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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2019-070-000343
[2020] NZFC 3683

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[ABBY STRONG] Applicant
AND	[ADAM GROSS] Respondent

Hearing:	27 May 2020
Appearances:	J Nicols for the Applicant (via telephone) Respondent Appears in Person (via telephone)
Judgment:	27 May 2020

ORAL JUDGMENT OF JUDGE C L COOK

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[1] This decision follows a submission-only hearing to determine an application filed by Ms [Strong] for interim maintenance. That application was filed back on 2 July 2019. I heard submissions from Ms Nicols for the applicant. Ms [Strong] was in the building but was distressed and did not come into the Court. I also heard from Mr [Gross] who is self-represented and resides in [Europe] by way of telephone link-up.

[2] The parties were married [in late] 1998. Both parties are [citizens of a European country] and were working at that time as [occupation deleted] in [that country]. The parties relocated from [that country] to New Zealand in 2002. The parties separated on 24 November 2018. During the course of the relationship both parties studied, they both [job details deleted] and the respondent worked full-time in a number of roles. As at the time of separation the relationship property consisted of a [business enterprise] company trading as [deleted], two vehicles, chattels, bank accounts and the respondent's Kiwisaver. There were also debts including a credit card debt, car loan and student loans. There are currently relationship property proceedings which I conferenced at the time of the interim spousal maintenance hearing.

[3] Throughout the course of the relationship the applicant was solely supported by the respondent and has not appeared to have worked apart from part-time [job details deleted]. From separation until 14 June 2019 the respondent continued to pay the applicant's rent and utilities whilst the parties were trying to resolve relationship property matters. The respondent ceased support of the applicant at that time and left his employment in New Zealand and returned to [Europe].

[4] Firstly, I deal with the legal position. The application is granted pursuant to s 82 of the Family Proceedings Act 1980. That section states that where an application from a maintenance order or for 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 a 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. No order under this section shall continue in force for more than six months after the date on which it is made. An order made under this section may be varied, suspended, discharged or enforced in the same manner as if it was a final order of the Family Court.

[5] As counsel for the applicant points out in the submissions which have been filed there is no onus of proof on the applicant to prove she has a claim for

maintenance. The leading case is *R v Ropiha*[1]. The Court of Appeal determined that on hearing and determining an application for interim maintenance the Court has an unfettered discretion both as to whether the order should be made at all and as to the amount of the order. All that can be said is the making of an order depends on all the circumstances of the particular case and the Court must do what it thinks just.

[6] In considering the position of an applicant for an interim maintenance order the Court will necessarily pay particular regard to the reasonable needs of the applicant over the period and time in which the order will subsist and the means likely to be available to the applicant to meet those needs. In assessing those needs the Court needs to take into account the standard of living the parties had adopted for themselves pre-separation.

[7] Ms Nicols in her submissions refers to the Family Court decision of *RKFH v DLH,* a decision of Her Honour Judge Riddell[2]. In paragraph 13 of that decision Her Honour Judge Riddell summarised the principles to be drawn from s 82 as follows:

(a) It is intended to protect an applicant who has inadequate means until a substantive order can be made in regard to spousal maintenance.

(b) There are no special conditions or criteria that must be applied by the Court.

(c) The Court has an unfettered discretion to decide whether to make an order and to determine the amount. The discretion must be exercised in a way that is just.

(d) Whether the order is made will depend on the circumstances of the particular case.

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[1] *R v Ropiha* [1979] 2 NZLR 245.
[2] *RKFH v DLH* [2012] NZFC 8276.

(e) The Court will pay regards 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. The Court will also consider the standard of living of the parties prior to separation.

[8] The applicant's case is that she is dependent on a benefit which is utilised in its entirety by rent and food, but she has mental health issues and they are directly linked to the breakdown of the relationship and that she is unable to work let alone work full-time. Ms Nicols in her submissions says the applicant's day to day needs are acute. The applicant is disadvantaged in terms of her mental health issues, her lack of job skills and lack of employment history in New Zealand given her only experience of working in New Zealand being the [job details deleted] part-time.

[9] The applicant has provided a budget and I agree that that budget appears very modest and her outgoings were part of the applicant's normal or usual expenditure prior to separation. She lives in rental accommodation in [location deleted] and it is submitted that it is impossible to reduce the amount she pays for rent and she contrasts that with the affidavit of financial means provided by the respondent for the 52 weeks immediately preceding 15 August 2019, his gross income was $195,000. Of that $120,000 was generated from his business.

