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N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.41/83

1518

BETWEEN I. ' F
Appellant

A N D J F
Respondent

Judge ordered names not to be published.

Hearing: 19 October 1984

Counsel: D.L. Wood for Appellant
J.B. Robertson for Respondent

Judgment 10 DEC 1984

JUDGMENT OF HOLLAND, J.

This is an appeal against a refusal of an application for variation of a maintenance agreement registered under section 83 of the Family Proceedings Act 1980 giving it the effect of a maintenance order. The application was made pursuant to section 99 of the Act.

The parties, to whom I shall refer for convenience as the husband and the wife, were married in 1953, and lived together until r 1978. There were 5 children of the marriage, all of whom are now adult. The parties orally agreed to separate on 1979, and the maintenance arrangements which were subsequently made took effect from that date. There was a decree absolute on 1981, and the husband remarried the following month. The parties included their agreement as to maintenance in a deed, dated 8 July 1980, which was registered as a maintenance agreement in the District Court at Dunedin on 1982. On

1982, the husband applied for an order varying the terms of this maintenance agreement on the grounds that the maintenance being paid was in excess of what was required for the wife's reasonable needs, and that he was now supporting a second wife.

The provisions concerning maintenance for the wife (and for two of the children of the marriage, though this is of no relevance here) were not the only matters dealt with in the deed in question. Also included in the same document were a separation agreement, as well as provisions concerning custody, access rights in respect of the children, and matrimonial property.

The husband has enjoyed considerable success in his profession of civil engineering. He is a senior member and director of the limited company in which he practises, and his income is substantial. The wife's income is virtually solely derived from the Ian Pairman Family Trust, which was established by the husband in 1965. This trust, in association with the family trusts of two other directors of the civil engineering company, undertook by means of a partnership all the administrative work associated with the professional practice. The income from this trust, the children now being adult, is effectively all received by the wife as part of her maintenance.

The deed entered into by the parties provides, inter alia, that the total of the wife's net income from the trust and the husband's net income should be combined and regarded as "family income", and, after allowance of a preferential payment of $5,000 to the husband, the remainder should be divided equally between them.

The provisions relating to matrimonial property in the deed were expressed to be made pursuant to section 21 of the

Matrimonial Property Act 1976, and complied with the formalities required by that section. Each party had separate legal advice, and the agreement was redrafted many times before the final version was signed. Certain items were agreed to be the separate property of one or other of the spouses, recording what appeared to be a division of chattels which had already taken place in practice; and in addition, the wife acknowledged that the shares in the company in which the husband was professionally engaged should be his "sole and absolute separate property". It was also provided that the husband agreed to sell his share of the matrimonial home to the wife, the purchase price being advanced to the wife by means of an interest free loan from the family trust, from a fund which the trust was holding pending the outcome of a dispute with the Inland Revenue Department. Provision was made for quarterly repayments of the principal sum owing by the wife in respect of this loan.

It is apparent that aspects of maintenance and matrimonial property were bargained against each other in this agreement. The husband agreed that the arrangement had to be looked at as a whole, for if the wife received less than her entitlement in one area, this was compensated for by her gain in another; and that the deed was a total package with a philosophy of "swings and roundabouts" associated with it.

As the maintenance payments due to the wife were not expressed to be a fixed sum but were calculated by means of a formula to be applied to the parties' incomes, the amount due to the wife under the agreement was clearly subject to change according to the degree of the husband's financial success in his profession. Figures produced in the District Court indicate that the husband's

contribution from his own earnings to the sum due to the wife had increased considerably since the agreement was made. His payments for the three years ended 31 March 1980, 1981 and 1982 were, respectively, $3,859, $10,540 and $12,800. Further increases appeared likely in the future, as the prospect that the husband would continue to prosper in his profession was said to be good.

Accordingy to a schedule put in by the wife, her expenses for a year are over $19,000. The schedule for the husband indicates expenses of some $39,000, excluding tax of $57,000 and maintenance (which was then still payable for children) of $15,000. For the year ended 31 March 1983, the figures revealed that the husband was left with a deficit of about $5,000, against his gross income of $107,000.

The wife's principal asset is her house, of which she purchased the husband's half share for $24,365 and which is now said to be worth about $94,0900. She also received some separate property by way of inheritance from her mother, and this was worth some $19,500 in 1978. The husband has now purchased a home for himself and his second wife at a cost of about $105,000, which is at present unencumbered, although if his dispute with the Inland Revenue Department should not be decided in his favour, he will be obliged to refund some $80,000 to the family trust, for part of the purchase price of his house comprised the sum set aside for this tax contingency, and was money which the husband could make use of.

