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

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IN THE FAMILY COURT
AT AUCKLAND

FAM-2018-004-000407
[2018] NZFC 7076

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	PETER BERIC Applicant
AND	JOANNA MAITLAND CHAPLAIN, OLAF GUY EADY AND SIMON HOLM EADY Administrators of the Estate of Diana Maitland Eady Respondents

Hearing: 13 September 2018

Appearances: P Brown for the Applicant
F McGeorge for the Respondents

Judgment: 19 October 2018

RESERVED JUDGMENT OF JUDGE I A McHARDY
[Interim spousal maintenance]

Introduction

[1] The applicant has applied for an order that the administrators of the estate of his late de facto partner, Diana Maitland Eady ("Ms Eady) be directed to pay him interim spousal maintenance of such an amount as the Court thinks fit. Ms Eady died on 10 February 2018. The applicant also sought a final spousal maintenance order

against the administrators. He relies on the fact that he and Ms Eady had been in a de facto relationship from July 1986 until her death.

[2] The applicant says that he needs such maintenance to meet his reasonable needs as he cannot currently meet these himself because of the following:

(a) He is 78 years of age and his only source of income is the fortnightly government superannuation payments he receives of $740.06.

(b) During his 32 year relationship with Ms Eady, they lived in their family home at [address deleted], then their family home at [Flat 1]. The apartment was ostensibly owned by trustees of the Diana M Eady Family Trust ("Trust"), but he believed it was at all times beneficially owned by Ms Eady.

(c) In the later years, Ms Eady paid their living expenses. She received regular distributions of income from the Trust to meet their costs.

(d) It was only after Ms Eady died that he was told that he was not a beneficiary of the Trust.

(e) Ms Eady's children were trustees of the Trust and are the administrators of her estate.

(f) He has now been told that the Trust has been wound up and all the assets distributed to Ms Eady's children, who then transferred those assets to a new trust of which they are also the trustees, called the ECI Trust.

(g) After living in [Flat 1] with Ms Eady as their family home for 24 years, he was evicted from the apartment by a trespass notice that was obtained by Ms Eady's children. The trespass notice was served on him on 13 April 2018, only eight weeks after Ms Eady's death, while he was still grieving for her.

(h) He owns no property in his own name and therefore he had nowhere to go other than to stay with his daughter and her family.

(i) He has filed proceedings under the Property (Relationships) Act 1976 ("the PRA") to have the status, ownership and division of all property owned by him and/or his late de facto partner, Ms Eady, determined by the Court. Until that is resolved by agreement or Court order, he is unable to support himself. He requires interim spousal maintenance pending determination of his substantive application.

[3] The respondents have opposed the maintenance applications on the basis that they allege that the applicant and Ms Eady separated a year before she died, the estate has insufficient funds to pay spousal maintenance and the applicant can support himself.

JURISDICTIONAL ISSUE

[4] An unusual feature of this application is that orders are sought against the executors of the applicant late partner's estate. Counsel for the applicant argues that such an application was obviously anticipated by the Legislature when the Family Proceedings Act 1980 ("the Act") was enacted. Sections 70-71 of the Act empower the Family Court to make both periodic and lump sum orders against executors of the respondent's estate providing that the applications is/are made before the expiry of 12 months from the grant of probate of the deceased's estate. It is acknowledged that there is a lack of case law involving respondents as executors.

The respondent's position

[5] Counsel for the respondents submits that the applicant does not have jurisdiction to apply for interim spousal maintenance in the light of the wording of s 82 of the Act. In particular, the wording allows an order directing the **respondent** to pay towards the future maintenance of the **respondent's de facto partner**. It is pointed out that the respondents in this case are the executors of the estate and therefore the applicant is not the de facto partner of the respondents – therefore the Court does not have the ability to make an order under s 82 for interim spousal maintenance.

[6] It is argued that it is only by virtue of s 70 of the Act that an application for spousal maintenance can be made against an estate. Section 70 provides:

> **70 Order for maintenance after marriage or civil union dissolved or de facto relationship ends**
>
> (1) The Family Court may make an order under subsection (2)—
>
> (a) on or at any time after the making of an order dissolving a marriage or civil union:
>
> (b) at any time after a de facto relationship ends.
>
> (2) The court may do the following under this section:
>
> (a) order either party to the proceedings, or the personal representative of either party, to pay to the other party for such term as the court thinks fit (but not exceeding the life of the other party) such periodical sum towards the maintenance of the other party as the court thinks fit:
>
> (b) make any other order referred to in section 69(1), either instead of or in addition to an order under paragraph (a).
>
> (3) Section 69(2) applies to an order under this section for the payment of a lump sum.
>
> (4) n this section, a reference to an order dissolving a marriage or civil union includes a reference to a decree or order or legislative enactment recognised in New Zealand by virtue of section 44, as if that decree or order or legislative enactment were an order of a court of competent jurisdiction in New Zealand.
>
> (5) This section is subject to sections 61, 70A, 70B, and 71.

