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**IN THE FAMILY COURT
AT NORTH SHORE**

**FAM-2017-044-000311
[2018] NZFC 2071**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	LEONIE ANN KOOREY Applicant
AND	KIERON PAUL LAWSON Respondent

Hearing: 1 March 2018

Appearances: V Crawshaw and S Trigg for the Applicant
S Morris and G Angus for the Respondent

Judgment: 23 April 2018

**RESERVED JUDGMENT OF JUDGE A M MANUEL
[Further Interim Spousal Maintenance]**

Introduction

[1] These are proceedings under the Family Proceedings Act 1980 (the Act)¹ and concern an application for interim maintenance by Ms Koorey (the wife) to be paid by Mr Lawson (the husband).

Background

[2] The parties were in a relationship for over 20 years. They began a de facto relationship in 1996, married in February 1997 and separated in March 2016. They have two daughters who are aged 21 and 19.

[3] The wife is aged 43 years and working as a part-time library assistant for Auckland City Council. The husband is aged 44 years and is a software engineer who worked in the IT industry throughout the parties' marriage. From separation until 2017 he was employed as a senior vice president of engineering for a US based company, earning at least \$336,295 a year, plus a potential bonus of up to 35 percent of his salary and a further \$20,000 in director's fees. Since April 2017 he has worked full-time in an IT venture which he co-founded.

[4] The wife has been living in the former family home which is owned by a family trust. The parties are settlors and beneficiaries. The children were living at home until one left in July 2016 to go flatting and the other left for university in February 2017. Home loans secured by mortgage over the family home amount to about \$375,000.

[5] On 11 August 2017 the interim maintenance issue came before the Family Court. On 21 August 2017 an interim maintenance order was made for \$6,267.97 a month with the first payment due on 25 August 2017.² The husband was to pay a further \$955.22 a month until the mortgage could be transferred to interest only repayments. The interim maintenance order had a duration of six months and expired on 21 February 2018.

¹ All sections referred to in this judgment are found in the Family Proceedings Act 1980.

² *Koorey v Lawson* [2017] NZFC 6589.

[6] There has been delay in the substantive relationship property proceedings. Having been unable to resolve property matters, and without a substantive maintenance hearing for the expiration of the interim maintenance order, the wife applied on 19 December 2017 for a further interim maintenance order.

Evidence

[7] Both parties have filed a number of affidavits. The wife filed declarations of financial means and their sources dated 17 May 2017 and 26 February 2018, and affidavits dated 17 May 2017, 11 July 2017, 8 December 2017, and 19 December 2017 (x2).

[8] The husband filed declarations of financial means and their sources dated 20 June 2017, 8 December 2017, and 26 February 2018, and affidavits dated 20 June 2017, 8 December 2017, 22 December 2017 and 24 January 2018. He also relied on his affidavits in the parties' relationship property proceedings.

The wife's position

[9] The wife seeks a further order for interim spousal maintenance from the expiration date of the previous order with a date for payment to be included so that there can be no uncertainty as to when it falls due.

[10] Counsel outlines the basis for the application as follows:

- (a) An obligation to the wife clearly exists;
- (b) The duration of the parties' marriage, the wife's considerably lesser actual and potential income than the husband's, and the standard of living that the parties enjoyed, are all factors which should be taken into account;
- (c) The wife has identified that her reasonable needs amount to \$11,960.47 a month and her income \$1,866.63 a month, leaving a shortfall of

\$10,098 a month.³ Her reasonable needs include the mortgage payments and maintaining the family home. Notwithstanding that the interim maintenance order of 21 August 2017 sees her with a deficit, she is merely seeking a further order in the same amount in the interim.

- (d) The husband clearly has the means and the ability to earn a significant income from which to pay any maintenance ordered;
- (e) Jurisdiction exists for the making of a further interim maintenance order, particularly in the circumstances where the relationship property and substantive maintenance matters have not been resolved. Delays in progressing the property proceedings have been outside the wife's control.

The husband's position

[11] The husband asks for the interim maintenance to be declined or at least substantially reduced to reflect the change in his financial position since the August 2017 decision. He accepts that the wife is currently unable to meet the full extent of her reasonable needs. However, due to changes in his own financial position, he claims that he is unable to continue paying maintenance at this level.

