IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. 296/83

IN THE MATTER of the Family Proceedings Act 1980

A N D

IN THE MATTER of an appeal against a District Court order relating to maintenance

BETWEEN H DONALD of Christchurch, Femme Sole

APPELLANT

A N D P DONALD of Christchurch, Freezing Worker

RESPONDENT

Hearing : 12th April 1984

Counsel : G.S. Brockett for appellant
S.G. Erber for respondent

Judgment : April 1984

JUDGMENT OF CHILWELL J.

Notwithstanding that the parties were divorced by decree absolute made in the Supreme Court on 30th November 1973 I will refer to them as the husband and wife. There were two children of the marriage viz. G y Donald born 1st May 1962 and G a Donald born 28th May 1965.

The parties executed a separation agreement on 21st November 1968 which provided for maintenance for the wife at $12. per week and for each child at $4. per week until attaining 16 years of age. The maintenance provision was registered as a maintenance agreement in the Magistrates' Court at Christchurch on 9th April 1969. On 20th April 1971 the registered agreement was varied by remitting all arrears thereunder except for $670. On 25th June 1979 the registered agreement was again varied by extending the term for child maintenance to 18 years of age while each child was engaged in a course of education or training. That was a consent order.

On 6th October 1982 the wife applied to the Family Court at Christchurch for orders increasing the amount of maintenance payable for each child. On 5th November 1982 the husband gave notice of intention to defend and claimed relief by remission of arrears then stated to amount to $3,364. The Family Court heard the application and cross claim for relief on 8th December 1982. The arrears at that date amounted to $3,252. At the hearing the wife claimed an increase in the amount of maintenance payable in regard to her. The Family Court Judge who heard the proceedings delivered a reserved decision on 13th June 1983. He ordered :

1. Cancellation of the registered agreement in so far as it related to the payment of maintenance to C y from 1st May 1982.

2. Cancellation of the registered agreement in so far as it related to the payment of maintenance to the wife.

3. An increase to $10. per week for maintenance in respect of G a.

4. Remission of arrears of $1,552.

5. Payment of the balance of arrears of $1700 by weekly payments of $15.

6. Suspension of payment of maintenance with respect to G a and the arrears to 1st December 1983.

He refused to make retrospective orders for increased maintenance in respect of the children and, specifically, refused lump sum payments :-

7. In respect of G y from 1976 (sic) to 1st May 1982.

8. In respect of G a from 1976 (Quare) to the date of judgment.

The present appeal was filed in the High Court on 30th June 1983.

The approximate ages of the parties at relevant

dates were :-

	Agreement 21/11/68	Registration 9/4/69	Variation 20/4/71	Divorce 30/11/73
Wife	29	30	32	34
G y	6 1/2	7	9	11 1/2
G a	3 1/2	4	6	8 1/2

Variation 25/6/79	Hearing 8/12/82	Judgment 13/6/83	Now 12/4/84
40	43	44	45
17	20 1/2	21	22
14	17 1/2	18	19

The issues as finally argued on this appeal related to :-

4. Remission of arrears of $1552.

5. The order directing weekly payments of $15. in respect of the balance of the arrears of $1700.

3. The quantum of maintenance in respect of G a.

7. & 8. The refusal to make lump sum orders by way of retrospective orders.

Cancellation of the registered agreement in respect of G y from 1st May 1982 could not be attacked in view of Section 72(1)(c) of the Family Proceedings Act 1980 (The Act) because G y attained 20 years of age on that date. Nor,

in view of Turner v Doak (1982) 1 N.Z.F.L.R. 250 and the facts of this case, could any successful attack be maintained against the order cancelling the registered agreement in respect of weekly maintenance payments to the wife.

It was common ground at the hearing in the Family Court and on this appeal that as at the date of hearing in the Family Court (8th December 1982) arrears totalled $3,252 calculated as follows :

G y and G a (quare) as at 27th June 1979	$416.
G y 29th June 1979 to 1st May 1982	$592.
G ıa 25th June 1979 to 25th November 1982	$711.
	$1719.
Say	$1700.
Wife	$1552.
	$3252

Mr. Brockett submitted in reliance upon Johnson v Johnson (1982) 1 N.Z.F.L.R. 212, 223 that the Judge was obliged to preserve the sanctity of the original order. In that case I said :-

> "It is my judgment that s 99(4) is designed to preserve the sanctity of Court orders. A party who has a maintenance order against him or her ought to be vigilant to apply for orders under s 99. Until he or she does and the formal liability varied, discharged or suspended he or she ought to be bound by the order. The Court has a discretionary power to prevent injustices in the exercise of its discretion under s 99(6).