[7] Counsel for the respondents argues that if the Legislature had intended a personal representative/estate to be required to pay interim spousal maintenance under s 82 of the Act, then the words "or the personal representative of either party" would have been inserted in s 82 in the same way it had been specifically inserted in s 70.

[8] Further, given an estate has finite resources, it is claimed that it will not necessarily have income with which to meet an award of interim spousal maintenance. Counsel submits it is appropriate that the less stringent test under s 82 for interim spousal maintenance does not apply to a claim for maintenance from the estate.

[9] It is submitted for the respondents that the most appropriate way to address financial support after death is by virtue of an applicant receiving any gifts under the deceased's will, or making a claim for the division of relationship property and/or

making a claim for maintenance under the Family Protection Act 1955. In the present case the applicant has made claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. It is argued if he meets the requirements of those Acts then that is the appropriate forum of compensation for him, not an award of interim spousal maintenance.

[10] As noted above, no cases where an application for interim spousal maintenance has been made against an estate can be found. Counsel for the respondent submits that this lack of case law is reflective of the fact that the Court does not have jurisdiction to award interim spousal maintenance against an estate.

[11] If the applicant does not have the jurisdiction to apply under s 82 of the Act then his application for interim spousal maintenance must fail. In the event that the Court finds it does have jurisdiction to award interim spousal maintenance, counsel for the respondents has made submissions in respect of the relevant considerations.

The applicant's position

[12] The applicant's counsel accepts that there appears to be no decisions where the Family Court has granted an order on interim or final spousal maintenance against executors of an estate. In *Morris v DGSW*[1], obiter at 631, it was said that ss 70-71 are enacted to allow all maintenance orders to be made after the respondent's death:

> There is obviously no purpose in imposing a limitation period (s 71)(1)) in respect of an application for maintenance under s 70 after the respondent's death unless it were recognised that the right to apply under s 70, and therefore the respondent's liability to maintain, is not terminated by the respondent's death.

[13] It is argued that the reasons why the Court can grant an order under s 82 against the executors are:

(a) the applicant has made an application for spousal maintenance under s 64 against his late de facto partner. Under s 70 the de facto partner needs to be read as including "personal representative";

[1] (1991) 7 FRNZ 626

(b) s 70 states that the Court may order a personal representative to pay "to the other party … such a **periodic sum** towards the maintenance of the other party as the Court thinks fit". The term "periodical sum" is repeated in s 82 which allows the Court to make "an order directing the respondent to pay a **periodic sum** … as the Court considers reasonable towards future maintenance of … the de facto";

(c) s 70 does not expressly exclude s 82 interim maintenance;

(d) just like s 82, s 64 (maintenance after de facto partner's ceased to live together) does not expressly refer to a personal representative having the obligation to maintain the other party but that is clearly the intention of s 70;

(e) the purpose of s 82 is to protect an applicant who cannot meet his/her reasonable needs until final determination of substantive proceedings. It would be unjust if as a result of the death of a spouse or partner, the applicant could not receive a limited period of maintenance support to overcome undue hardship caused by the length of time it can take to get to have the substantive proceedings heard;

(f) *Thakurdas v Wadsworth*[2] is a High Court decision of Hinton J where it was held that s 182 of the Act allowed an executor to bring proceedings even though that was not expressly provided for in the section. At para [44] Her Honour held:

> Considering the purpose and language of the section, I can see no good reason for putting a limited construction on s 182(1). One of the purposes of the section, as the Supreme Court said, is to prevent unfairness between the parties to a marriage following its dissolution. The fulfilment of that purpose is not made any less necessary or desirable by the death of one of the parties.

[2] (2018) NZHC 1106; (2018) 4 NZTR 28-006

Ruling as to jurisdiction

[14] I do not accept the submission that there is no jurisdiction to award interim spousal maintenance. I agree with the obiter in *Morris v DGSW.* I accept that the purpose of s 82 is to protect an applicant who cannot meet his/her reasonable needs until final determination of the substantive proceedings. It would simply be illogical for there to be a right to award final spousal maintenance but not interim. The fact that s 82 is silent as to personal representative does not mean that there is no jurisdiction in respect of an interim maintenance claim.

[15] The test is about need and s 82, with its wide discretion, is simply a follow on from s 70 and does not need the inclusion of the reference to the personal representative. Some of the same considerations exist as were present in *Thakurdas v Wadsworth*. There is no good reason for putting on s 82 a limited construction. Also, it can be said that the purpose of the section is to prevent unfairness. It could certainly be unfair if the applicant could not seek interim relief.

