IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M No. : 310/86

BETWEEN

ELLIS-MARTIN

APPELLANT

AND

ELLIS-MARTIN

RESPONDENT

Hearing: 18 March 1987

Counsel: BM Yolland for appellant
NG Cooke for respondent

Judgment: 19 March 1987

JUDGMENT OF CHILWELL J

Notwithstanding the dissolution of the marriage of the parties on 4 November 1983 I will, for convenience, refer to them as the husband and the wife.

The husband appealed against a decision of Family Court Judge Cartwright in which she discharged a maintenance order under which the husband was to pay $40 per week to the wife for her maintenance and another $20 per week for the child of the marriage. The order in respect of the child was increased by consent, upon the wife's cross application, to $25 per week, and that in respect of the wife was discarged as from 18 July 1985, being the date of service of the application for discharge on the wife.

The maintenance orders were made on 14 April 1981. The wife was then in receipt of a domestic purposes benefit in consequence of which the orders became suspended in terms of section 27J of the Social Security Act 1964. Instead the husband made contributions as a liable parent in terms of that Act. His liability under the orders revived when the wife's domestic purposes benefit was cancelled on 26 February 1983 when she commenced part time employment with the South Canterbury Hospital Board. Notwithstanding that the husband's liability under the maintenance orders then revived he paid no maintenance for his wife and child until some time towards the end of June 1985. He then paid $735 and, subsequently, he made nine payments at the rate of $173 per month. Those payments were made in respect of the child's maintenance order and amounted to $2292. The point is that at no time since 16 February 1983 has the husband paid any maintenance in respect of his wife; also maintenance for the child is in arrears.

The husband's application to the Family Court was made on 28 June 1985. It was for an order for the discharge variation or suspension and remission of arrears in respect of the wife's maintenance order of $40 per week and made, principally, upon the ground that the wife had commenced full time work at the Maternity Hospital on 16 March 1983 (the correct date

being 26 February 1983). The wife was served with the application on 18 July 1985 and gave notice of defence on 31 July 1985. Her evidence was taken at the District Court in Timaru on 6 December 1985. The hearing of the husband's application took place before Judge Cartwright on 7 April 1986. She delivered a reserved judgment that day. In her reasons for judgment the Judge stated that she was satisfied that the wife was able to earn a reasonable income and cope with the care of the child; also that the husband was able to meet the amount of maintenance sought by the wife. The Judge observed that, in terms of section 99 of the Family Proceedings Act 1980, her ability to fix maintenance following the dissolution of a marriage is extremely limited. The essential part of her reasons for judgment in regard to the discharge of the order for the wife's maintenance states:-

> "In accordance with section 99 of the Act I am required to take into account section 64 in the present circumstances. I am satisfied that the respondent does have an income adequate for her needs and that she does not any longer require any direct assistance from the respondent by reason of her responsibilities to "
> (Page 3)

That part of the judgment is accepted by both parties as are the findings of fact on which it was based. It appears from the notes of evidence that on 26 February 1983 the wife commenced part time employment with the Hospital Board. Her base work was for 24 hours per week but she also relieved for the staff

and was on-call. Part of her employment was to work two nights per week at the rest of her work was performed at where she lives. Although her basic salary was about $9,600 for the year ended 31 July 1985, she did in fact receive $18,822 gross salary and wages. She had managed to save $2,500 between the date of commencing work and the date of the hearing in the Family Court.

It is against the factual background so far discussed that the husband contended that he ought not to have to pay the arrears of maintenance incurred from 26 February 1983. The Judge found to the contrary:

> "The application for cancellation was made on 28 June 1985. Until it was served on the respondent she had every right to expect that maintenance for herself was not in issue. I therefore propose to fix the arrears of maintenance as the sum due by the applicant from 26 February 1983 down to 18 July 1985 being the dates when the respondent began work and this application was served on her." (Page 4)

