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 MAKAURAU

FAM-2022-004-000359
[2023] NZFC 3926

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

Hearing:	20 April 2023
Appearances:	E Telle for the Applicant V Crawshaw KC and S M Wilson for the Respondent
Judgment:	20 April 2023

ORAL JUDGMENT OF JUDGE K MUIR

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[1] In the context of a relatively short relationship with no children, should Mr [Jones] be responsible for Ms [Thomas]' maintenance until she has finished that course or until the final maintenance hearing is concluded?[1]

[1] This statement of the key issue originally appeared at paragraph [31] of this oral judgment.

[2] [Ms Thomas] once again applies for an order for interim maintenance against [Mr Jones]. On 11 October 2022 her Honour Judge Otene ordered interim maintenance of $1,345 per week to be paid for six months from 17 October 2022, and effectively that order would have expired on 17 April 2023 so it has just expired.

[3] The issue that I must consider is whether I should make a further order for interim maintenance and if so for how long and for how much.

[4] The parties agree that their relationship ended on 16 September 2019. The parties do not agree when their relationship started. It either started early in 2014 or in July 2015 when Ms [Thomas] and her son moved in with Mr [Jones] in a farmhouse on a farm on the Coromandel Peninsula. So, we have a relationship either of around five and a half years or just over four years. An application for interim spousal maintenance was filed in this Court in April 2022, some two and a half years after separation.

[5] When considering whether to make an order for interim spousal maintenance, I have a broad discretion. I can be guided by, but I am not bound by the matters contained in the Family Proceedings Act 1980 at ss 64 and 64A. The key principles were set out in the Court of Appeal decision of *Ropiha v Ropiha*:

> (a) Interim spousal maintenance is intended to protect an applicant who has inadequate means until a substantive maintenance order can be made.
>
> (b) The discretion is unfettered as 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.[2]

[6] I agree with her Honour Judge Otene that key matters for consideration are:

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

(a) The reasonable needs of the applicant over the period for which the order would subsist and an interim order may not continue beyond six months.

(b) The means likely available to the applicant to meet those needs.

(c) The respondent's reasonable means to meet any shortfall and his own reasonable needs.

(d) The ability of the respondent to be able to meet the reasonable needs of the applicant.

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

[7] As her Honour said the factors that are relevant to considerations of final maintenance under s 62 to s 66 of the Act do not have to be considered under s 82, but they made provide useful guidance. The key factors include:

(a) Whether there is a causal nexus, in other words is the ability of the claiming spouse to meet their needs caused by any of the matters referred to in s 64A(3)(c) of the Act. Those matters are the ability of the claiming spouse to become self-supporting having regard to:

(i) The effects of the division of functions within the relationship while they were living together.

(ii) The likely earning capacity of each partner.

(iii) The responsibilities of each partner for the ongoing daily care of any minor or dependent children.

(iv) Any other relevant circumstance.

[8] There are no relevant minor or dependent children to be considered here.

[9] I note that under s 64A there is an obligation on each spouse to assume responsibility within a period of time which is reasonable in all the circumstances to meet their own needs and I also note that the obligation to maintain a spouse to the level of their reasonable needs must have regard to the ages of the spouses, the relationship duration and their ability to become self-supporting.

[10] Her Honour Judge Otene relevantly referred to the decision of Judge Kós in *Hodson v Hodson* where at paragraphs 27 and 28, he said:

> 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)"
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> 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 respondent. If he is living in 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.[3]

[11] I also agree with Judge Otene that in terms of procedure it is in the nature of interim maintenance hearings that are frequently dealt with on the basis of submissions. The Court cannot fully test the evidence – and I observe as Judge Otene did that in this proceeding there are a number of factual matters of significant dispute which I cannot resolve and which may not even be capable of resolution in the substantive maintenance hearing, they may not all be relevant to the substantive maintenance hearing.

[12] The factual background is set out in Judge Otene's decision, and I will not repeat what is recorded at paragraphs 7 to 9 of her decision. The broad tenor of Ms [Thomas]' evidence is that she had essentially had all but established a career in pest destruction through the Department of Conservation in the area of Coromandel in which she and Mr [Jones] were living. She decided to abandon that established career to enter into this relationship with Mr [Jones]. She did that because she was

[3] *Hodson v Hodson* HC Napier CIV-2011-441-000618, 6 December 2011.

focussed on assisting with the care of his child and on contributions to the farm life and domestic life. I should record that that is her evidence, and it is not evidence that Mr [Jones] accepted.

