

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

DP NO's 19/2016 & 25/2016

IN THE MATTER of the Sections 23 and 25 of the Matrimonial Property Act 1976 of New Zealand (as that Act applies in the Cook Islands by virtue of the Matrimonial Property Act 1991-92)

**AND
IN THE MATTER** of Applications for Custody, Access and Maintenance

BETWEEN **ROSEMARY JULIA WEBB** of Rarotonga,
Teacher Aide
Applicant

AND **PAUL WEBB** of Rarotonga, Businessman
Respondent

Hearing Date: 8 to 10 May 2017

Counsel: Messrs I Hikaka and B Marshall for Applicant
Mr S McAnally for Respondent

Judgment: 9 March 2018

**JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER
on Application for Variation of Maintenance (now Support) Orders**

[0917.dss]

Application

[1] In its judgment dated 26 October 2017 (“the Judgment”) this Court made orders at [8] and [15] for maintenance payable by Mr Webb:

- a) \$1,500 per month to Bethany (by consent); and
- b) \$3,800.63 per month for Mrs Webb, reduced to \$2,536.55 per month during term time on the basis that Mrs Webb earned income during term time of \$1,264.08 per month.

[2] By (amended) application dated 19 January 2018 Mr Webb applied to vary these orders by reducing support:

- a) for Bethany to \$1,000 per month; and
- b) for Mrs Webb to Nil.

[3] Mr Webb claims a substantial change in circumstances since 24 November 2017 when the Court of Appeal vested in Mrs Webb the leasehold interest in the property at Arorangi (“the Property”) having a value of approximately \$2.83M. It includes three rental properties comprising three separate tenancies, with the result, Mr Webb says:

- a) Mrs Webb’s ability to meet her own reasonable needs has substantially increased; and
- b) Mrs Webb’s ability to contribute to Bethany’s maintenance has substantially increased; and
- c) Mr Webb’s ability to pay maintenance has substantially diminished.

[4] Mr Webb initially relied on his affidavit dated 15 December 2017 and the affidavit of Des Eggleton dated 21 April 2017 which exhibited his valuation dated 3 April 2017 of the Property. Mr Eggleton valued the Property at \$2.83M comprising land \$560,000, buildings \$2,120,000 and improvements \$150,000. However, Mr Webb filed a further lengthy affidavit dated 13 February 2018 in reply to Mrs Webb’s affidavit sworn 31 January 2018.

Opposition

[5] Mrs Webb filed a Notice of Opposition and supporting affidavit dated 31 January 2017. She says that:

- a) No variation or discharge of the orders is justified;
- b) In the alternative, the variation should not be to fully discharge the orders.

[6] Mrs Webb says the additional income from the Property comes with additional expenses and in all the circumstances the existing orders for spousal and child support are reasonable and justified.

Family Protection and Support Act 2017 (the Act)

[7] The Act came into effect on 1 December 2017 and repealed the relevant provisions of the Cook Islands Act 1915 and Cook Islands Amendment Act 1994 under which the previous maintenance orders in this case were made.

[8] By definition under s 4, **Support Order** means an order under s 14 providing for domestic support by one former spouse or partner to the other, child support and childbearing expenses.

[9] Part 3 applies to domestic and child support. The purposes are stated in s 13:

13 Purposes of Part

The purposes of this Part are –

- (a) to provide for the payment of support by one spouse or partner to the other spouse or partner; and
- (b) to recognise equally the financial and non-financial contributions to a marriage or de facto relationship made by each spouse or partner; and
- (c) to recognise the economic advantages and disadvantages of a marriage or de facto relationship for each spouse or partner; and
- (d) to provide for the support of a child; and
- (e) to ensure that each parent contributed equitably to the financial support of their children; and
- (f) to ensure that a father makes an equitable contribution to the expenses of childbearing.

[10] Under s 14 the High Court may order support payments in periodic and lump sum payments or in kind (land and other assets).

[11] An application to vary or discharge an order may be made under s 15. The Court may vary or discharge the order if satisfied that this is justified because of a change in circumstances of a party to the order.

[12] Factors relevant to determining the amount of a domestic support order are set out s 18. Those applicable in this case include:

- (a) the age and state of health of each spouse or partner;
- (b) the income, earning capacity, property, and financial resources of each spouse or partner;
- (c) whether either spouse or partner has parental responsibility for a child or has any dependents;
- (d) the ability of each spouse or partner to support –
 - (i) herself or himself; and
 - (ii) any child for whom he or she has parental responsibility; and
 - (iii) any dependants.
- ...
- (f) the extent to which the payment of support to a spouse or partner would increase the earning capacity of that person by enabling the person to –
 - (i) undertake a course of education or training; or
 - (ii) establish a business; or
 - (iii) obtain an adequate income property.
- ...
- (j) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.

