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2nd July 1986

IN THE ROYAL COURT OF THE ISLAND OF JERSEY
MATRIMONIAL CAUSES DIVISION

BEFORE MR. V.A. TOMES, DEPUTY BAILIFF
JURAT J.H. VINT
JURAT C.S. DUPRE, M.C.

IN THE MATTER OF THE REPRESENTATION OF ^D
_L , PARTY CONVENED

ADVOCATE T.A. DOREY FOR REPRESENTOR (RESPONDENT)
ADVOCATE B.M.B. THACKER FOR PARTY CONVENED (PETITIONER)

On the 19th October, 1983, the Court decreed that the marriage had and solemnised on the 2nd July, 1977, between ^L (the Petitioner) and ^D (the Respondent), be dissolved by reason that the respondent had treated the Petitioner with cruelty; the Court postponed the further consideration of ancillary matters.

On the 2nd November, 1983, Mr. Peter Douglas Harris, Greffier Substitute, ordered, inter alia, that ^S and ^M, issue of the marriage, (the children) should, until further order of the Court, remain in the joint legal custody of the Petitioner and the Respondent whilst remaining under the care and control of the Petitioner and that the Respondent should pay, or cause to be paid, to the Petitioner, maintenance for each of the children at such rate as might be agreed between the parties and incorporated in a subsequent order of the Court. On the 11th November, 1983, the Greffier Substitute further ordered, by consent, that the rate in

question should be the sum of £15.00 per week towards the maintenance of each of the children.

On the 9th December, 1983, the decree nisi of divorce was made final and absolute and the marriage was thereby dissolved.

On the 30th July, 1985, on the application of the Respondent, inter alia, the order of the 11th November, 1983, was rescinded and there was substituted an Order whereunder the Respondent should pay, or cause to be paid, to the Viscount, on behalf of the Petitioner, the sum of £10.00 per week towards the maintenance of each of the children.

On the 7th August, 1985, the Petitioner obtained a judgment in the Petty Debts Court against the Respondent for the sum of £840.00 in respect of arrears of maintenance for the period 11th January, 1985, to 19th July, 1985, inclusive.

On the 7th November, 1985, the Greffier Substitute dismissed the Respondent's application for remission of arrears of maintenance.

On the 13th November, 1985, the Respondent made a Representation to the Petty Debts Court requesting that Court to order that the Act of the 7th August, 1985, be stayed pending the determination of an application to the Royal Court for the remission of the arrears; the Assistant Magistrate refused the application.

The Respondent now asks this Court to order that he is entitled to make an application for remission of the arrears and to give directions as to the procedure to be followed in the making of such an application. The Petitioner avers that the judgment of the Petty Debts Court of the 7th August, 1985, has not been appealed against by the procedure set out by statute and is final; that a judgment of the Petty Debts Court cannot be stayed by the Royal Court either pending appeal or at all, nor set aside save on appeal in due form; and that the Respondent is, in any event, without right to petition the Matrimonial Causes Division of the Royal Court for the remission of arrears of maintenance in that:

- 1) the Matrimonial Causes (Jersey) Law, 1949 (as amended) makes no provision for the remission of arrears of maintenance and;
- 2) any jurisdiction vested in the Matrimonial Causes Division in matrimonial causes other than that conferred by statute is the jurisdiction possessed before 1949 by the Ecclesiastical Court of Jersey and there is no ground to believe that the Ecclesiastical Court exercised or possessed any power to remit arrears of maintenance;

accordingly the Petitioner requests that the Representation be dismissed

Without deciding the question whether the Royal Court has, under any circumstances, the power to stay a judgment of the Petty Debts Court pending appeal or at all, it is clear that the Act of the Petty Debts Court of the 7th August, 1985, is not an order for the payment of maintenance but is a judgment for debt. The judgment has not been appealed against and is final.

However, that is not the crux of the matter before us. The question which we have to decide is a narrow one; we are asked to decide whether the Respondent is entitled to make an application to this Court for an order for the remission of arrears of maintenance. If we were to decide that the Respondent is so entitled the merits of the application could be decided later, possibly by the Judicial Greffier.

The decision of the Greffier Substitute of the 7th November, 1985, dismissing the Respondent's application for remission of arrears of maintenance was not appealed against; even if it had been, there is no provision in the Matrimonial Causes (Jersey) Law, 1949, for the remission of arrears of maintenance. We agree with Mr. Thacker that there cannot be an implied power to remit. Maxwell on Interpretation of Statutes, 12th edition, at page 159 states that:

"... a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect". We agree that if the Matrimonial Causes Division is to have the power to remit arrears of maintenance, an express provision is required in the Matrimonial Causes (Jersey) Law, 1949. We cannot usurp the power of the legislature.