[13] The domestic tasks that she undertook, she says, included not only caring for his daughter but also at times caring for his mother and organising a carer schedule for his mother who was suffering from dementia. She also assisted with tasks around the farm from time to time. Mr [Jones] on the other hand says that domestic roles were undertaken in a shared fashion although he does acknowledge the assistance that Ms [Thomas] gave to his mother.

[14] It is common ground that their lifestyle was maintained by Mr [Jones], he was the source of finances while they were together, albeit the finances were comparatively modest but they lived in adequate comfort but not in glamour. This is a dry stock operation on land that has been owned generationally in Mr [Jones]'s family. I infer that the operation is only economical because he and his brother share different parts of the operation, he operates the breeding side of the dry stock operation and his brother the fattening side.

[15] I note that the relationship proceeded with them living in adequate accommodation on the farm. During the four or five years they were together, they were able to enjoy two overseas trips. They were also able to enjoy or spend money on costs such as fertility treatment and investigations and counselling services.

[16] During the relationship Mr [Jones] supported Ms [Thomas] into a mobile coffee business which was pursued for a year or two. Towards the end of the relationship Ms [Thomas] was working at a tourist site, she had skills in hospitality and is a barista.

[17] There are real differences between the parties about the cause of the end of the relationship. Mr [Jones] says that Ms [Thomas] became addicted to methamphetamine. He claims that they used it together initially and that her use spiralled out of control. He says that that had a real impact on her employability and

her reputation in the neighbourhood. She became demotivated and unfocussed on work which is why she lost her jobs.

[18] Ms [Thomas] on the other hand says the end of the relationship came about because of Mr [Jones]'s infidelity. She says that he has viciously spread untrue rumours of her drug use, that he has significant influence in the district in which she lived and that as a result she effectively had to abandon the area as her home and abandon her attempts to continue to find work in the area.

[19] She says that she was suffering stress and anxiety brought on by the circumstances of that separation and that that kept her out of the workforce for a considerable period to time. She moved to Auckland in around August 2020 and her son moved to live with her. She commenced studying an art course with a design focus in 2021. Her application for interim maintenance was filed in April 2022.

[20] I accept that she was living at something approaching a subsistence level before Judge Otene made her ruling awarding her additional maintenance. Judge Otene's decision awarded her the sum of $1,345 per week for a period of six months. I note that Mr [Jones] had accepted that she had a need for maintenance following the hearing. He accepted that she would have had a need for maintenance for at least 12 months post separation. He offered $28,000 as compensation which I note would have amounted to only $538 per week. That might have been a contribution to her living expenses had she remained living in the Coromandel area in cheap accommodation. Unfortunately, it would have been nowhere near enough for her to maintain any kind of comfortable lifestyle in Auckland.

[21] Judge Otene therefore found in her discretion that maintenance should be awarded for the maximum period available in an application of this kind for six months. She made the following relevant observations. At paragraph 30 she said:

> Finally I pause in respect of Ms [Thomas]' election to embark on requalification 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.

[22] At paragraph 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.

[23] In paragraph 39 she noted at the end of that paragraph:

> 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.

[24] I observe from that and from the balance of the decision that clearly Judge Otene was motivated in her decision toward maintenance in that sum by the fact that the period for which she was awarding maintenance would not exceed six months.

[25] What is this case all about then? Well in essence Ms [Thomas] says that she has reasonably undertaken post-separation retraining and continues to undertake that training. She says it is necessary because Mr [Jones] has defamed her in the Coromandel community. There is no prospect of her returning to her pest control work with DOC. The influence of Mr [Jones] was a pervasive factor in that region. That meant that she had to relocate to Auckland and having relocated to Auckland she had to find a new source of income and it is reasonable that she would retrain.

[26] I should note at this point that Mr [Jones] is not at all critical in today's application of Ms [Thomas]' expenses or budget. On the other hand, Ms [Thomas] disputes Mr [Jones]'s evidence that he cannot afford to pay.

[27] I have no reason to doubt Mr [Jones]'s evidence that his income is modest, I am not persuaded by Mr Telle's suggestions that Mr [Jones] may have been deliberately diminishing his income or hiding income. I accept that he is owed approximately $1,338,000 by his family trust. I accept what Ms Crawshaw KC tells me which is that that is a debt that is owed by the family trust being the cost of the acquisition of the land from him by it and it is not immediately recoverable, it is not

liquid funds to recover all or a good part of that fund. It would require the land to either be encumbered or sold I infer.