THE RESPONDENTS' POSITION RE INTERIM MAINTENANCE

[16] I will deal with the respondents' position first as the applicant has answered some of these submissions orally at the hearing. In respect of a s 82 application it is said that case law has established that the key factors which the court must consider are:

(a) the reasonable needs of the applicant over the period for which the order would subsist;

(b) the means likely to be available to the applicant to meet those needs himself;

(c) the respondent's reasonable needs to meet any shortfall and;

(d) should judicial discretion be exercised to make an interim order?

[17] As stated in *Langridge v Langridge*[3]:

> The judicial discretion to grant an interim maintenance order is unfettered. Whether the Court elects to make an order or not, and the amount of the order depends on what is just in the circumstances.

[18] It is argued that although s 82 of the Act is a "stand alone" provision, it has been accepted that when considering an application for interim spousal maintenance, guidance be obtained by considering the statutory principles set out in respect of substantive applications under s 62 to 66 of the Act. Justice France confirmed this in *T v H* where she stated[4]:

> The statutory principles set out in ss 62 - 66 are not therefore mandatory considerations. In practice, they are the sorts of things that a Court may well look at in determining whether the s 82 test is met …

[19] The following submissions were therefore made on behalf of the respondents in respect of s 64 considerations:

(i) the applicant has not specified the particular circumstances he relies on under s 64 of the Act to support his application for spousal maintenance. It is submitted that he cannot provide evidence to satisfy the causal link that his inability to support himself is because of any one or more of the circumstances set out in s 64(2). Rather, his inability to meet the reasonable needs is because of his decision to retire without any savings on which to fund his retirement;

(ii) the submission is made that the applicant's spousal maintenance must fail for the following reasons:

(a) s 64(2)(a)(i) – *divisions of functions*.

Counsel submits that there are no effects of the division of functions within the relationship on which the applicant can rely. The parties did not have children together nor did the applicant forgo his career during the relationship. Rather, prior to his unilateral retirement he was the only income-

[3] [1987] 2 NZLR 554
[4] [2006] NZFLR 560 AT PARA [19]

earner given that Ms Eady did not work for almost all of the relationship;

(b) s 64(2)(a)(ii) – *likely earning capacity*

The applicant cannot rely on the likely earning capacity of each de facto partner. After separation neither the applicant nor Ms Eady had any earning capacity, other than the other government superannuation payments. At the time the Court considers the application for interim spousal maintenance, Ms Eady's estate has no earning capacity or income other than the minimal interest earned on invested funds;

(c) s 64(2)(a)(iii) – *any other relevant circumstances*

The applicant during his relationship with Ms Eady kept his income and any assets he acquired separate and did not share them with her. In doing this, he could have created savings or an asset base on which to fund his retirement, which would have been entirely achievable given he was living rent free in the Trust-owned apartment. Instead he made the choice to spend his income and live outside his means, relying on Ms Eady to fund any shortfall. In making this choice it is argued that the applicant has been the author of his own misfortune and must take responsibility for finding himself in a position that he is now in, where he has limited income and no cash reserves on which to fund his retirement;

(d) s 64(2)(b) – *Care of Children* – not relevant

(e) s 64(2)(c) – *Standard of living during the relationship*

It is accepted that the parties had a comfortable living standard, however it was only achievable due to the Trust housing Ms Eady and the applicant rent free. Likewise, the Trust, through its distribution to Ms Eady as a beneficiary, funded her and the applicant's other outgoing

expenses. Without the support of the Trust, Ms Eady and the applicant could not have afforded the standard of living which they enjoyed.

The distribution which Ms Eady received from the Trust ceased during her and the applicant's relationship in September/October 2016 when Ms Eady's interest in the Trust was capitalised and paid out to her. From September/October 2016 the only payments which Ms Eady received were Government superannuation;

(f) s 64(2)(d) – *period of retraining* – not relevant

[20] In accordance with s 64B it is submitted that the estate is not liable to maintain the applicant given that he has been unable to provide a causal link as required under s 64 for his inability to meet his reasonable needs.

[21] As Justice Tipping emphasised in *Slater v Slater*[5] only when it is because of the effects of those relationship-related disabilities, as set out in s 64, that the party concerned cannot practically meet his or her reasonable needs for maintenance, that any liability can attach under the subsection.

The applicant's reasonable needs

[22] Issue is taken with the applicant's claim for reasonable needs. It is seen as being excessive. It is pointed out the applicant has calculated his expenses based on 75% of the cost that he and Ms Eady incurred during the relationship. However, he will be living in a much smaller house and costs will only be for one adult rather than two and therefore his projected expenses are not based on his actual reasonable expenses. The respondents submit that the applicant's expenses can be reduced in accordance with a budget set out in the submissions, whereas the applicant is claiming $1,575.83 per week. The respondents assess this as around $1,000. When the applicant's superannuation payments for $390 a week are deducted, his resulting deficit is $619.92 per week.

