

[HIGH COURT OF AUSTRALIA.]

FOX APPELLANT ;
 PLAINTIFF,
 AND
 BURVILL AND OTHERS RESPONDENTS.
 DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
 WESTERN AUSTRALIA.

H. C. OF A. *Testator's Family Maintenance—Provision for former wife—“Widow”—“Any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the court”—Divorced wife receiving secured maintenance under indenture as ordered by court—Whether “by order of the court”—Whether “from such husband”—Whether “permanent maintenance”—Testator's Family Maintenance Act 1939-1944 (W.A.), ss. 2, 3.*
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 PERTH,
 Sept. 13, 14.
 Fullagar,
 Kitto and
 Taylor JJ.

Section 3 of the *Testator's Family Maintenance Act 1939-1944* (W.A.) confers upon a widow of a testator (*inter alios*) a right to apply to a judge of the Supreme Court of that State for an order for maintenance out of the estate of such testator, where the testator has by his will failed to make adequate provision for her proper maintenance. By s. 2 of such Act the word “widow” is extended to include “any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the court.”

Held, that an order for maintenance can only be made under s. 3 in the case of a woman applying in reliance upon the extended definition of “widow” in s. 2, where the right to payments of maintenance received by such woman subsists by direct force of an order of the court imposing upon the husband an obligation to make such payments.

A decree *nisi* for dissolution of marriage ordered (*inter alia*) that the petitioner husband should make such provision for the maintenance of the respondent wife as appeared in an indenture executed between the husband, the wife and one Attewell as trustee on 16th August 1946. Such indenture

recited an agreement for the payment of certain specified weekly sums to the wife in respect of the wife and the daughter of the marriage, and by it the husband covenanted to pay to the wife the sum of £1,000 within fourteen days and to transfer to the trustee within one month 6,000 shares in a brewery to be held by the trustee upon trust to pay to the wife out of the income the weekly amounts mentioned for the maintenance of herself and the daughter and to hold any excess income in any year for the benefit of the husband. In the event of the income being less than that required in any year to meet such weekly amounts the husband covenanted to make good any deficiency to the wife. The wife for her part covenanted to accept the payments from the income of the shares and the husband's covenants in full satisfaction and release of all claims against the husband and further not to take proceedings for any other order for the provision of maintenance for herself and the daughter. A further deed dated 3rd September 1946 was executed between the husband and the trustee Attewell carrying out the provisions of the earlier deed. The sum of £1,000 was duly paid to the wife and the shares transferred to the trustee by the husband. The income from the shares was paid over by the trustee to the wife and there was never a deficiency in income to be made good by the husband. The husband having died, the former wife made application for maintenance pursuant to s. 3 of the Act above-mentioned claiming to be a "widow" within s. 2 of such Act.

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Held, that the former wife was not a "widow" within s. 2 as (i) payments received or receivable by her were made not under any order of the court but by virtue of the terms of the deed dated 3rd September 1946; (ii) such payments were not received or receivable from the former husband but from the trustee under the terms of the said deed.

Decision of the Supreme Court of Western Australia (*Virtue J.*): *Fox v. George and Burvill* (1954) 56 W.A.L.R. 74, affirmed on other grounds.

APPEAL from the Supreme Court of Western Australia.

The appellant applied by originating summons under the provisions of the *Testator's Family Maintenance Act* 1939-1944 seeking an order that such provision as the court shall think fit be made out of the estate of the deceased for her maintenance, such provision to consist of either a lump sum or periodic payments or both a lump sum and a periodic payment. The appellant who was the divorced wife of the testator claimed that she was the testator's "widow" within the meaning of the definition of that word contained in s. 2 of the *Testator's Family Maintenance Act* 1939-1944 (W.A.), which definition is in the following terms:—" 'Widow' includes any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the court."

H. C. OF A. The defendants as executors and beneficiaries and certain other
1955. beneficiaries contested the application.