[13] Factors relevant to determining the amount of a child support order are set out in s 22. They are mandatory factors for consideration by the Court, focussed on the best interests of the child.

[14] S 150 enacts transitional provisions. By s 150(7) a maintenance order under the Cook Islands Amendment Act 1994 is taken to be a support order under the Act.

Changes in circumstances

[15] There is no dispute that the vesting of the Property in Mrs Webb is a change in circumstances within s 15. The issue is, to what extent that change justifies a discharge or variation of the existing maintenance order.

[16] Mrs Webb’s evidence is that her income as a teacher aide is now \$1014 per month, a reduction of approximately \$250 per month in income from this source when the maintenance orders were made. This evidence is not contested.

Mr Webb’s earning capacity and financial resources (s 18(1)(b) of the Act)

[17] In the Judgment at [7] I said:

“Mr Webb’s evidence at trial was that his monthly income is \$2000-3000 but he presented no evidence in support of this claim. Clearly Mr Webb’s earnings are not received by him on a regular basis but he has had access to substantial sums of money from time to time from his various business activities ...”

[18] Mr Webb’s affidavit of 13 February 2018 provides no further information as to his earning capacity and financial resources. He notes he pays child support and costs for his son Sebastian, but no details are provided. The ground stated in 4(c) of his application dated 19 January 2018 that his ability to pay maintenance has substantially diminished, is not supported by any evidence. The essence of Mr Webb’s claim that the support orders for Mrs Webb and Bethany should be discharged or varied, appears to be not his inability to meet the payments ordered, but Mrs Webb’s increased ability because of income she now derives from the Property.

Mrs Webb’s earning capacity and financial resources

[19] Mrs Webb’s evidence is that the gross rentals from the three tenancies on the Property are \$2813.33 per month. Copies of the tenancy agreements are exhibited to her affidavit of 31 January 2018. It is not relevant that Mr Webb thinks Mrs Webb may have been “hoodwinked” in regard to certain rentals. The tenancy agreements provide for the landlord to be responsible for power, water, some internet charges, and for one tenancy, local phone charges.

[20] Mrs Webb’s uncontested evidence at trial on the basis of which the existing orders were made, was that her monthly expenses were \$5,363. Exhibited to her affidavit dated 31 January 2018 is a schedule of expenses amounting to \$17,155.96 per month. The increase of approximately \$11,800 per month is substantially comprised of an estimate for legal fees to be incurred in defending Mr Webb’s appeal to the Privy Council (\$8,879.47 per month) and “maintenance to home” (\$2,573.10 per month).

[21] The schedule also includes \$365 for storage costs but storage costs were disallowed at [9] of the Judgment.

[22] Mrs Webb will have outgoings to meet in respect of the Property including land lease rental \$1,575 per annum, insurance stated at \$4,449.58 per annum, increased charges for power internet and phone on the basis of the tenancy agreements, and ongoing repairs and maintenance.

[23] The insurance premium is assessed on the basis of \$2,224.79 for six months cover. This should reduce when negotiated on an annual basis. I note the Arorangi Trust had cover expiring 20 December 2017 for a sum consistent with Mr Eggleton's valuation of the buildings at a considerably lower premium than quoted by Mrs Webb (see "K" to Mr Webb's affidavit dated 13 December 2017). I have reduced the allowance for the insurance premium to \$4,000, approximately a 10 percent reduction which should be available if the premium is fixed on an annual basis.

[24] Mrs Webb has also estimated a likely tax liability on the rental income at \$460.89 per month, but she provides no basis for this calculation. At the same time she says "it is likely the two apartments will need some fairly major maintenance work". Repairs and maintenance and other outgoings in respect of the rented apartments, including a percentage of land lease rental and service charges, would be deductible against the rentals for tax purposes, reducing or eliminating taxable income. I have therefore made no allowance for tax on rentals.

[25] Under "maintenance to home", Mrs Webb includes significant amounts, mainly based on estimates, for what may be categorised as deferred maintenance, including:

- a) Pool repair \$1,500;
- b) Kitchen repair \$14,000;
- c) Bathroom cabinets \$200;
- d) Exterior painting \$5,278.50;
- e) Toilet restore \$1,000.