[5] [1983] NZLR 166

The applicant's ability to meet his reasonable needs

[23] The respondents submit that the applicant should, through his own efforts, now be capable of meeting his own reasonable needs in light of the following factors:

(i) during his relationship with Ms Eady he was able to live rent free and the Trust (via Ms Eady) met the majority of the living costs. He in turn kept the majority of his income and all his assets separate. Given he was aware that Ms Eady was terminally ill, he has had many years and the means in which to build up savings with which to fund his retirement and his expenses after separation and/or Ms Eady's death;

(ii) the applicant and Ms Eady were separated for almost a year prior to Ms Eady's death and it has now been a further six months since Ms Eady's death. Accordingly the applicant has had 18 months from separation until the hearing of this application for interim spousal maintenance to adjust his living standards and to become self-supporting. Under s 64A he is required to assume responsibility for his own needs within a reasonable period of time after separation. His decision to spend all his income both during the relationship and after the relationship, rather than saving it to enable him to meet his reasonable needs, is his own decision and not one for which he should be rewarded by being awarded spousal maintenance;

(iii) the applicant, without authorisation, deducted $15,800 cash on Ms Eady's credit card prior to and shortly after her death. He also incurred expenses of approximately $1,900 on Ms Eady 's credit card. As a result he has, by his own unilateral actions, already had financial support from Ms Eady and the estate of $17,700. Had he used this money wisely and managed his expenses, these funds could have met his reasonable needs for at least 6 months being the period allowed pursuant to s 82.

[24] It is submitted that if the applicant had lived more frugally and had saved money during his relationship with Ms Eady, then he would now be in a position to meet his reasonable needs from those savings and the income he receives from Government superannuation.

[25] The respondents do not accept that the applicant's legal fees should be included in any award for spousal maintenance. While counsel accepts that legal fees can be included in an award of interim spousal maintenance, it is submitted that it would be inappropriate and unjust to include legal fees in this case.

[26] It is argued that the applicant is pursuing unmeritorious claims (see the decision of Judge Whitehead dated 28 May 2018 declining him an occupation order in relation to the [Flat 1]). As such, the applicant should not be enabled to do this further by the estate funding any part of his legal fees. If the Court were to include a component of legal fees in any spousal maintenance award it would in effect be usurping the Court's discretion as to costs as the end of the proceedings.

[27] It is argued that in other cases where legal fees have been included in an interim spousal maintenance award, it has generally been funded from the respondent's income and has not depleted their capital. To require one party to pay the other's legal fees from capital is effectively pre-determining any subsequent costs award application at the end of the proceedings.

[28] It is argued that the estate simply does not have income with which to fund the applicant's legal fees and it is therefore submitted that it is not appropriate in the circumstances for any legal fees component to be included if an award of interim spousal maintenance is made in the applicant's favour.

[29] It is pointed out that Ms Eady in her last will gifted the applicant half of her estate which prior to all the legal proceedings equated to the applicant receiving approximately $220,000. Had the applicant accepted this gift he would have had the ability to meet his reasonable needs without an award of spousal maintenance. It was his decision not to accept this gift and it is argued instead issued proceedings for all matters, thereby not only foregoing his gift under the will but depleting the estate in a significant way due to the ongoing legal costs.

The respondents' means and ability to meet the applicant's shortfall

[30] The submission is made that if the estate is ordered to pay interim spousal maintenance, irrespective of the amount, it will have no choice but to fund the order from its capital because it has no real income. The estate's capital is relatively modest and is rapidly reducing as a result of the number of unnecessary and meritless legal claims which the applicant is bringing against the estate.

[31] Further, it is argued that if an award of interim spousal maintenance is granted at the quantum sought by the applicant (even excluding his legal fees) the estate will be significantly depleted, thereby leaving little to nothing in the estate for distribution to Ms Eady's children in accordance with the terms of her will.

Conduct

[32] It is pointed out that under s 66 of the Act the Court may consider the applicant's conduct when considering an application for maintenance and the amount of maintenance. The conduct the Court can consider is:

(i) conduct that amounts to a device to prolong his inability to meet his own reasonable needs; and/or

(ii) misconduct that is of such a nature and degree that it would be repugnant to justice to require the other partner to pay maintenance.

[33] The submission is made that the applicant's following conduct and misconduct is relevant when determining whether it is just to award the applicant interim spousal maintenance:

(i) the choice to retire knowing he had no savings or retirement scheme with which to support himself;

(ii) his choice not to save money during and after the relationship on which to support himself in his retirement and after Ms Eady's expected death despite living rent free and keeping the

majority of his income during his relationship with Ms Eady separate;

(iii) living beyond his needs both after separation and after Ms Eady's death and failing to take any steps to become self-supporting as required under s 64A of the Act;

(iv) unilaterally taking and spending cash of $15,800 and spending approximately $1,900 on Ms Eady's credit card in the days leading up to and after her death;

(v) unilaterally taking Ms Eady's car when she went into hospice care and changing the ownership into his name;

(vi) refusing to vacate [Flat 1] after separation despite Ms Eady's repeated requests for him to leave;

(vii) locking himself into [Flat 1] after Ms Eady's death and refusing to leave despite the owner's requests for him to leave.