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The summons was heard by *Virtue J.* who delivered judgment on 6th December 1954 and dismissed the application on the ground that, insofar as the decree *nisi* ordered the testator to pay permanent maintenance to the plaintiff, such payments to commence before decree absolute, the order was made without jurisdiction and that therefore the plaintiff was not at the date of death of the testator receiving or entitled to receive permanent maintenance from the testator under an order of the court; and further *semble* on the ground that the secured payments did not answer the description of permanent maintenance; and further on the ground that the plaintiff had not been left without adequate provision for her proper maintenance.

J. P. Durack Q.C. (with him *P. D. Durack*), for the appellant. [Counsel was requested by the Court to deal firstly with the question of whether at the date of death of the testator the appellant was receiving or entitled to receive permanent maintenance from him by order of the court.] This order does not order payments to be made but it does order compliance with the deed and therefore the payments were being received by virtue of the order. The deed contains a personal covenant and, although the testator was not in default under this covenant the appellant would have been entitled to receive payments under this covenant had there been default. This order was made under s. 96 (1) of the *Supreme Court Act* 1935-1945 and, under this order, the maintenance is in fact permanent in that it continues for the life of the wife and is not variable. The term "permanent maintenance" is in fact more apt to apply to an order under s. 96 (1) than under s. 96 (2), which latter is only for joint lives. If the appellant was not actually receiving the payments under an order she was, nevertheless, entitled to receive them under an order as she could have applied at any time for an order. Her covenant not to do so was not enforceable: *Bennett v. Bennett* (1). The Court would have extended the time to apply: *Fisher v. Fisher* (2).

J. Lemonis, for Diana Elizabeth Fox, a beneficiary, adopted the arguments and submissions of counsel for the appellant.

J. L. C. Wickham (with him *R. C. Witcombe*), for the respondent executors and for Burvill a beneficiary, and *K. W. Hatfield*, for other beneficiaries were not called upon.

(1) (1952) 1 K.B. 249.

(2) (1942) 1 All E.R. 438.

The judgment of the Court was delivered by FULLAGAR J.

This is an appeal from an order made by *Virtue J.* refusing an application under s. 3 of the *Testator's Family Maintenance Act 1939-1944* (W.A.). That section authorizes the court to order that provision be made out of the estate of a testator for the maintenance of his widow or children. The appellant applied for an order that such provision should be made for her as the widow of the testator. Since she was a divorced wife, she was, of course, not a widow within the ordinary meaning of that term, but it is claimed that she comes within s. 3 by reason of the extending definition of the word "widow" in s. 2 of the Act. Section 2 provides that the word "widow" "includes any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the court." Both the words "from such husband" and the words "by order of the court" are of importance.

The facts of the case may be shortly stated. The husband and wife, Mr. and Mrs. Fox, were married in 1930, and a daughter, Diana Elizabeth Fox, was born in 1931. In 1939 the wife, that is the present applicant, left her husband in circumstances which do not reflect upon her in any way. That is common ground. At the time of her leaving, a verbal arrangement was made between the two that she should be paid the sum of £7 10s. 0d. per week for herself and for the daughter, who went with her when she left her husband. The amount was to be reduced to £5 0s. 0d. per week on the daughter's attaining the age of eighteen years. The parties continued to live apart, and in 1946 the testator instituted proceedings for divorce. The ground on which he petitioned for divorce is that stated in s. 69 (6) of the *Supreme Court Act 1935* as amended by the *Supreme Court Act 1945*. That sub-section provides that any married person domiciled in Western Australia may present a petition to the court praying that his or her marriage may be dissolved, and it shall be competent, subject to the next succeeding section, for the court to decree a dissolution thereof in the case where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that co-habitation will be resumed. The next succeeding section has no relevance in the present case. The provision which I have read is subject to a proviso that the court in its absolute discretion may refuse to decree a dissolution of the marriage, and shall refuse a decree unless and until provision is made for such maintenance, as in the circumstances

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the court thinks proper, of the respondent and any children of the marriage. That proviso merely requires that the court, before granting a decree, must be satisfied with regard to the matters mentioned. It does not, directly at any rate, authorize the actual making of an order for maintenance.

