IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M. No. 40/73

BETWEEN DONALD HENRY EADE

Appellant

A N D GLADYS MYRTLE EADE

Respondent

Hearing: 30 July 1973.
Judgment: 13 August 1973
Counsel: G.A. Howley for the appellant.
W.F. Thomson for the respondent.

JUDGMENT OF QUILLIAM J.

This is an appeal against an order of the Magistrate remitting arrears of maintenance owing by the appellant in excess of $2,500. By the same order the periodic maintenance payments for the respondent and two dependent children were reduced but there is no appeal in respect of this.

The maintenance order was originally made against the appellant in 1963. It was varied in March 1969 and the position then was that the appellant was to pay to the respondent the sum of $8.00 per week for herself and $2.00 per week for each dependent child. The present application for variation was made in June 1972. It was made under s. 85 of the Destitute Persons Act 1968, as amended in 1971. It was therefore for the appellant to show that since the making of the last variation the circumstances had so changed "that the order ought to be varied, extended, or suspended, or, as the case may be, discharged and a new order substituted".

Subsequent to the 1969 variation the appellant received a substantial compensation payment in respect of personal injury. As a result of an accident sustained in the course of his employment he received about $21,000. This was invested in the purchase of a building containing two shops in Cromwell and also in a taxi business. He set up business in the two shops and ran these

businesses, and also the taxi business, with the help of his second wife. All the businesses failed. He sold the taxi business but has been unable to sell the shops. He then had a fire in his business premises in June 1972 for which insurance payments were received or were due to be paid. The net result of all this was that at the time of the present application the appellant had capital assets of about $12,000 of which about $6,000 was in cash. All these assets can be traced back directly to the compensation money he received.

The appellant is fit only for light work. He has taken casual employment but has been unable to get any permanent employment. He has responsibilities in respect of his second wife and two children of his second marriage. His second wife has four children by her first marriage. Between them they therefore have a substantial household.

It is clear that circumstances have changed significantly since the variation was made in 1969. The appellant first lost his normal wage-earning capacity, then received a substantial sum in cash, and finally lost a large part of that sum. The reason for this loss may have been mismanagement or bungling but the fact is at the time of his application his assets had been substantially reduced.

The respondent's position is that she still has two dependent children and also another child born since the parties separated and of whom the appellant was not the father. She gave details of her financial position which showed that her income was derived primarily from the Domestic Purposes Benefit and the family benefit. Her outgoings appeared to approximate her income.

It would appear that a change of circumstance had been established and the question which remained was as to the appropriate order to be made. The periodic maintenance was reduced by the Magistrate to $2.00 per week for the wife and $1.00 per week for each of the two dependent children. There has been no appeal from this part of the order. The arrears of maintenance as at the date of hearing are not shown in the evidence,

although they were apparently $2,514.57 as at the 18 July 1972. The Magistrate took the view that the appellant should apply $2,500 of his cash resources in reduction of his liability for arrears and remitted the balance, whatever it may have been.

For the appellant it was conceded that no exception could be taken to the nature of this order except only upon the basis that the appellant's funds represented the balance of what was paid to him by way of worker's compensation. As this was a payment calculated by reference to earnings, and was intended to compensate the appellant for future inability to earn an income at the same rate as prior to his accident, it was argued that the funds should not be regarded as available for payment of arrears of maintenance.

The order made by the Magistrate was the exercise by him of a discretion. It is clear that this Court will not interfere with the way in which a discretion is exercised if it appears that all relevant considerations have been taken into account. It was said here that no sufficient weight was given to the fact that the appellant's capital fund was to be regarded in reality as a fund of income. I do not think this argument is sound. What the Magistrate did was to consider the whole position including the ability of the appellant to earn, his responsibility to his second wife and the children of the second marriage and so on. He reduced the liability for current maintenance to little more than nominal amounts and with this there can be no quarrel. In addition he took the view that the appellant should refund some of the arrears which should have been met out of income at an earlier stage. If he had remitted the whole of the arrears on the basis contended for then it is hard to think that the periodic maintenance could properly have been reduced to the extent that it was.

In Martin v. Martin (1967) N.Z.L.R. 593, there was an appeal from the decision of the Magistrate refusing to remit arrears of maintenance. The appellant had received damages for personal injuries received in the course of his employment and

it was from this fund that arrears of maintenance were to be paid. That case was not precisely the same as the present case in so far as the damages included something for pain and suffering and loss of enjoyment of life as well as for past and future economic loss. At least a substantial part of the total fund, however, represented economic loss. Although there was no specific reference in the judgment of Henry J. to the principle to be applied in such a case, it is apparent that Henry J. did not consider the Magistrate had applied any wrong principle in permitting the damages to be attached for arrears of maintenance. It is also apparent that the Magistrate had turned his mind to the kind of argument presented to him in the present case.

I can see no reason in principle why the fact that compensation in a lump sum has been received should render it immune from payment of arrears. Each case is to be considered upon all its own circumstances and so long as that is done by the Magistrate this Court will not interfere. I do not consider the Magistrate has applied any wrong principle or has failed to take any relevant consideration into account. I am not therefore prepared to disturb his decision.

The appeal is dismissed with costs of $20.00 to the respondent.

Solicitors: Brodrick, Parcell, Milne & Howley, DUNEDIN, for the appellant,

Adams Bros., DUNEDIN, for the respondent.