[10] The respondent's narrative affidavit deposed that he was then unemployed but there has been no updating evidence filed. The respondent's position in his evidence is that he does not consider that the applicant has demonstrated that he has any liability for ongoing maintenance. His position is that the parties had no children and apart from the two and a half years spent during the course of the relationship undergoing IVF treatment there is no reason why the applicant could not have secured full-time work during the course of the marriage and since the separation. His position is that he supported the applicant for seven months post-separation and she does not appear to have taken any steps to gain employment so that she can support herself. His position is that he is no longer employed and is trying to start a new life in [Europe]. The respondent's position is that the applicant did undertake a number of different courses of study but she did not complete them at her choice and his evidence is that he started the [company]. He worked very hard and that he should not be penalised

for that and contrast to the applicant's position and that the work that he undertook for the company was due to his skill and that the company in itself was not a mechanism to continue to earn an income, it was solely dependent on his efforts. He also points out that the applicant has retained chattels which he says are worth about $5000 and whilst he retained both vehicles there were debt on the vehicle but he also confirms that he has retained his Kiwisaver which is relationship property and has a balance of about $16,568.

[11] I now turn to my decision having summarised the evidence and also the legal framework. Mr [Gross] has just joined us by telephone. Firstly, in respect of the parties' position prior to separation, there is very little evidence as to their lifestyle but it is clear that it was modest as they were renting and had limited assets. The applicant's claim for the shortfall for her benefit from expenses is now being varied to $223.50 for a period of six months which equates to a total of $5,811. I find her claim modest and there is no challenge to her reasonable needs as set out in her budget and I do not hear that Mr [Gross] challenges that aspect of the claim. She seeks those funds in a lump sum. I did at the time of the hearing receive updated evidence from the psychiatrist Dr [Yates] that shows that the applicant has been a patient at the [regional Mental Health Services] since March 2009. Dr [Yates]'s letter which was read out to Mr [Gross], but I agree that Dr [Yates] has not been subject to cross-examination but I take judicial notice of the letter in terms of Dr [Yates] being a psychiatrist at the hospital and it is on letterhead so there is no issue as to the source of that correspondence. He confirms that she was initially diagnosed as suffering from [various mental health issues] and was treated with appropriate psychiatric treatments including case management and medication. He says as a result of that the applicant has been unable to work since separation and is unable to work now.

[12] The respondent's position at the hearing was that he has worked very hard throughout the course of the relationship at the expense of his own mental health and that the applicant could have sought work a lot earlier and that he no longer has any obligation to support her. His position is that he is living with his mother and is not in receipt of any income.

[13] In respect of the respondent's position at the date of separation and the year prior it is clear that he had a very high gross income and I also note that the company had current accounts, that is [his company], where both current accounts had a positive balance of $83,000 as at the end of the financial year 2019 which must have been classed as an asset for relationship property purposes.

[14] The respondent has for his own reasons left New Zealand and returned to [Europe]. I am satisfied that as at the date of separation at least and subsequent to that there has been no impediment on the respondent to undertake paid employment and whilst the world has been going through COVID-19 given the nature of his employment with [field deleted] I struggle to see why he has still not obtained any income and further he has not filed any updated evidence as to his current level of income, but I am satisfied as I say that he has a clear capacity to earn and it is unclear where the funds that he earned as at the date of separation and the company have gone.

[15] I am satisfied therefore in conclusion that:

(a) The applicant's needs are reasonable.

(b) On the medical evidence that I have she has no capacity to earn at the moment.

(c) That the respondent has had capacity but I have no evidence as to his position.

(d) That he has considerable resources as at the date of separation and I refer to the decision of *L v T*[3].

[16] The High Court Judge found the Family Court Judge had not erred when he found that a person could be compelled to borrow to pay spousal maintenance. In that decision they said not infrequently a party subject to a maintenance liability will be required to borrow or arrange a sale of assets to meet that liability. There can be no objection in principle to that and the Courts have not suggested otherwise. Were it

[3] *L v T* [2008] NZLR 975.

otherwise parties could avoid responsibility for their maintenance obligations simply by the way in which their financial affairs were arranged and it was relevant in that case that the appellant who had been ordered to pay interim spousal maintenance had substantial current account credits with two companies and significant shareholdings in a third.

[17] Whilst each case must fall on its own factual position in conclusion I find it will be in the interests of justice as an interim measure pending an application being determined for final maintenance for there to be a lump sum payment order for spousal maintenance in the amount of $5811 being six months payments of $223.50.

[18] Accordingly, that is my decision in respect of the interim maintenance. There will be a further judicial conference allocated to progress the application for final maintenance and Mr [Gross] may appear by phone in respect of that matter.

C L Cook
Family Court Judge

This is an oral decision and as such I reserve the right to amend this decision, the intent and effect of the directions I make shall however remain the same.