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[SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM 2019-004-000105
[2020] NZFC 5102**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[CARMEN SIMPSON] Applicant
AND	[TERRY MORTON] Respondent

Hearing:	11 May and 9 June 2020
Appearances:	M Crotty for the Applicant Respondent appears in person
Judgment:	6 July 2020

RESERVED JUDGMENT OF JUDGE A M MANUEL

[1] What follows is a decision about spousal maintenance. Under the Family Proceedings Act 1980 (FPA), Ms [Simpson] is seeking past and future maintenance from her former husband Mr [Morton].

[2] The parties were married for 14 years from [mid-2002] to August 2016. Their marriage was dissolved in August 2019. They have two children; [Kate] who

was born in [month deleted] 2009 and [Curtis] who was born in [month deleted] 2014. The children are now aged 11 and 6.

[3] The parties are in their mid 40s. They are both qualified professionals. Ms [Simpson] worked as [occupation deleted] until March 2009, when she left the paid workforce to care for [Kate]. From 2010, she established and ran [a business] which sold [details deleted].

[4] Mr [Morton] worked as [occupation deleted] until 2011. He briefly joined Ms [Simpson] working in [the business], then he began working as [occupation deleted]. In about 2012 the parties sold an investment property and paid the proceeds of sale into [the business] but it ceased trading in March 2015 and was later placed in liquidation by the Inland Revenue Department (IRD).

[5] After March 2015 (and for some time before) Mr [Morton]'s earnings [in his new occupation] were the family's sole source of income.

[6] Ms [Simpson] claims that over the years the family generally had a good standard of living with comfortable rental accommodation, meals out, an up to date car, insurance for health, life, motor vehicle and home contents, holidays and extra-curricular activities for their daughter.

[7] In the period leading up to their separation they ran into financial difficulties. Mr [Morton] claims the problems started in mid-2014 when [the business] "was experiencing a cashflow crisis with several key suppliers who were pursuing the business for overdue invoices".¹ The family credit card was used to prop up the business cashflow and when payments were not made, the debt was referred to a debt collection agency. The family car was financed by [a finance company] and in late 2015 a repossession agent began trying to repossess the car after those payments were not made either.

[8] The family also fell behind with payments due to the IRD. In February 2016 the IRD served proceedings on Mr [Morton] claiming \$98,556 including:

- | | | |
|-----|------------|----------|
| (a) | Income tax | \$15,934 |
| (b) | GST | \$66,877 |

¹ Affidavit of Respondent, 3 September 2019 at 16.

- | | | |
|-----|--------------|------------------------------------|
| (c) | Tax credit | \$11,827 |
| (d) | Student loan | <u>\$3,918</u> |
| | | \$98,556 |
| | | plus penalties, interest and costs |

[9] In April 2016 Mr [Morton] completed a Disclosure of Financial Position document in an attempt to negotiate a payment arrangement with the IRD.² This set out the additional debts the family owed at the time. They included:

- | | | |
|-----|------------------------------|-----------------|
| (a) | [Credit Line]: | \$14,000 |
| (b) | [credit card]: | \$4,600 |
| (c) | [Bank]: | \$4,000 |
| (d) | Secured over the family car: | \$13,000 |
| (e) | [name deleted]: | \$2,500 |
| (f) | Contractor: | \$8,000 |
| (g) | [name deleted]: | <u>\$6,000</u> |
| | | \$52,100 |

[10] Mr [Morton] explained in the disclosure document that they had fallen behind with tax payments because of:³

Insufficient funds. We are a single income adoptive family. My business is relatively young and my income has been inconsistent.

[11] Ms [Simpson] also acknowledged that the family was having financial problems in an affidavit dated August 2016:⁴

We have had huge financial issues also. We have moved ten times in the last six months and were homeless for about 2 ½ weeks. ...

We have lived all over the place, and despite having the respondent control my business it has closed and we are in debt, and I understand that he has been

² Affidavit of Respondent, 3 September 2019 at Exhibit I.

³ At Exhibit I.

⁴ Affidavit of Applicant in parental proceedings, 25 August 2016, at 12 and 13.

served with Court application by the IRD for his personal debts. I see us in crisis completely and I worry about the impact on the children.

[12] Mr [Morton]'s income (after business expenses and tax were deducted)⁵ had been \$105,876 for the 2016 financial year.⁶ In 2017 his income was \$173,201.⁷

[13] The improvement in his income did not save the marriage. Nor did it solve the family's financial issues. Ms [Simpson] left with the children in August 2016, about five months into the 2017 financial year.

[14] Mr [Morton]'s income has never been as good again. It was \$49,432 in 2018,⁸ \$93,383 in 2019⁹ and less than \$59,286 in 2020.¹⁰ His evidence was that given the impact of the COVID-19 virus on the economy, his income for 2021 would be much lower than it had been in 2020.¹¹

[15] Ms [Simpson] did not return to the paid work force after the separation. She is in receipt of a benefit and living in social housing in [location deleted]. Her rent is about \$5,500 a year.¹² Her income, which is from her benefit and child support, has been about \$30,000 net each financial year since the separation.¹³ She has been home schooling the two children, contrary to Mr [Morton]'s wishes.

