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FURTHER ASPECTS OF MAINTENANCE LAW

Some post "Family Law 1981" Chapters

by

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CHAPTER ONE

REGISTERED MAINTENANCE AGREEMENTS AND THE FAMILY PROCEEDINGS ACT 1980.

Introduction

Practitioners in the family law field have long been familiar with the neat system whereby a maintenance agreement may be registered in order to facilitate its enforcement. The possibility of registration was first introduced by s. 4 of the Destitute Persons Amendment Act 1955. It was continued under the Domestic Proceedings Act 1968. It still remains possible to register certain types of maintenance agreement under the Family Proceedings Act 1980. It is the purpose of this article to state what the new law is, for it comes into force on 1 October 1981.

It is not every maintenance agreement that is capable of being enforced via the registration procedure. There is, as under the former legislation, a close definition of the term "maintenance agreement". It appears in s. 2 of the Act:-

> "Maintenance agreement" means-
>
> (a) A written agreement made between a husband and wife, providing for the payment by either party of a periodical sum of money or lump sum of money or both towards the maintenance of the other party; or
>
> (b) A written agreement made between the parties to a marriage that has been dissolved, and providing for the payment by either party of a periodical sum of money or lump sum of money or both towards the maintenance of the other party; or
>
> (c) A written agreement made between a person and any other person who acknowledges parenthood of a child, and providing for the payment by that parent of a periodical sum of money or lump sum of money or both towards the maintenance of the child; or
>
> (d) A written agreement made between any persons who acknowledge themselves to be the parents of a child and providing for the payment by either parent of a periodical sum of money or lump sum of money or both towards the maintenance of the other parent, where the parties -

(i) Are not married to each other; and

(ii) Have never been married to each other or (if they have been married to each other) have had their marriage dissolved before the conception of the child; or

(e) A written agreement made between a person who may apply under Part VI of this Act for a maintenance order in respect of a child, and a person against whom that order may be made, and providing for the payment by the last-mentioned person of a periodical sum of money or lump sum of money or both towards the maintenance of the child - whether or not the document in which an agreement to which paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) or paragraph (e) of this definition applies is embodied provides also for the separation of the parties to a marriage or for the custody of a child.

It is as well also to bear in mind the meaning of the word "maintenance" in this context. Section 2 of the 1980 Act states that:-

"Maintenance" means the provision of money, property and services; and includes -

(a) In respect of a child, provision for the child's education and training to the extent of the child's ability and talents; and

(b) In respect of a deceased person, the cost of the deceased person's funeral.

It is also necessary to understand the term "maintenance order" Section 2 of the 1980 Act states that:-

"Maintenance order" -

(a) Means an order or interim order made under Part VI of this Act for the payment of maintenance; and includes -

(i) A maintenance agreement which is registered under s. 83 of this Act and which has effect as a maintenance order under s. 84 of this Act; and

(ii) In Part VIII of this Act, a subsisting order (including an order in or consequent on an affiliation order) for the payment by any person of a periodical sum of money towards the maintenance of a

person whom the first-mentioned person is, according to the law in force in the place where the order is made, liable to maintain; and

(iii) In Part VIII of this Act, a subsisting order of the kind described in section 78(1)(b) or (2) of this Act; and

(b) Where an order within the meanining of para. (a) of this definition has been varied, means the order as varied and all orders by which it has been varied.

It need hardly be said that care is needed not to tender for registration a document which is not registrable. By the same token, if an unregistrable agreement is registered, the registration would be a nullity. In Lewis v. Public Trustee[1], a husband had written a letter which operated as an assignment of income out of his mother's estate to his wife by way of maintenance. Somers J. held that the assignment could not be seen to be a registrable maintenance agreement and that it was merely an arrangement better to secure payments of maintenance which had been agreed upon elsewhere.

Registering Agreements

The position is that s. 83(1) enables either party to a maintenance agreement within the above definition to register it in the prescribed manner in the office of a District Court. Should the parties desire to vary a registered maintenance agreement, they may do so freely. If it is varied by written agreement between the parties, then subs. (2) allows the variation to be registered in the same manner as the original agreement, which "shall thereafter for the purposes of this section have effect as so varied". Where parties do agree on a variation, it is essential that the variation agreed on should be reduced into writing and registered. If there is a variation which has been agreed upon and matters are left at that, difficulty may well arise: the original agreement will no longer be in force.

The effect of registration is stated by s. 84(1). Subject to the Act, while a registered maintenance agreement continues in force, it is to have the same effect and force as if it were a

maintenance order made under the Act by a Family Court[2] on the date of the registration of the agreement under s. 83 and the provisions of the Act relating to maintenance orders are to apply accordingly with the necessary modifications. For instance, the remedies available for the enforcement of maintenance orders could be invoked.[3]

It is provided by s. 85 that a maintenance agreement of the kind described is to bind the parties according to its tenor, and, so long as it remains in force, no party to whom money is payable under the agreement may apply under the Act for a maintenance order against any other party to the agreement for the payment of maintenance in respect of any person for whose maintenance provision is made in the agreement. This notwithstanding, however, subs. (2)(a) states that, where a maintenance agreement contains an express provision whereby any person undertakes not to register the agreement in a District Court, then an application for a maintenance order referred to in subs. (1) may be made by any party to the agreement; and subs. (2)(b) provides that, where the agreement is registered pursuant to this Part of the Act, nothing in subs. (1) is to derogate from the other provisions of this Part of the Act in relation to any such agreement.

It is also provided by subs. (3) that a maintenance agreement entered into by a person who is a minor is to be binding on, and may be enforced by, or against, that person as if the maintenance agreement were entered into by a person of full age.

Section 85 is in fact reinforced by the terms of s. 86, which enacts that, while a registered maintenance agreement remains in force, no maintenance order other than an order by way of variation, for the maintenance of a person in respect of whom maintenance is payable under the agreement is to be made against the party liable under the agreement in favour of the other party.

Thus if H. and W. enter into a separation agreement under which H. agrees to pay, say, $30 a week to W. and $10 a week in respect of each of their two children, W. can register the agreement provided she has not undertaken not to register it. She

cannot take W. to court for a maintenance order for herself or for those two children. On the other hand, if she finds the money insufficient she could ask a District Court or a Family Court for a variation upwards.[4] If H. finds the sums payable to be crippling, e.g. because he becomes unemployed because of slump conditions, he can seek a variation. But if the variation can be agreed on and written down and then duly registered, the whole matter can be dealt with out of Court.

In Sweeney v. Sweeney[5] by one of the terms of their separation deed the husband agreed that, during the wife's period of exclusive possession of their former home (which they had agreed upon), he would pay the mortgage instalments, the rates, insurance and major maintenance on it. There was no express provision whereby either spouse undertook not to register. The wife, on her side, agreed that, during her period of possession, subject to the husband's obligation in respect of major items of maintenance, she would maintain the house and grounds in reasonable order and condition and, subject to the husband's observing and performing the terms of the agreement, that she would maintain herself and the children without further recourse to the husband. The wife sought a maintenance order for herself under the Act. She could not do so, as Barker J. said, because of the equivalent of s. 85, unless the agreement failed to provide maintenance for her. The question therefore arose whether the clause binding the husband to pay the outgoings on the house was a provision for her maintenance. The home, it may be added, was registered in the parties' joint names and had there been proceedings under the Matrimonial Property Act 1976 it would almost certainly have been vested in them equally. Barker J. considered that there was a maintenance agreement here and that the wife was therefore prohibited from instituting maintenance proceedings.[6]

It will be seen from the foregoing that registration is still a non-compulsory matter. It remains entirely optional, so if neither party wants to register, neither need do so. If one party later changes his or her mind, registration can be effected subsequently. Until registration, the matter rests in contract, for the documents will have created rights and obligations from

the date of making. It is also clear that the legislative aim is to encourage the registration of registrable agreements. It was, indeed, held by Beattie J. that it was doubtless the intention of the legislature to give registered agreements much greater force than before the Domestic Proceedings Act 1968 came into force because the conciliation procedures in that Act encouraged parties to settle matters amicably.[7]

Transitional Provisions

As has already been noted, the notion of registering maintenance agreements is not novel and is not the child of the present legislation. Section 192(6) of the Act accordingly provides that the new Act is to apply to every maintenance agreement registered under the former Domestic Proceedings Act 1968 at the commencement of s. 83 of the new Act and every agreement so registered shall, on the commencement of that section, have effect as if it were registered under that section.

