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IN THE FAMILY COURT
AT MANUKAU**

**FAM-2016-092-001238
[2017] NZFC 2125**

IN THE MATTER OF THE FAMILY PROCEEDINGS ACT 1980

BETWEEN [POPPY COATES]
 Applicant

AND [ADAM COATES]
 Respondent

Hearing: 28 February 2017

Appearances: V Crawshaw for the applicant
 L Kearns and J Williams for the respondent

Judgment: 22 March 2017

JUDGMENT OF JUDGE A-M SKELLERN

Introduction

[1] The applicant (Mrs [Coates]) applies for interim spousal maintenance against the respondent (Mr [Coates]) pending determination of her substantive application for past and final maintenance.

[2] The parties began a de facto relationship in November 1985 and married on [date deleted] March 1986. Mrs [Coates] says they separated on 17 May 2015 and Mr [Coates] says they separated on 28 June 2015.

[3] Mr [Coates] is [occupation deleted] and Mrs [Coates], [occupation deleted].

[4] There are three independent children of the marriage aged 27, 25 and 22.

The parties' positions

[5] Mrs [Coates] makes her application on the basis that she has not been able to meet her reasonable needs from her own resources since separation without significantly depleting her capital. She seeks maintenance of \$5,592.00 per month on an interim basis which she says is the difference between her income and her reasonable needs.

[6] Mr [Coates] seeks that the Court declines the application on the grounds that Mrs [Coates] has produced no evidence to support her contention that she is unable to meet her reasonable needs.

[7] Mr [Coates] says that Mrs [Coates] has met her own needs without requiring spousal maintenance for almost 2 years since separation. Further he says that he has supplied considerable financial support to her since separation and that the application is simply a device to delay the resolution of relationship property proceedings.

[8] Mr [Coates] also submits that Mrs [Coates] is currently in a de facto relationship with her partner. He says further that even if the court finds she is not in a formal de facto relationship, the relationship is relevant to these proceedings as he is more likely than not, providing her with additional financial support which she has not disclosed.

[9] It was the issue of the nature of this relationship that resulted in Counsel for the respondent seeking limited cross examination of the applicant, rather than proceeding on a submissions only basis. That application was not opposed and the hearing proceeded, including limited cross-examination of Mrs [Coates].

The parties' financial arrangements, post-separation

[10] For the first six weeks following separation, Mr and Mrs [Coates] continued to use their joint account in to which Mr [Coates]'s income was paid.

[11] When Mr [Coates] left the family home the joint account was split and each party received the sum of \$128,656.00.

[12] In addition to the funds received from the joint account, Mrs [Coates] sold her [make deleted] vehicle for \$51,000.00 and replaced it with a [make deleted] which cost \$20,000.00, leaving her an additional \$31,000 in funds.

[13] Mrs [Coates] continues to reside in a property at [street name deleted], Papakura, the former family home owned by a family trust. Both Mr and Mrs [Coates] are trustees of the trust with a third independent trustee.

[14] Mrs [Coates] was unable to work for a period after separation but now earns an income of \$61,585 net per annum.

[15] Proceedings have been filed under the Property (Relationships) Act 1976. Mrs [Coates] has sought advice on the value of Mr [Coates]'s medical practice and the viability of a claim under s 15 of that Act for compensation for economic disparity.

The Law on Interim Maintenance

[16] Section 82 of the Family Proceedings Act 1980 provides jurisdiction for the Court to make interim maintenance orders. It states:

82 Interim maintenance

- (1) Where an application for a maintenance order or for the variation, extension, suspension, or discharge of a maintenance order has been filed, any District Court Judge may make an order directing the respondent to pay such periodical sum as the District Court Judge thinks reasonable towards the future maintenance of the respondent's spouse, civil union partner, or de facto partner until the final determination of the proceedings or until the order sooner ceases to be in force.
- (2) *[Repealed]*
- (3) *[Repealed]*

- (4) No order made under this section shall continue in force for more than 6 months after the date on which it is made.
- (5) An order made under this section may be varied, suspended, discharged, or enforced in the same manner as if it were a final order of a Family Court.

[17] The judicial discretion to grant interim maintenance is effectively unfettered. However the approach to exercising such discretion has been usefully summarised in a number of often-quoted authorities.