[28] Similarly, I note that the shares that he has in the family farming company which have been valued at $137,740 are unlikely to be a liquid asset, it is relatively unlikely that there is anyone outside of the family who could be a purchaser for those shares. Mr [Jones] has deposed that he has earned income of only $37,000 and yet had expenses of over $56,000. Mr Telle doubts that evidence but it seems consistent with the nature of the farming enterprise that is being undertaken here.

[29] The real issue is that Ms [Thomas] says she needs six more months' worth of interim maintenance at least. She says that she cannot work and study effectively and that her study is needed so that she can rebuild her income.

[30] As yet there is no real evidence before the Court that the course she has chosen is vocationally appropriate. By that I mean there is no real evidence that her income is likely to be significantly enhanced when she has completed that course compared with the income that she could earn in any established courses of income that she has pursued in the past such as in hospitality.

[31] Hence the issue summarised in the opening paragraph; in the context of a relatively short relationship with no children, should Mr [Jones] be responsible for Ms [Thomas] maintenance until she has finished that course or until the final maintenance hearing is concluded?

[32] The question of whether he should be responsible until she has finished the course would properly be a question to be resolved at the substantive hearing. Unfortunately, we are still a long way off holding that substantive hearing. Mr Telle says that two to three days will be needed for that long cause fixture. He wants to cross-examine "all of the witnesses," and this matter is clearly not ready to be referred to a fixture yet. For example, Mr Telle is still waiting for ESR results from syringes that have been sent for analysis.

[33] The relevance of that evidence is to presumably establish whether those syringes were actually used by Ms [Thomas]. If the tests are positive then presumably that might indicate that she had used them. He says that goes to credibility and essentially goes to the issue of whether the allegations that Mr [Jones] was allegedly making that she was a drug user were true or untrue.

[34] When this matter was case managed by her Honour Judge Fleming in November last year, her Honour made a comment on the application and the hearing of the final maintenance order. Ms Crawshaw was asking that the matter be immediately transferred to long cause fixtures for the allocation of a hearing with an estimate of two days. Her Honour noted that there were many witnesses who had filed affidavits and from what Mr Telle had indicated, all would be cross-examined - that is congruent with what he has indicated today. Her Honour was not prepared to transfer the matter yet to a long cause hearing, but she agreed that the matter needed obviously to be tracking towards a hearing*: "To avoid a position where there is some submission made that the interim maintenance orders need to be rolled over, because the final maintenance hearing has not allocated",* and she then made directions to facilitate that.

[35] We are now exactly in the position where it is being submitted that the interim maintenance order needs to be *"rolled over"* because the final maintenance hearing has not yet been allocated or heard.

[36] There is no doubt that I have the ability to order further interim maintenance and if any authority is needed for that there is none better than the case of *Cooper v Pinney* a decision of Mander J.[4] I note from paragraph 64 and 65 as set out below that:

> Applying ordinary principles of statutory interpretation to the words of s 82, I have concluded the provision does not restrict the Family Court to a single exercise of its discretion to order interim maintenance. In the absence of any express prohibition on the number of times the Court may exercise its power under the section there appears little ambiguity or doubt that its jurisdiction is not confined to the making of a single order. When assessed against the purpose of the enactment and the objective of pt 6 of the Act, it is not apparent

[4] *Cooper v Pinney* [2016] NZHC 1633.

> any different meaning was intended to be ascribed to the provision. To the contrary, it supports such a jurisdiction.
>
> In the absence of clear and express language, a Court should be cautious before interpreting a provision as restricting its discretionary jurisdiction. The inferences to be drawn from the legislative history of the provision may reflect a concern that interim orders not be allowed to circumvent the statutory requirements for an award of maintenance and become substantive orders by default. However, such considerations can be taken into account in the exercise of the Court's discretion when assessing a further discrete application. Such concerns are insufficient to exclude the Court's jurisdiction.

[37] I note the concern that the Judge expressed at paragraph 64 that interim orders ought not to be allowed to circumvent the statutory requirements for an award of maintenance and become substantive orders by default. Those comments are reflected somewhat in the comments that he made at paragraph 55 where he said:

> Limiting an interim order to six months and ensuring the order is not simply rolled over by allowing an existing order to be extended were steps likely taken to ensure that interim orders did not become de facto substantive orders. The mandatory principles to be applied to substantive applications should not be allowed to be avoided in that way. However, such concerns are not sufficient to limit the Court's jurisdiction from hearing a further application.