Limits to Enforcement

1. A registered maintenance agreement may, by its terms, provide for the payment of sums of money for a child's maintenance to continue in force after the child reaches the age of 16 years. In that event, the agreement is not, by virtue of s. 87(1)(a), to be enforced under the Act after that date, and, according to s. 87(1)(b), no order affecting the agreement is to be made under the Act after that date, save, in either case, in accordance with s. 76, which deals with maintenance orders in respect of children. The provision does not remove the parties' rights and duties under the common law.

2. A registered maintenance agreement may provide for the payment of sums of money for the maintenance of a child to continue in force after the child attains the age of 20 years or sooner marries. This notwithstanding, s. 87(2) provides that the agreement is not to be enforced after that date under the Act. Again, therefore, after that date the parties to the agreement are thrown back on

their common law rights.

It is, however, provided that nothing in subs. (1) or (2) is to affect any right to bring proceedings in respect of money owing under a registered maintenance agreement at the date on which the agreement ceases under either of those subsections to be enforceable: s. 87(3).

A registered agreement may be expressed to continue in force after the death of the person liable under the agreement. In this event, s. 88 states that the agreement is not to be enforced under the Act after the date of death, except in respect of money owing at the date of death. It would appear that the person for whose maintenance after the payer's death provision is made would have to resort to his or her common law rights against the personal representatives of the deceased payer.

Arrears on Cessation of Agreement

Even though a registered maintenance agreement has ceased to be in force, proceedings may, pursuant to s. 89, be taken under the Act for the recovery of money owing at the time when it ceased to be in force. This section obviously assumes that the agreement was at some time in force. Consequently, the section cannot be invoked if the agreement never came into force at all.

Setting Aside and Cancelling Registration

By virtue of s. 90(1), the Court is bound to set aside the registration of a maintenance agreement where it is satisfied that, at the time of registration, the agreement was not in force. According to subs. (1), the Court may make an order cancelling the registration of any maintenance agreement where it is satisfied that the agreement is no longer in force. These, and other provisions in this Part of the Act, make use of the term "in force". It is therefore necessary to consider the meaning of that phrase.

"In force" and its connotation

It is important to know when an agreement is "in force" because the Court must set aside the registration of an agreement if it is satisfied that, at the time of registration, the agreement was not in force and it may make an order cancelling the registration of any agreement if it is satisfied that it is no longer in force: s. 90(1) and (2). There is also the "proviso" that, notwithstanding that any agreement that is registered has ceased to be in force, proceedings may be taken under the Act for the recovery of any money owing when it ceased to be in force: s. 89.

In Cameron v. Cameron[8] the parties entered into a written separation agreement late in 1971 and they agreed thereby that the husband should pay a weekly sum of maintenance for the wife during their joint lives. Late in 1972 the marriage was finally dissolved. In 1973 the former wife registered the agreement in the proper manner. The husband sought to have the registration set aside arguing that it was invalid since s. 55(2) of the Domestic Proceedings Act 1968, now replaced by s. 84(1) of the present Act, provided that a registered agreement had the same force and effect as if it were a maintenance order under the 1968 Act on the date of registration and under the Act a maintenance order could not have been made in favour of the former wife on the date of registration inasmuch as she was not then a "wife". Cooke J. held that this contention was not acceptable, and that s. 55(2) was a provision designed to bring about the result that once an agreement had been registrable and had been registered it should be enforceable in the same way as an order. It was a provision as to the consequences of registration, not as to conditions precedent to registration.[9]

If a written maintenance agreement has been varied by parol agreement between the parties and the original agreement is then registered, the registration must be cancelled. The point is that the original agreement is no longer in force and there is really nothing to register: Bunney v. Bunney.[10]

In Maintenance Office v. Winter[11] the agreement was registered

well over two years after it was entered into. One of the terms was that the maintenance would be paid so long as the wife should continue to live a chaste life. Unknown to the husband the wife had already been unchaste before the date of registration, a fact which became only too apparent when her ex-nuptial child was born. It was held that the husband was entitled to have the registration cancelled as there was no agreement "in force" to register on the date of registration. The wife had rendered the agreement unenforceable by reason of her unchastity.

In Ross v. Ross,[12] the husband was a seaman who was from time to time at sea for considerable periods. The wife was working at an hotel. They were separated under a separation agreement, one clause of which provided that, in the event of their at any time thereafter mutually consenting to cohabit as man and wife, the agreement should become null and void as and from the date upon which such cohabitation might take place. Towards the end of 1958 the spouses met and agreed to attempt a reconciliation. The husband booked in at the hotel, sexual relations were resumed and thereafter, whenever the husband's ship was in New Zealand waters, he resumed his marital relationship with his wife. Later, as a result of a difference of opinion the parties went their separate ways. It was held that the words "while it continues in force" related back to the agreement itself and not merely to the provisions in it concerning maintenance. Consequently the agreement was at an end from the date of resumption of cohabitation and the Court had no jurisdiction to cancel or vary the agreement as registered.

If a maintenance agreement is so worded that it is to become null and void upon dissolution of the marriage by a Court of competent jurisdiction, it cannot be said to continue in force after the dissolution. The agreement would be self-destructing on the divorce and would not survive the divorce.[13]

It has been long accepted that a maintenance agreement which expressly or implicitly ousts the jurisdiction of the Court in the matter of maintenance is not enforceable because it is void as contravening public policy.[14] It may well be that a question arises as to whether such an agreement can "remain" in force for

the purposes of s. 85(1). The answer must be that it cannot, for the excellent reason that it was never in force in the first place.[15]

CHAPTER TWO

DISCHARGE, VARIATION AND SUSPENSION OF MAINENANCE ORDERS MADE BY FAMILY COURTS AND OF MAINTENANCE AGREEMENTS.

Section 99(1) of the Family Proceedings Act 1980 empowers Family Courts from time to time, in respect of any maintenance order, to make any of the following orders:-

(a) An order discharging the maintenance order:
(b) An order varying or suspending the maintenance order:
(c) An order temporarily suspending the maintenance order, as to the whole or any part of the money ordered to be paid:
(d) An order discharging the maintenance order, and substituting in its place a new maintenance order, whether of the same kind or not:
(e) An order extending the term for which the maintenance order was made.

These powers are exerciseable by a Family Court or a District Court. The Court must be satisfied that it ought to make any of the above orders regard being had to the principles of maintenance set out in ss. 62 - 66[1] and in ss. 72 and 73[2] and in s. 81[3] of the Act.

Section 99(2) gives a corresponding power in respect of registered maintenance agreements. It states that, where a Court is satisfied that it ought to do so having regard to the principles of maintenance set out in the same sections as those mentioned in subs. (1), it may from time to time, in respect of a maintenance agreement registered under Part VI of the Act, make any order specified in subs. (3) in respect of the registered maintenance agreement. The orders referred to in subs. (3) 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.

If a maintenance order is discharged, or if 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 it was discharged or cancelled or otherwise ceased to have effect are to be recoverable by the party to whom they are owing as if the order or agreement were still in force - unless, of course, they are remitted by a Court, in which case there will be no arrears at all to recover or recovery can be had only in respect of the arrears to the extent that the Court did not remit them.[4]

When the Court makes an order under s. 99 varying a maintenance order or a maintenance agreement by increasing the amount payable under it, it has a discretion, which it may exercise if it thinks fit, to state that the variation is to take effect from a date that is earlier than the date of the variation order, but not earlier than the date on which the grounds for the variation arose.[5]

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 (b) suspend, on such terms and conditions (if any) as it specifies, the payment of the whole or part of any such arrears, whether or not the order or agreement has ceased to be in force.[6]

Section 99 deals also with orders for security for the payment of maintenance. A Court may (a) from time to time vary or extend an order made by it under the 1980 Act for the giving of security for the payment of maintenance, whether as to the term of the order or the nature of any security, or by increasing or diminishing the amount of any security, or otherwise; or (b) discharge an order made by it under the 1980 Act for the giving of such security.[7]

Finally, a Court may exercise the powers given by s. 99 notwithstanding that the order that is varied, extended, suspended, or discharged was made by consent of the parties.[8]

Social Welfare

Section 61C of the Social Security Act 1964 contains a provision

that must be read in conjunction with s. 99 of the Family Proceedings Act 1980. Notwithstanding anything in the 1980 Act if (a) any person is required to make periodical payments of sums of money towards the maintenance of any beneficiary or any child or children in the care of the beneficiary in accordance with a maintenance agreement that is for the time being registered under s. 83 of the 1980 Act; or (b) the sums of money payable towards the maintenance of any beneficiary or any child or children in the care of the beneficiary in accordance with a maintenance order made under the 1980 Act have been consented to or agreed to by both the beneficiary and the person liable to pay the money, and the amount of the sums of money so payable is, in the opinion of the Commission, inadequate for the maintenance of the beneficiary or any child or children in the care of the beneficiary, the Commission may apply to a District Court for a variation of the agreement or order and the provisions of s. 99 of the 1980 Act are to apply accordingly to the application.[9]

There must also be mentioned the point, which is outside the scope of this paper, that the Social Security Amendment Act 1980 has devised a scheme whereby contributions may be levied from a liable parent towards the cost of Domestic Purposes Benefits for solo parents. Provision is made in that Act for the suspension of maintenance orders and maintenance agreements from the date of the grant of the benefit until its cancellation.[10]

Principles upon which the Court acts:

Section 85 of the former Domestic Proceedings Act 1968 required that there should be shown to be a "change of circumstances" since the making of the maintenance order sought to be varied or since the last variation of it. This led to difficulties into which we need not now go[11] and it would seem that matters have been rendered much easier by the simple "directive" in s. 99(1) and s. 99(2) that the Court, on being satisfied that it "ought" to take action "having regard to the principles of maintenance set

out in ss. 62 to 66 and in ss. 72 and 73 and in s. 81" of the Act, may make any order mentioned in s. 99(1) or 99(3), as the case may be.