[34] It is said that given that the applicant was aware as early as 2011 that Ms Eady was likely to die before him, he has had plenty of time to arrange his financial affairs so as to be self-supporting either at separation or on Ms Eady's death. Not to do so has been an intentional ploy by him and should therefore, it is argued, prohibit him from being awarded interim spousal maintenance.

[35] Counsel submits that the Court can reach the same conclusion as Judge Burns in *CAM v DCK*:[6]

> I have reached the conclusion that her own conduct has amounted to a device to prolong her inability to meet her own reasonable needs, and I think she should have faced up to the changes in her life a lot earlier, and taken decisions that would enable her to meet her own reasonable needs.

Is it just to make an award of interim spousal maintenance?

[6] FC Auckland FAM 2007-004-000523, 16 May 2007 at [25]

[36] The respondents' position is that even if the Court finds that the considerations in s 82 of the Act have been met, the Court must still be satisfied that the making of an order is just and if it is not, an order for spousal maintenance must be declined.

[37] In *YM* v *MJM*[7] Judge Walker confirmed:

> Whether this Court elects to make an order or not and the amount to be awarded depend on what I consider to be just in the circumstances.

[38] Likewise, Justice France in *T v H* (supra) reaffirmed the principles determining whether interim maintenance should be ordered and stated *in determining what constitutes a need, the court must carefully examine the circumstances of a particular case and then do what is just*.

[39] Here, counsel submits that if the applicant had made an application for interim spousal maintenance after separation but before Ms Eady's death he would not have been successful. Ms Eady's only income was her Government superannuation payments and in light of her cancer and health needs, her reasonable needs were much greater than the applicant's Counsel submits it would be both erroneous and unjust for the applicant to now succeed in an application for maintenance, as a result of him waiting and bringing his application after Ms Eady's death.

[40] It is submitted that in the circumstances of this case, particularly given the applicant's own behaviour is the reason he cannot meet his reasonable needs, it would not be just to make an award for spousal maintenance.

Lump sum payments

[41] The applicant is seeking a lump sum payment of spousal maintenance, however under s 82 any interim spousal maintenance must be periodic.

[42] In respect of s 73 of the Act, lump sum payments by virtue of s 69 are only available in relation to applications under s 67 which only applies to married or civil union couples.

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[7] FC North Shore FAM – 2006-044-002830, 20 March 2008 at [10]

[43] By way of conclusion, the submissions are made:

(i) there is no jurisdiction under s 82 of the Act to award interim spousal maintenance against the estate;

(ii) the applicant's request for interim spousal maintenance is neither reasonable nor necessary and it would be unjust and unreasonable for interim spousal maintenance to be granted;

(iii) it is clear that the applicant's inability to meet his own reasonable needs is not as a result of the division of functions of the relationship, nor any other of the qualifying factors under s 64 of the Act and therefore he is not eligible for spousal maintenance;

(iv) the respondents, as executors of the estate, do not have the means and ability to meet any award for spousal maintenance;

(v) in light of the applicant's own conduct and misconduct, it is not appropriate to award him spousal maintenance;

(vi) in the circumstances of this case it is not just nor appropriate for spousal maintenance to be awarded against the estate.

APPLICANT'S POSITION RE INTERIM MAINTENANCE

[44] Section 61 excludes the requirements of ss 62 – 66 considerations applying to s 82 applications. Two factors need to be satisfied before the exercise of discretion under s 82:

(a) the applicant's reasonable needs which have been set out in a budget attached to the applicant's affidavit. The respondent's submission is that reasonable costs are $1,009.92 a week, not $1,575.83 as claimed by the applicant. It is argued that there is no evidence to support that submission;

(b) the ability of the parties to meet the reasonable needs;

[45] It is submitted that the reason why ss 62 – 66 are not mandatory considerations for the Court when determining an application under s 82 is because those sections generally require the Court to make findings on disputed facts. In the context of s 82, submissions only hearing, the Court cannot make such findings without the evidence being tested by cross-examination.