[16] Mr [Morton] is living in a rental property and his rent is about \$35,880 to \$37,440 a year.¹⁴ He had a boarder who contributed about \$10,400 - \$13,000 a year¹⁵ before his new partner [Julie Neal] moved in with him in August 2019. She has been paying about \$26,000 a year for half the rent and half the utilities.¹⁶

⁵ The income figures are for income after business expenses and tax were deducted. The financial years end on 31 March each year. They are sourced from IRD documents.

⁶ Respondent's Memorandum, 11 June 2020, annexed.

⁷ Affidavit of Respondent, 3 September 2019 at Exhibit C.

⁸ At Exhibit C.

⁹ At Exhibit C.

¹⁰ Affidavit of Respondent, 29 April 2020 at Exhibit A. This figure does not appear to include a deduction for business expenses.

¹¹ Notes of Evidence, page 59.

¹² Affidavit of Applicant, 29 January 2019 at Exhibit E; and Affidavit of Applicant, May 2020 at Schedule 1.

¹³ Affidavit of Applicant, 29 January 2019 at Exhibit E; and Affidavit of Applicant, May 2020 at Schedule 1.

¹⁴ Affidavit of Respondent, 10 December 2019 at Exhibit A and B.

¹⁵ At Exhibit A. Mr [Morton]'s first boarder contributed about \$200 a week and the second \$250 a week, but the payments were irregular.

¹⁶ At Exhibit B.

[17] The evidence suggests that the parties' financial positions are currently much the same as they were at separation, with debts exceeding assets.

Proceedings in this Court

[18] In the four years or so since they separated, the parties have been involved in extensive proceedings in this Court. They have been represented at times and at others they have represented themselves.

[19] Ms [Simpson] applied without notice a week or so after the separation for a parenting order granting her day-to-day care of the children and Mr [Morton] supervised contact. Her application was placed on notice. Mr [Morton] began having contact with the children, on an unsupervised basis, in October 2016. He has continued to have unsupervised contact ever since. The parenting proceedings were defended, acrimonious and expensive. They were eventually resolved in February 2018 with a final parenting order which was made by consent. Broadly, the children are in their mother's care for five days and their father's care for two days each week during school term time. In the school holidays the parties share care of the children week about. There are ongoing disputes about schooling and other issues.

[20] In December 2017 Ms [Simpson] brought an application for discovery prior to issuing relationship property proceedings. Relationship property proceedings were issued in February 2020 and are ongoing. The documents indicate there are mainly debts and very few assets to be divided between the parties.¹⁷

[21] The debts are all likely to be classified as "relationship" debts under s 20 of the Property (Relationships) Act 1976 (PRA). Relationship debts are usually shared equally.

[22] Despite this Ms [Simpson] has steadfastly maintained that she has an entitlement under the PRA because relationship property income before separation was sufficient to clear or significantly reduce the relationship debts and Mr [Morton] has concealed or minimised assets and income.

¹⁷ Commonly (but not invariably) past and future spousal maintenance is determined at the same time as the division of relationship property.

[23] Mr [Morton] counters that after assets and debts are offset there are only relationship debts left to be divided and although both parties are liable, he has been paying them singlehandedly.

[24] In January 2019 Ms [Simpson] issued these spousal maintenance proceedings. She initially applied without notice for interim maintenance as well as past and future maintenance. Her application was placed on notice. In February 2020 she discontinued her application for interim maintenance.

[25] In June 2019 Mr [Morton] applied for an order dissolving the parties' marriage. Ms [Simpson] defended the proceedings, unsuccessfully, on financial grounds.

The evidence and the hearing

[26] The parties each made a number of affidavits in the proceedings.¹⁸ Counsel to assist was appointed to help make sure that the necessary information was in evidence. This appointment ended before the hearing took place. Ms [Simpson] engaged counsel in about January 2020. Mr [Morton] represented himself. Both parties appeared at the hearing and were cross-examined.

Ms [Simpson]'s claim

[27] Ms [Simpson]'s claim is for:

- (a) past maintenance from the date of separation to the date of hearing. This covers the financial years ending 2017 (33 weeks from the date of separation) 2018, 2019, 2020 and 2021 (6 weeks to the date of hearing)¹⁹ and;
- (b) future maintenance from the date of hearing to 30 March 2022.

	2017 (33 weeks)	2018	2019	2020	2021	2022

¹⁸ Ms [Simpson]'s affidavits are dated 24 January 2019, 19 March 2019, 29 July 2019, 10 October 2019 and 11 May 2020 and Mr [Morton]'s are dated 20 March 2019, 14 May 2019, 3 September 2019, 10 December 2019, 8 January 2020, 29 April 2020 and 11 May 2020.