Obviously there must be some justification for seeking a variation, such as a rise in the cost of living since the original order.[12] No doubt a claim for a variation must be supported by figures of some exactitude.[13] Where it is considered that the Court has exercised its discretion wrongly, as by acting upon incorrect principles, then the aggrieved party can be advised to appeal, but it must still be true to say that variation proceedings cannot be used in order to obtain an increase or reduction of a figure correctly arrived at by the original Court. Such a figure "ought" not to be varied.[14] Subject to the above, the Court will simply look at the application as it stands when the case is before it, decide if it "ought" to act in the light of the designated sections or not and give judgment accordingly.[15] In this sense, the Court does refix afresh the amount of maintenance to be paid having borne in mind changes in any of the matters mentioned in the designated principles of maintenance.

No doubt the onus of proof continues to rest upon the party seeking the discharge, variation, etc., to show that the Court has jurisdication to do so. In Denby v. Croucher,[16] for instance, the wife had appeared in person before the Magistrate in order to obtain an upward variation of a registered maintenance agreement in respect of the children of her (first) marriage entered into between her and her (first) husband. Chilwell J. found as a fact that the evidence had been so poorly presented by her in the Court below that it had been impossible for the Magistrate to come to a rational conclusion as to the true source of the alleged increases in costs now that she had a new household composed of herself, her second husband, his two children, the parties' four children and her child by her second husband. To be fair to the wife, she was under financial and emotional strain as a result of the second marriage, but this does not relax the jurisdictional rules; indeed, it cannot do so. The increased sums awarded by the Magistrate were quashed.

No doubt, as occurred before the 1980 Act came into force,

there will continue to be cases where, since the making of the order, the claimant is discovered to have obtained it by fraud or perjury or where there is material evidence as to circumstances existing at the time of the original order that was not before the Court at the time. It is submitted that a rehearing of the original application should be applied for under s. 173 as was the case under the former law.[17]

In connection with maintenance agreements which have been registered, there is no requirement (as there was under s. 85 of the Domestic Proceedings Act 1968) that, at the date of the agreement (or the last variation of it that had been agreed) its provisions must have been "unfair or unreasonable" or that, since those dates, the circumstances had so changed that the agreement ought to be varied, etc. Thus there is now no need to look to see if any of these pre-conditions are satisfied. The Court will simply look at the relevant principles of maintenance de novo.[18]

On the other hand, it stands to reason that the Court has no jurisdiction under the section under review in respect of an agreement that is not "in force". It will not, therefore, cancel a maintenance agreement which has ceased to be in force because it had come to an end on the parties' divorce.[19]

It would also seem that the reference back to the principles of maintenance set out in the designated sections will now mean that the changes in circumstances are no longer limited to changes foreseen by the parties when they entered into the agreement.[20] Indeed if, as submitted above, it is correct to say that the Court may look at the matter de novo, the changes in circumstances are not really relevant at all.

In Schulz v. Schulz[21] it was contended that the Magistrate should not have increased the $8 per week payable in respect of a child under a registered maintenance agreement to $20 and should have passed some of the burden of the child's maintenance to the wife. It had been agreed that $20 weekly was what the wife

was spending on the child. The parties were undeniably well-to-do. In dismissing the appeal of the husband, (who had considered to be sufficient the $8 due under the agreement, which had been made back in 1972), Chilwell J. said there was no presumption that parents were under an equal statutory responsibility in providing for their children and that, while there might be some cases where a wife ought to bear some of the increase in the maintenance for a child, this was not one of them - a sentiment which may well continue to be true.

In the somewhat unusual decision in Caron v. Caruana,[22] Chilwell J. accepted for the purpose of variation proceedings that a husband's obligations to his mother could be taken into consideration. She came from Malta to New Zealand when she was 68 and when the husband's commitments were confined to his first family. She began to suffer ill-health shortly after her arrival. The husband had had to undertake to the Government to maintain her so that she would not become a charge on the State. At a later date, the husband married again and had a new family.

There would be a good case for cancellation of a maintenance order or registered agreement where, since the order was made or the agreement was registered, the payee has entered into a relationship with another man or woman, as the case may be. A woman's having a mere passing affair with another man is unlikely to cause a Court to order cancellation. On the other hand, if there is a stable de facto relationship between the payee and another man or woman, that is to say the matter has gone beyond the two people merely sharing a house and other expenses, there is room for cancellation.[23] There can, however, be what White J. has referred to as a semi-permanent association falling short of a de facto relationship.[24] In Cross v. Cross,[25] the wife had received financial contributions from a man with whom she had a sexual relationship and who had enabled her to buy a cottage next to his own home and to travel overseas with him. The wife, an experienced teacher, did not pursue employment possibilities with any great effort. The relationship lasted five years. This could not be described as a case where, again to cite White J., a

husband's maintenance was being used in part to enable a wife to associate intimately and continually with other men.[26] The husband had agreed under a registered maintenance agreement to pay $15 weekly for the wife. Richardson J. was prepared to reduce it to $10.

A further good reason for applying for a variation of a maintenance agreement that has been entered into as part of an overall settlement after divorce and that deals with access rights is where the payee spouse has ignored her obligations under the agreement and has flouted Court orders requiring her to allow access, the paying spouse having faithfully observed all his other obligations.[27]

Another reason for seeking the discharge, variation or, perhaps preferably, a suspension of a maintenance order or agreement in respect of an ex-nuptial child made against, or by, the putative father is where that child has been adopted, with the father's consent, by the mother and her husband or by the mother alone.[28]

In the context of orders for the maintenance of children, the kind of things that may go in favour of variations are: that a child has left a fee-paying school for an ordinary non-fee paying school so that the parent who was paying fees is exonerated from paying further fees; that the child has now attained a greater age and is thus more costly to maintain; that the mother in whose custody the child is has had an increase in earnings, even if only about the same as the father's increase; that the woman living with the maintenance-paying father at the time of the original order and being supported by him has now married him and is earning a salary.[29]

A practical point emerging from Denby v. Croucher[30] is worth making. There were four children in this case, the younger being boys of 14 and 11. Maintenance for them had been agreed upon and the agreement had been registered. The wife sought an upward variation and the Magistrate increased each child's maintenance and extended it while each was still attending full-time secondary

school. On appeal, Chilwell J. held that extension of the maintenance in respect of these younger boys had been premature and that the question of extension should be determined in the light of the facts at or about the appropriate time, that is, when each child had reached, or was rising, 16.

Remitting arrears:

Eade v. Eade[31] gives some indication of how a Court may still act. The Magistrate remitted arrears of maintenance owing by the appellant of over $2,500. The original order had been made in 1963 and varied in 1969, at which latter time the appellant was ordered to pay $8 weekly for the respondent and $2 weekly for each of their two dependent children. The present application had been made in 1972, but in 1969 the appellant received some $21,000 by way of accident compensation. This he invested in businesses which failed. He also had a fire at his business premises with the result that, in 1972, he had capital assets only of about $12,000 of which $6,000 was in cash. All of these were directly traceable to the compensation. The appellant was fit for light work only and, though casually employed, had no permanent job. He remarried, evidently, had had two children by his second marriage and his second wife had four children by her first marriage. Consequently, their household was substantial. The basic fact was that, by 1972, the appellant's assets had been substantially reduced albeit by mismanagement or bungling.