The divorce proceedings were not defended, but the advisers of the husband and wife conferred, and agreement was reached as to what provision should be made for her. It was agreed that the same weekly amounts should be paid as had been agreed to be paid under the verbal agreement made in 1939, but that those amounts should be secured by creating a trust of 6,000 shares held by the husband in the Swan Brewery Co. Ltd. In addition, a lump sum of £1,000 was to be paid by the husband to the wife. On 16th August 1946 an agreement under seal was made between the husband and the wife and one Arthur Leonard Attewell as trustee. It recited the agreement for the weekly sums to be paid to the wife for herself and her daughter, and the husband by the deed covenanted with his wife, first, that he would within fourteen days pay to her the sum of £1,000, and, secondly, that he would, within one month after the date of the deed, transfer to the trustee 6,000 shares in the Swan Brewery Co. Ltd. to be held by the trustee on trust, first to pay the income to her during her life, until she should remarry, for her maintenance and benefit, and for the maintenance, education and benefit of the daughter until the daughter attained the age of eighteen years. It was provided that, in the event of the income exceeding in any year the weekly amounts payable, the excess should be held in trust for the husband, and that, in the event of the income being less in any year than the weekly amounts payable, the husband would pay the amount of any such deficiency to the wife. The wife covenanted that she accepted the income from the shares and the covenants of the husband contained in the deed "in full satisfaction and release of all claims which she now has or at any time hereafter may have against the husband." She also covenanted that she would not take any proceedings to obtain any other order or provision for the maintenance or support of herself or the child.

The petition for divorce came on for hearing before *Walker J.* It is evident that his Honour approved of the arrangement embodied in the deed of 16th August 1946, and regarded the provision made by it as satisfying the requirements of the proviso in s. 69 (6) of the *Supreme Court Act*. A decree *nisi* was accordingly granted. That decree *nisi* is dated 7th August 1946. It would seem that it ought to have been dated 16th August 1946—or perhaps 19th August

1946. At any rate it would appear to have had only conditional operation until 16th August 1946. It recites that the petitioner has undertaken to abide by the terms of the settlement already agreed to and to be embodied in a formal deed to be executed and to be produced to the learned judge. It then grants a decree *nisi* for dissolution, and it orders "that the petitioner shall make such provisions for the maintenance of the respondent as set out in the said indenture as executed by the petitioner and the respondent respectively and dated the 16th day of August 1946." On 3rd September 1946 a deed was executed between the testator and Mr. Attewell as trustee. It is not necessary to read this deed or to refer in detail to its contents. It simply carries out the provisions of the earlier deed to which the wife was a party. The 6,000 shares in the Swan Brewery Co. Ltd. are to be transferred to Mr. Attewell, and he covenants to hold them on the trusts set out in that earlier deed. The covenant of the trustee to carry out the trusts is a covenant with the testator, but it could, of course, be enforced by the wife as beneficiary.

The sum of £1,000 was in due course paid to the wife, and the shares were in due course transferred by the testator to the trustee. These things having been done, the testator had done everything which he had undertaken to do apart from the promise to pay the amount of any deficiency if the dividends of the Swan Brewery Co. Ltd. were insufficient to pay the weekly sums payable to the wife, a promise which is enforceable against his estate during her life. It may be mentioned that there has never been any such deficiency. The testator had also, as it seems to us, completely carried out what the order of *Walker J.* required him to do. He had made all the "provisions" that the order required him to make when he executed the deed of trust of 3rd September 1946 and paid £1,000 to the wife and transferred the shares to the trustee. At least from 3rd September onwards the amounts receivable and received by the wife were not receivable or received by her from him, nor were they, in our opinion, receivable or received by her under an order of the court. They were received from the trustee under the terms of the deed of 3rd September. She received what she received, and she was entitled to receive what she was entitled to receive, not under any order of the court but under and by virtue of the deed, and it follows in our opinion that she was not within the extending definition of "widow" in s. 2 of the *Testator's Family Maintenance Act*.