¹⁹ I am unable to verify the precise income figures provided by the applicant with reference to her evidence. The evidence suggests her income has been about \$29,000 - \$30,000 a year after tax.

					(past & future maintenance)	
Maintenance claim less income	\$49,500 \$15,184)	\$78,000 (\$25,308)	\$78,000 (\$27,337)	\$78,000 (\$28,825)	\$153,088 (\$28,825)	\$78,000 (\$54,339)
Total	<u>\$34,315</u>	<u>\$52,692</u>	<u>\$50,663</u>	<u>\$49,175</u>	<u>\$124,263</u>	<u>\$23,660</u>

[28] Ms [Simpson]’s claim is calculated on what she says her reasonable needs should be, rather than the benefit-level lifestyle she has been living since separation. Recently she began studying for a [postgraduate degree] which she expects to complete in about 2021. Her calculations include expenses for her studies and re-entry into the workforce. From 2022 her claim is reduced because she expects that by then she will be earning some income.

[29] Her total claim is for \$334,768.²⁰ The question is whether Mr [Morton] has the means to meet her claim.

[30] In a maintenance decision the usual approach is to look at whether there is a liability at law to pay maintenance. If there is, an assessment is made of the applicant’s reasonable needs and her means to meet them. After that an assessment is made of the respondent’s own needs and means and whether he is able to pay any maintenance.

[31] I have taken the reverse approach and begun by assessing Mr [Morton]’s needs and means.

[32] Mr [Morton] claims that even if Ms [Simpson] demonstrates that there is a liability at law to pay maintenance and a shortfall between her reasonable needs and means, he cannot pay any shortfall and her application must fail. Or, as he puts it, “you cannot squeeze blood from a stone”.²¹

[33] The figures for Mr [Morton]’s income (before his personal expenses are taken into account) are set out against Ms [Simpson]’s claim for maintenance to 2021 below:

	2017 (33 weeks)	2018	2019	2020	2021
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²⁰ Ms [Simpson] reduced her claim by \$62,039 due to the fact that she expected to be earning more in the years ending 2023 and 2024 than the \$26,000 a year she claimed for those years. There is no legal basis for this reduction.

²¹ Notes of Evidence, page 46, line 7.

Mr [Morton]'s income (before personal expenses)	\$109,916	\$49,432	\$93,383	\$59,286 ²²	\$36,000 ²³ (estimated)
Ms [Simpson]'s claim	\$34,315	\$52,692	\$50,663	\$49,175	\$124,263

[34] This leads on to the following issues:

- (a) was relationship property income sufficient to clear or significantly reduce the relationship debts at separation?
- (b) has Mr [Morton] concealed income or assets?
- (c) what were Mr [Morton]'s reasonable needs (in other words, his personal expenses) after the separation and before the date of hearing?
- (d) what will his reasonable needs be after the date of hearing?
- (e) does Mr [Morton] have any ability to borrow and if he has, should he be required to do so?

(a) Was relationship property income sufficient to clear or significantly reduce the relationship debts at separation?

[35] Ms [Simpson] maintains that Mr [Morton] earned enough relationship property income in commissions prior to the separation to clear or significantly reduce the relationship debts. The debts referred to at paras [8] to [9] total about \$150,000.

[36] The IRD proceedings were issued in December 2015. The declaration was completed in April 2016. The separation was in August 2016.

²² As noted previously this figure does not appear to include business expenses.

²³ Mr [Morton]'s evidence (which is accepted) is that his income for 2021 due to COVID-19 is likely to be less than his income for 2020 by as much as 40%.

[37] While there is evidence to suggest that the income tax component (\$15,934) of the IRD debt had been paid off by August 2016,²⁴ interest and costs were still running. The IRD debt at separation was likely to be at least \$80,000.²⁵

[38] Ms [Simpson] produced copies of Mr [Morton]'s bank account statements²⁶ and pointed to commissions received and debt repayment made soon after the separation.

Date	Receipt	Payment	Narration	Court's comment
1/9/2016	\$112,480		[income]	Probably relationship property
1/9/2016		\$15,803	[Finance]	Possibly repayment of debt secured over family car at [9](d) above
1/9/2016		\$12,668	[credit line]	Likely repayment of debt referred to at [9](a) above.
1/9/2016		\$5,000	[name deleted]	Likely repayment or part payment of debt at [9](g) above.
1/9/2016		\$4,000	[name deleted]	Likely repayment or part payment of debt referred to at [9](e) above.
1/9/2016		\$6,000	[name deleted]	Unclear on evidence whether this was repayment of relationship debt
30/9/2016		\$4,000	[name deleted]	

²⁴ Exhibit A.

²⁵ Ms [Simpson] submitted that the student loan component (\$3,918) of the IRD debt was Mr [Morton]'s personal debt but it may well be classified as a relationship debt, not his personal debt, if it was incurred during the marriage to benefit the family.