The respondent still had the parties' two dependent children to look after - and also another child, born to her after the parties' separation, of whom the appellant was not the father. Her income was derived primarily from family and domestic purposes benefits and her outgoings appeared to approximate her income.

The Magistrate reduced the weekly figures for periodic maintenance to $2 for the respondent and $1 for each child, and this was not appealed against. The Magistrate took the view that $2,500 of the appellant's cash resources should be applied in reduction of the arrears and that the unstated balance should be

remitted. This was the subject-matter of the appeal. It was argued that the appellant's funds represented what was left of the compensation and that, as this has been a payment calculated by reference to earnings and was intended to compensate him for future inability to earn at the same rate as before the accident, these funds ought not to be regarded as available for payment of the arrears. Quilliam J. upheld the Magistrate's decision and stated that he could see no reason in principle why the fact that the receipt of the compensation in a lump sum should render it immune from the payment of arrears, and that each case had to be considered upon all its own circumstances. There seems to be no reason why a similar case should not be decided in the same way under s. 99.[32]

In Bunce v. Bunce,[33] Barker J. refused to cancel outright a maintenance order in favour of a first wife or to remit in full the arrears going back nearly two years. The parties' marriage had lasted over twenty years and ended because of the husband's adultery. The husband had remarried and it was clear that the first wife's working days were numbered. She was in receipt of national superannuation. Deferred maintenance to her property was necessary. Noting that a husband was not entitled to take undue benefit from the thrift displayed by a wife, he reduced the husband's weekly payments from $20 to $5 and ordered the arrears to be paid off at the rate of $10 per week until the date when his former wife went onto national superannuation and at the rate of $5 per week thereafter.[34]

There was an appeal to the Court of Appeal from the judgment of Barker J.[35] It was there emphasised that Mrs. Bunce had been working since at least 1970 and was in a secure financial position and, as the Magistrate had found, living comfortably. The Porter and Lindsay cases were cases of original applications, not cases of applications to vary or discharge, and the latter case was one where the wife, when she applied for maintenance and her husband had already remarried, was found to be clearly in need of maintenance. Richardson J., giving the judgment of the Court, pointed out that s. 85 of the former Domestic Proceedings Act 1968 contemplated successive applications[36] and the possibility of

temporary suspension of an order in appropriate cases.[37] The Court considered that there had been no justification, at any rate here, for an order of a small weekly sum simply to retain the jurisdiction of the District Court against the possibility that a further change of circumstances might at some later date warrant a variation.[38]

Thus the appeal was allowed and the Magistrate's cancellation of the order was restored. It is possible that this solution would be in accordance with the new order of things laid down in s. 99 of the 1980 Act, under which there would be nothing to prevent her re-applying for maintenance in, say, 1984, should she be able to establish need at that time.

As to the arrears, the Court of Appeal noted that the Magistrate had not found that, before Mrs. Bunce qualified for her national superannuation, her income was adequate to meet her needs without help from Mr. Bunce. The superannuation added $28 weekly. Barker J., as we saw, required Mr. Bunce to pay $10 until Mrs. Bunce went on to national superannuation and thereafter at $5 a week. The Court had no doubt that he took into account her budgeted income and expenditure exclusive of national superannuation. It did not differ from this approach, but it accepted a suggestion that, to produce finality, a lump sum payment should be ordered. On the basis that a generous offer ought to be made and that account should be taken of the delays due to the litigation concerning the arrears it was put at $1,000 payable within six weeks from the date of judgment.[39] No doubt this reasoning would be relevant today.

The Court was prepared to cancel a registered agreement and remit nearly $4,000 arrears in Caron v. Caruana.[40] In so acting, Chilwell J. was influenced by the following factors, viz., that a course of conduct had led the husband to suppose that he was no longer obliged to pay maintenance; that the acquiescence of his former wife and/or the Department of Social Welfare in his not paying maintenance had lulled him into a false impression as to his financial position;[41] since the date of the agreement he had undertaken the care and support of his mother, who had suffered

ill-health after her arrival in New Zealand from Malta[42] and, finally, the husband could not maintain his new family by his third wife and his mother at a reasonable level of subsistence if he were made to honour the maintenance agreement.[43]

Suspension

One may speculate what would occur under the 1980 legislation where it appears that, at the date of the agreement, the wife's financial situation was different from that which the husband supposed to exist. In Richards v. Richards[44] a husband entered into a separation agreement which provided for the maintenance of his wife and children on the footing that they were to leave their home in Upper Hutt and go to Invarcargill, where the wife was to find a flat and supplement her finances by doing some hairdressing on a modest scale. In fact, at the date of the agreement, which had been registered, the wife was housekeeping for a man in Gore who was providing free board and lodging for the wife and children, and $6 week for the wife. Consequently, she was much better off than the husband, at any rate, had anticipated, and he certainly would not have concluded the agreement on the terms that he did had the true circumstances then been known to him. It is submitted that, given that the wife was receiving sufficient for her reasonable needs without the agreed maintenance, this would be an appropriate case to suspend payment of the sums due to her under the agreement.

Matrimonial Property Act 1976

Section 99 of the Family Proceedings Act 1980 is, it must be stated in conclusion, not the only repository of the power of the Courts to discharge, vary or extend or suspend a maintenance order or to cancel, vary, or extend or suspend a maintenance agreement. Section 32 of the Matrimonial PROPERTY Act 1976 provides for the exercise of such powers. It reads as follows, as inserted by the First Schedule to the Family Proceedings Act 1980 and s. 189(1) thereof:-

32. Court may discharge or vary maintenance orders -

(1) In any proceedings under this Act, the Court shall have regard to any maintenance order made against one spouse in favour of the other spouse or in favour of any child of the marriage and to any maintenance agreement and may, if it considers it just, discharge, vary, extend, or suspend any such order, whether it has been made in the High Court or in a Family Court, and may cancel, vary, extend or suspend any maintenance agreement, whether or not that agreement has been registered under Part VI of the Family Proceedings Act 1980.

(2) An order made under this Act in respect of matrimonial property shall not be sufficient to support an application for discharge, variation, extension, or suspension of a maintenance order pursuant to s. 99 of the Family Proceedings Act 1980, or for cancellation, variation, extension, or suspension of a maintenance agreement pursuant to that section.

(3) For the purposes of this section, the expression 'maintenance agreement' means any written agreement made between a husband and wife, and providing for the payment by either party of sums of money towards the maintenance of the other party or of any child of the marriage."

It will be seen that the main message of the section is that maintenance matters should be adjusted in the light of the correlative matrimonial property order when the latter order is made and should not be left to separate legal proceedings. It is not the purpose of this article to enter into the decisions under the original s. 32, but merely to remind readers of the existence of the new s. 32.[45]

CHAPTER THREE

VARIATION OF MAINTENANCE ORDERS AND THE TRANSITIONAL PROVISIONS OF THE FAMILY PROCEEDINGS ACT 1980.

The previous Chapter devoted to the variation etc., of maintenance orders and agreements was written in the primary hope that it would be of long-term assistance. This present short Chapter is merely intended to make a point of short-term assistance. It will, as will shortly appear, spend its force in a comparatively short time. For this reason, the present Chapter has been kept deliberately separate from the previous one.

The transitional provisions of principal import appear in s. 192(1) - (3). Subject to these subsections, subs. (4) enacts that the 1980 Act is to apply to every order - (a) that has been made under the former Matrimonial Proceedings Act 1963 or the former Domestic Proceedings Act 1968 or to which either of those Acts applied; and (b) is of the kind that could have been made under the 1980 Act if the 1980 Act were then in force - as if it had been made under the 1980 Act.

What the writer would now like to draw to readers' attention is the rule to be found in s. 192(5), which reads as follows:-

> (5) Notwithstanding subs. (4) of this section, no application may be made under s. 99[1] of this Act for an order varying a maintenance order[2] that has been made before the commencement of that section,[3] unless a period of not less than 12 months has expired since the making of the order or since the last date before the commencement of s. 99 of this Act[4] on which the order was varied; but an application for a variation of that order may nevertheless be made before the expiration of that period of 12 months under s. 47 of the Matrimonial Proceedings Act 1963[5] or under s. 85 of the Domestic Proceedings Act 1968,[6] as the case may require, as if those sections had not been repealed.

It is obviously necessary for practitioners carefully to check, when seeking a variation in the early days of the 1980 Act for a client, to be sure that they are seeking it pursuant to the correct statutory provision.

CHAPTER FOUR

THE ENFORCEMENT IN NEW ZEALAND UNDER THE FAMILY PROCEEDINGS ACT 1980 OF MAINTENANCE ORDERS MADE IN NEW ZEALAND.