We find it unnecessary to review in detail the several authorities which Mr. Thacker placed before us. *Watkins -v- Watkins* (1896) p.222 C.A. dealt with the inalienability of permanent maintenance under the Matrimonial Causes Act, 1866, but shows that by means of the device of limiting sequestration, the Court could indirectly remit arrears. Lindley; L.J. at page 227 says that :

"if he (the husband) cannot pay the allowance fixed by the Court, the Court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether".

Lopes, L.J. at page 230 said that:

"It (the maintenance) is during their joint lives to be paid at short intervals, and the Court keeps its hand upon the maintenance, because if the husband is unable to make the payments the Court can discharge or modify the order or temporarily suspend the same as to the whole or any part of the money ordered to be paid, and again revive the same wholly or in part.

Kay L.J. at P.231 says that:

"The power of making this kind of provision for the maintenance of a divorced wife is altogether a creature of statute",

and at p. 232:

"The Court has the power to diminish the amount, or to discharge the order or suspend it in case the divorced husband should become unable to continue to pay it, but only in that event. The statutes do not in terms give any other power to interfere with it when once granted".

In *Campbell -v- Campbell* (1921) 187, which was a suit for restitution of conjugal rights, the Court merely confirmed that it had a discretion as to what, if any, arrears may be enforced.

Neither the minutes of evidence taken before the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey pps. 557 and 558 nor C.5 *Le Gros' Droit Coutumier* Chapter "Des Aliments" p.356 advance the matter any further. We agree with Mr. Dorey that we have to look at the modern law starting with the Matrimonial Causes (Jersey) Law, 1949.

On the other hand, Mr. Dorey sought to rely on MacDonald -v- MacDonald (1963) 2 All E.R. 857. However, that case is not authority for saying that the High Court, and thus it is argued the Royal Court, has power to remit arrears. The headnote to that case makes the position perfectly clear:

"The High Court has jurisdiction to back-date an order under s.28 of the Matrimonial Causes Act, 1950, varying or discharging a maintenance order, even if that results indirectly in maintenance already accrued due being remitted". The order appealed from in Macdonald -v- Macdonald was an order for a nominal rate of 1s per annum. At the date when it was made the husband, against whom it was made, was in arrears to a considerable extent under a previous maintenance order. The order made by the registrar, although made on February 1st, 1963, was back-dated to August 16th, 1962. The practical effect of the order complained of was, therefore, to remit arrears outstanding under the previous order.

Wilmer L.J., who delivered the Court of Appeal's judgment, said, at p.858: "Our attention has been drawn to the fact that, whereas by s.76 of the Magistrates' Court's Act, 1952, power is specifically given to a Court of summary jurisdiction to remit the whole or any part of a sum due under an order, no such power is, at any rate expressly, conferred on the High Court by the relevant section of the Matrimonial Causes Act, 1950. The relevant section dealing with variation and discharge of orders for maintenance is s.28 of the Act of 1950. The explanation of this difference of treatment as between courts of summary jurisdiction and the High Court may well be, as was suggested by Diplock, L.J. in the course of the argument, that express power to remit had to be given to the justices for the very reason that they had no jurisdiction to make retrospective orders, whereas it is not in dispute that the High Court has jurisdiction to make retrospective orders".

Article 8 (3) of the Separation and Maintenance Orders (Jersey) Law, 1953, as amended, whereunder power is specifically given to the Petty Debts Court to remit the whole or any part of a sum due under an order, and Article 32 of the Matrimonial Causes (Jersey) Law, 1949, as amended, which deals with the variation and discharge of

orders for maintenance, are directly analogous to the provisions referred to by Willmer L.J.

As to the power of the Court, Willmer L.J. at p.859 said:

".....the High Court has power to back-date its orders even if that does result indirectly in maintenance already accrued due being remitted or written off".

We were also referred to Carr -v- Carr (1974) 3 All E.R. 366. However, that case decided that the Court had no power to back-date an order varying a maintenance agreement made between the parties; it only had jurisdiction to make an order which had the effect of altering or revoking such an agreement from the date of the order itself. The Court referred to MacDonald -v- MacDonald and, at page 370, Hollings J. said:

"First of all, the power of the Court to back-date an order which has been assumed in the way intimated in the judgment in MacDonald -v- MacDonald is a power assumed to back-date an order which has the effect of altering an order of the Court itself retrospectively. The Court is there, of course, dealing as it were with an order of its own". Hollings J. went on to distinguish the variation of a maintenance agreement and concluded:

"... it is plain to me that the effect of the section (s.35(2) of the Matrimonial Causes Act 1973) is, as I said at the outset, to empower a Court by its order to make an alteration in the agreement which has effect from the making of the order, that is the date of the order and not before it".