Although the husband's immediate earning position is strong, his income will be substantially reduced when he reaches the age of 60 in 1987. This is because he is obliged under an agreement with his business colleagues to dispose of two-thirds of his share

in the professional company at that date. The wife appears to have no immediate prospect of employment, having been occupied with domestic duties and so out of the work force for over twenty years. She said, however, that she was studying for Real Estate examinations with a view to becoming a Real Estate salesperson but the prospects of her earning an income of any substance are remote.

The husband's proposal for variation was that he would forego the $5,000 preferential payment, and the family income would be divided on the basis that he would receive two thirds, and the wife one third of the fund. Although he relied on the changes in legislation relating to maintenance contained in the Family Proceedings Act 1980, he contended that the reason for his application was that he was now supporting his second wife, who did not have paid employment; and that the formula he proposed would still leave his first wife ample for her reasonable needs. He said that he would not have considered attempting to vary the agreement were it not for these two factors. Against this, it was said for the wife that the deed was a "package deal", in which maintenance provisions were associated with questions of matrimonial property, and that such a carefully prepared agreement, to which the parties had given detailed consideration with the assistance of their respective professional advisers, should not be set aside, especially as it had been in operation for only a comparatively short time. It was also alleged that the husband was aware of the possibility that he would remarry in the future at the time he signed the deed.

The law as to maintenance is embodied in the Family Proceedings Act 1980, which constitutes a code in respect of the

liability of parties to a former marriage to provide maintenance for each other. The legislation furthers the "clean break" principle, described in Bunce v Bunce (1980) 2 N.Z.L.R. 247 in relation to the Matrimonial Property Act 1976, in that, in recognition of changing social attitudes towards equality of the sexes and the desirability that parties to a former marriage should achieve independence from each other as soon as possible, entitlement to maintenance has been curtailed to some extent. A party to a former marriage can now not expect to receive maintenance from the other party except in the circumstances defined in the Act. The notion of the equality of the spouses is recognised in the Matrimonial Property Act 1976, and to some extent the policies of the two Acts complement each other. There was, however, a period of some four years between the passage of the two Acts in which the provisions of the Matrimonial Property Act were in force, but the Family Proceeding Act, with its less stringent maintenance requirements, was not. It was during this period that the deed in this case was entered into. Had the deed been drawn after the introduction of the Family Proceedings Act it is likely that the financial provisions made for the wife would not simply have been described as maintenance.

It is impossible to know what would have been the wife's entitlement under the Matrimonial Property Act had she chosen to make a claim under that Act, and any speculation as to that would be inappropriate here. It was said for the husband that any attempt on the wife's part to claim a share in his business assets would have been strenuously resisted. The wife, however, chose to agree, against a background of prima facie entitlement to half of the spouses' matrimonial property, that the husband's interest in his

professional business should be his separate property. The maintenance provisions, however were agreed in a legal context which could possibly have placed a greater liability upon the husband than does the present legislation, pursuant to which this appeal is brought.

For present purposes, it will be assumed that the deed which was registered in the District Court was in fact a "maintenance agreement" within the definition of that term in section 2 of the Act. A maintenance agreement, as defined in section 2 is "a written agreement ... whether or not the document in which an agreement ... is embodied provides also for the separation of the parties to a marriage or for the custody of a child". The present document, embodying as it does provisions as to matrimonial property which are not merely provisions for separation or custody, may perhaps not be within this definition, but this point was not argued, and is immaterial in view of my conclusions on other aspects of the matter.

The District Court Judge approached the case on the basis that he was obliged to consider an application for variation as if it were a new application; he found that the circumstances from which liability to arose still existed; and that that liability had not ceased to exist for the reason that the parties had intended (although this was not expressed in the deed) that maintenance should continue until 1987, at the date when the husband would be obliged to accept a cvonsiderable drop in income. The husband had said in evidence that he had calculated that the wife's house would be paid for by that date, although, as it eventuated, it would in fact be unencumbered some time before then. As the parties had

indicated their own expiry date, the husband's application was refused.

The essence of the husband's appeal is that, by treating the application for variation as if it were an original application, the District Court Judge directed his attention to irrelevant considerations, and failed to take the required matters into account. He also places some considerable weight on the fact that no agreement as to an expiry date was included in the deed and the evidence supporting the view that the parties would not formally agree on such a date.

Jurisdiction to vary a registered maintenance agreement is conferred by section 99(2) and (3) which read:-

> "(2) Where a Court is satisfied that it ought to do so having regard to the principles of maintenance set out in sections 62 to 66 and in sections 72 and 73 and in section 81 of this Act, the Court may from time to time, in respect of a maintenance agreement registered under this Part of this Act, make any order specified in subsection (3) of this section in respect of the registered maintenance agreement.
>
> (3) The orders referred to in subsection (2) of this section are:
>
> (a) An order cancelling the agreement:
> (b) An order varying or extending the agreement:
> (c) An order cancelling the agreement and making a maintenance order in its place:
> (d) An order temporarily suspending the agreement as to the whole or any part of the money payable under it."