On this appeal the contention of counsel for the husband was that once the Judge found that grounds existed justifying discharge of the maintenance order she was required by section 99(1) to discharge it from the date when those grounds first existed which, it was submitted, was the date when the wife commenced work, i.e. 26 February 1983. It was submitted that it is implicit in the Judge's reasons for judgment that she found those grounds to have existed then. I am not

entirely convinced that is the case but both counsel presented argument on that footing. In support of his principal contention counsel relied upon the requirement in section 99(1) for the Court to have regard to the principles of maintenance set out, for the purposes of this case, in sections 63 and 64 of the Act. He submitted, on the basis of the decision in Shrimski v Shrimski (1985) 3 NZFLR 707 that, when a determination is made in terms of those principles that a husband is not liable to maintain a wife, the residual discretion is limited to the form such an order may take, i.e. an order discharging the maintenace order, an order varying or suspending it, an order temporarily suspending the order as to the whole or any part of the money ordered to be paid, an order discharging and substituting in its place a new order or an order extending the term for which the order was made. In this case it was submitted that the Judge made the correct choice of order but failed properly to exercise her jurisdiction to discharge the order from the correct date and exceeded her jurisdiction by taking into account a factor not provided for in section 99(1) - viz "Until it was served on the respondent she had every right to expect that maintenance for herself was not in issue". Moreover, it was submitted that because the evidence established that the husband was not liable to maintain the wife from 26 February 1983 it could not be said that the wife had every right to the stated expectation. Furthermore, it was submitted that there was no evidence that the wife needed the amount of the arrears.

Shrimski v Shrimski concerned an application for child maintenance which met the tests required under sections 72 and 73 but the Family Court Judge refused to make an order because of an agreement made not to apply for maintenance and because of misconduct in denying access. On appeal Sinclair J decided that public policy required the Court to ignore the alleged agreement and that conduct in regard to access had no bearing on child maintenance. He accepted an opinion expressed in Butterworth's Family Law Services 5031 to the effect that section 76 is merely a machinery provision which entitles the Court to choose a form of order and that section 72(2), by expressly referring to "all relevant circumstances affecting the welfare of the child", by implication ruled out the use of other circumstances. The present case is clearly distinguishable. It is not an application under section 63 or 64 for wife maintenance to which sections 69 and 70, relating to the forms or order, are, after proper enquiry, to be applied. The application is made under the provisions of section 99 for discharge, variation, or suspension and remission of arrears. That section provides a code for that type of relief. Included in that code are the provisions of subsections (4) and (6) which state:-

> "(4) Where a maintenance order is discharged, or a registered maintenance agreement is cancelled, or any such order or agreement otherwise ceases to have effect, all arrears due under the order or agreement at the time when it was discharged or cancelled or otherwise ceased to have effect shall, unless and to the extent that they are remitted by a

> Court, be recoverable by the party to whom they are owing as if the order or agreement were still in force."
>
> "(6) A Court may from time to time-
>
> (a) Remit the whole or part of any arrears due under a maintenance order or under a registered maintenance agreement; or
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> (b) Suspend, on such terms and conditions (if any) as it specifies, the payment of the whole or part of any such arrears-
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> whether or not the order or agreement has ceased to be in force.

I had occasion to review those provisions in their context in Johnson v Johnson [1982] 1 NZFLR 212. In that case Mr Galbraith of counsel submitted that the Court must have regard to the principles of maintenance set out in section 64 in making an order under section 99(6); that the Court is obliged to ascertain when timeously the liability to maintain ceased and to determine the cut off date for arrears accordingly. Essentially the submissions made by counsel for the appellant in the present case are the same. Counsel submitted that the present case is distinguishable because the Judge implicitly fixed the cut off date at 26 February 1983 and failed properly to exercise her discretion in the respects previously discussed. The whole appeal turns upon counsel's principal submission that, having fixed a time when liability to maintain ceased, the arrears had to be assessed as at that date

and not beyond. Section 99(1) has to be read in the context of the code established by that section which includes a specific provision for arrears. I do not consider that the facts of this case render it distinguishable from the ratio decidendi in Johnson v Johnson nor do I consider that Shrimski v Shrimski has any bearing upon the principal issue in the present case. I do not resile from the following part of my judgment in Johnson v Johnson at 223, to which should be added references to sections 101 and 102:-

> "Subsection (4) preserves liability for arrears due at the time of discharge. That liability is founded upon the order; it is not founded upon the principles which, by s 99(1), are those set out in ss 62 and 66. Those principles are applied in making the decision to discharge the order. Subsection (6) gives the Court an unfettered discretion to remit or suspend and this is so whether or not the order has ceased to be in force. Remission or suspension can be ordered whether liability to maintain exists or not. Furthermore, there is no express reference in subs (6) to subs (1) or to ss 62 to 66. Mr Galbraith, while conceding that a wider discretion exists under subs (6), submitted that the Court must first be guided by subs (1) considerations and secondly by other relevant considerations: unless the first set of principles are applied an inconsistent result could flow ie if liability under s 64(1) had ceased at a given time it would be inconsistent to require payment under s 99(6).
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> 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 Galbriath's submission. The discretion under s 99(6) is unfettered."