A. Part VII of the Act, consisting of ss. 101 to 134 inclusive, contains a veritable battery of direct and indirect methods of enforcing maintenance orders within New Zealand. These will not be examined in extended detail in the pages which follow. Only a fairly brief mention will be made, therefore, of the procedures available.

1. Money Payable under Maintenance Order Constitutes a Debt - It is provided by s. 101(1) that all money payable under a maintenance order is, as soon as it is arrear and unpaid, to constitute a debt by the person against whom the order was made to the person to whom the money is payable pursuant to the order. That money may, without prejudice to any mode of recovery, be recovered in any District Court or Family Court. Subsection (2) indicates that, without prejudice to any other remedies or proceedings under the Act, a judgment so obtained may be enforced in the same or a like manner as a judgment of a District Court.

2. Bankruptcy -
Should a person against whom a maintenance order has been made be subsequently adjudicated a bankrupt, s. 102(1) states that all money due and unpaid at the date of the adjudication is to constitute a debt provable in the bankruptcy. However, subsection (2) goes on to provide that no such bankruptcy and no discharge from the bankruptcy is to (a) release the bankrupt from any personal liability under the maintenance order, or from any proceedings for the enforcement of the order, or for the punishment of any breach of the order, whether in respect of money due at the time of the adjudication or of the filing of the petition or accruing due thereafter; or (b) affect any security for the observance of the maintenance order, or the liability of any property to be made available in satisfaction of the order, other than property that is or becomes assets in the bankruptcy.

3. Warrant of Distress -

Where any payment that is directed to be made by a maintenance order is in arrear and unpaid for not less than 14 days, a District Court Judge is empowered by s. 103(1) to issue a warrant of distress in the prescribed form with any necessary modifications against the person by whom it is payable for the amount unpaid, or for so much of that amount as for the time being remains unpaid. (The detail is contained in the rest of the section, viz., subss.(2) to (9)).

4. Deductions from salary or wages for payment of maintenance - It may be convenient for a worker if the trouble of making his payments due under a maintenance order or maintenance agreement could be deducted from his wages by his employer. It is provided by s. 4 of the Wages Protection Act 1964 that, as a general rule, a worker's wages must be paid in cash as they become payable. It has accordingly been enacted by s. 104(1) of the Family Proceedings Act 1980 that, despite s. 4 of the 1964 Act, an employer may, with the consent in writing of a worker employed by the employer, make deductions for the payment of maintenance under a maintenance order or a maintenance agreement from any wages payable to the worker; or, on the written request of the worker, agree to make deductions for that purpose. For the above purposes, the terms "employer" and "worker" have, by virtue of subsection (2), the same meanings as they have in s. 2 of the 1964 Act. Section 2 also defines "wages".

5. Attachment Orders -

Section 105(1) empowers a District Court or a Family Court to make an attachment order on or at any time after making a maintenance order. Such an order may be made only against a person who is proved to the satisfaction of the Court to be an employer of the respondent against whom the maintenance order is made: subsection (2). Subsection (3) requires the amounts to be deducted under the attachment order to be paid to a Maintenance Officer at any Office of the Department of Social Welfare.[1] An attachment order must, according to subsection (4), specify an amount, known as "the protected earnings rate", below which the net earnings paid to the respondent is not to be reduced by

reason of compliance with the order. This ensures that the respondent is not left below the breadline. An attachment order may, according to subsection (5), be made either for a fixed period or so as to remain in force until it is discharged in accordance with s. 109.[2] When an attachment order has been made, it must be served on the employer under s. 106 in the manner there described in detail.

The effect of an attachment order is described in s. 107. In brief, the order will direct that the money due and payable or at any time becoming due and payable under the relevant maintenance order is, by way of specified weekly payments, to be a charge on any salary or wages that from time to time while the attachment order remains in force become due and payable by the employer to the respondent under the maintenance order. Subsection (2) describes the nature of the charge in detail. The employer's rights and duties as to deducting and paying the relevant sums and informing the Court when a respondent in respect of whom an attachment order is in force leaves the employer's employment are set out in full in s. 108. An attachment order may be at any time varied, suspended or discharged in accordance with s. 109 by a Family Court or District Court. Subsection (3) indeed allows the Court Registrar to exercise this jurisdiction if he is not a constable.

6. Deduction Notices -

A new system has been introduced by ss. 110 to 114. Under s. 110(1), where a respondent who is liable to pay maintenance either consents in writing to the issue of a deduction notice or refuses to, or fails to, make payment of any money payable under a maintenance order, so that payments for a total period of at least 14 days remain in arrear and unpaid, and there is no attachment order in force in respect of the respondent's salary or wages, a Maintenance Officer may cause a deduction notice to be issued against the employer of the respondent. This will take effect when it is served on the employer in accordance with s. 106. A copy of every deduction notice so issued and of the revocation of any such notice must be given to the respondent by a Maintenance Officer: see subss. (2) and (3). The notice

must inform the respondent and his employer of the rights conferred by s. 114: see s. 110(4). Section 114 enables both respondent and employer who consider a notice to have been issued in error, or to contain an error, to complain to an office of the Department of Social Welfare and, ultimately, to a District Court Registrar; who may in appropriate circumstances discharge or vary the notice.

A deduction notice remains in force, according to s. 110(5) until it is either discharged under s. 114 or revoked by a maintenance officer. By virtue of subs. (6) nothing in s. 97 of the Shipping and Seamen Act 1952 is to apply to a deduction notice.

The effect of a deduction notice is described in s. 111(1). It directs that an amount, not exceeding the periodical sum required to be paid weekly under the maintenance order, is to be a charge on the net amount of any salary or wages that, while the notice remains in force, become due and payable from time to time by the employer to the respondent liable under the maintenance order. However, this notwithstanding, where the respondent is in arrears, subsection (2) states that a deduction notice may, for the purposes of recovering them, specify, as the amount directed to be deducted under that notice, an amount that is greater, by not more than five percent, than the maximum amount that could otherwise be specified under subsection (1). Section 107(2) applies with the necessary modifications to any charge under subs. (1): see subs. (3).

The liability and rights of an employer as to deducting and paying the relevant sums to a Maintenance Officer and informing a Maintenance Officer when a respondent leaves his employment are set out in considerable detail by s. 112.

The "Protected Earnings Rate"

An employer must not, according to s. 113(1), in making deductions under a deduction notice, reduce the amount paid to a respondent by way of salary or wages in respect of any week to

an amount that is less than 60 per cent of the amount calculated as being the respondent's "net ordinary pay" for a week. The "net ordinary pay" is defined in subs. (2).

7. General provisions relating to Attachment Orders and to Deduction Notices -

It will be appreciated that, where an employer makes a deduction from wages or salary in order to comply with the terms of a deduction notice, it causes him or his clerical staff a certain amount of extra trouble. S. 115 accordingly allows a "transaction fee" of 50 cents to be paid to the employer in respect of each occasion on which such a deduction is made. This fee comes from the Consolidated Account out of moneys appropriated for the purpose by Parliament. It is, which seems fair, not recouped from the employee's wages.

It will also be appreciated that the less scrupulous employer may be tempted to dismiss an employee - or alter his position in the employer's business or undertaking to the prejudice of the employee - by reason of an attachment order or deduction notice having been served. Such employers are obviously to be discouraged, and the quite strict terms of s. 116 should succeed in discouraging them in that they commit an offence if, for instance, they sack men who have been made the subject of an attachment order.

Since it may well be that a respondent liable to pay maintenance is a Crown servant, provision has to be made for attachment orders being made against the Crown as employer or deduction notices being issued to the Crown as employer and matters cognate thereto. It will be seen that the extent to which these orders and notices bind the Crown and the general rules applicable in this context are to be found in s. 117.

8. Charging Orders -

The enforcement of maintenance obligations through a charging order differs from enforcement by an attachment order or deduction notice. As we have just seen, attachment orders and deduction notices entail deduction of the maintenance from wages

or salary. The charging order, on the other hand, is a means of getting at other property of the respondent. The basic position is that set out in s. 118(1), which states that, where a maintenance order has been made against a respondent, a Family Court or a District Court may[3] (a) if the maintenance order was made by that Court, on making the order: or (b) in any case, at any time after the making of the order, order that the money payable or to become payable under the maintenance order is to be a charge on any property to which the respondent is entitled. Section 118(2) - (8) contains the detail. The power conferred on the Court by s. 118 to make charging orders applies to policies of life insurance notwithstanding the protective provisions of the Life Insurance Act 1908.[4] There are also details, contained in s. 120, as to charging orders being binding on the Crown.