Because we are dealing here with a variation of an order for the payment of maintenance and not of a maintenance agreement, Carr -v- Carr has no relevance. But, in any event, Carr -v- Carr was overruled by the Court of Appeal in Warden -v- Warden (1981) 3 All E.R. 193, which was not cited to us, and which decided that under section 35 (2) of the Matrimonial Causes Act 1973 the Court has power to back-date an order made thereunder varying a maintenance agreement since the provision in s.35 (2) that the agreement shall have effect 'thereafter', i.e. after the variation order is made, as if the variation had been made by agreement between the parties for valuable consideration, is to be construed as meaning that the agreement shall "then" have that

effect, and thus the purpose of the provision is simply to make clear that although a variation order has been made the parties' obligations (subject to the variation) remain contractual and are not converted by the variation order into some other kind of legal obligation, and accordingly the provision does not prevent the variation from having retrospective effect.

In *Warden -v- Warden*, Ormrod L.J., at p.195, said:

"He (the husband) relies on two cases in this Court, *MacDonald -v- MacDonald* (already cited) and *Style -v- Style and Keiller (1954) 1 All E.R. 442*, and there is no doubt that both of these cases establish beyond any possibility of doubt that the Court, insofar as its own orders are concerned had an almost unrestricted power to vary them retrospectively and, moreover, retrospectively beyond the date of the application for variation, so that in the case of periodical payments the power to vary extends backwards, in the case of an order for periodical payments after divorce to the date of decree nisi....".

Mr. Dorey submitted, and Mr. Thacker did not dispute that the Royal Court has similar inherent powers to those of the High Court to make orders having retrospective effect. He gave as an example affiliation orders made by the Royal Court containing an order that maintenance be paid from the date of the birth of a child and thus having retrospective effect. He also cited *Logan -v- Blackmore and Green (1st June, 1970 - unreported)* where the Matrimonial Causes Division of the Royal Court made an order for the payment of maintenance back-dated to the 1st April, 1970.

The question whether the Royal Court has power to make retrospective orders was not raised in *Logan -v- Blackmore and Green* and thus was not argued. But we have no hesitation in declaring that beyond any possibility of doubt the Royal Court, insofar as its own orders are concerned, has an unrestricted power to vary them retrospectively and that, in the case of periodical payments, the power to vary extends backwards, in the case of an order for periodical payments after divorce, to the date of the decree nisi.

However, the power to vary orders retrospectively is not a power specifically to remit arrears of maintenance, albeit that retrospective variation may result indirectly in maintenance already accrued due being remitted. As we have said already, an express provision to that effect would be required.

Mr. Dorey submitted a number of orders made by the Matrimonial Causes Division which did indeed remit arrears. In *Wilson -v- Le Mottee* (1982, 6th October - unreported) the Greffier Substitute remitted maintenance payments totalling £240. In *Lodge -v- Klein* (1978, 23rd February - unreported) the Greffier Substitute rescinded a previous order of the 25th November, 1970, back-dated his new order for maintenance payments for the children to the 2nd February, 1978, and ordered that all arrears of maintenance due up to the 2nd August, 1977, be remitted. In *Southard -v- Audrain* (1978, 13th April - unreported) the Greffier Substitute, whilst dismissing an application for variation, ordered that all arrears of maintenance due in respect of the child of the marriage up to the 31st October, 1977, be remitted. The Greffier Substitute was said to have followed the lead given by the Inferior Number of the Royal Court in *Le Pennec -v- Hébert* (1974, 16th July - unreported) where the Court dismissed an application for a reduction in the amount of maintenance ordered to be paid to the wife and the children of the marriage on the 28th February, 1973, but remitted the maintenance payments due between 10th November, 1973 and the 31st May, 1974.

Mr. Dorey argued that the order of the Royal Court in *Le Pennec -v- Hébert* should be regarded as an authoritative precedent and that in the cases cited the Royal Court had declined to use any device indirectly to achieve remission, whether by discharging an order, or back-dating its effect, or other similar device.

We do not agree. In none of the cases cited did the Court state under what power it was purporting to remit arrears. The matter was not disputed and, thus, not argued. Insofar as orders of the Court (and there may well be others) purport to remit arrears of maintenance they were made 'per incuriam' and do not bind this Court.

Interestingly, the Greffier Substitute, in *Tostevin -v- Kirkland* (1986, 21st May - not reported), applied the principle of *MacDonald -v- MacDonald*, discharged an order with effect from 1st January, 1986, and made a new order effective from the 1st July,

1986. Indirectly, therefore, he remitted all arrears of maintenance between 1st January, and 1st July, 1986. We approve that procedure because the Royal Court has, in our judgment, jurisdiction to back-date an order varying or discharging or suspending a maintenance order, even if that results indirectly in maintenance already accrued due being remitted.

In the present case the fault lay in the order of the 30th July, 1985, which rescinded the order of the 11th November, 1983, and made a new order for maintenance payments in a reduced sum. The Greffier Substitute should have been urged to back-date his new order, which would have reduced the arrears retrospectively or to discharge the original order retrospectively, even if making a new order for payment of a reduced sum commencing from a later date, or to suspend the original order for a stated period. So far as we are aware, no such application was made and the order of the 30th July, 1985, which was not appealed from, stands.

Accordingly, we declare that the Respondent is not entitled to make an application for remission of arrears of maintenance.