²⁶ Affidavit of Applicant, 11 October 2019 at Exhibit J.

2/9/2016		\$7,334	IRD	Unclear on evidence this whether this was repayment of relationship debt or ongoing tax obligations.
1/9/2016		\$7,200		
27/9/2016		\$3,600		
28/11/2016		\$2,000		
3/10/2016	\$28,119		[income]	Possibly relationship property but increasingly distant from date of separation.
1/11/2016	\$23,785			
1/12/2016	\$21,568			

[39] Ms [Simpson] assumes that some \$185,953 received in commissions was relationship property and was available to pay relationship debt.²⁷ This overlooks the fact that the payments received were raw payments with no final adjustment made for IRD or business expenses.

[40] The IRD documents show that in the 2017 financial year Mr [Morton]'s income after tax and business expenses was about \$173,000. There is nothing to suggest this figure cannot be relied upon. Even if, hypothetically, the \$173,000 was available in a lump sum (it was not) and it had been entirely relationship property income (it was not)²⁸, it would not have been enough to repay their debt in full and support the family both before and after the separation. It was inevitable that relationship debt was carried forward into the post separation period.

[41] The relationship debts were in Mr [Morton]'s name and he continued to pay them. All things being equal, the debts should have been paid equally by the parties.

[42] Mr [Morton] gave evidence that he continued to reduce the IRD debt until finally in August 2019 he settled the balance still outstanding with a payment of \$25,000 which he borrowed from his partner, Ms [Neal].

²⁷ Memorandum of applicant dated 9 June 2020.

²⁸ It was most unlikely that all of Mr [Morton]'s 2017 income was earned on sales made between 1 April and separation on 11 August 2016 and none from 12 August 2016 to 30 March 2017.

[43] The evidence before the Court does not support Ms [Simpson]'s claim that relationship debts could and should have been cleared from relationship property income.

(b) Has Mr [Morton] concealed income or assets?

[44] In support of her claim that Mr [Morton] has concealed assets or income, Ms [Simpson] produced the copies of Mr [Morton]'s bank account statements at around the date of separation which are referred to at [38] plus bank statements after separation which showed spending on meals out and entertainment.²⁹ She also highlighted Mr [Morton]'s reluctance to produce documents, even when faced with Court orders. This reached a point where the Court made a referral for prosecution for contempt of Court.

[45] I was unpersuaded that Mr [Morton] had hidden assets or income for the following reasons:

- (a) Mr [Morton]'s income is from his work in [his profession]. He has worked for two major firms [in that profession]. He moved from one to the other in July 2017. Documents from the IRD and the [firms] tend to support the income figures for Mr [Morton] referred to in this judgment. There is no suggestion that the documents are inauthentic or cannot be relied upon. It is unlikely that Mr [Morton] could conceal income from both the IRD and the [firms]. In addition to this, the IRD had been pursuing him and the debt was not finally settled until 2019. Presumably the IRD was keeping a close watch on Mr [Morton] given his history.
- (b) Mr [Morton] has been under pressure from creditors for many years. This has taken a toll on him. At the hearing his evidence was that he currently owed more than \$90,000.³⁰ It is unlikely he would have endured this pressure if he had hidden assets or income available to clear the debts;

²⁹ Affidavit of Applicant, 19 March 2019 at Exhibits L and M.

³⁰ Notes of Evidence, page 91, line 14 -26.

- (c) before separation the family was living in poverty; with homelessness, threats of repossession, and proceedings being issued. It is doubtful whether Mr [Morton] would have allowed this to happen, particularly to his children, if he had hidden assets or income available to improve the family situation. His conduct in the parenting proceedings suggests that he cares about his children and is committed to an ongoing relationship with them. His evidence was that he had spent about \$45,000-\$50,000³¹ on legal fees to achieve a shared parenting outcome, which he could ill afford;
- (d) Although Mr [Morton] was slow to produce or comply with Court orders for discovery this does not necessarily indicate that he had something to hide. Mr [Morton] tends to put his head in the sand when faced with demands from Courts or creditors. Eventually he provided sufficient information for the hearing to proceed;
- (e) Mr [Morton] explained that his spending on meals out and entertainment were part of his job. That may be so. It is also possible that he was living beyond his means;
- (f) Apart from expenses such as the meals out and entertainment, there is no evidence to suggest that Mr [Morton] has greater means than he claims – there have been no overseas holidays or major purchases, for example;
- (g) In the dissolution proceedings the Court made findings that³²:

[22] The respondent considers that the applicant has hidden assets and that her interlocutory application before the Court will establish this. However there is no evidence before the Court to support such a contention. The parties did not own a family home at the time of separation. They had not owned a home since 2010. They were in rental accommodation at the time of separation and their evidence would suggest that they were not in a position where any great savings could have been made. The Court would need more than an assertion on the part of the respondent to be satisfied that there were assets that had been hidden which impact ultimately on the welfare of the children and therefore prevent the Court from considering making a dissolution order.