[12] Counsel for the husband submits that there are essentially two issues for the Court to determine:

- (a) Whether there has been any change to the wife's reasonable needs and her ability to meet those needs; and
- (b) The husband's ability to meet her reasonable needs.

[13] While the husband accepts that the wife is unable to meet the full extent of her reasonable needs, he suggests that her expenses could be reduced. It is not appropriate,

³ Based on her budget of 26 February 2018, as amended by her counsel's advice at the hearing that the mortgage figure was \$1,813 a month, rather than \$2,100 a month.

for example, for her to contribute the maximum amount to Kiwisaver. If she reduced her Kiwisaver contributions to the minimum of three percent she would receive an additional approximately \$45.95 a week, or \$199 a month.

[14] Further, the wife is currently working 30 hours per week. She is capable of working full-time and there is no reason why she could not obtain a part-time role to supplement her income.

[15] The husband claims he no longer has the means to meet the wife's shortfall as assessed earlier. He is not currently earning an income and, other than his post-separation earnings and redundancy pay, he does not have any separate property that can be utilised to pay maintenance.

[16] While the husband has approximately \$84,861.89 remaining in his bank accounts, he has liabilities of around \$78,895.06 comprised of income tax liability on consulting income, legal fees and an American Express balance, leaving him with cash of only about \$6,000. This is not enough to cover his own reasonable needs, calculated as being \$12,297 per month.

[17] The only assets available to the husband are relationship property assets including the family home, his Kiwisaver and the Mercedes Benz. There is therefore no capital available for maintenance, however it is open to the court to order that relationship property be sold for this purpose.

[18] The husband maintains that the wife does not have any interest in his new IT venture as no intellectual property existed at the date of separation and the company was incorporated after the parties separated. The husband lays the blame for delays in resolving property matters squarely at the feet of the wife and her professional advisers. More than six months have passed since he provided her with \$6,500 in order to obtain an expert report on her alleged interest in the IT venture. As at the date of the hearing, no report had been completed. The delay was unjustified and prejudicing the husband's position.

The law

[19] The High Court in *Cooper v Pinney*⁴ confirmed that:

[33] There is no explicit statutory restriction on the number of times the court may exercise its discretion to make an interim order. In the absence of such an express restriction to imply such a limitation into s 82 to limit the court's discretion would, in my view, run counter to the purpose of the enactment and the wider scheme of the Act.

[34] Such an approach would also appear inconsistent with the Court of Appeal's understanding of the purpose of interim maintenance ...

[20] Any further application for interim maintenance will be examined afresh on its merits.⁵ This may include re-examination of the relevant circumstances of the parties and the reasons why another application is necessary, and may include the status of the substantive proceeding. It is also likely that it will include the procedural history of the manner and the responsibility of the parties for any delay.

[21] Section 82 provides for interim maintenance:

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 the Family Court.

⁴ *Cooper v Pinney* [2016] NZHC 1633.

⁵ *Cooper v Pinney* [2016] NZHC 1633 at [56].

[22] The purpose of interim maintenance was discussed in the Court of Appeal decision of *Ropiha v Ropiha* as follows:⁶

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.

[23] This approach has since been confirmed in *FH v LH*⁷ and *Tsoi v Hua*.⁸ In *RKFH v DPLH*⁹ the Family Court highlighted the relevant principles to emerge from *Ropiha* as follows:

- (i) It is intended to protect an applicant who has inadequate means until a substantive order can be made in regard to spousal maintenance.
- (ii) There are no special conditions or criteria that must be applied by the court.
- (iii) The Court has an unfettered discretion to decide whether to (a) make an order and (b) determine the amount. That discretion must be exercised in a way that is just.
- (iv) Whether an order is made will depend upon the circumstances of the particular case.
- (v) 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 *Ropiha v Ropiha* [1979] 2 NZLR 245 (CA).

⁷ *FH v LH* [2013] NZHC 1044.

⁸ *Tsoi v Hua* [2006] NZFLR 560 (HC).

⁹ *RKFH v DPLH* [2012] NZFC 8276 at [13].

- (vi) The Court will also consider the standard of living of the parties prior to separation.

[24] The principles set out at ss 62-66 may provide guidance in determining an application for interim maintenance, however consideration of them is not mandatory.¹⁰ The court must have regard to all relevant and appropriate factors in determining whether to make an award.