I reject Mr Galbraith's submission. The discretion under s 99(6) is unfettered." (page 223)

Mr. Erber submitted that the Judge had preserved the sanctity of the original order by preserving the arrears in respect of the children. Implicit in that submission is that cancellation of the order in respect of the wife justified cancellation of the arrears. I cannot follow the logic of that proposition. The reasons given by the Judge for cancelling arrears in respect of the wife were the husband's commitment and expected work redundancy. By the combined effect of the provisions of his late father's will and of an order made in his favour on 7th December 1976 by Casey J. the husband is entitled to income from the residuary estate. I was informed from the bar that he was entitled to income from one-eighth of the residuary estate. However the estate accounts for the year ended 31st March 1981 indicate that he receives income from about one half of the residuary estate of $327,000 approximately. It was common ground that in that year he received as income from the estate $15,068.62. The comparative figure for fifty two weeks prior to 7th December 1982 (the date of his declaration of financial means) was stated to be $14,202.00. His total income for that period was declared to be $30,639. as follows :-

Salary as a freezing worker at the Canterbury Frozen Meat Company	$15,664.
Amount received from boarder (A son of his present wife)	$ 400
Compensation or damages received	$ 373
Estate of C.S. Donald deceased	$14,202
	$30,639

His assets were declared to amount to $43,702 as follows :

Land and Buildings	$38,000
Saving Bank	202
Motor vehicle	5,500
	$43,702
Less mortgage	6,780
	$36,922

He declared his expenses at $35,767. These included income tax, $16,262, mortgage payments, $5,547, and arrears of income tax, $2,200. It is clear that he had not made proper provision for income tax. In consequence, on 5th March 1982 he borrowed $6,780 from the Canterbury Savings Bank by way of personal loan subsequently secured against his home. That amount included capitalised charges and interest at a flat rate of 13% reducible to 11% for prompt payment. The advance was repayable by 12 monthly payments of $565 (i.e. $6780) reducible to $555 for prompt payment (i.e. $6660). The "mortgage repayments" of $5547,supra, represent about 10 instalments. He had thus almost repaid the loan by the date of the hearing in the Family Court.

The reasons given by the Judge for cancelling the arrears were :-

> "Mr Donald remarried in 1979. He supports his wife and one child. He is working for the Canterbury Frozen Meat Company and last year received wages totalling $15,664 gross. He says that he receives a weekly pay of $112.00

per week at the present time; that he works seven months of the year, and in the off season he has in the past obtained employment as a labourer, but this last year that work has not been available.

He also says in June 1983 he will be made redundant because the department he works for is being transferred to Ashburton. He also received an income from the estate of C.S. Donald totalling $14,202. Mr Donald produced a declaration of his financial means and their sources. In that he shows an excess of expenditure over income of $5,128. The deficit is brought about by income tax he had to pay and for which he had not allowed. He says that there were increases of interest to the estate, investments of which he was not aware, and consequently he had not provided for the increased tax.

This year he was required to pay $10,258 and a further $6,000 PAYE, and he is again required to pay a further $2,200 provisional tax, which is still to be paid. To pay the tax he was required to borrow $6,780 from the Canterbury Savings Bank. By this loan Mr Donald is required to pay $6,780 by 12 equal instalments of $565.00. When the loan is repaid to the Canterbury Building Society Mr Donald will not then be required to pay monthly payments of $565.00. His concern is that he will be made redundant at his work, and that his only income will be that from the estate.

If that be so, he will have expenditure amounting to $14,202 per annum. Outside his house and a small amount of money in the bank and his car, he has no other assets. Mr Donald's wife earns money from the sale of tomatoes. He says she may have made $1,500 in the last season. She also works as a cleaner in a minimal basis." (pages 7 and 8)

and the reasons given for suspending payment of arrears and current maintenance for G a were :-

"With his committments and his expected redundancy, payments of maintenance and balance of arrears should be suspended until Mr Donald's future financial position is determined." (page 9)

Mr. Brockett submitted that the Judge was not justified in treating the husband's alleged lack of

financial resources as an excuse on the ground that he had received a large income which he unwisely spent without making provision for income tax and in the face of his legal obligation to pay modest maintenance orders. That approach by the Judge, he submitted, was a wholly wrong way to assess the husband's legal duty to his wife and children. In my judgment that submission is unanswerable. The Judge was not justified on the facts in exercising his discretion to relieve the husband from a formal order of the Court. The appeal must be allowed in regard to the remission of arrears of $1552. Nor, in my judgment, was the Judge justified in suspending payments. That matter is now academic because the suspension period has expired.