³¹ Respondent's Affidavit of 20 March 2019 at 18. See also Notes of Evidence, page 90, line 27.

³² *[Morton] v [Simpson]* [2019] NZFC 6909.

[46] I have reached a similar conclusion. There is insufficient evidence to establish that Mr [Morton] has concealed income or assets.

(c) what were Mr [Morton]’s reasonable needs (in other words his personal expenses) before the date of hearing? and (d) what will his reasonable needs be after the date of hearing?

[47] Mr [Morton] did not provide a full picture of his expenses from separation to the date of hearing. He provided sworn details of his business and personal expenses for the 52 weeks to 30 September 2019 of \$101,629 and the 52 weeks afterwards of \$113,331.³³ He did not break these down separately into business or personal expenses.

[48] However from the available evidence it is possible to calculate an approximation of Mr [Morton]’s reasonable personal expenses from separation to the 2021 financial year.

(c)+(d)(i) - rent

[49] Mr [Morton] moved to his current home reasonably soon after the separation. It is a 1950s three bedroom flat in a sought after location. He pays a market rent.³⁴ Before his partner moved in and began contributing about \$26,000 a year Mr [Morton] had boarders.

[50] Ms [Simpson]’s home is a two bedroom cottage in a desirable location. The huge difference in the rent they pay is largely due to the fact that Mr [Morton] is paying market rent and Ms [Simpson]’s rent is subsidised.

[51] Although Ms [Simpson] was critical of Mr [Morton]’s rent and said he was paying too much, she estimated her own rent on a market basis at \$41,600 a year.³⁵ This suggests that the rent Mr [Morton] is paying is reasonable.

³³Affidavit of Respondent 10 December 2019.

³⁴The rent was \$35,880 in the year ending September 2019 and increased to \$37,440 in the year after that.

³⁵ Affidavit of Applicant, 19 March 2019, Exhibit S.

[52] I have allowed a figure of about \$25,000 a year for Mr [Morton]'s rent (or about \$35,000 less about \$10,000 for the boarders' contributions)³⁶ to the end of August 2019. From September 2019 I have allowed \$11,500 a year (or about \$37,500 less \$26,000 for his partner's contribution).

(c)+(d)-(ii) repayment of relationship debts

[53] \$30,000 a year has been included for Mr [Morton]'s payment of relationship debts (or \$90,000 repaid over three calendar years from the date of separation).³⁷ Although Mr [Morton] did not in fact repay the debts in full over three years this would have been a reasonable timeframe. He is still repaying the remnants³⁸ as well as fresh personal debts incurred since the separation.

(c)+(d)-(iii) child support

[54] Mr [Morton] has paid child support since the separation and he included child support at \$7,500 a year from September 2019 in his expenses. Sometimes he has been up to date with his payments and at other times in arrears.³⁹ I have adopted a figure of \$7,000 a year for child support⁴⁰.

(c)+(d)-(iv) other expenses

[55] As for other expenses (such as groceries, medical and dental expenses, clothing and so forth) I have allowed a figure of \$30,000 a year. This is less than the figure provided by Mr [Morton]. He clearly had other expenses such as his legal fees for the parenting proceedings. At times he may have been spending beyond his means, (as perhaps illustrated by some of the bank statements produced by Ms [Simpson]). However Ms [Simpson], who was on a benefit, had only about \$25,000 a year left over, after she had paid her rent, to meet her other expenses. Mr [Morton] was working [in his profession] and his expenses, for items such as clothing and transport, would

³⁶ A small reduction has been made to allow for the fact that not all the contributions were actually paid.

³⁷ On the available evidence it is not possible to quantify the relationship debts carried forward by Mr [Morton] but these were likely to be between \$80,000 and \$100,000 plus interest given the amount still outstanding to the IRD. There were likely to be other debts remaining as well. \$90,000 has been fixed as a midpoint.

³⁸ The funds borrowed from Ms [Neal] to settle with the IRD, for example.

³⁹ At the dissolution hearing he was paid up to date. At the date of hearing he said he was about \$3,000 in arrears. Notes of Evidence, page 91, line 20.

⁴⁰ At times Mr [Morton] had a nil assessment because his income had decreased, so some allowance has been made for this.

likely have been higher than hers. For this reason a figure of \$30,000 a year has been adopted for Mr [Morton]'s other expenses.

