

IN THE SUPREME COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

BETWEEN [REDACTED] EADDY
Petitioner
AND [REDACTED] EADDY
Respondent

Application for discharge or
variation of maintenance order

Hearing: 28 November 1979

Counsel: J.C.A. Thomson for Respondent in support
L.H. Atkins for Petitioner contra

Judgment: 24 July 1979

JUDGMENT OF O'REGAN J.

The respondent filed an application for her own maintenance on 16 March 1977. Her application was heard by Jeffries J. on the 14th February 1978. At that time the petitioner had not filed any affidavits in the matter. On the evidence contained in the respondent's affidavit, the learned Judge ordered the petitioner to pay the respondent \$45 per week and costs, \$75.

On 16 May 1978, the petitioner applied for discharge of these orders or alternatively for variation of them. In his affidavit in support he deposed that subsequent to service upon him of the application, he with the concurrence of the respondent's solicitor negotiated directly with the respondent and that she agreed to withdraw her application. He said

that he so advised the respondent's solicitor. Because of these matters, he said, he did not take any step in the proceedings.

The petitioner also deposed that he knew that the respondent was in full-time employment for "substantially the whole of 1977 and in February 1978 was working as a [REDACTED]." The respondent in her affidavit sworn on 11 March 1977 had deposed that she was not then in employment. In his judgment the learned Judge said :

" The respondent is a qualified [REDACTED] but it is known to the Court that work in this field is very limited at the present time. She said in 1977 she was unable to obtain employment and there is no reason to believe that position has at present changed. "

The respondent in an affidavit filed on 5 July 1978 deposed that she did not discuss her maintenance or employment situation with her solicitor between the swearing of her initial affidavit and 18 October 1977 when she had a consultation with him and that apart from a telephone conversation with him on 31 October 1977 she had no further conversation with him until after the order was made. Her affidavit is silent as to whether she informed her solicitor on either of the two conversations in October 1977 of her being then employed. Her solicitor Mr J.H. Williams, however, has deposed as to these discussions and I

accept that employment was not mentioned although it was made known that the benefit was being paid at a rate lower than at February 1977. Perhaps that information should have put Mr Williams on inquiry of her as to the reason for such. She was in fact employed from 12 April 1977 until 16 December 1977, when, no doubt because of the school holidays and the need to give full-time care to her four children, she applied for and was granted a benefit by the Department of Social Welfare. She resumed employment on 30 January 1978 and was in employment at the date on which the order was made.

She agreed that there were discussions between the petitioner and her as to maintenance matters but said that agreement was never reached that she should withdraw her application for maintenance. Having seen and heard the parties giving evidence, I accept the evidence of the respondent on this topic. I accept also the evidence of Mr Williams that the petitioner did not inform him of such an agreement.

The petitioner is a [REDACTED] by profession. He was at the date of hearing employed by a firm of [REDACTED] in [REDACTED], although he proposed in the near future to purchase some 14 acres of land and to engage in what he termed the business of an [REDACTED]. When he described what he had in mind it became obvious that what he proposed was more in the nature of a [REDACTED]. He deposed as to the projected purchase of the land and provided a projection of the costs of establishing the business and his anticipations as to the income that will be derived from it. These matters, I think, must await another day for consideration. They are too remote for present purposes.

The petitioner is living in a de facto relationship with a lady who has two children of her own. She has an order for maintenance in respect of the children in the Magistrate's Court in [REDACTED] [REDACTED] but is not receiving payments thereunder. She performs some very limited services for the firm of [REDACTED] who employ the petitioner and is in receipt of \$280 nett per month from that source. From the information supplied by the petitioner the services are by no means commensurate with the rewards and from what he told me the payments to her are in the main part a permissible tax avoidance scheme. He allowed that she does but little work for the firm and that the payments to her were what he described as a "taxation ploy." He said that he maintains his cohabitee and her children. Seeing, however, that she receives \$280 per month tax free from the employer, strictly speaking, she has that money to put to the maintenance of herself and her children.

The petitioner paid nothing for the maintenance of the four children in the twelve months preceding the date of hearing. There is a maintenance order extant in respect of the children which had its genesis in a written agreement between the parties which was registered in the Magistrate's Court. The order under review has also been registered in the Magistrate's Court. There were to be hearings in the Magistrate's Court of variation proceedings instituted by the petitioner later in the week in which this matter was heard and although the Court file for these proceedings is endorsed "Decision reserved" my note is that they were adjourned to await the outcome of the proceedings in the lower Court. Counsel were to submit a memoranda as to those matters and on the case generally. Their memoranda

reached me on 12 July 1979. During the hearing in the Magistrate's Court, proposals for settlement were made but ultimately rejected and in the end the learned Magistrate took the view that he should reserve his decision until such time as the outcome of the present application was known. I think, with hindsight, that there is a lot to be said for his taking that course.

The Magistrate's Court at Norwell, Victoria on 3 November 1978 made a garnishment order whereby A\$70.00 was ordered to be paid to the Court by petitioner's employers from his salary. This order is in enforcement of the order of this Court of 14 February 1978. It encompasses the weekly order and arrears. Until that order became operative, the petitioner had made no payments.

The petitioner's case is not comparable with the type of case in which an indigent breadwinner has obligations to two households. The petitioner is a professional man. He seems, of choice, to be earning below his potential. He left New Zealand with his cohabitee and her children and until the garnishment order forced his hand left his wife and children to the wife's resources and the New Zealand taxpayer. By his unilateral acts he has, in effect, made himself a beneficiary of the New Zealand Social Security system inasmuch as by shirking his prime responsibilities to his family he has put it upon the Social Welfare Department to provide or to supplement the means of sustenance of his wife and his children in his place and stead. This I categorize as a planned abuse of the Social Welfare legislation of this country. He practised as a [REDACTED] for some years in New Zealand and extensively in the [REDACTED] field.

He knew well the law and the practice relating to domestic purposes benefits and he has cavalierly taken advantage of it. Having treated his flesh and blood thus, he had the effrontery to show an item of \$10.00 per week in his budget for the cost of keeping cats and a dog.

At the time the order under review was made the respondent was earning \$73.50 per week nett. In the year ending 31 March 1978, she earned in total \$3670.46 nett or an average of \$70.58 per week. At the date of hearing she was in a [REDACTED] and earning \$99.00 per week nett. She had debts totalling \$1256.79 the major items being two years rates arrears and arrears of instalments on her mortgage to the Housing Corporation. Her weekly expenses at the date of hearing before me were \$149.30. The order made by Jeffries J. was based upon the weekly expenses to which she had deposed in March 1977, namely \$98.50 per week. Her expenses include the costs referable to the children in respect of which she has the maintenance orders. Nothing had been paid thereunder in the twelve months preceding the hearing. I assume for present purposes that those orders will be enforced or otherwise dealt with. It would complicate matters and create confusion if I did not take both the costs of maintaining the children and the amount of maintenance payable in respect of them out of present consideration.

Turning to the provisions of s.40 and s.43 of the Matrimonial Proceedings Act 1963 I have regard to the respondent's earnings. I take account, too, of the conduct of the husband to which I have earlier adverted and I hold that his responsibilities (s.43(b)) do not include the support of his cohabitee and her children.

On the material before me I think the situation is met by varying the order of the 14th February 1978 to \$25.00 per week from that date to 31 March 1979 and thereafter to \$15.00 per week and there will be orders accordingly.

The petitioner is ordered to pay the respondent \$60.00 costs.

Solicitors:

Cooper Rapley & Co., Palmerston North, for Respondent
in support

M.J. Behrens Esq., Palmerston North, for Petitioner contra