It goes without saying that if the wife's original application for maintenance orders had come before the Family Court on, or shortly after, 26 February 1983, and, if it had then been established that the wife's earnings were to be not $9600 but $18822, in all probability the Court would not have made a maintenance order for the wife. Counsel for the husband observed that if arrears are not cancelled at the time when the liability to maintain ceases it puts it within the power of a maintained spouse to conceal the facts which justify cancellation. This does not appear to have been a factor which influenced the Judge in the present case nor does the evidence suggest that the wife concealed anything. In fact she was receiving no maintenance for herself and was sufficiently uncertain about her legal position to obtain legal advice from the local "radio solicitor" upon the steps to be taken to enforce payment. However, the type of circumstance raised by counsel, which could in certain circumstances lead to injustice, must be balanced by the desirability of a reviewing Court maintaining the sanctity of the original order. It is not for the paying party to decide that he or she need not and will not pay; the sanction of the Court ought first be obtained by application under section 99 of the Act. If a person obliged to pay maintenance does not pay it because of his or her perception that payment is no longer necessary it may well be in the interests of

justice that he or she be required to pay arrears despite the reviewing Court adopting the payer's view of the situation.

It is neither possible nor desirable to provide a summary of factors to be taken into account in exercising a discretion under section 99(6). Some factors of more general application were reviewed by Family Court Judge Inglis in Hamer v Colthorpe [1984] Recent Law 92, 95. In the present case there is the point made by counsel for the husband about concealment just discussed, the point accepted as implicit in the judgment of the Court below that the wife had income adequate for her needs from 26 February 1983 and the point, which by inference it is possible to draw, that the wife had no need for the amount of the arrears. Other relevant factors are that the wife received no maintenance for herself or her daughter from 26 February 1983 until the end of June 1985 at which time the husband filed his application under section 99, that no explanation was advanced by the husband for his delay from February 1983 to June 1985 yet, on the evidence, the proper inference is that he knew his wife was working at least by the time her domestic purposes benefit was cancelled and his liability as a liable parent contributor ceased, the finding by the Judge that he had the ability to pay the amount of the maintenance order and, implicitly, the arrears. In other cases it

may be relevant to inquire into any new domestic arrangements of the applicant, whether or not the applicant has genuinely tried to meet payments but failed, the extent to which his or her disregard of the maintenance order is blameworthy, any illness or other disability of the applicant, whether or not the applicant has genuinely tried to make earlier application for relief under section 99 and, I would think always, the reasons for delay.

In the present case the issue on discretion is not what this Court considers appropriate but whether it has been established that no weight or no sufficient weight was given to relevant considerations which were important to the just determination of the matters in issue and, it goes without saying, that the test of relevancy includes the impact of irrelevant considerations. The Judge was entitled to take into account the applicant's delay between February 1983 and June 1985. In my judgment it was not a misdirection to say that the wife had a right to expect that maintenance for herself was not in issue for the very good reason that she had a solemn court order establishing her right. I think that the adjective "every" was unfortunate but it does not justify interfering with the exercise of the Judge's discretion. Her short judgment of four pages outlines succinctly the relevant considerations. The appellant has not established, to

the extent required, the grounds for reviewing the exercise of the Judge's discretion in terms of section 99(6).

The appeal is dismissed. The order of the Family Court is confirmed. The question of the amount of arrears was reserved by the Judge. Counsel were unable to agree at the hearing of the appeal. The case is referred back to the Family Court for directions as to the amount pursuant to leave reserved.

The respondent (wife) is entitled to the costs of this appeal which I fix at $650 (including the adjournment on 18 March 1987) plus disbursements as fixed by the Registrar of this Court.

19 March 1987

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