9. Receiving Orders -
Where a charging order is made under s. 118 in respect of any property, a Family Court or a District Court may, according to s. 121 (1), at the same time as it makes the charging order or at any subsequent time, if any money is in arrear and unpaid under the maintenance order to which the charging order relates and if it thinks fit,[5] make an order appointing the Public Trustee or any other person to be the receiver of the whole or any part of that property, or of the rents, profits, or income of the property, or any part of that property.[6] Neither the Public Trustee nor any other person is to be appointed as a receiver, however, unless he consents. Subsections (2) and (3) deal with the variation, discharge and duration of receiving orders. The important powers and duties of a receive are extensively described in s. 122.

B. Miscellaneous Provisions as to the Enforcement of New Zealand Maintenance Orders in New Zealand

1. Orders for Enforcement of Arrears under Maintenance Order -
Section 123 provides that an order made under Part VII of the Act for the purpose of enforcing payment of any money payable under a maintenance order may be made in respect of arrears due under that maintenance order up to the date of the first-mentioned order, that is to say, the "enforcement" order.

2. Dealing with Defaulters -

Inevitably there will be those who see fit to do their best to "beat the system". Accordingly, the Act has to make provision for dealing with the recalcitrant. It contains more efficient modes of dealing with the disobedient than did the former Domestic Proceedings Act 1968 with its "disobedience proceedings", which were governed by ss. 107 and 108.

(i) Examination Under S. 124. -

Where a respondent who is liable to pay maintenance "refuses or fails" to make payment of any money payable by him under a maintenance order, the Registrar of the District Court nearest to the place where the respondent resides or carries on business, on the application of the Maintenance Officer or other person entitled to receive payments of maintenance, supported by sufficient evidence of default, may, unless that Registrar knows that the respondent is undergoing a sentence of detention, as defined in the Summary Proceedings Act 1957, issue a summons, in the prescribed form, under s. 124(1). A summons so issued must, according to subs. (2), require the respondent, unless the amount of arrears due under the maintenance order is sooner paid, to appear at the time and place appointed in the summons to be examined orally by the District Court as to his means and the reasons for his alleged default. He is required by subs. (3) to produce at the examination books, papers, and documents relating to the debts he has incurred and to his default under the maintenance order. In the event that a summons issued under the section cannot be served, or if a respondent upon whom such a summons has been served fails to appear before the District Court at the time and place specified in the summons, or at any subsequent time and place to which the examination is adjourned, subs. (4) permits a District Court Judge to issue a warrant to arrest the respondent and bring him before the Court as soon as possible.

It should be noted that s. 125 provides that, for the purposes of ss. 124, 128 and 130, a certificate of arrears signed by a Director or Assistant Director of any office of the Department of Social Welfare specifying the amount of any money

in arrear and unpaid under a maintenance order is, until the contrary is proved, to be sufficient evidence of the amount so in arrear and unpaid as at the date specified in the certificate.

The Registrar, where he believes in relation to any examination to be held under s. 124 that any person other than the respondent (a) has possession of any book, paper, or document relating to the affairs or property of the respondent; or (b) is capable of giving information concerning the respondent's income from any sources or concerning the respondent's expenditure, is empowered by s. 126(1) to issue a summons in the prescribed form requiring that person to appear before the District Court as a witness at the time and place appointed in summons. According to subs. (2), any person so summoned may be required to produce any book, paper, or document relating to the affairs, finances, or property of the respondent. No person who is required by such a summons to travel more than 20 km. to attend the examination, however, is to be bound to attend unless, according to subs. (3), expenses in accordance with the scale prescribed by regulations made under the Summary Proceedings Act 1957 are tendered to that person. On the failure of any person to appear before the Court in answer to a summons under subs.(1), a District Court Judge may, by virtue of subs. (4), issue a warrant to arrest that person and bring him before the Court as soon as possible.

The conduct of the examination is dealt with by s. 128. Subsection (1) clearly envisages an examination being made "orally on oath before the District Court". However, subs. (2) goes on to state that, while every respondent who is summoned or brought before a Court for examination must appear personally, he may be represented by a barrister or solicitor, who may examine him and be heard on the matter of the respondent's liability and means. On the other hand, subs. (3) provides that the respondent may be cross-examined by the Maintenance Officer or other person entitled to receive payments of maintenance. Subsection (4) also provides that any witness may be cross-examined by the respondent or his barrister or solicitor and by the Maintenance Officer or other person entitled to receive payments of maintenance.

Subsection (4) also provides that any witness may be cross-examined by the respondent or his barrister or solicitor and by the Maintenance Officer or other person entitled to receive payments of maintenance. An examination may from time to time be adjourned by the Court under subs. (5) to a time and place to be appointed.[7]

(It may incidentally be noted that s. 127(1) provides that a person to whom a warrant under s. 124(4) or s. 126(4) is issued may execute it forthwith but shall not be obliged to do so if he believes that the person to be arrested cannot be brought before the District Court within 72 hours after arrest. As might be expected, such warrants are, by virtue of subs. (2), to cease to have effect if the amount of the arrears due under the maintenance order is paid. Furthermore, every respondent or other person apprehended under a warrant are, by virtue of subs. (3), to be bailable as of right).

The final question is: when the examination is completed, what may the District Court then do? The answer is provided by s. 129, which states that, after giving the respondent and the Maintenance Officer or other person who is entitled to receive payments of maintenance an opportunity to be heard, it may do one or more of the following things, viz. (a) make an order under s. 99 of the Act discharging, varying, or suspending the maintenance order, or remitting or suspending in whole or in part any arrears under the maintenance order; or (b) make any order or issue any warrant under the Act relating to the enforcement of the maintenance order that it thinks fit.

(ii) Contempt Procedures -

It may well be that, on completion of an examination under s. 124 of the Act, the District Court is satisfied beyond reasonable doubt that the respondent has, or has had, sufficient means to pay any money payable under the maintenance order but has refused or failed to do so and that other methods of enforcing payment under Part VII of the Act have been considered or tried and it may appear to the Court that they are either inappropriate or have been unsuccessful. By s. 130(1), the Court may (a) order the

respondent to undergo periodic detention for such period, not exceeding in any case 12 months, as the Court thinks fit; or (b) inform the respondent that, unless he makes the payments specified by the Court within a specified period of time, a warrant of commitment will be issued committing him to prison for a term not exceeding three months for wilful disobedience to the maintenance order; or (c) commit the respondent to prison for a term not exceeding three months for wilful disobedience of the maintenance order.

Where the Maintenance Officer or other person entitled to receive payments of maintenance under a maintenance order alleges that the respondent has wilfully disobeyed a maintenance order, the Maintenance Officer or other person may apply to the District Court, with a supporting affidavit setting out the details, under subs. (2), to have the defendant dealt with pursuant to subs. (1). Subsection (3) provides that, where, upon an application made to it under subs. (2), the District Court is satisfied that the respondent has, within the 12 months immediately preceding the application, been examined or received a summons to attend an examination under s. 124, the Court may proceed in all respects as if subs. (1) of s. 130 applied.

Further matters requiring notice in the present context are:-
(a) Subsection (4) requires that a copy of the application and affidavit referred to in subs. (2) be served on the respondent;
(b) If a copy of the application and affidavit cannot be served on the respondent or if he fails to appear at the hearing, the District Court may issue a warrant to arrest him and bring him before the Court as soon as possible: subsection (5).

A person to whom a warrant is issued may execute it forthwith but is not obliged to do so if he believes that the person to be arrested cannot be brought before the District Court within 72 hours after his arrest. A warrant, moreover, is to cease to have effect if the amount due under the maintenance order is paid: see subss. (6) and (7).

Passing to the effect of an order under subs. (1)(a), the

position is that the order is to have effect as if the respondent, following conviction on an information, had been sentenced to periodic detention - this provision is to be found in subs. (8). However, where a District Court acting under the section under review orders a respondent to undergo periodic detention or commits a respondent to prison, subs. (9) gives him the same right of appeal to the High Court against the order or committal as he would have had had he been convicted and sentenced by the District Court on an information. Perhaps the most important thing - from the point of view of the person entitled under the maintenance order - is that neither detention nor imprisonment pursuant to the section operates to extinguish or affect the liability of the respondent under the maintenance order. This rule appears in subs. (10) and should dispel any false assumption by the layman that he can write off his arrears by going to prison. Section 13A of the Criminal Justice Act 1954 is to apply in relation to s. 130 as if the District Court were imposing a sentence: s. 130(11). As to legal aid for those brought before the Court under s. 124 or 130, see s. 131.