[46] It is submitted, however, that if the Court decides ss 62 – 66 considerations are relevant, the following submissions need to be taken into account from the applicant's perspective:

(a) s 64(2)(a)(i) – division of functions in the relationship – Ms Eady controlled the ownership of the properties the parties lived in during their 32 year relationship. If it had not been for Ms Eady's control then the applicant would have a half share in valuable relationship property and would most likely be in a self-supporting position. It is acknowledged that this is a disputed fact;

(b) s 64(2(a)(iii) - other relevant factors – the respondents allege that the applicant should have saved for his retirement. The applicant says that he relied on statements made by Ms Eady during their shared life together. The respondents also allege that the applicant kept his assets separate during the relationship. It is argued that there is no evidence of this and the applicant has deposed that he applied his earnings towards paying living costs. The applicant's business was liquidated in 2013 when he was aged 73. There is no evidence that he "made the unilateral decision to retire" (disputed facts);

(c) s 64(2)(c) – standard of living during the relationship – the Trust did provide accommodation, however it is alleged that property and relationship property were disposed of by Ms Eady to the Trust. The applicant contributed directly and indirectly to the relationship. His standard of living has been traumatically effected by the death of Ms Eady, the loss of his home of 24 years and having to file proceedings to receive his entitlements under the PRA. In his

modest budget the applicant has not claimed for use of a luxury holiday home, overseas holidays and restaurants regularly enjoyed while he and Ms Eady were together.

The Court is referred to *Hodson v Hodson.*[8] Kos J stated at [28] that close reference should be made to the lifestyles the parties enjoyed during their marriage. The reasonable needs of the applicant should not be diminished as to create a:

> *sudden and traumatic end to that lifestyle, regardless of what the respondent might wish.*

Later in the decision at [29]:

> *A robust sense of fairness must prevail*.

(d) S 66 Conduct of the parties:

(i) Car – Ms Eady's car was worth $15,000. She gave the applicant the keys for him to use the car when she was admitted to hospice. The respondent's claim the car was transferred into the applicant's name on 7 February 2018 at which time Ms Eady was alive. No transfer of ownership documents had been provided which would show that Ms Eady signed the document. Following her death the car was transferred back into Ms Eady's name. The applicant used the car until 20 April 2018 when the executors demanded it be returned even though they accept the car is relationship property; they knew the applicant did not have his own car and would have to borrow a car from his daughter and Ms Eady's car was not required by the executors. It is argued that this calls into question the respondents' conduct.

(ii) Credit card – the applicant was given a credit card by Ms Eady to use when she went into hospice. He was concerned as to how Ms Eady's children would treat him once she died. He accepts he withdrew $15,800 from the credit card and has included that as a loan in his affidavit of financial means and sources in the PRA

[8] [2012] NZFLR 252 (HC)

proceedings. Those funds have been spent. Contrary to the respondent's view he says that the lap top and printer are essential for his role as a plaintiff in the proceedings;

(iii) The separation date – in terms of the evidence filed in relation to whether or not the applicant and Ms Eady separated in February 2017, it is submitted that the relevant date in relation to de facto partners and the obligations for maintenance under the FPA is "the date the parties ceased living together". [ss 64, 64A, 65(1)(b), 66(1)(b)]. The applicant and Ms Eady ceased living together when Ms Eady died on 10 February 2018. It is argued that if the Court considers conduct between February 2017 and Ms Eady's death is relevant in terms of s 66, then these facts are disputed and should not be determined by a submissions only hearing under s 82;

(iv) Conduct from 2011 as "intentional ploy" is not to be a self-supporting position after Ms Eady died – it is argued that this submission made by the respondents is ludicrous. The applicant's company had been expected to yield significant returns following the redevelopment of a rest home but was put into compulsory liquidation. The applicant was 73, Ms Eady was diagnosed with secondary terminal cancer in 2012 and the applicant had his own health concerns. He had little or no hope of finding employment and the couple made a decision that he retire;

(v) Application for security for costs – the respondents have indicated that they will be applying for security as to costs in the High Court proceedings. The amount of the security being sought is unknown, however, the respondents, as trustee defendants, have already sought $50,000 from the applicant for security as to costs. The submission is made that such an application by the executors is contrary to the principle of the PRA and is a tactical weapon to either delay the proceedings or attempt to shut down the applicant's claim. If so, this is an abuse

> of the right to seek security for costs. The respondents as beneficiaries of the Trust fund have access to a valuable property which earns significant income (2017 financial statements show rental income from the [address deleted] property of $500,000 per annum which has no doubt increased since that year). They are ensuring the applicant faces every procedural hurdle and incurs significant legal costs to obtain his legal entitlements.

Legal costs

[47] The leading case is a Court of Appeal decision of *C v G*[9] discussed by Justice Kos in *Hudson v Hudson* at [36]:

> First, the Court of Appeal's decision in *C v G* is clear: legal costs should only be included in a s 64 final maintenance order if likely to be a continuing expense. In the context of a s 82 interim order, a more liberal approach may be taken. But it is unlikely to be right to make provision for legal expenses, as part of the interim reasonable needs of the applicant, unless such expenses will be incurred within the immediate six-month period …

[48] It is claimed that as a result of this battle of attrition (being allegedly waged by the respondent in their various capacities), the applicant has ongoing legal costs which will continue until the proceedings are determined by the Court or settlement can be reached. He is going into significant debt to meet these costs. At present he is incurring fees of around $15,000 to $20,000 per month. Given the volume of the applications and the oppositions, the submission is made that this will continue for at least the next six months. Discovery is scheduled to be completed by the end of the year with at least one interlocutory hearing already being set down for the first available date in February.