The Cases

[18] The correct approach to the exercise of this discretion is set out in the leading case of *Ropiha v Ropiha*.¹ The Court of Appeal stated:

The purpose of the provision is obvious enough. It is to protect the position of an applicant who may have inadequate means to meet current needs pending determination of the proceedings, if and so far as it is reasonable in all the circumstances to do so. But the statute does not expressly lay down conditions or criteria as to the granting of an interim order. This is unlike the position that applies where permanent maintenance is sought. ... It is given an unfettered discretion both as to whether an order should be made at all and as to the amount if an order is made. All that can be said is that the making of an order depends on all the circumstances of the particular case. The Court must do what it thinks just.

[19] The relevant principles derived from *Ropiha* were summarized by Her Honour Judge Riddell at paragraph [15] in *RKFH v DPLH*² as follows:

1. Interim maintenance is intended to protect an applicant who has inadequate means until a substantive order can be made in regard to spousal maintenance.
2. There are no special conditions or criteria that must be applied by the Court.
3. The Court would have an unfettered discretion to decide whether to:
 - a. Make an order; and
 - b. Determine the amount. That discretion must be made in a way that is just.

¹ [1979] 2 NZLR 245(CA)

² [[2012] NZFC 8276]

4. Whether an order is made will depend upon the circumstances of the particular case.
5. The Court will pay regard to the particular needs of the applicant over the period for which the order will subsist and the means available to the applicant to meet those needs.
6. The Court will also consider the standard of living of the parties prior to the separation.

[20] In determining the question of interim maintenance the Court:

... only needs to find some cogent evidence on the part of the applicant, and that the respondent has the means to pay, before an interim maintenance award can be made³.

[21] In *Ropiha* the Court made the following further observations:⁴

In considering the position of an applicant for an interim order a Court will necessarily pay particular regard to the reasonable needs of the applicant over the period for which an order will subsist and the means likely to be available to the applicant to meet those needs. In assessing those needs the Court will take into account the standard of living the parties had adopted for themselves. And we use the term “means” in the broadest sense to encompass any sums which the applicant could reasonably be expected to earn from his or her own efforts during the term of any interim order together with any funds available to the applicant during that period. What is important, if those means are to be set against the applicant’s needs in determining whether to make an order, is that the monies taken into account should be reasonably assured to the applicant. What could he/or she reasonably count on having available during the limited term of an interim order? By the same token, a defendant should not be called on to pay maintenance before there is any finding on the substantive proceedings unless proper weight has been given to the applicant’s capacity from all sources to meet her needs over that period. In principle, it is immaterial in that regard whether the source of funds is employment reasonably available to the applicant, private income, resources of capital, or welfare benefits provided by the state or some other body.

[22] Ms Crawshaw refers to the case of *FH v LH*⁵ where she quotes part of Justice Priestley’s consideration of the term “stop-gap”. His Honour in fact considered that although that term was an accurate enough approximation of the underlying policy, it:

... runs the risk of overlooking the carefully focused comments of the Court of Appeal in *Ropiha*. Certainly the purpose of the provision is not designed to provide a period of adjustment and reflection... The various financial provisions

³ *Day v Waldon-Day* HC Hamilton CIV-2007-419-1291, 3 December 2007

⁴ Per Richardson J at 247

⁵ [2013] NZHC 1044

found in family law legislation create rights and remedies. They do not provide therapeutic interludes.

Issues to be Determined

1. What are Mrs [Coates]'s reasonable needs and are her means sufficient to meet those needs?
2. If her means are not sufficient, is Mr [Coates] able to meet those reasonable needs?
3. Should judicial discretion be exercised to make an order?

What are Mrs [Coates]'s Reasonable Needs and her Means to meet those needs?

Mrs [Coates]'s reasonable needs

[23] Mrs [Coates]'s budget, attached to her affidavit of 24 February 2017 appears reasonable in most respects. Indeed Mr [Coates] does not generally take issue with them per se. I note that Mrs [Coates] should not be limited to seeking interim maintenance at a subsistence level.