Warrant of Commitment -

A warrant of commitment issued under s. 130 must require the respondent to be imprisoned in some prison for such time, not exceeding three months, as the District Court thinks reasonable unless the amount due under the maintenance order or any lesser amount specified pursuant to s. 130(1)(b) is sooner paid. While this provision may effectively deter some recalcitrants, it is certain that some would still prefer to go to prison as a matter of misguided principle. As we have seen, imprisonment does not per se extinguish or affect the liability to pay, so such an attitude helps nobody in fact.

Payment by Detained Respondent -

It may be that a respondent undergoing periodic detention pursuant to an order under s. 130(1)(a) or who is imprisoned pursuant to a warrant issued under that section sees the error of his ways and pays or causes to be paid the amount due under the maintenance order or any lesser amount specified pursuant to s. 130(1)(b). In this event, s. 133 states that the warden of the periodic

detention centre at which the respondent is required to report or the Superintendent of the prison in which the respondent is imprisoned must, on being notified by a Maintenance Officer of the payment of that sum, thereupon notify the respondent that he is no longer required to report or discharge the respondent - unless, of course, there is some other reason for the respondent being required to report to that work centre or being in custody.

(iii) Arresting respondents about to leave New Zealand with intent to avoid the payment of maintenance -

A logical step for one bent upon "beating the system" is to leave New Zealand in order to "go to ground" overseas. It is accordingly provided by s. 134(1) that, where a District Court Judge, or if one is not available and the case appears to be one of urgency, any Registrar who is not a constable, is satisfied on application in writing made on oath that there is reasonable cause to believe that any person (to whom the section refers as the respondent) is about to leave New Zealand with intent to avoid payment of maintenance - (a) under a maintenance order in force against the respondent; or (b) to a person by whom or on whose behalf a maintenance order against the respondent has been applied for, or who would be entitled to apply for a maintenance order against the respondent - the District Court Judge or Registrar, may issue a warrant for the respondent's arrest.

Subsection (2) enumerates the persons who may make an application as follows:-

(a) Where the application is in respect of a maintenance order in force, then by the person who applied for that maintenance order, or by any person who could have applied for it, or by a Maintenance Officer, or by a constable;

(b) In any other case, by any person who is entitled to apply for a maintenance order against the respondent.

The purpose of the proceedings is readily apparent from subs. (3) - that the respondent must be brought as soon as possible before a District Court. If that Court is satisfied that the respondent is indeed likely to leave New Zealand with intent to avoid payment of maintenance, it may make any one or more of the following orders:-

(a) Order that the respondent give such security, including the provision of sureties, for the payment of maintenance as the Court specifies;

(b) Order that the respondent do not leave New Zealand without the written permission of the Court;

(c) Order that the respondent surrender to the Court for such period as the Court specifies any tickets or travel documents in the respondent's possession.

In the event of an order of type (b) or (c) being made, subs. (4) of the section empowers the Court to direct the Registrar to give notice of the order to such Departments of State, offices, or persons as the Court or the Registrar thinks proper. Furthermore, every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding $500 who, being a person against whom a type (b) order mentioned above is in force, leaves New Zealand, or attempts or does any act with intent to leave New Zealand: see subs. (5).

Subsection (6) leaves it open to a person against whom a type (a), (b) or (c) order is in force to apply to the Court for the discharge of it and to the Court to discharge it accordingly.

The almost identical provisions of the former Domestic Proceedings Act 1968, s. 109, figured in Fry v. Wilson and Fry.[8] The appellant had been ordered to pay a weekly sum for each of his two children who were in the custody of the second respondent. On 26 July 1972, the latter had applied for a warrant for the appellant's arrest under s. 109, swearing that she had reasonable cause to believe that the appellant was about to leave the country with intent to avoid payment of maintenance. She averred that, when seeing the children at the previous weekend, the appellant had told her he was intending to leave the country in about two weeks; that, as she understood him, his departure was to be permanent and that he had said nothing about maintenance arrangements intended to be made by him. She appeared on 27 July 1972 before Wilson S.M. the first respondent, and gave some evidence - of which there was no record - in support of her application and a warrant was

issued. The appellant was arrested and came before Wilson S.M., in the September following. It was ordered that the appellant should not leave the country without the Court's leave and that he should surrender his travel documents. On appeal, Roper J. stated that it was for the applicant under s. 109 to satisfy the Magistrate that there was reasonable cause to believe (a) that a person is about to leave New Zealand and (b) that he is doing so with intent to avoid payment of maintenance. He observed that the procedure was one that could have serious consequences, viz., temporary loss of liberty and more permanent loss of freedom of movement. He further held that the Magistrate was under a judicial duty to exercise his judgment in deciding whether there was such reasonable cause for belief and that he could not discharge that duty merely by acting on the applicant's assertion that there was reasonable cause or because the applicant herself claimed to hold such a belief. In his Honour's view, when the "absconder" (as the respondent was then referred to) was brought before the Court, he must show cause why an order should not be made, i.e., there was an evidentiary burden lying on him to displace the belief already formed in the Court's mind. Roper J. concluded that the Magistrate here had gone no further than to satisfy himself that there was reasonable cause to believe that the appellant was about to leave New Zealand and that, on the evidence, there was nothing upon which the Magistrate could be satisfied as to the appellant's intent, the second of the matters which an applicant should prove. Roper J. thought that, when the matter first came before Wilson S.M., it seemed clear that all he had had before him were the facts that the appellant had declared his intention to leave New Zealand in about two weeks and that no arrangements had been made about payments of future maintenance. He was never asked between the Sunday visit and the issue of the application what were his plans about future payments of maintenance either by the second respondent or her advisers. It was not as though the appellant intended leaving the country in a matter of hours. Moreover, it was significant that it was the appellant who told the second respondent that he was leaving New Zealand, which was hardly the conduct of a potential "absconder". In the view of Roper J. the facts did not take the matter further than a suspicion that the appellant might "abscond" and certainly not to the stage of a belief that he was about to do

so.[9] It therefore followed that the issue of the warrant and the making of the orders subsequent thereto were bad in law and had not been justified on the facts. Accordingly, a writ of certiorari was issued to quash the warrant and the orders. It is submitted that the ratio decidendi of this case remains good. The procedure should, therefore, not be lightly invoked. It does not follow, for instance, that a crew member of a ship or aircraft who returns aboard as it is about to leave New Zealand for overseas is, per se, intending to avoid the payment of maintenance under a New Zealand order.

FOOTNOTES

Chapter One

1 (1977) 3 N.Z. Recent Law (N.S.) 40.

2 Section 84(2) indicates that the relevant Court is the Family Court that constitutes a division of the District Court in the office of which the agreement is registered.

3 The various methods of enforcement appear in Part VII of the 1980 Act.

4 As to variation of agreements, see s. 99.

5 [1977] N.Z.L.J. 305.

6 It would seem that the tactical move to be made by the wife after this decision would have been to register the agreement and then lodge an application to vary the sum payable upwards - if, that is, she thought she had not enough maintenance.

7 Hall v. Hall [1970] N.Z.L.R. 1132, at p. 1134. Part II of the 1980 Act contains strengthened provisions in respect of reconciliation and conciliation, so the observation of Beattie J. now has added force.
It is, perhaps, a pity that the 1980 Act does not provide for the recovery of arrears due under an agreement before registration.

8 [1975] 1 N.Z.L.R. 75.

9 See also White v. White (1973) 14 M.C.D. 95.

10 (1956) 9 M.C.D. 67.

11 (1957) 9 M.C.D. 194.

12 (1960) 10 M.C.D. 117.

13 Bowen v. Bowen, noted in [1974] N.Z.L.J. 229.

14 Hyman v. Hyman [1929] A.C. 601 (H.L.); Bennett v. Bennett [1952] 1 K.B. 249; [1952] 1 All E.R. 601; Amess v. Amess [1950] N.Z.L.R. 428, 430; Leighton v. Leighton [1954] N.Z.L.R. 841; Duncan v. Somlai [1962] N.Z.L.R. 849; Baker v. Baker [1958] N.Z.L.R. 1138; A. v. A. [1967] N.Z.L.R. 357; Buckthought v. Buckthought [1977] 2 N.Z.L.R. 223 (a contract case and not one in which mainenance was sought); Denton v. Denton [1979] 2 N.Z.L.R. 472, where the cases are nicely reviewed by McMullin J.

15 Denton v. Denton, supra. The result was that the wife was able to seek, and obtain, a maintenance order because she was not barred by what is now s. 85(1).

