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**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2016-019-000558
[2017] NZFC 4533**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[DEMI WILLIAMS] Applicant
AND	[HAYDEN WILLIAMS] Respondent

Hearing: 16 May, 13 June 2017

Appearances: Ms H MacColl for the Applicant
Ms E Dawe for the Respondent

Judgment: 3 July 2017 at 4.00pm

**RESERVED JUDGMENT OF JUDGE R H RIDDELL
[Spousal maintenance]**

Introduction

[1] The parties were in a long term marriage which was dissolved on [date deleted] September 2016.

[2] On 26 June 2016 the wife applied for a domestic maintenance order seeking the following:

- (a) A periodic sum of \$2,000.00 per week for future maintenance; or
- (b) A lump sum for future maintenance;
- (c) A lump sum for past maintenance.

[3] The application was brought under s 63 and s 64 of the Family Proceedings Act (“the Act”). As the parties have since divorced, the s63 application was withdrawn, leaving the s64 matter for determination. That requires the Court to also take into account s 64A and s 65.

[4] The respondent opposes the making of any order.

Law

[5] Section 64(1) sets out five factors which must be met before any spousal maintenance order can be made. They are:

- (a) That such maintenance is necessary;
- (b) To meet the reasonable needs of the claimant;
- (c) Where the claimant cannot practicably meet;
- (d) The whole or any part of those needs; and
- (e) Because of one or more of the circumstances in ss (2).

[6] Those circumstances include the ability of the claimant to be self supporting having regard to the effects of the division of function during the marriage. It also includes the likely earning capacity of each spouse and any other relevant circumstances.

[7] Once a marriage has been dissolved and the Court is considering a s 64 application, then s 64A also comes into consideration. That section requires a claimant to assume responsibility for their own needs within a reasonable time where either the marriage has been dissolved or in the case of a de facto relationship, the parties have ceased to live together.

[8] The term “within a period of time that is reasonable” is not defined in the statutory provision. However the Court must take into account all the circumstances of the case and this will include those set out in ss (3) being:

- (a) The ages of the spouses;
- (b) The duration of the marriage;
- (c) The ability of the spouse to become self supporting having regard to the division of function, the likely earning capacity and the responsibility for any care of minor children;
- (d) Any other relevant circumstances.

[9] When considering what level of spousal maintenance might be appropriate, s 65 reminds the Court that the following are pertinent:

- (a) The means of each spouse including potential earning capacity and any means derived from the division of property between them;
- (b) The reasonable needs of each spouse;
- (c) The fact that the spouse is supporting any other person;

- (d) The financial and other responsibilities of each spouse;
- (e) Any circumstances that make one spouse liable to maintain the other.

[10] In considering the means of each party, the Court may take into account the source from which each derives their income. For example in *McQueen v Penn*¹ both parties enjoyed a very high standard of living during the marriage, part of which was sustained by distributions from the husband's family trust. In the Family Court the wife was awarded \$8,509.00 per week in maintenance and that was upheld on appeal.

[11] In that case the Court into account that access to the husband's family trust continued after separation. The Judge considered that to be relevant.²

[12] The Court should also adopt a reasonable approach to the question of "need". As Cos J said in *Hodson v Hodson* referring to the well known decision of *M v B* observing:

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 ... A Court "should not be niggardly in its approach to the problem faced by a wife (or a husband).

[13] A party's liability to maintain the other party is dependent on a consideration of what reasonable needs might be. There is no specific entitlement to spousal maintenance. Liability flows from a present inability to be self supporting therefore requiring assistance.

[14] Accordingly the Court must first find under s 64 that maintenance is necessary to meet the reasonable needs of the other party. At that step, the means of the person from whom maintenance is sought are entirely relevant as noted by Justice Tipping in *Slater v Slater*³.

[15] His Honour also pointed out that an inability to meet all or part of that person's needs must derive from the effects of one or more of the division of function within

¹ *McQueen v Penn* BC 201662923 [2016] NZHC 699.

² [137].

³ *Slater v Slater* [1983] NZLR 166.

the marriage while the parties lived together, custodial arrangements for the children post separation and the undertaking of a reasonable period of education or training.

[16] What is an appropriate timeframe for becoming financially independent will vary from case to case. As the Court noted in *Z v Z (No 2)*⁴:

While subs (1) clearly indicates that any maintenance obligations following dissolution of marriage should ordinarily be temporary, and not lifelong, there is nothing in the wording of the sub section to preclude a lengthy period of time, or even an indefinite period, if, having regard to the factors in subs (1), that period of time is reasonable in all the circumstances of the case.

[17] Section 63 of the Act applies to parties who may be separated but not divorced. Section 64 applies post dissolution and therefore s 64 is intended to give effect to the clean break principle and encourage parties to become independent and self sufficient after their marriage is dissolved.