[56] Combining these figures with Mr [Morton]'s income (after tax and business expenses) produces the following result:

2017 (33 weeks)	Living expenses Rent: \$15,865 Child support: \$4,442 Other living expenses: \$19,038 Relationship debt repayment: <u>\$19,038</u> \$58,383	Income: \$109,916 Less: (\$58,383) Available income: \$51,533
2018	Living expenses: Rent: \$25,000 Child support: \$7,000 Other living expenses: \$30,000 Relationship debt repayment: <u>\$30,000</u> \$92,000	Income: \$49,432 Less: (\$92,000) Available income: (\$42,568)
2019	Living expenses Rent: \$25,000 Child support: \$7,000 Other living expenses: \$30,000 Relationship debt repayment: <u>\$30,000</u> \$92,000	Income: \$93,383 Less: (\$92,000) Available income: \$1,383
2020	Living expenses Rent (21 weeks): \$10,096 Rent (31 weeks): \$6,855 Child support: \$7,000 Other living expenses: \$30,000 Relationship debt (repayment 19 weeks to end of three years): <u>\$10,961</u> \$64,912	Income: \$59,286 Less: (\$64,912) Available income: (\$5,626)
2021	Living expenses Rent: \$11,500 Child support: \$7,000 Other living expenses: <u>\$30,000</u> \$48,500	Income: \$35,500 (estimated) Less (\$48,500) Available income: (\$13,000)

[57] It follows that in the financial years ending 2017 and 2019 Mr [Morton] may have had the means to pay maintenance to Ms [Simpson]. In 2018 and 2020 his

expenses were greater than his income. It is likely that his expenses in the 2021 and 2022 years will again be greater than his income.

[58] Averaging the years ending 2017-2022 Mr [Morton] has had little or no net income available to pay spousal maintenance.

[59] It must be borne in mind that the figures set out above are approximations only; by way of example, Mr [Morton]'s business expenses included an allowance for depreciation, which was a notional rather than an actual expense. If depreciation were excluded this would increase his means slightly. No allowance has been made for his legal expenses in the parenting proceedings, which were arguably a reasonable expense given he was unlikely to qualify for legal aid. If these were included his means would decrease.

[60] On a broad brush analysis I find Mr [Morton]'s available means for the years 2017-2021 were negligible, given his income, tax, business and reasonable personal expenses. The same is likely to be true in the future, more so in fact.

(e) Does Mr [Morton] have any ability to borrow and if he has, should he be required to borrow?

[61] Ms [Simpson] submitted that Mr [Morton] could borrow to meet her maintenance claim.

[62] Mr [Morton] produced evidence that his credit rating was "only fair" and he had no assets to provide any security to a lender. He said he was still struggling to keep on top of his debt repayments and if any order for maintenance was made, particularly for a lump sum, he would be unable to pay and at risk of bankruptcy. If he was bankrupt he could not work [in his current profession].

[63] Whether Mr [Morton] could borrow to pay any maintenance awarded to Ms [Simpson] would depend on the amount awarded. I find it unlikely he would be able to borrow the full amount of her claim, but he may be able to borrow some smaller amount.

[64] However, Mr [Morton] has been repaying relationship debt since the separation. If he has had a better lifestyle at times than Ms [Simpson]'s - including

meals out and entertainment – he may have funded it by incurring fresh debt. He currently has significant debts relative to his income and assets. Ms [Simpson]’s current debts are relatively small.

[65] Requiring Mr [Morton] to borrow to pay maintenance when he has been repaying relationship debts and has likely funded his own post-separation expenses at least partly through borrowing would be inequitable.

[66] I find that Mr [Morton] did and does not have the means to pay any maintenance and should not be required to borrow.

[67] Given this finding it is not necessary to consider where there is any liability at law or to analyse Ms [Simpson]’s claimed reasonable needs or her means. However, there is another difficulty with Ms [Simpson]’s claim, particularly post-dissolution. For completeness I have considered these matters briefly.

Liability at law

[68] Ms [Simpson]’s application for past and future maintenance straddles a period before the parties’ marriage was dissolved and a period after it was dissolved. Section 63 FPA applies for maintenance during a marriage, and s 64 FPA applies for maintenance after a marriage is dissolved. The test is:

- (a) each party is liable to maintain the other party;
- (b) to the extent that such maintenance is necessary to meet the reasonable needs of the other party;
- (c) where the other party cannot practicably meet the whole or any part of those needs;
- (d) because of any 1 or more of the circumstances specified in subsection (2).

[69] The circumstances specified in ss 63(2) FPA and 64(2) FPA are largely the same. They include the ability of the spouses to become self-supporting having regard to the division of functions within the marriage and the likely earning capacity of each party, the responsibilities of caring for dependents, the standard of living previously enjoyed by the parties, the undertaking of education or training by a party to work towards becoming self-supporting, amongst other things. Section 63 FPA also includes any physical or mental disability of a party, and any inability of a party to obtain work

that it is reasonable in all the circumstances for that party to do so and is adequate to provide for that party. Section 64 FPA is subject to s 64A FPA, which provides that parties must assume responsibility for their own needs within a reasonable time.

[70] Section 65 FPA states the means of each party must be analysed including their potential earning capacity and means derived from any PRA awards, both parties' reasonable needs and any financial or other responsibilities or circumstances relevant to one party being liable to maintain the other.

[71] Section 70 FPA provides that a periodical or lump sum payment of past and/or future maintenance can be ordered by the Court.