[26] This expenditure amounting to approximately \$21,978 plus a further \$750 for more minor repairs, a total of \$22,728, is difficult to reconcile with the valuation of Mr Eggleton dated 3 April 2017, which was obtained by Mrs Webb and accepted without question by Mr Webb at trial. Mr Eggleton variously states:

"the interior appointments and kitchen equipment are of a high standard"

"the Property [has been] maintained by fastidious owners and continues to be one of the 'premium' beachfront residences in the Cook Islands."

“recent upgrades have seen LED lighting provided throughout the residence along with ‘toughened glass’ provided to all glass windows and doors.”

[27] Mr Eggleton notes in relation to deferred maintenance, only that “some deterioration to fittings, the result of the proximity of the main residence to the beach and lagoon, has affected the large sliding front doors, while general maintenance upkeep appears to be ongoing.” The roofing is older style Super 6 profile that continues to perform satisfactorily”.

[28] I consider it improbable that the significant deferred maintenance Mrs Webb identifies only eight months after Mr Eggleton inspected and valued the Property, is reasonable or justifiable. Nevertheless I accept that as the Property owner Mrs Webb will have general ongoing maintenance, as Mr Eggleton notes in his valuation. While Mr Webb refers to specific costs he considers are overstated by Mrs Webb, he does not provide any analysis of the costs of ongoing maintenance while the Arorangi Trust held the Property and he managed the income and expenditure. As best I can on the limited verifiable information available to me, I adopt a round figure of \$1,000 per month for repairs and maintenance in respect of the Property, for the purpose of the application before the Court.

[29] Mrs Webb has made an assumption as to ongoing legal fees in relation to Mr Webb’s appeal to the Privy Council of \$8,879.47 per month. The costs of legal services will depend on the way the appeal is conducted and the eventual outcome. Both parties will incur costs. The Privy Council will ultimately award costs if the appeal proceeds to hearing, as have this Court and the Court of Appeal in proceedings to date; Mr Webb has been ordered to pay costs exceeding \$94,000. It is not appropriate to factor into a support order, what would effectively be an advance to Mrs Webb for anticipated legal fees.

Analysis

[30] For the reasons stated above, from Mrs Webb’s listed monthly expenses in Schedule 1 to her affidavit, totalling \$17,155.96 I deduct the following:

Total monthly expenses as listed		17,155.96
Deductions –		
Tax	460.89	
Legal fees	8,879.47	
Storage	365.00	
Insurance premium (part)	449.58	
Maintenance to home (monthly) –		
\$22,728.00 ÷ 12	<u>1,894.00</u>	12,048.94
		<u>5,107.02</u>
Add –		
Allowance for repairs & maintenance	<u>1,000.00</u>	
Adjusted monthly expenses		6,107.02
Less		
Rental income	<u>2,813.33</u>	
Shortfall		3,293.69
Monthly shortfall \$3,293.69 to be met by –		
Support order for Bethany	1,500.00	
Support order for Mrs Webb –	1,793.69	
Reduced in term time by teacher aide salary		
\$1014 per month	779.69	

[31] I see no basis to vary the support order in respect of Bethany previously agreed at \$1500 per month. Nearing 11 years of age, her expenses are likely to increase.

[32] Rounded off, the support orders are:

- a) \$1,500 per month for Bethany;
- b) \$1,800 per month for Mrs Webb reduced to \$780 per month during term time on the basis that Mrs Webb earns income during term time of \$1014 per month.

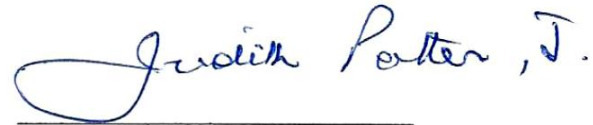
[33] The support order for Bethany remains unchanged and is continuous. The variation of the support order for Mrs Webb will take effect from 26 January 2018 which allows two months for the change of ownership ordered in the Court of Appeal judgment to be implemented and bedded down before the reduction in support for Mrs Webb which follows from this judgment, becomes effective.

Costs

[34] Both parties have had some success. Costs will lie as they fall.

Arrears of maintenance

[35] As recorded in [1] of my Minute dated 19 December 2017, I determine arrears of maintenance (now support) payments as at 14 December 2017 at \$27,231.85 in accordance with the schedule of that date filed by counsel for Mrs Webb. This has not been contested by Mr Webb. I believe this amount is to be reduced by \$2,300 for New Zealand welfare benefits received by Mrs Webb (refer [10] of the Judgment).



Judith Potter, J