[18] So the Court must begin by asking whether maintenance is necessary to meet the reasonable needs of the claimant where that person cannot practicably meet the whole or part of those needs because of one or more circumstances set out in s 64.

[19] Such maintenance must be necessary and it is for a claimant to demonstrate by setting out in a declaration their means and sources that there is a short fall and therefore there is a necessity for the order to be made. That declaration must also set out what are the reasonable needs of a claimant. The Court will look at what the claimant's "reasonable needs" are in the circumstances of what those needs were during the marriage and what the claimant considers to be reasonable now.

[20] A claimant must also demonstrate that they are practicably unable to meet all or part of those reasonable needs; in other words that because of the division of function during the marriage, their current likely earning capacity is very limited.

[21] The age of a claimant will be relevant as will the duration of the marriage and a claimant's ability to be self supporting after separation.

⁴ *Z v Z (No 2)* [1997] NZFLR 241 at p 69.

[22] An application cannot be considered unless there is a qualifying circumstance present under s 64. So if there was a division of function during the marriage where one party was primarily responsible for the care of the children and, as a result on dissolution of the marriage is unable to return to the work force in order to meet their reasonable needs, then the Court must assess what would be the appropriate level of maintenance.

[23] So where, for example in *Mackie v Mackie*⁵ the parties were married for 30 years, the wife worked at a number of part time and full time jobs during the marriage. On appeal, the High Court concluded that the wife had particular skills and was capable of employment. Therefore the appeal against a maintenance order was allowed.

[24] The factual matrix will differ from case to case. Once the Court has determined that a s 64 qualifying circumstance exists, then the s 65 assessment must be carried out to determine the appropriate level of maintenance payable. Only then, is the Court required to consider whether it is unreasonable for the claimant to manage without maintenance and reasonable for the respondent to pay maintenance.

[25] The s 65 assessment will take into account not only the claimant's standard of living after separation but also the other party's. In *McQueen v Penn*⁶ the husband: "continued to enjoy a high standard of living and plainly lived in comfort".⁷

[26] In that same decision Justice Woodhouse said:

Section 65(2)(a)(i) requires the Court to have regard to the potential *earning capacity* of both parties. The focus ... must therefore be on the potential earning capacity of the husband as well as his actual direct and indirect income.⁸

Discussion

[27] The first question is whether under s 64, a qualifying circumstance exists.

⁵ *Mackie v Mackie* (1992) 10 FRNZ 60.

⁶ *McQueen v Penn* (supra).

⁷ [136].

⁸ [130].

[28] Looking first at the effects of division of function within the marriage, it is not disputed that the husband was the sole income earner during the marriage. Nor is it disputed that, after the children were born, the first in 2001, the wife was an at home mother.

[29] But the relationship began in 1994 and they married in 1996. So there was a seven year period before the children arrived. In that time the parties struggled with infertility and the wife had treatment which she said impacted on her ability to work. She said for 12 months before falling pregnant she had to stop work. That was not disputed. [Timothy] was born in [month deleted] 2001. Twelve months before his conception would be [month deleted] 1999. That leaves a five year period in which the wife could or did work. Her evidence was that early in the relationship the parties tried to have children and underwent IVF treatment for some years. Some of that treatment resulted in her hospitalisation on a number of occasions because of complications with IVF.

[30] Nevertheless, for the bulk of the relationship, 2001-2006 and 2008-2013 she was a stay at home mother, responsible for child care and running the household. There is no dispute that that was her role and she did not undertake any part time or full time work during that period. Whether she was the main caregiver during the period of separation is unknown, but the husband has not asserted that he took over the care during that time.

[31] The wife also relies on her now limited earning capacity. She says her [previous employment roles] after leaving school are not jobs she can readily step back into.

[32] Were she to consider [occupational fields deleted] careers, she would first need to complete NCEA levels 2, 3, 4. Even then, further study would involve a student loan and she already has debts owing for medical fees, legal aid and loans from her parents.

[33] Having been a stay at home mother for 13 years and now aged 43, she contends her likely earning capacity is significantly reduced.

[34] The husband believes she is able to meet her reasonable needs, has the benefit of sharing her house with her [close family relative] and should, three years after separation, take responsibility for returning to the work force.

[35] That argument minimises the joint decision made some years ago that the wife would stay at home. There were consequences flowing from that decision and I am satisfied that it has impacted on the wife's ability to now be self supporting. She has been unable to step back into the workforce or pick up a career.

[36] It is clear from the evidence that she is still reliant on state support three years after separation. More usually a claimant is saying to the Court that they will have difficulty obtaining suitable employment. In this case we know that to be so.