With regard to the quantum of G a's maintenance, it was common ground that the then current tariff in Christchurch was $25 per week in the case of one child and $20 in the case of two or more children. The Judge was influenced by the fact that each child was entitled to capital and income from their grandfather's estate in terms of his will and of the effect of the order of Casey J. in the proceedings under the Family Protection Act 1955. There is a fund of $10,000 held on trust for each child. The provision for G a, which is the same as that for G y, is as follows :-

> "..... during the life of the plaintiff (i.e. the husband) :-
>
> (i) To apply at their discretion, the whole or such part if any, of the nett annual income therefrom as may, in all the circumstances be reasonable for or towards the maintenance or

education or advancement or benefit of G A DONALD until she attains the age of twenty-one years and to accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income therefrom from time to time and shall hold such accumulations for the said G a Donald absolutely.

(ii) On the said G a Donald attaining the age of twenty-one years to pay the nett annual income therefrom to the Plaintiff for life.

(iii) In the event of the said G a Donald dying before attaining the age of twenty-one years to pay the nett annual income therefrom to such as shall be living of G y Donald and W Mason in equal shares.

(iv) On the death of the Plaintiff or in the event of all of the said G y Donald, G a Donald and W y Mason dying before attaining the age of twenty one years then the said fund as well the capital as the income shall be held for the said P Nyhan absolutely." (Para. 3(b) of the Supreme Court order)

W Mason is the child of the husband and his present wife. P Nyhan is the husband's sister and a will beneficiary. There is a further provision in the order that when G y, G a and W each attain twenty one years of age prior to their father's death they are to receive $10,000 from residue. The effect of the latter provisions is that, while the husband then receives the income from the Nyhan trusts, when each child reaches twenty one he loses the equivalent income from the residuary estate. It was common ground at the hearing in the Family Court and in this Court that upon their father's death the children each become entitled to one third of a one eighth share in the estate. The trustees had accumulated income as at 31st March 1981 of $4,667.33 in respect of G y, $4,655.03 in respect of G a and $4,667.23 in respect of W

In fixing maintenance for G a at $10. per week the Judge said :-

> "G ıa was 17 on 28 May 1982. She attended the Papanui High School in 1982 and proposed returning to school in 1983. G a is in a similar position to her brother with respect to her grandfather's estate. Boarding fees have been paid for G a at the rate of $600.00 per term from the estate when she was at Nelson Girls' College.
>
> The amount of maintenance paid with respect to G a is $4.00 per week. It is accepted that that is too low. In fixing maintenance I have regard to the fact that application can be made to the estate for maintenance and education for G ıa. Mrs. Donald says she will do this as soon as the Court order is known.
>
> Mr Donald is liable to pay maintenance with respect to G a, but I take into account his present financial position. I accept that any order for payment of maintenance by him at the present time must be suspended. In view of his obligations I do not see that he should be completely freed from it because of G ıa's estate entitlement.
>
> Balancing up the various matters I consider it fair that the maintenance with respect to G a should be increased to $10.00 per week." (page 6)

Mr.Brockett submitted that the Judge failed properly to pay regard to the statutory command in Sections 72(2) and (3) of the Act to take the therein listed criteria into account. The wife's declared income for a period of 52 weeks prior to the hearing in the Family Court was $8,550 comprising domestic and family benefits. Her declared outgoings were $8580 concerning which no item calls for specific mention. Her assets comprised savings, $2030, a motor car, $4,000 and furniture and effects, $10,000, (a total of $16,030). I agree with Mr. Brockett's submission that the wife had nothing of consequence. Moreover she had the obligation to educate

and maintain two children, fully discharged to G y, not yet fully discharged to G a. Reference was also made by Mr. Brockett to twin children of the wife born during the marriage but not children of the husband. Their custody and maintenance is her responsibility. Mr. Brockett so referred in order to offset any suggestion that the husband should be able to claim some responsibility to maintain children of his present wife. I find little value in that submission and put it aside.

The implication from the whole of the Judge's reserved judgment is that he considered that the children should receive maintenance from the trustees of the grandfather's estate. The wife said in evidence that her representations to the trustees had resulted in only a grant for G a's school fees and G y's university fees: that the trustees had decided to assist with education only. She said she would apply to the trustees again after the judgment of the Family Court Judge was known. A Family Court Judge has no right to give the trustees any direct or indirect direction or to put any pressure upon them. They are not accountable to him. If accountable at all they are accountable to the High Court and then only if they have gone very wrong in the exercise of their discretion. There was not sufficient evidence before the Judge upon which to base any express or implied determination of the correctness of the exercise by the trustees of their discretion. He was entitled to take into account the existence of the trust and of the maintenance power but not to speculate upon the exercise or non exercise of the trustees' discretion. The only evidence of any value was

that the trustees had paid G a's boarding fees at College and part of G y's university fees. Moreover, W y had fared no better. Her accumulated interest was the same as G y's and very close to G a's.