[72] The liability to pay maintenance under s 63 FPA exists only for the duration of the marriage. For the period after the marriage is dissolved, liability will be assessed under s 64 FPA. There will, at some date, be an end point to maintenance, when it is reasonable for parties to assume responsibility for their own needs under s 64A FPA.⁴¹

[73] In *Williams v Williams*, Judge Riddell stated:⁴²

[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.

...

[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.

[74] All things being equal, the Court must ask what Ms [Simpson]'s reasonable needs are and whether maintenance from Mr [Morton] is necessary to meet them. Ms [Simpson] must show she is unable to meet those needs for a reason specified above at [69].

[75] Under s 167 FPA Ms [Simpson]'s application must be decided on the balance of probabilities.

⁴¹ *B v B* [2004] NZFLR 127 (FC) at [71].

⁴² *Williams v Williams* [2017] NZFC 4533, [2017] NZFLR 999 at [22]-[24].

[76] Claims will typically have strength where, due to the functions of the marriage, for example, one party is delayed in re-entering the workforce post separation. However claims typically lose their strength where it is found the party has not made reasonable attempts to re-enter the work force, or it is no longer reasonable for that party to not have assumed responsibility for their own needs. As stated by the Court of Appeal in *C v G*:⁴³

[31] This Court has discussed the effect of s 64 (in the form in which it stood prior to statutory amendment on 1 February 2002) in *Slater v Slater*⁴⁴ and *Z v Z (No 2)*.⁴⁵ It is unnecessary to repeat all that was said in those decisions which describe the significant policy changes effected by the legislature in this field when the Family Proceedings Act was enacted. It is sufficient to briefly reiterate the broad statutory policy that, subject to specified statutory exceptions, neither party to a marriage is liable to maintain the other party after the dissolution of the marriage. Where one party is liable to maintain the other, the legislative policy is that the liability should ordinarily be temporary in nature while the maintained party consciously moves towards self-sufficiency. These concepts are eloquently captured in the following passages from the judgment of Richardson J in *Slater v Slater*:⁴⁶

That latter subsection [then s 64(2)] expresses a legislative commitment to the social policy that any maintenance obligations following dissolution of marriage should ordinarily be temporary, not lifelong. The former spouses should go their own ways with their respective shares in the matrimonial property and free of any continuing financial responsibility for one another. The subsection contemplates that in the ordinary run neither spouse will be financially dependent on the other for more than a transitional period and that this will be so even though the effects of the three circumstances specified in s 64(1) are not entirely spent.

And:⁴⁷

... maintenance is ordinarily to be viewed only as a bridge to assist the party concerned while he or she is consciously moving towards self-sufficiency.

[77] Ms [Simpson] left a well paid role as an employee to care for baby [Kate]. She combined this with self-employment and worked from home between 2011 and 2015. At the point of separation she was caring for the parties' two young children and home schooling [Kate]. She is now studying and plans to re-enter the paid workforce. Her claim clearly falls within one or more of the qualifying circumstances at ss 63(2) and 64(2) FPA.

⁴³ *C v G* [2010] NZCA 128, [2010] NZFLR 497.

⁴⁴ *Slater v Slater* [1983] NZLR 166 at 173-175.

⁴⁵ *Z v Z (No 2)* [1997] 2 NZLR 258 at 292-296.

⁴⁶ At 174.

⁴⁷ At 176.

What were Ms [Simpson]’s reasonable needs before the date of hearing and what will her reasonable needs be after the date of hearing?

[78] Mr [Morton] was critical of some of Ms [Simpson]’s claimed expenses, such as for study and parking. He also argued that they did not reflect the standard of living before the separation, when the family had been poverty stricken.

[79] Broadly I have no criticism of Ms [Simpson]’s claimed reasonable expenses. With some exceptions, they seem unremarkable for a middle class professional living in one of the most expensive cities in the country. While the family was in dire straits financially for the eighteen months or two years before the separation, before that they had enjoyed a higher standard of living. Had Ms [Simpson]’s claim not failed for other reasons I would have been prepared to assess her reasonable needs against the earlier living standards rather than the standards before the separation.

[80] I have reservations about the length of her claim, however, which extends over six financial years and runs to more than five years from the date of separation. This leads on to an assessment of Ms [Simpson]’s means, including her potential earning capacity.

What are Ms [Simpson]’s means?

[81] Mr [Morton] claimed that Ms [Simpson] was well able to find a job and contribute towards her own needs. He highlighted her experience in [profession deleted] and business and the lack of evidence (apart from her own) that she had tried to obtain a job since the separation. He suggested she was not genuinely motivated to find a job, at least until she had completed her Master’s Degree, because she was committed to home schooling the children and pursuing her various claims in this Court.

[82] Ms [Simpson] replied that at separation the children had still been young and the parties had agreed to home school [Kate]. It was only after the separation that Mr [Morton] changed his mind about schooling.