[37] Under s64A a claimant must assume responsibility for their own needs within a reasonable time. Domestic maintenance is not intended to be a lifelong obligation. But the Court must assess what is reasonable taking into account all of a claimant's particular circumstances. Where a person has been unable to meet their needs and that inability can be sheeted back to the division of function within the marriage, then that is a relevant factor. The duration of the marriage is also relevant and here, the parties were together for a total of 16 years, a not insignificant time. Another consideration under s64A is whether the applicant has care of any minor children. Here, the wife has the majority of care for the two children, now aged 16 and 13.

[38] The wife's reliance on a state benefit has meant that her income is extremely limited and therefore her lifestyle has been curtailed from what she enjoyed during the marriage. The husband on the other hand has continued to enjoy the same way of life that was available to him before separation. He has not assisted his ex wife financially. On the contrary he took the family vehicle from her, claiming he would offer her a replacement vehicle but has not done so. He conceded in cross examination that there was a degree of malice in his actions because she had left him.

[39] The wife was previously covered by family medical insurance. The husband cancelled that post separation and as the result of requiring surgery the wife now has a medical bill which she is struggling to pay. There is no evidence the husband has

offered any ongoing financial support and relationship property matters are the subject of separate proceedings, so she has not received any division of relationship property which might enable her to re-establish herself financially.

[40] The wife has come to recognise that she will have to first complete NCEA before embarking on any further study and she has arranged to undertake NCEA studies very soon. It will be some time before she is likely to complete her studies and be self supporting.

[41] I am satisfied that the effect of division of function in this marriage and the wife's likely earning capacity both meet the threshold for a qualifying circumstance.

[42] The next step is to assess the appropriate level of maintenance.

[43] It is relevant to consider the standard of living enjoyed by the parties before separation. They built a home which has never had a mortgage over it. They enjoyed a substantial income from the family business. Evidence of its worth is found in the sale of the business which realised \$21 million dollars of which the family trust held a 36 percent shareholding at the date of sale worth \$4.5 - \$4.7 million dollars.

[44] The husband sold the motor vehicle used by the wife during the marriage for \$44,000.00 and a boat for \$60,000.00 after separation. He continues to receive a generous income from the trust. In the last twelve months that amounted to \$154,783.40 based on the wife's counsel's calculation of spending from the bank statements. He has rent free accommodation at the former family home and the trust meets all the rates, insurance, repairs and other outgoings for the home.

[45] He estimated his post separation income at \$86,713.00pa and expenditure at the same amount. That included \$57,950.00 for his food annually or \$1,114.00 per week. When those sums were challenged, the husband claimed that the declaration form did not contain any provision for specific items and so he "lumped together" general spending under the heading of "food and household supplies". That made it difficult for the Court to analyse specific items to determine whether or not they were reasonable.

[46] The disparity between his acknowledged income of \$86,713.00pa and \$154,783.40 emerged in cross-examination when counsel took him through the total of bank deposits and spending for the preceding year. The total was \$204,783.40 but \$50,000.00 was repaid to his children's account after he withdrew funds to avoid breaking a term deposit, leaving a balance of \$154,783.40.

[47] In summary, it is clear the husband continues to enjoy a high standard of living. He continues to enjoy the gym, [sport deleted], sports supplements, holidays and travel, all met by the family trust. He pays his partner \$100 per week for her expenses and meets the living costs of his partner and her child.

[48] The husband has access to an income of \$154,783.40pa. The wife's income is \$36,660.00pa derived solely from WINZ. She has rent of \$360 per week and other expenses totalling \$41,004.00. She has also amassed debts which she is currently unable to service.

[49] The car she used before separation was removed by the husband. He claimed to have offered her another motor vehicle, but has not actually done so. The husband has since purchased another vehicle for his own use. The purchase cost was \$65,000.

[50] The wife was covered by medical insurance during the marriage. When she required major surgery post-separation, she discovered the husband had removed her from the policy and she now has a \$1,000.00 debt for medical costs.

[51] In considering the wife's potential earning capacity I have had regard to the following:

- (a) Any work undertaken before or just after the marriage was many years ago. The wife is unlikely to be able to resume that work without further training;
- (b) If the wife wishes to train for a career in [occupations deleted], that will require her to first obtain NCEA passes, then the training period which together, are likely to take some time;

- (c) To date the wife has not been able to secure any relationship property settlement which might assist her financially to train for a new career;
- (d) Post-separation the wife had significant medical issues requiring surgery and she has continued to suffer from [medical condition deleted];
- (e) Her living circumstances are such that she is dependent on the goodwill of her [close family member]. So she is not living in a property where she could consider taking on a boarder for additional income;
- (f) The wife, like the husband was a beneficiary of the family trust. Two weeks before separation, she was removed as a trustee of the trust and has not received any distribution from the trust in the intervening three years. It is reasonable to conclude she is unlikely to benefit from the trust in the future, given the current approach of the trustees;
- (g) But for the assets in the trust, the husband would not enjoy his current lifestyle.