Unmeritorious claims

[49] In relation to the claims made by the applicant in the Family Court and the High Court, the respondents and their counsel have consistently used the words

[9] [2010] NZCA 128; [2010] NZFLR 497

"unmeritorious" "without merit", "meritless" and "unnecessary" in submissions and affidavits. The applicant's submission for application to sustain notices of claim set out the basis for the claims in the proceedings. It is argued that these claims have merit and have not been struck out.

[50] The applicant may not have been successful in his application for an occupation order but the apartment was his home for 24 years. It is submitted that if Judge Whitehead had determined the applicant's claim was without merit he would have awarded costs against the applicant.

[51] The applicant's counsel says that the use of these words and phrases are unhelpful and argumentative in the context of the respondent's affidavits. They are inadmissible submissions and should be excluded.

[52] The respondents submit that the applicant should not have received maintenance prior to Ms Eady's death. If the applicant and Ms Eady had separated before her death and she had remained a beneficiary under the Trust, the Court would have followed the same enquiry made by the Court in *Hudson* at [57] and *L v T*[10] to ascertain whether Ms Eady was a beneficiary of the Trust and was able to "lay her hands on" sufficient funds to pay maintenance to the applicant. If she had received $500,000 from the Trust and was no longer a beneficiary, then the applicant would have sought part of the capital to pay maintenance until his claims have been determined.

[53] The following concluding submissions are made on behalf of the applicant as to whether it is just in the circumstances to award interim maintenance:

(i) The applicant and Ms Eady ceased living together on Ms Eady's death. He has reasonable needs that he cannot meet as a result of him relying on Ms Eady's promises and being deprived his entitlements under the PRA. He is 78 and his living standard has dramatically altered since Ms Eady died. He needs his independence and to live in an appropriate home;

[10] [2008] NZFLR 975 (HC)

(ii) His needs outweigh those of other beneficiaries of the estate who have access to a vast trust fund;

(iii) the applicant has acted promptly to file his claims. The protection afforded by s 82 is essential for the applicant to ensure that he can support himself until his claims are determined by the Court. It would be unjust in the circumstances if the applicant was unable to live reasonably and pay ongoing legal costs which are essential to the determination of his claims.

[54] The estate has sufficient capital to pay the applicant:

(a) $1,185 per week (or $5,235 per month) for rent and living expenses for the next six months (total $30,810). The first payment is to include a bond of $3,620; and

(b) $1,615 per week (or $7,000 per month) for legal fees for the next six months (total $42,000).

Commentary

[55] There is jurisdiction to order interim spousal maintenance. The issue is whether the Court exercises its discretion to make an award in this particular instance.

[56] This was a lengthy relationship – in excess of 30 years. Given the nature of the relationship it is not unexpected that the applicant had a reasonable expectation that he might be provided for better than what he has been by Ms Eady after her death.

[57] He is 78 years of age and obviously during the relationship enjoyed a comfortable lifestyle. That lifestyle has definitely been taken away from him as a consequence of Ms Eady's death and it is not surprising that he is looking to the courts to remedy what he sees as a very unfair situation. It is apparent that he considers that Ms Eady's family have persuaded her to take the legal steps that she did – which the applicant says was done without his knowledge.

[58] Given this, it seems somewhat harsh for the respondents to be making the criticism of him that they now do. The relationship income primarily came from Ms Eady by way of her being a beneficiary in the Trust. It is certainly understandable that a decision would be made for the applicant to retire when his business was liquidated in 2013 when he was aged 73. There seems to have been an expectation on the respondents' part that despite that business being liquidated, the applicant ought to have made provision for his retirement and thereby change the dynamics that had existed for years in their relationship. That is, that their lifestyle had been primarily funded because of Ms Eady's good fortune in being able to receive payments from the Trust. That in itself is a division of functions in the relationship on which the applicant can establish a claim for spousal maintenance.

[59] It is not established on the evidence before the Court that the applicant did keep his income and any assets he acquired separate and did not share them with her over the 30 years of marriage. He was a bankrupt at the commencement of the relationship. What has been established however was that one party to the relationship was reliant on the other's income to sustain the lifestyle that they both enjoyed. In this case it was Ms Eady's who enjoyed the better financial position and it would seem the applicant paid what he could to their joint costs. It is somewhat harsh to accordingly make the claim that the applicant has been the author of his own misfortune and therefore he must take responsibility for the position he now finds himself in.

[60] The applicant is claiming that he had no idea that, behind his back, Ms Eady was being persuaded/advised to enter into a series of legal steps which would shut out the applicant from a share in Ms Eady's wealth which he unwittingly may have considered it to be somewhat more than has now been prescribed.

