19/11

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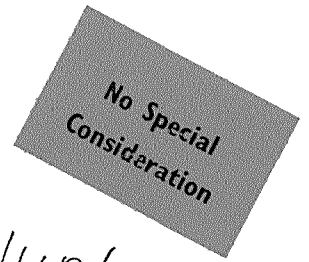
IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No. 434/84



1401

BETWEEN GEBBIE

Appellant

A N D GEBBIE

Respondent

Hearing: 31 October 1984

Counsel: S.G. Erber for Appellant
A.P.C. Tipping for Respondent

Judgment: 15 NOV 1984

JUDGMENT OF QUILLIAM J

This is an appeal against the dismissal by the Family Court of an application for a lump sum award of maintenance. For convenience I refer to the parties as the husband and the wife. It is necessary to set out in brief the history of the matter and the way in which the application came before the Family Court.

The parties were married in 1939 and on 10 September 1969 a decree absolute in divorce was made between them in this Court at Christchurch. The decree absolute incorporated a provision "reserving to the respondent leave to apply for such capital provision under s 41 of the Matrimonial Proceedings Act 1963 as she may be advised at anytime hereafter." In 1982 the wife applied for capital provision pursuant to that leave reserved. That application was, however, struck out on the basis that the High Court no longer had any jurisdiction to grant ancillary relief: (see

Gebbie v Gebbie 1 NZFLR 433). The wife then applied to the Family Court for an award of a lump sum. That application purported to be made under s 69 (2) of the Family Proceedings Act 1980 but it is common ground that it could only have been made (if at all) under s 70 and has been regarded as having been made under that section. The application was dismissed by the Family Court on the ground that there was no jurisdiction to entertain it and the question now for determination is whether that decision was correct.

Those parts of s 70 which are relevant for present purposes are:

> " 70. (1) A Family Court, on or at any time after the making of an order dissolving a marriage, may, subject to section 61 of this Act, -
>
> (b) Make any other order referred to in section 69 (1) of this Act, either instead of or in addition to an order under paragraph (a) of this subsection.
>
> (5) In this section a reference to an order dissolving a marriage includes a reference to a decree or order or legislative enactment recognised in New Zealand by virtue of section 44 of this Act, as if that decree or order or legislative enactment were an order of a court of competent jurisdiction in New Zealand. "

Section 69 (1), so far as applicable, provides:

> " 69. (1) On hearing an application under section 67 of this Act a Family Court may, subject to section 61 of this Act, make any one or more of the following orders:
>
> (b) An order directing the respondent to pay such lump sum

> towards the future maintenance of the applicant as the Court thinks fit. "

The question which now arises is whether the expression in s 70 "an order dissolving a marriage" refers only to an order made by the Family Court under the Family Proceedings Act or includes a decree of divorce made under the Matrimonial Proceedings Act.

The effect of the decision which has been given is to expose what appears to be a rather disturbing lacuna arising out of the transfer of jurisdiction from this Court to the Family Court. It is indeed the very unfortunate consequences which have formed the main basis for the present appeal. In short, the argument for the appellant was that the legislature ought not to be presumed to have intended an interpretation which would produce an anomalous and perhaps an unjust result. It would not, however, be the first time that such a situation had arisen and if the words of the statute are clear then any resulting anomaly or injustice must be a matter for correction by Parliament and not for any strained or unnatural interpretation by the Courts.

It seemed very clear, in the course of argument, that the present appeal could not succeed, but because of the consequences I have thought it proper to take time to consider it. Having done so I am satisfied that the appeal must fail.

For the appellant to be able to succeed it would be necessary to interpret the expression "an order dissolving a marriage" in s 70 (1) as including a decree of divorce made under the Matrimonial Proceedings Act. There are several reasons why that may not be done.

The first is that nowhere in the Family Proceedings Act is there any provision which expressly equates a decree absolute with an order dissolving marriage. The very considerable change which was effected in the law by the transfer of jurisdiction from the High Court to the Family Court inevitably carried with it the consequence that orders and decrees already made under the earlier legislation would be affected. This has been recognised in a number of ways. In s 70 (5), which I have already set out, attention was given to the effect of foreign orders and decrees. It may well be thought that this was the obvious place to deal also with existing orders and decrees of the (then) Supreme Court, but they are conspicuous by their omission. Section 189 deals expressly with orders and the like in force at the commencement of the Act and equates in subss (2) (d) a decree absolute to an order dissolving marriage but its effect is confined by subss (2) to "any other enactment" and so again deliberately excludes from the Family Proceedings Act any continuing jurisdiction in respect of orders already in force. It is also to be observed that s 189 (2) (d) provides that a reference to a decree absolute is to be read as including an order for dissolution of marriage but not the converse. Accordingly, one looks in vain through the Act itself for any provision which equates a decree absolute with an order dissolving marriage so as to give the Family Court express jursdiction in cases such as the present.

It is necessary, then, to consider the way in which s 70 (2) is expressed in order to determine whether there is any rule of construction which would permit the interpretation sought by the appellant. It is readily apparent that there is none. The way in which the subsection is expressed makes this plain. There are two circumstances in which the Family Court may make an order for maintenance after dissolution of marriage. The first is

"on" the making of an order, and the second is "at any time after" the making of an order. By no process of interpretation can it be said that "on" the making of an order could apply to a decree already made. There is no basis upon which to conclude that "after" the making of an order should somehow introduce the concept plainly excluded from the earlier provision.

It is, of course, clear that the conclusion arrived at by the Family Court, and with which I am in agreement, has meant that people who had the benefit of an order of this Court but which was not capable of variation have been left with no remedy at all. There seems little doubt that this will not have been foreseen by Parliament and will no doubt require statutory rectification. I can, however, see no basis of interpretation which would permit this Court to arrive at any different conclusion.

The appeal is accordingly dismissed and there will be no order as to costs.

Solicitors: Weston Ward & Lascelles, CHRISTCHURCH, for Appellant

Wynn Williams & Co., CHRISTCHURCH, for Respondent