[24] There are however, given the nature and duration of such an order, some costs which I consider should be excluded. These are:

- a) \$50.00 per week for domestic help, given that there is no cogent evidence to support Mrs [Coates] paying for domestic help;
- b) \$200.00 per week for entertainment given the already generous allowance for one person in terms of grocery costs;
- c) \$207.00 per week for holidays given that Mrs [Coates] has already made two overseas trips since separation and has funded a third;
- d) The lawn mowing services which are met by the Trust.

[25] Mrs [Coates]'s legal and accounting costs have been properly incurred and are supported by invoices. However the invoices produced as far as I am able to ascertain

total \$34,134.30 which appears reasonable in the circumstances and results in a monthly expenditure \$2,844.52.

[26] Accordingly, her reasonable needs are \$8,164.47 per month.

Mrs [Coates]'s Means

[27] I am satisfied that Mrs [Coates] is working to the best of her ability at 32 hours per week.

[28] I do not consider, in calculating Mrs [Coates]'s means, that I should take into account that Mr [Coates] has offered to distribute relationship property in the sum of \$242,592.72 immediately. Although the distribution of this sum would provide an additional approximately \$500.00 per month in income to Mrs [Coates], given the uncertain nature of the pool of relationship property, it is reasonable for her to defer accepting an equal distribution of this sum at this juncture.

[29] The question as to whether Mrs [Coates] is currently in a de facto relationship with her partner is relevant to the calculation of her household income and accordingly, her means. If she is not, then the question arises as to whether he provides her with additional financial support.

[30] Ms Kearns cross-examined Mrs [Coates] as to the nature of the relationship.

[31] Mrs [Coates] acknowledges that she is in a sexual relationship with her partner. She agrees that her partner's former wife had accused her of having a relationship with her husband in 1989 and that resulted in her terminating her employment with him in 1990.

[32] She says she was only in a relationship with him from the time she and Mr [Coates] separated.

[33] Ms Kearns cross examined Mrs [Coates] about her outgoings in terms of expenditure particularly where that expenditure was in the [location 1] and [location 2] areas, given that Mrs [Coates]'s partner has properties in these areas. The suggestion

by counsel was that Mrs [Coates] was at the very least, living between her home and her partner's home.

[34] Mrs [Coates]'s evidence is that she spends significant periods of time with her partner. In answer to questions as to the frequency of visits to a café in the area in which her partner lives, she answers that she has other friends in that area and often catches up with them. She is adamant that she is not in a de facto relationship with anyone. She agrees that she spends significant time with him and travels with him from time to time but that is all.

[35] She says she does not describe him as her life partner. She describes having come out of a 30 year marriage she brings with her "baggage". She is therefore not contemplating living with anyone else. She has made a commitment to be independent medium to long-term.

[36] She emphasises that she in fact enjoys living alone.

[37] Section 2D(2)(a) of the Property (Relationship) Act 1976 defines the meaning of a de facto relationship:

2D Meaning of de facto relationship

...

- (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
 - (a) the duration of the relationship:
 - (b) the nature and extent of common residence:
 - (c) whether or not a sexual relationship exists:
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
 - (e) the ownership, use, and acquisition of property:
 - (f) the degree of mutual commitment to a shared life:
 - (g) the care and support of children:
 - (h) the performance of household duties:

- (i) the reputation and public aspects of the relationship.

Discussion

[38] In determining whether Mrs [Coates] is in a de facto relationship I consider the following matters:

- a) *The duration of the relationship:*

There is no evidence before the court to suggest that from 1989 to 2015 Mrs [Coates] was involved in a relationship with her current partner. Accordingly I accept she formed the relationship with her current partner after her marriage ended;

- b) *The nature and extent of common residence:*

Although Mrs [Coates] and her partner clearly spend significant periods of time together there is no evidence to suggest that either of them use the residence of the other as their home. I accept Mrs [Coates]'s evidence that she has other friends in the [location 1] area with whom she enjoys socialising and the court cannot be satisfied that every time she spends funds in the [location 1] area that she is with her partner. The time she spends in [location 2] on the other hand is always with her partner and there are regular trips for a few days at a time to this area;

- c) *Whether or not a sexual relationship exists:*

Mrs [Coates] agrees she is in a sexual relationship with her partner;.

