

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2022-004-000359
[2022] NZFC 10437**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[MS THOMAS] Applicant
AND	[MR JONES] Respondent

Hearing: 11 October 2022

Appearances: E Telle for the Applicant
S Wilson for the Respondent

Judgment: 11 October 2022

ORAL JUDGMENT OF JUDGE S D OTENE

[1] [Ms Thomas] applies pursuant to s 82 of the Family Proceedings Act 1980 for interim maintenance from her former de facto partner [Mr Jones].¹ Mr [Jones] opposes the application.

¹ An application for a maintenance order was not specifically pleaded. A potential jurisdiction issue arises given that the ability to make an interim maintenance order is predicated upon an application for a maintenance order having been made. The matter was not taken up for [Ms Thomas] as an issue for the hearing. I therefore infer an application for a substantive order by noting that the maximum period for which interim maintenance can be ordered is six months and the particularisation in the

The Legal Framework

[2] The law as to interim spousal maintenance is well settled with relevant principles drawn from the Court of Appeal decision *Ropiha v Ropiha* as follows.²

- (a) It is intended to protect an applicant who has inadequate means until a substantive maintenance order can be made.
- (b) The discretion is unfettered as to the making of the order and as to the amount. The court must do justice to the particular circumstances of the case.
- (c) Regard will be paid to the reasonable needs of an applicant during the period of the order and the means available to an applicant.
- (d) The court will also consider the living standards of the parties prior to the separation.

[3] The key matters for consideration are:

- (a) The reasonable needs of the applicant over the period for which the order would subsist, noting that an interim order may not continue beyond six months;
- (b) The means likely to be available to the applicant to meet those needs;
- (c) The respondent's reasonable means to meet any shortfall and his or her reasonable needs;
- (d) The ability of the respondent to be able to meet the reasonable needs of the applicant;

application that in addition to and order to an interim maintenance order Ms [Thomas] seeks that spousal maintenance continue until one year after she completes her studies.

² *Ropiha v Ropiha* [1979] 2 NZLR 245.

- (e) Whether the court ought to exercise its discretion to make an interim order and, if so, for how long and on what conditions.

[4] Factors relevant to considerations of final maintenance under ss 62 to 66 of the Act do not have to be considered under s 82 but may provide a useful guideline of factors to be considered. Those factors include:

- (a) Causal nexus - that is that the inability of a spouse to meet his or her reasonable needs is due to any of the ability to be self-supporting, responsibilities for the care of dependent children of the relationship, the standard of living during the relationship and the need for education or training;³
- (b) An obligation upon each spouse to assume responsibility within a period of time which is reasonable in all the circumstances to meet his or her own needs;⁴
- (c) Despite the preceding factor, the obligation to maintain a spouse to the level of his or her reasonable needs having regard to the ages of the spouses, the relationship duration and the ability to become self-supporting.⁵

[5] Also, as Justice Kos in *Hodson v Hodson*⁶ observed:

[27] In assessing the applicant's "reasonable needs", Hammond J (in the Court of Appeal in *M v B*) has said that such needs are not to be diminished to the mere necessities of life. They may include a "respectable period of grace for re-entry (and retraining) in the work force, having regard to that person's life situation." Further, a Court "should not be niggardly in its approach to the problems faced by a wife (or a husband)."

[28] Close reference should be made to the lifestyles the parties enjoyed during their marriage. As Judge Callinicos noted, the reasonable needs of the applicant are not to be so diminished as to create a "sudden and traumatic end to that lifestyle, regardless of what the respondent might wish." It also seems logical, in assessing what is reasonable, to consider and compare the continuing lifestyle of the

³ Section 64(2).

⁴ Section 64A(1).

⁵ Section 64A(2) and (3).

⁶ *Hodson v Hodson* [2010] NZFLR 252.

respondent. If he is living in the comparative luxury, it hardly lies in his mouth to say that the applicant should cut her cloth more closely than he is prepared to do.

