

HOLLEY v HOLLEY (1965) ZR 120 (HC)

HIGH COURT

CHARLES J

August 18, 1965

Flynote and Headnote

[1] Civil procedure - estoppel, issue - applicable to alimony proceedings:

See [4].

[2] Civil procedure - res judicata - applicable to alimony proceedings:

See [4].

[3] Family law - Alimony and maintenance - change of circumstances leading to variation in amount:

Changes in the amount of alimony to be paid may result from changes in financial circumstances such as regular income, mental, physical and financial resources, capital position, and rate of current personal expenditure.

[4] Family law - Alimony and maintenance - res judicata and issue estoppel applicable:

The principles of *res judicata* and issue estoppel apply no less to proceedings for orders for alimony and proceedings to vary or discharge such orders than to other proceedings.

Case cited:

W v W (No. 3) [1962] 1 All ER 736; [1962] P. 124.

Wood, for the petitioner

A O R Mitchley, for the respondent

Judgment

Charles J: This is an appeal against a decision of the Deputy Registrar dismissing an application by the respondent to a matrimonial suit for variation of an order for payment of alimony at the rate of £67 10s 0d per month to the petitioner.

On the 19th November, 1960, the petitioner was granted a decree of judicial separation from the respondent. On the 2nd December, 1960, the Deputy Registrar made an order that the respondent pay alimony to the petitioner at the rate of £67 10s 0d per month. The order appears to have been based upon an uncontradicted affidavit by the petitioner in which it was stated that the respondent was paying £50 per month to her, that those payments were her only income, and that the respondent was a farmer with a half share in a farm which the petitioner believed yielded him at least £2,000 with additional benefits by way of foodstuffs and transport. On the 7th May, 1962, the petitioner obtained a decree *nisi* of dissolution of her marriage to the respondent, and the decree *nisi* was made absolute on the 25th August, 1962. On the 9th January, 1963, the respondent, who had been paying alimony only at the rate of £50 per month, applied for remission of arrears and a variation of the order. The Deputy Registrar dismissed the application, and an appeal from that decision was unsuccessful.

The application to which this appeal relates was lodged in January, 1965. The basis of the application was that the respondent's circumstances did not permit him to pay £67 10s 0d per month as alimony. In support of the application, the respondent filed two affidavits.... [*The learned judge summarised the affidavits, which covered the respondent's financial history since 1949, and in particular since 1960, including several yearly balance sheets of the respondent's partnership after 1960.*] The learned Deputy Registrar dismissed the application on the ground that the respondent's circumstances had not altered sufficiently to justify any modification of the order for alimony, the only alteration in circumstances being a further deteriorating of the capital position.

The grounds of appeal are, in substance, that the learned Deputy Registrar did not attach proper weight to the alteration and wrongly considered that the respondent was bound to apply capital moneys from the partnership in payment of alimony to the detriment of the business, and that no or insufficient weight was given to the reduction in the appellant's resources by his remarriage and the birth of his child.

In determining this appeal, it is important to appreciate the learned Deputy Registrar's position in relation to the application before him. [1] [2] [3] The principles of *res judicata* and issue estoppel apply no less to proceedings for orders for alimony and

proceedings to vary or discharge such orders than to other proceedings. Hence, the learned Deputy Registrar was not concerned with such questions as whether the original order or the dismissal of the previous application to vary were made on sufficient or insufficient information as to the respondent's then financial position and his capacity to pay, provided that the respondent had the opportunity, as he did have, correctly to place all relevant information before the court. Neither was the Deputy Registrar concerned with any questions pertaining to the correctness of the original order and the dismissal of the previous application to vary. He was bound to accept both the original order and dismissal as having been a correct determination of the respondent's capacity to pay at the time they were made, and [4] his only concern was whether such a change in the respondent's circumstances had occurred since the previous application as to have affected his capacity to pay and to require a variation or discharge of the order with or without remission; of what changes, if any, had occurred in such factors as the respondent's regular income, his mental, physical and financial resources, the money at his disposal, however it may be used, his capital position and the rate of his current personal expenditure. (See *W. v W.* (No. 3) [1962] 1 All ER 736 at 738 - 9.)

No evidence was adducted on this application to show when the respondent re-married and when the child of the second marriage was born. The ground of appeal suggesting that those events were changes in circumstances since the previous application which were not taken into account by the learned Deputy Registrar is, therefore, untenable. Apart from that, the record of the previous application shows that those two events had occurred before that application and were taken into account in respect of it.

The record of the previous application also shows that the court had before it some information which was indicative of the continued deterioration of the respondent's capital position from 1960 - 1963. It would appear that information was not as complete as was that before the Deputy Registrar on this application, and that, such it was, its reliability was affected by the respondent having tried to show that his financial position was bad by a misleading affidavit. Be that as it may, it must be assumed as already indicated, that the court disposed of the previous application after fully taking into account the respondent's continually deteriorating capital from 1960 - 1963.

The result is that the learned Deputy Registrar was faced with the fact that the court had not been satisfied on the previous application that the resources available to the respondent were insufficient to enable him to satisfy the alimony order, notwithstanding his progressively deteriorating capital position. The Deputy Registrar rightly decided that the only question before him was whether such an insufficiency had since been created by the continuation of the deterioration for one more year. That question was answered in the negative.

Having regard to the limited scope afforded to answering that question by reason of the principle of *res judicata* and issue estoppel even though the last year's deterioration had to be considered as a continuation of a process which had been going on over the years, I am not satisfied that the answer was wrong. On the contrary, I do not think that it could have been otherwise. The appeal, therefore, must be dismissed.

Appeal dismissed