The relevant circumstances of the parties, the reason why another application is necessary and the status of the substantive proceedings

[25] In the August 2017 decision the court considered the relevant principles in s 63 including:

- (a) the wife's ability to become self-supporting (s 63(2)(a)). This involved considering the effects of division of functions during the marriage (s 63(2)(a)(i)), her likely earning capacity (s 63(2)(a)(ii)) and any other relevant circumstances (s 63(2)(a)(iii));
- (b) the responsibility of the parties for the ongoing daily care of the children (s 63(2)(b));
- (c) the standard of living while they lived together (s 63(2)(c));
- (d) any physical or mental disability or inability to obtain work that is reasonable or adequate (s 63(2)(d) and (e)); and
- (e) the need for a reasonable period of retraining (s 63(2)(f)).

[26] The principles referred to at [25](b) and (e) above are no longer relevant given that the children are now living independently and the wife is not currently undertaking any retraining.

¹⁰ *Tsoi v Hua* [2006] NZFLR 560 (HC).

[27] In this case the parties separated after a lengthy relationship which produced two children. The marriage was a traditional one in the sense that the husband was the main breadwinner. The extent to which the wife was responsible for caring for the home and children was in dispute. The husband claimed his contribution was greater than the wife gave him credit for. He was also critical of her study and work history. He could not understand why she was not working full-time, given that she no longer had “any responsibilities for the ongoing care of the children and [was] not required to provide a home for them”.

[28] The wife claimed that the parties enjoyed a “very comfortable” standard of living while they were together. Since separation the husband had continued to enjoy the same standard of living whereas she had been forced to “forgo many of the day to day comforts I was used to” and live on a “comparatively meagre budget”. The husband on the other hand said that the parties had a “modest” standard of living when they were married and that he had pruned his expenses to cope with the changes after their separation.

[29] In the August 2017 decision the court acknowledged that it was not possible, given the truncated nature of an interim maintenance hearing, “to resolve disputes between the parties about what their standard of living was during the marriage, what roles each had in the household, and the wife’s work and study history”. Nevertheless the court held that the parties had at least a comfortable standard of living and commented that it was difficult to understand how the parties shared the care of the children and household duties in the way the husband suggested, if he worked long hours and travelled overseas working for an overseas based company.

[30] The 2017 decision also traversed the history of the proceedings up to that time. There were Property (Relationships) Act 1976 (PRA) proceedings filed in May 2017 which were at a very early stage of the court process. Both parties had filed their affidavits of assets and liabilities and narrative affidavits and the file was awaiting a judicial conference date. The court noted that “the PRA file is complicated by a dispute about whether the husband’s interests in a company commenced in June 2016 is separate or relationship property. The wife will soon be organising her own valuation of the husband’s business interest”.

[31] Having concluded that on the balance of probabilities one or more of the grounds in s 63 applied, the court in August 2017 went on to assess the wife's reasonable needs. Because the husband accepted that he had the means to meet the wife's reasonable needs, the focus of the decision was on that assessment.

[32] Some six months have passed since the first hearing. Over that time the wife had increased her income somewhat but not her hours. Her evidence was that she had attempted to find a suitable full-time or better paid job without success, and she was hampered by fragile psychological health. She had not wished to separate and found the circumstances distressing. [Details deleted]. She included chiropractic and counselling expenses in her revised budget.

[33] The husband's employment position had also changed. At the time of the August 2017 hearing he had been made redundant some four months earlier but received a redundancy payment covering the eight months to February 2018. His new IT venture, in which he began working full-time in mid 2017, had raised initial funding of \$1.8 million. The board had agreed in August 2017 that he and his co-founder would begin drawing partial salaries as consulting fees from September 2017. For the husband this was \$10,000 a month before tax (or about \$7,000 a month after tax). The venture required further funding by February 2018 which was linked to the company either being close to or meeting its projected revenue target.

[34] In his affidavit of 8 December 2017 the husband gave evidence that the company was behind its revenue schedule and there were significant year to date losses. Discussions were being held with a number of investors but the husband and his co-founder had not yet been successful in "gaining strong commitment from any investors". If he and his co-founder were unsuccessful in raising a second round of funds the business would either restructure or close its doors. The husband would be unable to draw any salary after February 2018 and need to return to a full-time salaried position.