[6] Finally, in terms of procedure it is the nature of interim maintenance hearings that they are frequently, as here, dealt with on the basis of submissions. In consequence the court is hampered by the inability to fully test the evidence. I observe that in this proceeding there are various factual matters of significant dispute, the resolution of which is beyond this determination given that many will likely turn upon credibility findings if indeed such findings can be made.

Factual background

[7] The parties met in October 2013 at a social event. They diverge on the length of the de facto relationship by virtue of dispute about the commencement date. They agree that the relationship ended on 16 September 2019. Mr [Jones] contends a four year one month duration for the relationship having commenced in July 2015. Ms [Thomas] identifies July 2015 as the date about when she relinquished the home in which he and her son [Tyler] (born 2003) had lived and from which they moved the last of their items to Mr [Jones]'s home. However, she contends that the de facto relationship commenced in early 2014 from which time she and [Tyler] were staying a minimum of five nights each week at Mr [Jones]'s home in [location A]. Hence her position is that the relationship duration was approximately five and a half to six years.

[8] The home occupied by Mr [Jones] is the dwelling on the farm property owned by trust settled by Mr [Jones]'s parents of which he is a discretionary beneficiary and, since July 2018, a trustee. Mr [Jones] farms the property in partnership with family members through a corporate entity of which he is a director and employee. These ownership and business arrangements pre-dated the commencement of the parties' relationship regardless of which commencement date might ultimately be adopted.

[9] Before the parties met Ms [Thomas] lived with [Tyler] in a community collective on Coromandel. She worked part-time for the collective as a stock-hand. That work was minimally remunerated. Ms [Thomas] otherwise supported herself and [Tyler] by contracting her pest control services to the Department of Conservation

("DoC"), that being an endeavour in which she had engaged for a number of years. Her income was also supplemented by social security payments.

[10] The broad tenor of the evidence for Ms [Thomas] is that she had all but completed the process to obtain a controlled substance licence which would have authorised her to use cyanide in her pest control work and hence to secure more lucrative contracts. Her position is that such career development was not a mere possibility, rather it was a likelihood given her good standing with DoC. However, upon meeting Mr [Jones] Ms [Thomas] said she did not pursue that opportunity because it did not provide the necessary flexibility to accommodate the developing relationship and the responsibilities she assumed within the context of the relationship. Instead, in early October 2014 because Ms [Thomas] was spending increasing time with Mr [Jones] in [location A] she took a part-time job at a local café.

[11] Ms [Thomas] says that the relationship was organised with she undertaking responsibility for all the domestic tasks for the home and family. That responsibility extended to assistance with farm duties as well as primary responsibility for [Tyler]'s care, the care of Mr [Jones]'s daughter [Dana] (born [month deleted] 2007) and for Mr [Jones]'s mother who suffered dementia when she stayed for them with a month in 2016. Additionally that she organised Ms [Jones]'s carer schedule and assisted Mr [Jones] with legal aspects of Family Court parenting proceedings regarding [Dana] between Mr [Jones] and [Dana]'s mother. [Dana] spent weekends with Mr [Jones] and Ms [Thomas] and then lived with them full-time for two years from November 2016 to November 2018.

[12] Mr [Jones] says Ms [Thomas]' employment with DoC had ended before the commencement of their relationship and that domestic tasks were undertaken in shared fashion, though acknowledges that Ms [Thomas] did provide particular assistance organising his mother's care schedule and with the Family Court proceedings for [Dana].

[13] The parties' respective domestic responsibilities aside, their lifestyle was almost exclusively financially maintained by Mr [Jones] if not directly by his means then by the resource that was available via the farming enterprise. The parties enjoyed

the adequate comfort of a four-bedroom home to which renovations were made during the course of the relationship, the use of vehicles, two overseas trips and a holiday within New Zealand and the ability to access fertility and counselling services.