This subsection does not appear to confer any greater or less jurisdiction on the Court than to empower it to make any of the specified orders listed in the section, having regard to the sections mentioned. The District Court Judge considered that the

word "ought" had no mandatory significance, but was applied to what is "befitting, proper, correct or naturally expected". With respect, this approach appears to be the correct one. The word "may" in this context is appropriate for the subsection lists a number of orders which might be made, so that, in effect, the Court may choose to make any of the orders specified in the section. There is nothing to indicate that the word "may" confers a jurisdiction on the Court to exercise a discretion to refuse an order once the required criteria are satisfied.

Section 92 reads as follows:-

> "Where an application is made to a Court for an order under this Part of this Act, the Court may make any other order under this Part of this Act that it could have made if an application for that other order had been made at the time when the first-mentioned application was made."

The combined effect of this section and subsection 99(2) was, the District Court Judge considered, that he was obliged to consider an application for variation as if it were a new application. As authority for this, he cited Turner v Doak (1982) 1 N.Z.F.L.R. 250, 251, where Casey J. said:

> "Having regard to the provisions of ss.92 and 99 of the Family Proceedings Act 1980, there seems now to be no practical difference in the way the Court is to approach the matter between an original application, and one for variation and cancellation of an existing order."

On the basis that he should treat the application as if it were a new application, the District Court Judge proceeded to consider section 64 which deals with maintenance and is exhaustive

of the circumstances in which maintenance is payable by one party to a former marriage to the other. The section reads:

> "(1) Subject to subsection (2) of this section, after the dissolution of a marriage each party shall continue to be liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of the effects of any one or more of the following circumstances:
> (a) The division of functions within the marriage while the parties lived together:
> (b) Any custodial arrangements that apply in respect of any child of the marriage after the parties ceased to live together or after the dissolution of the marriage:
> (c) The undertaking by a party of a reasonable period of education or training designed to increase that party's earning capacity or to reduce or eliminate that party's need for maintenance from the other party where -
> (i) Because of the effects of any of the matters set out in paragraphs (a) and (b) of this subsection on the potential earning capacity of the party undertaking the period of education or training; or
> (ii) Because the party undertaking a reasonable period of education or training has previously maintained or contributed to the maintenance of the other party during a period of education or training,-
> it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking a reasonable period of education or training to be met immediately by that party.
>
> (2) Where a marriage is dissolved, each party shall assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting the party's own needs, and on the expiry of that period of time neither party shall be liable to maintain the other pursuant to subsection (1) of this section.
>
> (3) Notwithstanding subsection (2) of this section, where a marriage is dissolved and, having regard to the ages of the parties and the duration of the marriage,-
> (a) It is unreasonable to require a party to do without maintenance from the other party; and

> (b) It is reasonable to require the other party to continue to provide maintenance -
> the other party shall continue to be liable to maintain the first party pursuant to subsection (1) of this section to the extent that such maintenance is necessary to meet the first party's reasonable needs.
>
> (4) Except as provided in this section, neither party to a marriage is liable to maintain the other party after the dissolution of the marriage."

The District Court Judge held that the circumstances outlined in section 64(1)(a) and (c) still existed, as they had at the date the agreement was made, so that, by virtue of the wife's spending over twenty years occupied with domestic duties and out of the paid work force, she could not meet her own financial needs; and that the provision as to retraining was applicable in that the wife was studying to be a Real Estate salesperson. The period of time within which the wife should assume responsibility for meeting her own needs as provided in section 64(2) had not expired, for the parties had intended that the expiry date should be 1987.

On this aspect, the District Court Judge appears to have taken an erroneous approach, based on a misinterpretation of Turner v Doak. The fact that there is "no practical difference" in the Court's method of approach between an original application and an application for variation does not mean that a Judge may treat an application for variation as if it were an original application. Section 99(2) directs that, in making any of the orders specified in that section, the Court should have regard to the principles of maintenance set out in sections 62 to 66, 72 to 73 and section 81 of the Act. Not all of these sections will be relevant in each particular case; indeed, it is not possible for them to be so. Section 63, for example, deals with maintenance payable during

marriage, while section 64 concerns maintenance upon dissolution. The Court must therefore begin its task by ascertaining which section or sections contain the relevant principles, and this will depend on the nature of the order which is sought. The fact that the Court is empowered by section 92 to make any other order under that part of the Act does not mean that it must take into account principles other than those specified in the particular section or sections which relate to the order which is under consideration.