Mr. Erber submitted that the Judge was right to fix the order at $10. because of the husband's financial crisis: that $10. was the only sensible order in the circumstances. I disagree with Mr. Erber. The husband's financial position was very much better than the wife's. In respect of Section 77(3) criteria the score must come down heavily in favour of a proper order for maintenance for G a. In my judgment there was no basis in fact for not making a proper order, nor any reason for departing from a tariff which is sometimes imposed upon poorer men than this husband. With respect to the Judge he gave much more weight to the husband's financial crisis and to the existence of the estate trust than warranted and almost no weight to the wife's slender means and source thereof. The judgment cannot be supported on any reasonable ground. The appeal must be allowed. The proper amount for G a's maintenance should be $25. per week.

Retrospective payment is provided for in Section 99(5) of the Act :-

> "(5) An order under this section varying a maintenance order or maintenance agreement by increasing the amount payable under it may, if the Court thinks fit, take effect from a date that is earlier than the date of the order of variation,

but is not earlier than the date on which the grounds for the variation arose."

The Judge said that he had been asked to direct a lump sum payment for G y and G a in respect of past maintenance in terms of Section 74(1)(c) of the Act. That section has no application in regard to Section 99 applications. The Court's power is the discretionary power to give retrospective effect in terms of Section 99(5) supra.

The reasons given by the Judge for refusing to make provision for past maintenance were :-

"1. Application has been made to the Court for extension of time for payment of maintenance on 25 June 1979. No application was made at that time for an order for increased maintenance.

2. No application having been made in June 1979, no application was put before the Court until the current application was made. This has the effect if an order was now made for a lump sum payment of increasing the arrears owing by Mr Donald.

3. For some years since the divorce in 1973 and up to 29 June 1979 Mr Donald paid maintenance of $20.00 per week.

4. An application could have been made to the Trustees of the estate for maintenance.

5. The present financial position of Mr Donald." (page 5)

Mr. Brockett submitted that the husband ought to pay maintenance at an increased rate for G y from 27th June 1979 to 1st May 1982 and for G a from 27th June 1979 to the present time because he had unjustifiably ceased paying maintenance thereby compelling the wife to bring these

proceedings in which she had been considerably delayed by the Court process. I must say it is surprising that eighteen months have elapsed since the wife made her application on 6th October 1982. No blame is attributable to either party for the lapse of time.

Mr. Erber relied upon Johnson v Johnson, supra. He criticised the wife for taking no steps from 1979 to 1982. He submitted that the Court cannot allow Section 99(5) to be used as a vehicle for assisting slove litigants: it is not the purpose of Section 99(5) to encourage applicants to play a waiting game, apply late and get full recompense. Mr. Brockett replied that Johnson v Johnson was concerned with Sections 99(4) and 99(6) not 99(5). I accept that. The Court has a discretion under Section 99(5). In matters of discretion the Court frequently takes into account delay and its effect upon a just order in the circumstances. There is merit in Mr. Erber's submission. The wife did not satisfactorily explain the delay from 1979 to October 1982. But she is not responsible for any delay since then: nor is the husband. In my judgment the Judge was right not to make further provision for G y. The husband's legal obligation to him expired on 1st May 1982. The wife did not make her application until five months later. So far as G a is concerned, the Judge appears not to have considered the wife's position in regard to G a's maintenance from 6th October 1982 except to the extent that he refers to the estate trust and the present financial position of the husband. In my judgment he failed properly to consider the wife's circumstances and to weight them against the husband's. A just order would have

required some degree of restrospection, having regard to the time taken to deliver judgment. Since then, there has been a delay of about nine months in the appeal process. In my judgment justice requires that the order in respect of maintenance for G a take effect from 30th September 1983, being a date by which this appeal ought to have been heard and determined. The ready list was filed on 11th August 1983.

Finally, there remains the question of suspension of the payment of arrears. If the husband could borrow $6,000 net for the payment of tax in March 1982 (loan repaid in twelve months) he can do it again to pay the arrears now payable. Moreover he can borrow against his interests in his father's estate.

For the reasons given the appeal is substantially allowed :

(a) The order remitting arrears of $1,552 is revoked.

(b) The order that the amount of $1,700 be paid by weekly payments of $15. is revoked to the intent that the said sum of $1,700 remains immediately due and payable.

(c) The order increasing to $10. per week the maintenance with respect to G a is

varied by increasing the amount to $25 per week to take effect from 30th September 1983.

The question of costs is reserved. Counsel may file written memoranda.

16th April 1984.

Solicitors :

Appellant	:	G.S. Brockett, Christchurch.
Respondent	:	Weston, Ward & Lascelles, Christchurch.