[14] During the course of the relationship Mr [Jones] purchased a caravan from which Ms [Thomas] operated a mobile coffee business. Trade was for the most part over two summer seasons. The financial returns were not significant. In April 2019 Ms [Thomas] took a job at a tourism venture.

[15] The relationship began to falter in 2016 and became increasingly unsatisfactory to the point of the September 2019 separation. Ms [Thomas] attributes the relationship difficulties and eventual breakdown to Mr [Jones]'s conflicted state consequent upon an affair he had embarked upon with [details deleted]. Mr [Jones] attributes the difficulties and ultimate breakdown to Ms [Thomas]' methamphetamine use which became increasingly problematic over time. He further attributes that drug use to Ms [Thomas]' demotivation to employment and inability to sustain any endeavour which she undertook.

[16] Ms [Thomas] strenuously denies illicit drug use. She says rumours not only of her drug use but of her dealing drugs were started by Mr [Jones] and began circulating within the community in May 2019. She therefore undertook a drug urine test at that time which was negative for drug use. Ms [Thomas] posits that the rumours were started by Mr [Jones] to excuse his affair and that they are continued by him to undermine her case.

[17] Upon the relationship ending Mr [Jones] moved from the home, Ms [Thomas] remained in residence. She was given notice on 31 October 2019 on behalf of the trustee owners to vacate and did so in December 2019. She retained a vehicle which although at the time was warranted and registered has fallen into disrepair.

[18] At about that time Ms [Thomas]' employment was terminated for unsatisfactory performance. She explains her poor performance as a consequence of stress arising from the separation. She was medically certified as incapacitated for

work from December 2019 to February 2020 by an acute distress disorder and she was placed in receipt of a social security benefit.

[19] Upon vacating the home Ms [Thomas] and [Tyler] lived in the caravan formerly used for the mobile coffee business. In mid-2020 they took boarding lodgings with Ms [Thomas]' former employer at the tourism venture with whom she remained on good terms. Ms [Thomas] moved to Auckland in August 2020 with [Tyler] and in 2021 commenced a tertiary art course.

[20] Ms [Thomas] filed the application for interim maintenance in April 2022.

Ms [Thomas]' position

[21] Ms [Thomas] says that her financial circumstances admit only a subsistence level of existence, significantly below that enjoyed during the relationship with Mr [Jones]. By way of expansion - she rents a two-bedroom home which she says is cold and mouldy and which she cannot afford to heat but for short periods; has basic furniture and appliances; is without an operational vehicle; and requires funds for dental treatment, study fees and associated equipment and for clothing, food, vehicle and contents insurance. Furthermore, the acting manager of a budget service which Ms [Thomas] has consulted deposes that because [Tyler] has commenced employment and is contributing to rent and food Ms [Thomas]' benefit and allowances may be reduced by up to \$300 per week.

Mr [Jones]'s position

[22] Mr [Jones] accepts that because of Ms [Thomas]' financial dependence upon him during the relationship he had liability to maintain her for a reasonable period after the separation. He suggests that liability is met by payment of 12 months past spousal maintenance based on annual expenses for Ms [Thomas] of \$28,000.

[23] Mr [Jones] resists the claim for interim maintenance on the grounds as I distil that:

- (a) There is an absence of causal nexus in that Ms [Thomas]' inability to meet her reasonable needs is not due to any of the qualifying circumstances.
- (b) The lapse of time since the relationship ended has exceeded the period in which it would have been reasonable for Ms [Thomas] to assume responsibility for meeting her own needs.
- (c) In the alternative, if the discretion to order interim maintenance is exercised the quantum of an award should reflect the parties' modest living standards during the relationship, the short duration of the relationship, Mr [Jones]'s more constrained estimate of Ms [Thomas]' monthly expenses and Mr [Jones]'s modest shareholder salary of \$28,000.