- d) *The degree of financial dependence or interdependence between the parties:*

The bank statements in respect of which Mrs [Coates] was cross-examined reflect Mrs [Coates] meeting her own costs. When her partner pays such costs, I note Mrs [Coates] reimburses him. I do not perceive that he is subsidising Mrs [Coates]'s living expenses. They do not have joint or shared bank accounts;

- e) *The ownership, use and acquisition of property:*

There is no evidence to suggest that Mrs [Coates] and her partner have ownership, use or acquisition of any joint property;

f) *The degree of mutual commitment to a shared life:*

Mrs [Coates] is clear that she does not commit to a shared life with her partner at this juncture. There is no evidence to support any contention that her partner believes otherwise. However, even if he does, given Mrs [Coates]'s approach, there is no **mutual commitment** to a shared life.

g) *The performance of household duties:*

There is no evidence to suggest that either Mrs [Coates] or her partner perform household duties for each other.

h) *The reputation and public aspects of the relationship:*

Mrs [Coates] and her partner are publicly in a relationship, but there is no suggestion that they hold themselves out to be in a committed relationship in the nature of a marriage.

[39] The High Court authority referred to by counsel summarises the enquiry to be undertaken. Gendall J made the following comment when determining the duration of a de facto marriage:⁶

By way of summary, my overall assessment of the evidence has led me to a point where I do not think that by August 2007 there was the requisite emotional connection, or intertwining of lives, such that I can be satisfied that the parties were living together as a couple.

[40] My overall assessment of the relationship is that the requisite emotional connection or intertwining of lives is not such that I can be satisfied Mrs [Coates] and her partner are living together in a de facto relationship. Equally, I do not accept that Mrs [Coates]'s partner is subsidising her cost of living. She appears to be independent in this regard.

⁶ *Miller v Carey* HC Christchurch CIV 2014-409-000319 30 April 2015

[41] Mrs [Coates] has assessed an anticipated net income from interest on her fixed term deposit and added it to her income from work.

[42] Accordingly, Mrs [Coates]'s means total \$5,701.67 per month. Her reasonable needs are \$8,164.47 per month.

[43] The difference between her reasonable needs and her income is \$2,462.80 per month.

Mr [Coates]'s Ability to Pay Maintenance

[44] There is no question at all and neither was it argued by Mr [Coates] that he is unable to meet the deficit in Mrs [Coates]'s reasonable needs. He has a large net income.

Decision

[45] In considering whether to exercise my discretion to make an order for interim maintenance pending the outcome of the substantive maintenance proceedings, I make the following observations;

- (a) I do not accept that Mrs [Coates] has issued these proceedings as a device to delay the resolution of relationship property division. She is quite properly through her counsel, making enquiries as to whether an application under s 15 of the Property (Relationships) Act 1976 is viable.
- (b) This application must be considered against the backdrop of a thirty year marriage. The redress sought cannot be characterised as seeking to provide a therapeutic interlude.
- (c) The application has all the hallmarks of the applicant seeking assistance in the short term to meet her needs pending resolution of all substantive proceedings.

(d) Mr and Mrs [Coates] have clearly lived a very comfortable lifestyle. The period since separation is not such that Mrs [Coates] has had sufficient time to adjust to her new circumstances.

[46] It is just in all the circumstances that Mr [Coates] meets the shortfall in Mrs [Coates]'s reasonable needs and her means to meet those. In the assessment of this sum, I have considered that Mr [Coates] is already making some financial contribution to Mrs [Coates]'s living expenses.

[47] Mr [Coates] will pay Mrs [Coates] the sum of \$2,462.80 per calendar month for a maximum of six months. The first payment will be 7 days after the issue of this judgment. The monies will be paid into a bank account identified by Mrs [Coates].

[48] Given the terms of this decision, I consider it is appropriate that costs lie where they fall. Mrs [Coates]'s application has to some degree been successful but only to the extent of less than half that she sought. In addition to that issue, part of the interim maintenance award includes a significant allowance for legal fees. If Counsel wish to be heard as to costs the applicant is to file a Memorandum within 14 days with the respondent to reply within 7 days thereafter. Then to be referred to me in chambers.

A-M Skellern
Family Court Judge