[38] At paragraph 56 he said:

> It may be a fair inference that Parliament considered it important that such orders not be allowed by default to become enduring substantive orders but neither the specific terms of s 82 nor the wider scheme of the Act preclude the Court from exercising its discretion should a further application be made. Such an application would need to be examined afresh and on its merits, that may include a re-examination of the relevant circumstances of the parties and the reason why another application is necessary including the status of the substantive hearing. It would likely include the procedural history of the matter and the parties' respective responsibilities for that delay.

[39] I also note his comments at paragraph 60:

> The counter-argument is that the recipient of interim maintenance may receive payments which upon closer examination at the hearing of the substantive application will reveal they were not entitled. A further order for interim maintenance may aggravate that possible outcome particularly when regard is had to the absence of criteria and the reduced opportunity to scrutinise an award of maintenance on an interim basis. The Court will need to be cognisant of such concerns when assessing whether to exercise its discretion to make a further interim award.

[40] There are some real and very tricky questions that will be addressed at the final maintenance hearing, in particular is there a causal nexus between Ms [Thomas]'

inability to be self-supporting or at least her alleged inability to be self-supporting and the matters set out in s 65(4)A of the Act bearing in mind that s 64A is headed: "Spouses or de facto partners must assume responsibility for their own needs within a reasonable period of time."

[41] Is it the division of functions within the relationship that are the real cause of Ms [Thomas]' inability to be self-supporting or is it, as the focus of much of the evidence seems to be, Ms [Thomas]' allegation that it is really Mr [Jones]'s trashing of her reputation in the local area that is the cause of her current inability to support herself? That is not one of the matters that are mentioned in s 64A. It is of course a matter that I could take into account in the broad exercise of the discretion that I have when awarding interim maintenance, but it is not causally connected to the division of functions with the relationship.

[42] Another question that will need to be determined at the hearing is whether the art course, albeit with a design focus, that Ms [Thomas] has undertaken is a reasonable step to self-reliance and should Mr [Jones] be required to continue to fund it?

[43] If I decline interim maintenance, and Ms [Thomas] ultimately succeeds at the final hearing, she will suffer some significant hardship in the meantime, but she will at least receive an award of past maintenance which will compensate her for that hardship.

[44] If I grant interim maintenance now for a further six months then arguably it should also be granted in October when the six month order will expire if the maintenance hearing is still pending because, by that date, Ms [Thomas] will still not have completed her current qualification.

[45] If Mr [Jones] ultimately succeeds in a final hearing, how will he recover any payments that have been made to Ms [Thomas]?

[46] In this case Ms [Thomas] is obviously and commendably dedicated to her studies. However, I have no evidence that she has carefully considered other options

including parttime course work or perhaps a short suspension of her course work while she re-establishes her income.

[47] I note that the course that she is undertaking was not started until over 18 months after separation. By the time the course is completed, the time that will have passed since the parties separated will be very close to, or in excess of the length of their relationship. That is just too long and as Judge Otene observed, now that Ms [Thomas] is in a metropolitan centre, there are more varied employment opportunities available to her. She still has not really explained why this litigation and seeking support from Mr [Jones] is preferable to her having explored those opportunities.

[48] Judge Otene concluded that interim maintenance for a period of six months was appropriate but that did not preclude Ms [Thomas] from assuming responsibility for her own needs within that time.

[49] This matter could have been substantively heard by now if both parties had been focussed on the core matters at issue. I do not understand why the parties have been focussed on issues that are only relevant to credibility such as an analysis of the syringes.

[50] I am satisfied that there might be many reasons for the procedural delay to date but a good part of the reason for that delay has been Ms [Thomas]' focus on the need to obtain more evidence. I cannot incentivise a Rolls Royce approach to litigation with arguable irrelevant evidential gambits being pursued through discovery orders that have resulted in significant delays.

[51] Ms [Thomas] does have a continuing need for maintenance, but I am not satisfied that Mr [Jones] has an ability to support her even in the medium term. I am also not satisfied that the effects of the division of functions within the relationship are continuing factors that are preventing her from supporting herself.

[52] I am satisfied that she is able to find a means of support within a reasonable period of time. However, I am also satisfied that it is reasonable that the shock of an immediate end to maintenance should be avoided.

[53] I therefore find in my discretion that it is appropriate that Mr [Jones] be directed to continue to pay maintenance at the current level until the end of June 2023. I expect that by that time this matter will have been set down for a hearing and all interim issues will have been resolved. They certainly ought to have been resolved by then. That is the end date for interim maintenance and the parties should do their best to ensure that the substantive hearing commences as soon as possible and that is occupies no longer than is necessary to address the relevant issues.

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Judge Kevin Muir
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 24/04/2023