Discussion

[24] Whether a qualifying circumstance exists and whether there has been a lapse of time such that it is now reasonable that Ms [Thomas] assume responsibility for meeting her own needs are issues somewhat intertwined. I note first of all that Mr [Jones] has conceded a liability for maintenance albeit past maintenance. It is a proper concession at the least because he and Ms [Thomas] enjoyed a standard of living which even if not extravagant was appreciably superior to that which Ms [Thomas] was able to accommodate upon her income after separation. The crux is whether that circumstance has passed. Mr [Jones] says it has and that the reason for Ms [Thomas]' inability to now meet her reasonable needs is because she has elected to study rather than obtain employment.

[25] Ms [Thomas]' counterpoint is that she has reasonably embarked upon re-qualification because of circumstances brought about by Mr [Jones] which made her continued residence in the Coromandel region and employment in the sphere in which she is most experienced untenable. First because the unfounded rumours about her drug use leave her embarrassed to re-establish herself independently in the community. And secondly, because the standing of Mr [Jones] and his family in the

community has influenced potential employers including DoC, the employer to whom her skills are most relevant, against her.

[26] The factual matters that will inform findings as to the different narratives the parties offer - those factual matters being the nature of Ms [Thomas]' pre-relationship career, her alleged drug use, the circulation of those allegations about her within the community and Mr [Jones]'s exercise of influence within the community - are highly contested. Because that evidence is not tested within this hearing I am unable to make findings on those matters as to conclude whether or which of the different contentions are made out. But I am not moved at this point by the evidence to dismiss the contentions.

[27] I make the following further observations.

[28] First, Mr [Jones]'s evidence dismisses Ms [Thomas]' position that she had an established career in the pest control industry at the commencement of the relationship and was on the cusp of securing lucrative work which opportunity she passed upon to instead undertake domestic and farming tasks within the relationship. Taking that evidence at face value it was not likely then that Ms [Thomas] would be in a position to meet her reasonable needs as they are assessed (including in reference to the lifestyle the parties enjoyed during the relationship) even if she had maintained her employment at the tourist venture. It would likely have required steady employment sufficiently remunerated to establish over time an independent residence appropriately appointed and with ability to meet basic day-to-day expenditure. Even then, Mr [Jones]'s position as to Ms [Thomas]' skillset and ability lends to the case of her upskilling to better meet her reasonable needs. In making this observation I do not give the parties' living standards determinative weight but the detrimental change in Ms [Thomas]' circumstances has been significant.

[29] Secondly, whilst Mr [Jones] can point to Ms [Thomas]' rent-free residence in the farm dwelling for three months after separation and the provision of a vehicle as assistance for her to re-establish herself, that of itself was not sufficient given that Mr [Jones] accepts maintenance liability over and above that resource. The absence of adequate maintenance through the period to now and Ms [Thomas]' rather basic

lifestyle unlikely leant to her prioritising organisation of her legal affairs and provides some context for the delay in this application.

[30] Finally, I pause in respect of Ms [Thomas]' election to embark upon re-qualification rather than engaging in employment. She is now in a metropolitan centre presumably with more varied employment opportunity. She has not explained whether she has considered and pursued those opportunities. I do not within the context of ordering matters for only an interim period conclude that because of this [absence of explanation] Ms [Thomas] should have assumed responsibility for her own needs via employment. It may however be a factor that weighs more heavily and soon in the decision about final maintenance.

[31] Bearing in mind the need to do justice in the particular circumstances of the case I do not conclude that the point has yet been reached that it is reasonable for Ms [Thomas] to meet her own needs.

[32] Determination of the parties' respective needs and means is to a degree inhibited by the nature and quality of the evidence. Commensurate with that limitation and the nature of this hearing this assessment is necessarily broad brush rather than fine grained.

[33] Ms [Thomas] seeks a maintenance order in the sum of \$2,200 per week for living expenses and \$8,500 per month for legal expenses. She deposes that in the 52 weeks to April 2022 she has received income of \$31,000 from social security benefits and tax credits and incurred expenses of \$35,500, hence a deficit of \$4,500 per annum.