[61] I do not agree with the submission that there is no basis to the claim that the applicant makes because he has been unable to provide a causal link as required under s 64 for his inability to meet his reasonable needs.

[62] At the age of 78 the reality is that the applicant's ability to meet his reasonable needs are significantly reduced. There is dispute as to whether or not the parties had in fact separated prior to Ms Eady's death but, even if the respondents are right in their contention that there had been almost a year of separation, that does not significantly

change the picture for a then 77 year old man who has been living in a relationship of some 30 years wherein the parties had organised their affairs in such a way as to not put any pressure on the applicant to share in their living costs to the same extent as Ms Eady was able to.

[63] It would seem that what the respondents are saying is that if the applicant had taken what he had been left under Ms Eady's will he would have been able to get on with his life without the need to look for the financial support he is now looking for. It is too early to be assuming that the applicant will not succeed in his High Court proceedings. If he were to succeed that may change the present landscape and may be relevant in respect of whether or not there is a final spousal maintenance liability.

[64] However what has happened for the applicant is that there has been a sudden and traumatic end to the lifestyle he enjoyed and it becomes a question as to whether or not he should bear the total consequences of that. Due to the wording of the will he is now in a position where unless his various court proceedings are successful he will be left with nothing.

[65] Given the type of relationship that existed between Ms Eady and the applicant, it is also somewhat harsh and judgmental to be saying that the applicant should have saved for his retirement or that once it was known that Ms Eady was ill he should have taken steps to ensure he could meet his needs after her death.

[66] The conduct that the respondents complain of are not such that the applicant has become undeserving of consideration for interim spousal maintenance. The explanation given in respect of his use of Ms Eady's car and of her credit card do not disqualify him from making a claim. The withdrawal of $15,800 from the credit card was done at a time when it was obvious the applicant was somewhat desperate as to how he was going to maintain himself over and above what he was receiving from National Superannuation. His position is that that can be taken into account in any final wash up in respect of payments he considers he is entitled to expect from Ms Eady's estate or otherwise.

[67] It is a situation where the applicant can have a reasonable expectation that if he is awarded interim spousal maintenance it will include an amount to meet ongoing

legal costs. It is apparent that there are significant legal costs being incurred by the applicant at this time. That will continue until the High Court proceedings have been determined or there is a settlement. The Court is entitled to consider, in these circumstances, including in an interim spousal maintenance award an amount for ongoing legal costs.

[68] As already indicated, it is not possible at this distance for the Court to proceed on the basis that the applicant has been progressing unmeritorious, without merit, meritless or unnecessary legal proceedings. The Court has to be satisfied that it is fair to make an award to cover the transitional period that occurs when a relationship comes to an end. The applicant is not able to meet his reasonable needs at this time.

[69] In respect of the applicant's reasonable needs, he is claiming $1,575.83 per week plus $1,615 per week for legal fees for the next six months. The respondents submit that the reasonable costs can be pruned to a figure of $1,009.92 per week. The applicant claims that his shortfall is $1,185 per week and he is seeking with the initial payment an inclusion of the sum of $3,620 to meet a bond payment for rental accommodation. When one factors in the Government superannuation payment, the respondents' position is that the shortfall is $619.92 on the basis of their analysis of his budget.

[70] The respondents' counsel has set out in para [30] of her submissions a comparison of the applicant's budget and the respondent's proposed budget. It is pointed out that the applicant has calculated his expenses based on 75% of the cost that he and Ms Eady incurred during the relationship. The point is made however that the applicant will be living in a much smaller house and costs will only be for one adult rather than two, therefore his projected expenses are not based on his actual reasonable expenses. I consider there is merit in that criticism of the applicant's budget although it has to be acknowledged that it can be a difficult task to accurately assess one's future needs.

[71] Having considered the budgets and criticisms made I find that the likely shortfall is closer to the respondent's assessment of $619.92 in respect of the living costs. This can be rounded up to $620.00. I accept that there is also an entitlement for the applicant to receive an amount towards his ongoing legal costs at this time. I

am not persuaded that this liability should be fixed at the figure claimed by the applicant. Having considered the matter I fix that figure at $1,000 a week as being a more appropriate recognition of this particular liability during the period of the interim order.

[72] Given the actual need for the applicant to rehouse himself I accept that there should be an extra payment in the first payment towards a bond, but this should be calculated on the basis of $500 per week rental i.e. $2,000.

[73] I am satisfied that the estate does have sufficient capital to pay to the applicant the periodical sum that I have determined is to be paid. Accordingly I make an award in favour of the applicant in the sum of $1,620.00 per week (subject to the first payment including an additional $2,000 for a bond payment).

[74] The applicant is entitled to costs and these are to be fixed on the 2B category.

Dated at Auckland this day of

I A McHardy
Family Court Judge