IN THE HIGH COURT OF NEW ZEALAND M. 1140/83

AUCKLAND REGISTRY

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BETWEEN G MOAT

APPELLANT

A N D R MOAT

RESPONDENT

Judgment: 12 April 1984

Hearing: 12 April 1984

Counsel: J.G. Adams for Appellant
G. Bogiatto for Respondent

ORAL JUDGMENT OF CASEY J.

This appeal under the Family Proceedings Act relates to the way the learned Judge in the Court below dealt with the question of arrears of maintenance due to the Appellant under an order in her favour. The parties have been divorced for about 7 years. On 27th January 1978 Mr Moat was ordered to pay $15 per week maintenance for each of two children of the marriage, whose ages are now about . and on 24th August 1979 he was ordered to pay maintenance for Mrs Moat at $20 per week. At that time she was not working, but I gather that she was qualifying for suitable employment and as a result, between 19th August 1981 and 1st March 1983, she was earning a salary of $15,000 a year. During that 80 week period, according to the facts in the Memorandum which Mr Adams has submitted, maintenance of $4,000 was payable under these combined orders, but Mrs Moat received only $2,900 which was paid by her former husband in varying lump sums at irregular and sometimes quite long intervals. This maintenance was paid in the usual way through the Maintenance Officer in the Social Welfare Department and passed on to her.

She realised after a while that there were arrears, but it was difficult for her to ascertain the true position because of the way the payments were made by Mr Moat. But

once having discovered that arrears were accruing, she approached the Maintenance Officer to put pressure on her former husband to bring them up to date. As a result, on 3rd August 1982 he applied for a discharge of the order in her favour. After the usual conciliation proceedings the matter came before the Family Court on 8th August 1983 with two issues unresolved. First, the appropriate maintenance for the two children, and secondly, the question of the arrears. Mrs Moat accepted that she was not entitled to maintenance for the period she was working and there was a consent order made on 16th May 1983 discharging her maintenance order. The Judge made an order increasing the children's maintenance to $30 per week each, accepting that at that time it would cost $60 per week for their normal upkeep. There was no question of Mr Moat's ability to contribute towards their support and he held it was reasonable that financial responsibility be shared equally between them.

Most of his judgment dealt with this question but he accepted that Mrs Moat was not in need of maintenance for herself over the period when the arrears had accumulated. He said he was not satisfied that her ex-husband was required to meet them, being at that time not legally bound to maintain her, despite the order. Mr Adams submitted that in doing so he had not properly exercised the very wide discretion which he possessed under s.99(6), giving the Court power to remit the whole or part of any arrears due under such an order. He pointed out what I think is clearly supported in the evidence, that Mrs Moat treated the maintenance under the three orders at $50 per week as a global contribution to the family's finances and applied it indiscriminately to the maintenance of herself and the children at a time when the orders for them were only $15 each per week. She did not appreciate that the arrears were accumulating because her husband had ceased to meet his obligations under her order, as he had never bothered to communicate this fact to her. She was left to find it out through the Maintenance Officer when the proceedings were taken by him for discharge.

Having regard to the learned Judge's finding about the amount required to support children of this age at the time the last orders were made, it is quite proper for Mr Adams to suggest that over the period these arrears were accumulating the cost of keeping the two children would have been in the order of $40 to $50 per week each, with the higher figure being probably more appropriate. It was also suggested by the Judge - and again must have been applicable throughout this period - that it was reasonable and proper for each of their parents to contribute equally to their support and there is no question of Mr Moat's ability to do so. This is not simply a case of a wife having the benefit of a maintenance order and failing to enforce it against her husband for a long period, leading him to believe that she was waiving or going to sleep on her rights. I accept Mr Adams' submission that until the matter came to Court, Mrs Moat had no reason to believe that this was other than a case of simple arrears. Had she known the real reason, I am quite sure she would have taken prompt steps to have the maintenance for the children brought up to a more appropriate figure.

Mr Adams complains that with respect, the learned Judge looked at the exercise of his discretion to cancel the arrears in far too narrow a way. It would have been appropriate in this case to take into account Mrs Moat's attitude to the total maintenance, and the inequitable effect on her of cancelling arrears in respect of maintenance which she expected and was using effectively, as the Respondent's half-share towards the support of his children. As Mr Bogiatto conceded, the discretion given under s.99(6) is very wide and is not fettered by considerations which would apply to the making of a maintenance order in favour of a wife. I think it would have been appropriate in this case for the learned Judge to have taken account of these factors I have mentioned in deciding whether to exercise that discretion in Mr Moat's favour. After all, he had the obligation to pay maintenance under this order until it was discharged. He failed to take any steps to regularise the position until his former wife's action in seeking to have the order enforced prompted the

application; by doing nothing he effectively led her into a situation where she took no action to have the children's maintenance increased in order to keep pace with the cost of living and the growing demand of adolescence.

Justice requires that the unequal contribution towards their upkeep over that period that would effectively result from a cancellation of her arrears should be avoided. With respect, I feel that the learned Judge did not pay sufficient regard to this aspect in the unusual circumstances of this particular case. I would be prepared to allow the appeal on this ground, but Mr Adams also put forward an argument based on s.99(1)(d) in which he submitted that the Judge could have discharged the existing order and substituted a new one for the children, in which event he would have had the power either to backdate it or award a lump sum payment which effectively would have been equivalent to the existing arrears. I expressed some reservations and do not propose to act under that section as I think the discretion under s.99(6) is wide enough to have enabled the Judge to deal with it in the way I propose. I therefore allow the appeal to the extent of quashing the order cancelling the arrears, and award $50 costs to the Appellant.

M.B. Casey J

Solicitors:

Cairns Slane Fitzgerald & Phillips, Auckland, for Appellant
Grove & Darlow, Auckland, for Respondent