In Turner v Doak, the wife had succeeded in her application to have a maintenance order varied in her favour. The matter had been handled in the District Court as though it were a new application because the original order had been suspended for some four years prior to the hearing. The husband appealed, contending that no maintenance should be payable at all. This question could be decided only by an examination of section 64 to determine whether, pursuant to the provisions of that section, he was under any obligation to maintain the wife. An analysis of section 64 was a threshold requirement in view of the husband's assertion that he was under no liability to pay maintenance at all for, unless the wife could be shown to be within one or more of the conditions set out in that section, no liability to maintain could be imposed on the husband.

The present case differs from Turner v Doak in that there is here no denial of liability at all on the part of the husband and maintenance has continued. He accepts his obligation to continue maintenance payments to the wife. The only matter in dispute is that of the amount payable. This is covered by the provisions of section 65 which reads:-

"(1) In determining the amount payabe by one party to a marriage for the maintenance of the other party (whether during the marriage or after its dissolution), the Court shall have regard to:
(a) The means of each party, including -
(i) Potential earning capacity:
(ii) Means derived from any division of property between the parties under the Matrimonial Property Act 1976; and
(b) The reasonable needs of each party; and
(c) The fact that the party by whom maintenance is payable is supporting any other person; and
(d) The financial and other responsibilities of each party; and
(e) Any other circumstances that make one party liable to maintain the other.
(2) In considering the reasonable needs of each party pursuant to subsection (1)(b) of this section, the standard of living of the common household shall be disregarded unless, in the opinion of the Court, there are special circumstances.
(3) No party to a marriage shall be liablke to pay to the other party by way of maintenance (whether during the marriage or after its dissolution) any amount the payment of which would have the effect of depriving the first party, or any dependent person ordinarily residing with the first party, of a reasonable standard of living."

Clearly, the husband is at the present time in a stronger financial position than is the wife. Although he is now supporting a second wife, there is nothing to indicate that either of them would be deprived of a reasonable standard of living if the present maintenance arrangements were to continue. It was argued for the husband that, if his proposal for variation were accepted, the wife would in fact receive no less income than she had received at the date the agreement was made, because the husband's earnings have increased significantly since then. The husband's income has, of course, also increased. Although he now has the additional responsibility of a second wife, his remarriage was more than a possibility at the time he signed the deed. A change of

circumstances is not, in itself, a ground for variation under the present Act.

The most significant factor here, however, is that set out in section 65(1)(a)(ii), namely the means derived from a division of matrimonial property. Although the parties' respective entitlements and the nature of the property each received under the agreement are not known and cannot properly or profitably be speculated on, it is clear that there was an element of bargain in the agreement which was made. The effect of the agreement was that the husband's professional business remained intact in his hands, continuing to exist as the source of his substantial earnings. The terms of that part of the agreement relating to maintenance reflect the wife's expectation that she should participate in the profits generated by the husband, whose income-earning capacity was not impaired by any reduction, or threat of reduction, of his business assets.

It may well be that the reasonable needs of the husband to a greater proportion of the "joint income" can be demonstrated as greater than the reasonable needs of the wife to retain her agreed share but that is more than counterbalanced by the fact that the husband's income is "means" available to him as a result of a favourable division of property under the Matrimonial Property Act. I am fortified in this view by the remarks of the District Court Judge, with whom I agree, that it is in accord with the stated policy of the Act to promote conciliation, and encourage the parties to a former marriage to settle their own disputes where possible. It cannot further the cause of conciliation to set aside such agreements lightly. This is particularly so where, as here, an

agreement deals with a number of different matters relating to the parties' former marriage, their children and their property. To consider one element of such an agreement in isolation, and to vary that single element would jeopardize an entire agreement which was entered into with the intention that its effectiveness should depend on the totality of its terms, and that it should be read as a whole. In this case there are no other circumstances which are material to the application and it follows that the original agreement should stand without variation. The appeal is dismissed. Costs were reserved in the District Court. This is a quite unusual case and I consider it appropriate that there be no order for costs in that Court or on the appeal.

It will be obvious from the immediately preceding remarks that I am glad to have reached the conclusion which I did and which upholds the agreement made between the parties. There would appear to me to be an urgent need for an amendment of the Family Proceedings Act to provide that the terms of any agreement made between the parties are to be considered on any application for maintenance or to vary or discharge a maintenance order. This agreement was fairly and freely negotiated. It is acknowledged to have been fair at the time. It contemplated a basis of calculating maintenance dependent on contingencies. In the end the wife may have received more than the parties contemplated but she equally well may have received less. The fact that a maintenance order has been obtained by agreement certainly should not be an absolute bar to variation or discharge but it is easy to foresee injustice in some cases if the Court is prevented from giving some weight to the bargain struck by the parties.

A D. Holland J.

Solicitors:

Tonkinson, Wood & Adams Bros, Dunedin, for Appellant
Ross Dowling Marquet & Griffin, Dunedin, for Respondent