Chapter Two

1 These deal with the irrelevance of domestic benefits (s. 62); maintenance of spouses during marriage (s. 63); maintenance on dissolution (and annulment) of marriage (s. 64); assessment of maintenance (s. 65) and the relevance of conduct to liability for, and quantum of, maintenance (s. 66) and were discussed at the Seminar.

2 Section 72 defines the parental liability to maintain their children and indicates how the amount payable by a parent is to be determined. Section 73 denotes the liability of a father to maintain an ex-nuptial child and the limitations thereon.

3 This section enables the Court to order one unmarried parent

of a child to pay maintenance to the other unmarried parent. It has to be read in conjunction with s. 79.

4 See s. 99(4). The power to remit arises under s. 99(6)(a).

5 Section 99(5). Suppose a wife obtained a variation order increasing the maintenance payable to her on 20 June, having given as grounds for the variation a disability which overtook her on the previous 1 April. The Court can backdate the increase to 1 April but not to some earlier date, such as the preceding 1 February. And see Rhodes v. Rhodes [1976] 2 N.Z.L.R. 129, where Somers J. increased an order in May 1976, backdating it to the previous 1 January.

6 Section 99(6), and see Woodward v. Crutchley [1962] N.Z.L.R.221.

7 Section 99(7).

8 Section 99(8). A void consent order cannot be varied: Denton v. Denton [1979]2N.Z.L.R. 472.

9 Inserted by s. 189(1) and the First Schedule to the Family Proceedings Act 1980.

10 See s. 27J of the 1976 Act, inserted by s. 7 of the 1980 amending Act.

11 See, e.g., Kennedy v. Kennedy [1966] N.Z.L.R. 297; Hagglow v. Hagglow [1969] N.Z.L.R. 339.

12 Wright v. Wright [1970] N.Z.L.J. 316; Carter v. Carter [1974] Recent Law 231.

13 Ibid. It was also warned that "guesswork, generalities or mere estimates" are not acceptable to the Court.

14 Cf. Kennedy v. Kennedy [1966] N.Z.L.R. 197, at pp. 300 - 301.

15 Cf. Lewis v. Lewis [1977] 1 W.L.R. 409; [1977] 3 All E.R. 992.

16 [1979] N.Z. Recent Law 141.

17 See Kennedy v. Kennedy [1966] N.Z.L.R. 297 (non-disclosure by the wife of money in a bank account and of cash invested on a mortgage did not give jurisdiction to vary). The decision was applied in Richards v. Richards [1972] N.Z.L.R. 222.
Quaere whether fraud or perjury would be misconduct within s. 66(b) of the 1980 Act?

18 Viz. ss. 62 - 66; 72 and 73; 81. Thus much of what was said in Hall v. Hall [1970] N.Z.L.R. 1132 would appear to be no longer relevant.

19 Bowen v. Bowen, noted by Webb [1974] N.Z.L.J. 229. Cancellation should be sought under s. 90(2) of the Act.

20 Cf. Robertson v. Robertson (Supreme Court, Christchurch; judgment 11 December 1975, No. M.384/75); Gorman v. Gorman [1964] 1 W.L.R. 1440; [1964] 3 All E.R. 739 (C.A.); Ratcliffe v. Ratcliffe [1962] 1 W.L.R. 1455; [1962] 3 All E.R. 993 (C.A.); B.(V). v. B.(J). [1967] 1 W.L.R. 122; [1966] 3 All E.R. 768 (C.A.).

21 (1977) 3 N.Z. Recent Law (N.S.) 317.

22 [1975] 2 N.Z.L.R. 372, discussed further below.

23 Hayes v. Hayes (1975) 1 N.Z. Recent Law (N.S.) 306. Hence if a wife chooses to act as housekeeper for a man and his child without payment and there is no de facto relationship between

them, she ought to seek payment from her employer rather than look to her husband.

24 In Mitchell v. Mitchell [1975] 2 N.Z.L.R. 127, at p. 129.

25 (1977) 3 N.Z. Recent Law (N.S.) 193.

26 In the Mitchell case, at p. 129. Which conduct could well lead to cancellation or suspension.

27 See the obiter view to this effect expressed by Chilwell J. in Denby v. Croucher [1979] N.Z. Recent Law 141.

28 Maintenance Officer v. Stark [1977] 1 N.Z.L.R. 78, at p. 82, per Beattie J.

29 Cf. Carter v. Carter [1974] Recent Law 231.

30 [1979] N.Z. Recent Law 141.

31 [1973] Recent Law 275.

32 Cf. Martin v. Martin [1967] N.Z.L.R. 593.

33 [1979] N.Z. Recent Law 272.

34 His Honour applied the strict Lindsay v. Lindsay [1972] N.Z.L.R. 184 (C.A.) approach, but that case was obviously one where the husband and his second family would not be brought below subsistence level by the orders made. He also applied Porter v. Porter [1969] 3 All E.R. 640 (C.A.), at p. 644, to the effect that where a marriage had lasted 23 years, it would be rare indeed, if ever, for a wife living alone like the wife in that case to get no maintenance at all.

35 [1980] 2 N.Z.L.R. 247, at p. 253.

36 At pp. 253-254.

37 Ibid.

38 At p. 255.

39 The order for costs made in the Supreme Court was vacated and there was no order as to costs on the appeal: see at p. 256. Cf. Gould v. Gould [1972] Recent Law 232.

40 [1975] 2 N.Z.L.R. 372.

41 These factors would be relevant to suspension as well as remission.

42 The husband had to undertake to the New Zealand Government to maintain her so that she would not become a charge on the State.

43 Following Gaspar v. Gaspar [1972] N.Z.L.R. 174; Spanjert v. Spanjert (1972) N.Z.L.R. 287 was referred to also.

44 [1972] N.Z.L.R. 222; McKay, (1972) 5 N.Z.U.L.R. 169.

45 For cases where the Court refused to cancel an order under the previous s. 32, see, e.g., Sears v. Sears (1977) 3 N.Z. Recent Law (N.S.) 170; Edwards v. Edwards [1978] N.Z. Recent Law 153; Armon v. Armon [1978] N.Z. Recent Law 60. See also the observation of White J. in Hester v. Hester (1977) 3 N.Z. Recent Law (N.S.) 291.

The Court was prepared to cancel an order under the previous s. 32 in Winter v. Winter [1978] N.Z. Recent Law 110 and De Grauw v. De Grauw [1978] N.Z. Recent Law 195.

The wide definition of the term "maintenance agreement" in s. 32(1) was adverted to in Hallam-Eames v. Hallam-Eames (1977) 3 N.Z. Recent Law 171.

Chapter Three

1 This is the section discussed in the previous Chapter dealing with the discharge, variation and suspension of maintenance orders.

2 Defined in s. 2 of the 1980 Act.

3 Viz. 1 October 1981, by virtue of s. 1(2) of the 1980 Act.

4 See n. 3, supra.

5 This is the section dealing with the discharge, variation and suspension of maintenance orders made by the Supreme Court and, later, the High Court on divorce, nullity, separation, etc.

6 This is the section dealing with the discharge, variation and suspension of maintenance orders and maintenance agreements in the Magistrate's Court and, later, in the District Courts.
As to registered maintenance agreements, s. 192(6) is quite explicit: it states as follows:-

> (6) This Act shall apply to every maintenance agreement registered under the Domestic Proceedings Act 1968 at the commencement of s. 83 of this Act; and every agreement so registered shall, on the commencement of s. 83 of this Act, have effect as if it were registered under that section.

Section 83 commences, like s. 99, on 1 October 1981.

Chapter Four

1 The Court's direction, however, may require otherwise.

2 Section 97 of the Shipping and Seamen Act 1952 prohibits the attachment of the wages of any seaman by any Court but this prohibition does not apply to attachment orders under the 1980 Act: see s. 105(6) thereof.

3 The power is thus discretionary: see Richards v. Richards [1935] N.Z.L.R. s. 88.

4 See s. 119. The protective provisions in the 1908 Act are sections 65 and 66.

5 The matter is at discretion, therefore: see Re Watson (1944) 3 M.C.D. 541.

6 It will be appreciated that a receiving order cannot be made unless there is also a charging order.

7 On any examination under s. 124, ss. 46 - 49A of the Summary Proceedings Act 1957 are to apply, so far as they are applicable and with the necessary modifications, as if the examination were the hearing of a charge: subs. (6).

8 [1973] 1 N.Z.L.R. 624.

9 At p. 627. It may also be noted that the appellant had not been unpunctual in paying the maintenance ordered.