[34] Mr [Jones] crafts an expense budget for Ms [Thomas] of \$550 per week. Mr [Jones]'s budget tends to a niggardly approach against which this court is cautioned. By way of example he allows \$200 per week for rental. That is an unreasonable allowance for rental in Auckland. I cannot take Mr [Jones]'s point that it was Ms [Thomas]' choice to move from the Coromandel and incur higher living costs any further until the evidence as to justification (or not) for moving can be tested.

[35] I am satisfied that most of the expenses claimed by Ms [Thomas] are unremarkable in nature and quantum subject to the following observations.

- (a) Her current rental is approximately \$500 for substandard accommodation. I consider that a reasonable allowance to improve her accommodation is \$750 rather than the \$900 claimed.
- (b) There is nothing suggestive of a necessity for discretionary spending upon clothing of \$150 per week. I allow \$75 per week as reasonable.
- (c) I balance Ms [Thomas]' claim for university fees of \$135 per week and ancillary equipment \$50 per week against the relatively short duration of the relationship in contrast with circumstances whereby a spouse is kept out of the workforce for many years by the way functions are divided within the relationship. Furthermore, Ms [Thomas] has not explained and hence put cogently reasons why she has embarked upon re-qualification rather than sought employment in a metropolitan workforce. I am therefore not inclined to make allowances for university fees and course expenses.
- (d) I also balance Ms [Thomas]' claim for \$5,000 for dental costs against the relatively limited duration of the relationship. That type of cost indicates on the face of it attention to some longstanding matters. I allow \$50 per week as reasonable medical and dental expenses.

[36] I find the weekly expense of Ms [Thomas]' reasonable needs is \$1,645.

[37] Had Ms [Thomas] still been in receipt of jobseeker support the Act would have mandated its disregard in assessment of Mr [Jones]'s maintenance liability. She is now in receipt of a student allowance which does not fall for mandatory disregard. I consider however that the allowance is in substance a similar type of income and do disregard it. [Tyler] contributes to board and household groceries and the like. I allow \$300 per week for that and fix that figure as Ms [Thomas]' current weekly means. The

deficit between the cost of her reasonable needs and her current means is therefore \$1,345.

[38] In respect of legal expenses I take the point for Mr [Jones] that these are not expenses to Ms [Thomas] given that she is legally aided. The response for Ms [Thomas] is that receipt of interim maintenance may disqualify her eligibility for legal aid. That is speculative and not sufficiently persuasive in any legal principle offered to me or in fact as to be an expense of which I can properly take account. It may be that if Ms [Thomas]' legal aid grant is withdrawn the change in circumstances might found an application for variation but that is a matter for the future.

[39] Mr [Jones] deposes that in the 52 weeks to May 2022 he received income of \$37,400 and incurred expenses of \$56,300, hence a deficit of \$18,900 per annum. He deposes to assets of \$1,774,000 including money in bank accounts of \$72,600. Mr [Jones]'s income and expenses do not appear entirely straightforward and it is somewhat difficult to reconcile his annual deficit with, at the least, the amount of funds in a bank account. I note also he incurs expenses for rates which presumably should be for the trust or company. He incurs no legal expenses so presumably his litigation costs are funded by other means available to him. Bearing in mind that an interim maintenance order would subsist for no longer than six months I am satisfied that Mr [Jones] has funds available to meet Ms [Thomas]' reasonable needs.

Decision

[40] I determine that the discretion to award interim maintenance should be exercised and I order Mr [Jones] to pay interim spousal maintenance to Ms [Thomas] in the sum of \$1,345 per week for the six-month period from 17 October 2022.

[41] In respect of costs my preliminary observation is that there is no reason why they should not follow the result. If costs cannot be resolved counsel for Ms [Thomas] shall file submissions within 14 days and counsel for Mr [Jones] shall file a reply

within a further seven days thereafter. Those submissions shall exceed no more than four pages. I shall then determine the issue on the papers in my chambers.

Judge SD Otene

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 13/10/2022