[35] Due to a relative scarcity in New Zealand of the types of roles he had worked in he estimated that it would take at least six months to find a suitable position either locally or offshore.

[36] His savings from the redundancy payment and other sources had largely been spent and he claimed that the remainder was earmarked to pay the debts referred to at [16] above. Unless further funding was approved he had no ability to meet his own reasonable needs, let alone his wife's.

[37] In summary, he was not currently earning an income. Other than his post-separation earnings and redundancy pay he had no separate property that could be used to pay to support his wife.

Findings

(a) Principles in s 63

[38] I am satisfied that on the balance of probabilities one or more of the prescribed s 63 circumstances apply. The wife's ability to become self-supporting is limited by the effects of the division of functions during the marriage and her current earning capacity. The parties enjoyed a comfortable standard of living. To some extent her state of health limits her ability to work longer hours or in a more demanding but better paid job. The interim maintenance order expired less than two years after the parties separated. The effect of these factors is not spent.

(b) Procedural history and delay

[39] Although I accept there is some justification for the husband's criticisms of the wife's advisors' delays in obtaining her expert's report, I do not consider the delays involved to have been so inordinate that they are disentitling. The property proceedings have been on foot for less than a year.

(c) Examination of the wife's reasonable needs

[40] In the August 2017 decision the court examined the wife's reasonable needs in detail. There have been some changes to her income and expenses since then but because she is seeking less than her estimated shortfall (and the husband accepts that

she is unable to meet her own reasonable needs notwithstanding his suggestions for reductions) a detailed analysis is less necessary.¹¹

(d) The husband's ability to meet the wife's reasonable needs

[41] At the August 2017 hearing the central issue was the wife's reasonable needs. The central issue here is whether the husband has the means to meet or assist with payment of the wife's reasonable needs.

[42] The husband's position was premised on the basis that he was free to risk his future income by embarking on the IT venture, rather than seeking another salaried position after he was made redundant. And that he was also free to spend most of his post-separation income and redundancy pay. On his own evidence the amounts he received were in excess of his reasonable needs. Each of his declarations of financial means showed a surplus between income and expenses which could have been put aside to meet any future maintenance award, but has either been spent or been earmarked to pay debts.

[43] I do not accept that the husband can simply abrogate his responsibilities to support his wife by choosing to embark on the new IT venture and spending money which he could have saved, then claiming that the cupboard is bare. In terms of s 65(2)(a)(i) the husband's means include potential earning capacity.

[44] Nor do I not accept that the husband's position is as dire as he suggests. The husband is clearly an able businessman and a high earner. Post-separation his lifestyle has included expensive overseas travel, entertainment and other accoutrements. It is hard to believe that a man used to living at this level of expenditure would choose to leave himself in a position where potentially he has no ability to meet even his own reasonable needs for some time.

[45] In summary, I find the husband has the ability to pay maintenance in the sum sought by the wife.

¹¹ Nevertheless a revised assessment of the wife's reasonable needs is attached at Schedule A.

Summary of orders and directions

- (1) The husband is to pay interim maintenance in the sum of \$6268 a month to the wife for a period of six months.
- (2) Payments are to be made in the weekly sum of \$1446 commencing from 6 March 2017.
- (3) Any submissions as to costs are to be filed within 14 days and any reply within a further seven days.

A M Manuel
Family Court Judge

SCHEDULE A

Living expenses	Wife's monthly budget
Mortgage	\$1,813
Rates	\$185
Water	\$43
Home insurance	\$113
Life insurance	\$40
Vehicle insurance	\$55
Food and groceries	\$900
Power and gas	\$200
Phone and internet	\$120
Media	\$21
Lawns and gardens	\$105
Repairs and maintenance	\$300
Petrol, registration and warrant of fitness	\$179
Public transport/taxi	\$10
Clothing	\$300
Haircuts and grooming	\$125
Medical and dental	\$675
Legal costs	\$2500
Other professional services	\$290
Gifts for children	\$66
Gifts for family and friends	\$50
Entertainment and personal interests	\$200
Travel and holidays	\$200
Estimated outgoings	\$8,490
	- \$1,866
Total estimated outgoings	\$6,625