationship is stable. This, of course, will be a question of fact in every case.

[44] [1972] N.Z.L.R. 174.
[45] [1972] N.Z.L.R. 184.
[46] Loc. cit.
[47] Loc cit.
[48] [1973] 1 N.Z.L.R. 225.

It is submitted that the current approach of the courts is realistic and humane, although Mahon J.'s statement may have been too unfair on the first wife. If a weighing of the two matters of public policy, performed so adroitly by Speight J. in *Comp* v. *Comp*,[49] were undertaken in every case, an enlightened and fair system of compensation and relief would be the probable result.

[49] Loc. cit.