[52] The wife has calculated her necessities on a weekly basis at \$1493.43. The husband receives approximately \$3,000 per week from the trust. That enables him to maintain the pre-separation income which in the year before separation was \$142,312.30. I accept that the trust is meeting all the children's school and sporting expenses, together with any other clothing or general expenses while they are in their father's care.

[53] While I accept that the mother's weekly costs are nearly \$1500, she is seeking \$2,000 to approximate what she enjoyed before separation. She had a reasonably lavish lifestyle and income before separation. It is not reasonable to expect her to forfeit that lifestyle to such a degree and exist on \$36,660 pa. Her inability to develop a career coupled with her medical challenges justifies an award in my view, as her financial predicament is likely to persist. However the wife has identified her needs at nearly \$1500 per week. I find that sum rather than \$2,000 per week to be an accurate

and realistic estimate of her costs. I note that is half of what the husband receives from the trust.

[54] I turn now to consider whether it is reasonable for the husband to provide maintenance. He would argue that, but for the generosity of the trustees he would receive no distribution or income. But his income stream has remained constant over the past three years. I see no reason why that would not continue.

[55] When pressed, the husband acknowledged that his action in removing the car from the wife had an element of tit for tat or malice, because she had left him. That attitude permeated his other evidence. He receives \$13,000.00 per month in interest and dividends from trust investments, yet considers his ex-wife's income of \$36,660.00 per annum is adequate for her needs. In passing, I wonder whether he would consider living on that level of income.

[56] The Court heard evidence that the trust holds significant amounts in various bank accounts. For example the 50 account currently has \$240,000. Other amounts are on term deposit.

[57] The husband wields wide decision making power in regard to the family trust. He alone may appoint and remove trustees which in itself is significant. Should he disagree with the decision of the other trustee on any aspect of financial or other decision making, he can simply remove that trustee. The husband has already demonstrated he is prepared to exercise that power when he removed his wife as trustee shortly before separation.

[58] In other decision making areas, he takes the lead. For example he decided not to break a term deposit of trust money and instead took funds from his children's bank accounts, repaying it later. Those accounts provided for both husband and wife to be joint signatories but the wife was not consulted about that decision.

[59] I find he has at his disposal the means to make payments for a maintenance order of \$1,500 per week. That, in my view would be preferable to a lump sum for future maintenance because it is not clear at this stage how long it will take to resolve

relationship property matters. Counsel for the wife indicated the need to employ a forensic accountant and further interlocutory applications have yet to be dealt with. Therefore the weekly maintenance order is to continue until relationship property has been divided and those Court proceedings are concluded.

[60] I have also been asked to consider an award of past maintenance, dating back to the start of separation in [month deleted] 2013. It is not clear why the wife did not seek maintenance immediately following separation. Her application was filed a year ago.

[61] She seeks an order for past maintenance to enable her to buy a car (\$40,000), repay debt (\$20,000), pay for her NCEA study fees (\$7,000), purchase a computer (\$3,500) and finally meet the cost of a three year degree course (\$30,000). The total sought is \$100,500.

[62] In analysing those amounts, the car cost might seem more than essential for a replacement car, but when I consider the value of the vehicle the parties used before separation and the cost of the husband's motor vehicle after separation, I conclude it is reasonable.

[63] The debts to family have been established and no issue was taken in cross examination with the amounts.

[64] The wife is about to embark on NCEA study, so I regard those costs as acceptable, as is the need for a computer.

[65] I do however take issue with the 3 year degree costs for study and fees. For [duration of study deleted], the wife will be completing NCEA. Thereafter she may elect to complete a degree or she may be hindered by her health issues. She may decide to embark on different study which does not require three years for completion. Or, her relationship property proceedings may be concluded with some financial settlement. In the meantime, with a reasonable weekly maintenance award, she may be able to save towards any degree study. So I reject the need to take future study into account to that extent.

[66] Therefore I consider that a lump sum award for past maintenance should be \$70,500.

Orders

[67] For the reasons articulated above, I find that there are grounds for the making of a Domestic Maintenance Order in favour of the applicant.

[68] The respondent is directed to make payments of \$1,500.00 per week for maintenance to the applicant as from the date of this decision until relationship property proceedings have been concluded.

[69] Having made an order for a periodic sum, I decline to make an order for a lump sum for future maintenance.

[70] However I have found that a lump sum for past maintenance is appropriate for the past year in the sum of \$70,500.00. I am satisfied that the respondent has access to resources to enable him to make that payment. He will have a period of 28 days to pay the said sum and thereafter interest will accumulate at four percent per annum on a compounding basis.

[71] The applicant has been successful in her application and, accordingly costs are appropriate. I make a costs order against the respondent based on Schedule 2B.

R H Riddell
Family Court Judge