The definition in s. 2 of that Act does not, we think, apply unless the death of the former husband occurred during a period in respect

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of which he was under an obligation imposed directly upon him by an order of the court to make periodical payments to the wife by way of permanent maintenance. That a case should fall within s. 2 it seems to us that the right to payments must subsist by direct force of the order itself. The view which we take is, we think, supported by general considerations of the policy of the Act and the probable intention of the legislature. The draftsman had in his mind, no doubt, the provisions of s. 96 of the *Supreme Court Act* 1935-1945. Sub-section (1) of that section provides that the court may, if it thinks fit, on any decree for dissolution of marriage, order the husband to secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, the court deems to be reasonable. Payments secured in pursuance of an order made under sub-s. (1) would not normally cease on the death of the husband in the lifetime of the wife, and there seems to be no reason why a divorced wife, for whom permanent provision has been made under this sub-section, should come within the *Testator's Family Maintenance Act*. Her needs may naturally be regarded as having been provided for once and for all. On the other hand, sub-s. (2) of s. 96, which came into force originally at a later date than sub-s. (1), provides that the court may, if it thinks fit, by order direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable. This sub-section, unlike sub-s. (1), does not authorize the making of an order to operate after the death of the husband in the lifetime of the wife. There is, therefore, a clear reason for enabling a divorced wife, who has been in receipt of maintenance by virtue of an order made under sub-s. (2), to make an application under the *Testator's Family Maintenance Act*. We think it was a case where an order had been made under sub-s. (2) that the draftsman of s. 2 of the *Testator's Family Maintenance Act* had in mind, and not a case where an order had been made under sub-s. (1). The intention was to provide for cases in which payments which would cease with his death were being received by the wife from the husband at the date of his death, and the purpose of the definition was to ensure that in such cases the payments to the wife should not necessarily cease on his death. The order made by *Walker J.* in the present case, whether it is to be regarded as having been actually made under s. 96 or not, is of the nature of an order under s. 96 (1) and not of the nature of an order under s. 96 (2).

Mr. *Durack*, who, we think, has said everything it was possible to say on behalf of his client, has put two main arguments to the Court. He has said, in the first place, that the words "permanent maintenance" are just as apt to include an order of the kind that can be made under s. 96 (1) as an order of the kind which may be made under s. 96 (2). We think that in what we have already said the answer to that argument is to be found. Mr. *Durack* has also submitted that a wife is "entitled to receive" maintenance within the meaning of the *Testator's Family Maintenance Act* if the position is that she would be entitled to an order for maintenance if she made an application to the court in its divorce jurisdiction. We think that that construction is not really a possible construction. Nor is it clear that, even if it were adopted, it would help the present applicant.

For the above reasons we are of opinion that the appellant's application was rightly dismissed by *Virtue J.*, although the ground on which we are deciding the case is not the ground on which his Honour decided it. It is not necessary, in the view which we take, to consider the reasons given by his Honour, and we express no opinion, nor have we formed any opinion, with regard to their validity.

In our opinion this appeal should be dismissed. We think that, in the circumstances of this case, the appellant should have her costs of the appeal out of the estate, and, since counsel for all parties, including counsel for the executors, consent, we are prepared to make an order that the costs of all parties appearing before us of the appeal be paid out of the estate. We must not be taken, however, as giving any countenance to the view that, in cases under the *Testator's Family Maintenance Act*, any beneficiary who chooses to be separately represented is entitled to receive, or should receive even by consent, costs out of the testator's estate.

Appeal dismissed. Costs of appeal of all parties represented before the Court out of the estate.

Solicitors for the appellant, *Dwyer, Durack & Dunphy.*

Solicitors for the respondent executors and the respondent Burvill, *Joseph Muir & Williams.*

Solicitor for Diana Elizabeth Fox, a beneficiary, *John Lemonis.*

Solicitor for other beneficiaries, *K. W. Hatfield.*

Solicitor for The Home for Peace for the Sick, *Parker & Parker.*

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