[83] She also explained the difficulties of bridging the financial gap caused by moving from a benefit to paid employment. Nevertheless she was very confident that she would make contacts while she was completing her Master’s Degree which would

lead to employment in the [professional] world once her degree was completed, hence her inclusion of figures for the income she expected to earn after 2021.

[84] Other than a brief email to the [professional association] in March 2017⁴⁸:-

Hello I'm a mum looking to return to [the profession] after seven years out.
What would you suggest I do to get myself [employment] ready? Many
thanks [Carmen].

there was no independent evidence to confirm any efforts by Ms [Simpson] to re-enter the workforce. Nor was there any independent evidence to confirm that completion of a Master's degree would be necessary to enhance Ms [Simpson]'s employment prospects.

[85] I was left with some scepticism about whether she had truly tried to re-enter the workforce, or preferred to have this coincide with the completion of her studies. This was underpinned by my assessment of Ms [Simpson]'s claim and her views as fixed and unreasonable in some respects. For example:

- (a) in cross-examination she maintained she knew little about the debt to the IRD, even after confronted with an email sent by her to the parties' lawyers which showed a detailed knowledge;⁴⁹
- (b) when the possibility that success with her claim would result in Mr [Morton]'s bankruptcy was put to her, she was reluctant to consider the effect on the father of her children or her children;⁵⁰
- (c) she laid the blame for the failure of [the business] at Mr [Morton]'s feet, due to an alleged failure to produce financial statements in a timely fashion. If the business was trading profitably it would be surprising if that was the sole cause. Ms [Simpson] was running the business and it is possible other factors played a part;
- (d) despite alleging that she had had no luck whatsoever in obtaining a job of any description to date, Ms [Simpson] was surprisingly confident

⁴⁸ Affidavit of Applicant, 29 July 2019 at Exhibit K.

⁴⁹ Exhibit A, produced at hearing.

⁵⁰ Notes of Evidence, page 44, line 19 - 22.

that she would secure a [position] through contacts made while completing her degree.

- (e) the quantum of her claim was unreasonable in view of Mr [Morton]'s means and needs;

[86] Although the difficulties for a [businesswoman] re-entering the paid workforce are no doubt formidable, Ms [Simpson] demonstrated perseverance, organisational skills and an acute attention to detail in her conduct of this proceeding. She is already well connected in the [profession], having a senior [professional] and former president of the [local professional association] as a support person at an interlocutory hearing, and being [details deleted].

[87] As the children grew older it is likely that Ms [Simpson] could have re-entered the work force in some capacity if she wished. Mr [Morton] offered (and she declined) to have the children in his day to day care to assist with this.⁵¹ While she should not have been expected to re-enter the workforce immediately after the separation, in 2019 [Curtis] turned five and the parties' marriage was dissolved.

[88] On my assessment of the evidence relating to Ms [Simpson]'s claim under s 63 FPA, (the period from separation to dissolution in August 2019), Ms [Simpson] may well have had a successful argument for maintenance at some level. While Ms [Simpson] may have been able to find part time work during this period, I accept that due to her staying home to care for the children, she was in a position post separation but pre dissolution where she could not practicably meet all her reasonable needs.

[89] On my assessment of the evidence under S 64 FPA, (the period from dissolution in August 2019 onwards), I would not consider Ms [Simpson] to have a successful argument for maintenance.

[90] Nevertheless, the discussion from [68] has only been included for completeness, given the findings at [60] and [66] that Mr [Morton] does not have the means to pay maintenance. This is a bar to Ms [Simpson]'s maintenance claim succeeding.

⁵¹ Affidavit of Respondent, 3 September 2019 at 28.

[91] Despite being neither employed nor self-employed since March 2015, Ms [Simpson] impressed as a resourceful and highly focused person with excellent contacts within the [profession] and wider community. I find that her [professional] and business skills and connections could have led to paid employment and an income stream before now had she been fully committed to re-entering the paid workforce.

Summary of findings

[92] In summary I find that:

- (a) Mr [Morton]'s income (after tax, business and personal expense) viewed in the round since the date of separation, has been insufficient to pay Ms [Simpson] all or any of the maintenance she is seeking from separation to the date of hearing;
- (b) Mr [Morton] assumed sole responsibility for paying relationship debts after separation which, all things being equal, should have been paid by both parties. Ms [Simpson] has received the benefit of this;
- (c) Mr [Morton]'s debts exceed his assets. This has been the position since separation and is likely to continue;
- (d) Ms [Simpson] has not demonstrated that Mr [Morton] has concealed income or assets;
- (e) Ms [Simpson] has [professional] and business skills and connections which could have led to paid employment before now and bridged (or helped bridge) any shortfall between her reasonable needs and her means.
- (f) I decline to award maintenance as Ms [Simpson] seeks or for any lesser sum. The application for spousal maintenance is dismissed;
- (g) Costs are to lie where they fall.

Dated at Auckland this 6th July 2020 at 2pm.

A M Manuel

Family Court Judge