

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

**IN THE FAMILY COURT  
AT MANUKAU**

**I TE KŌTI WHĀNAU  
KI MANUKAU**

**FAM-2019-092-000689  
[2020] NZFC 6084**

IN THE MATTER OF     The Family Proceedings At 1980  
  
BETWEEN                 [DIANE HOGAN]  
                                  Applicant  
  
AND                         [CHASE HOGAN]  
                                  Respondent

Hearing:                 14 January, 14 February 2020  
  
Appearances:            Ms A Newfield for R Von Keisenberg for the applicant  
                                  Ms S Bush for the respondent  
  
Judgment:                29 July 2020

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**RESERVED JUDGMENT OF JUDGE A G MAHON  
(Reasons for Decision)**

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[1]     On 26 June 2019, the applicant made an application for interim, past and future maintenance orders.

[2]     I declined the application for interim maintenance and now set out my reasons for that decision.

**Background**

[3]     The parties began a de facto relationship in mid-2003, married on [date deleted] 2005 and separated in January 2017.

[4] They have three children:

- (a) [Mollie] ([under 25]);
- (b) [Erica] (15); and
- (c) Curtis] ([under 12]).

[5] The principal assets of their 13-year relationship are:

- (a) A family home at [address deleted] which is owned by a family trust.
- (b) Shares in [name deleted – “the business”], the company through which Mr [Hogan] operates his business.
- (c) Kiwi Saver.
- (d) Bank accounts.
- (e) The \$50,000 proceeds of sale of a boat.

[6] The mortgage principal of \$680,000 owing on the family home is the principal debt of the parties. In addition, Mr [Hogan] has accrued a personal tax debt of \$102,000 since the separation.

[7] The parties had traditional roles in their relationship. Mr [Hogan] worked full-time in the [business] while Ms [Hogan] focussed on day-to-day care of the children, although at times also assisted in the business.

[8] Ms [Hogan] initially occupied the home with the children after the separation, but after about six weeks Mr [Hogan] began living there. While the exact dates of changes in day-to-day care of the children is disputed: [Mollie] was living independently at the time of separation, [Erica] began living with her father shortly after separation, while [Curtis] was in the shared care of the parties until late last year when he began living in the day-to-day care of his father and saw his mother on weekends.

[9] Mr [Hogan] paid Ms [Hogan] weekly maintenance on the following basis after separation:

- (a) \$1,450 (\$650 for rent and \$800 for day-to-day costs) from March 2017 to March 2018.
- (b) \$1,050 from March 2018 until May 2019.
- (c) \$200 from May 2019.

[10] At the time of the hearing before me there was a dispute between the parties about disposition of the family home but no interim application for sale had been filed. The parties were also involved in relationship property proceedings in this Court, but this dispute was settled recently at a judicial settlement conference before another Judge. The settlement included Ms [Hogan]'s substantive maintenance claim.

[11] Mr [Hogan] continued working in the [business] after separation. Ms [Hogan] obtained part-time employment with several employers. This included the [name deleted – the first employer] (a job from which she was made redundant in December 2019) and then [name deleted – the second employer] where she claimed to have been working since January this year.

[12] Ms [Hogan] was seeking interim maintenance because of the inability to meet day-to-day costs on her part-time income.

## **The Law**

[13] Applications for interim maintenance order are determined under s 82 of the Family Proceedings Act 1980 (the Act).

### **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.

[14] The Court of Appeal decision of *Ropiha v Ropiha*<sup>1</sup> sets out the principles to be applied in determining interim maintenance applications. In *Dalrymple v Dalrymple*<sup>2</sup> Collins J summarised these principles in the following manner:<sup>3</sup>

- (a) The provision exists “to protect the position of an applicant who may have inadequate means to meet current needs pending determination of the proceedings, if and in so far as it is reasonable in all the circumstances to do so”.
- (b) The Court has “an unfettered discretion as to whether an order should be made at all and as to the amount if an order is made”. The Court must “do what it thinks just” which will “depend on all the circumstances of the particular case”.
- (c) The Court “will necessarily pay particular regard to the reasonable needs of the applicant over the period for which an order will subsist and the means likely to be available to the applicant to meet those needs”.
- (d) “In assessing those needs the Court will take into account the standard of living the parties had adopted for themselves”.
- (e) The term “means” is used “in the broadest sense to encompass any sums which the applicant could reasonably be expected to earn from his or her own efforts during the term of any interim order together with any other funds available to the applicant during that period”. Any “moneys taken into account should be reasonably assured to the applicant”.

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<sup>1</sup> *Ropiha v Ropiha* [1979] 2 NZLR 245 (CA).

<sup>2</sup> *Dalrymple v Dalrymple* [2019] NZHC 637.

<sup>3</sup> At 24.

- (f) Interim maintenance should not be ordered “unless proper weight has been given to the applicant’s capacity from all sources to meet her needs over that period. In principle, it is immaterial in that regard whether the source of funds is employment reasonably available to the applicant, private income, resources of capital, or welfare payments provided by the State or some other body”.

[15] The relevant circumstances the court is required to consider in an application for a final maintenance order are set out in s 63:

**63 Maintenance during marriage or civil union**

(1) During a marriage or civil union, each party is liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1) are as follows:

- (a) the ability of the parties to be or to become self-supporting, having regard to—
  - (i) the effects of the division of functions within the marriage or civil union while the parties are living together or lived together:
  - (ii) the likely earning capacity of each party:
  - (iii) any other relevant circumstances:
- (b) the responsibilities of each party for the ongoing daily care of any minor or dependent children of the marriage or civil union after the parties ceased to live together:
- (c) the standard of living of the parties while they are living together or lived together:
- (d) any physical or mental disability:
- (e) any inability of a party to obtain work that—
  - (i) it is reasonable in all the circumstances for that party to do; and
  - (ii) is adequate to provide for that party:
- (f) the undertaking by a party of a reasonable period of education or training designed to increase that party’s earning capacity or to reduce or eliminate that party’s need for maintenance from the other party, where it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking that education or training to be met immediately by that party—
  - (i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that party; or
  - (ii) because that party has previously maintained or contributed to the maintenance of the other party during a period of education or training.

(3) Except as provided in this section, neither party to a marriage or civil union is liable to maintain the other party during the marriage or civil union.

[16] On hearing any application for a final spousal maintenance order, the statutory principles in ss 62-66 of the Act must be considered. Although these principles may also be considered in an interim maintenance hearing, it is not obligatory to do so. Rather, the court must have regard to all relevant and appropriate factors which may include but are not limited to the factors in ss 62-66.<sup>4</sup>

### **The Case for the Applicant**

[17] The applicant disputed the evidence of the respondent that he was not able to pay interim maintenance to her. She claimed that he was and gave examples of his discretionary spending, including holidays, in support of this claim.

[18] Ms [Hogan] focussed on her reasonable needs and her inability to meet those needs. She calculated her reasonable needs at \$11,576 monthly in her initial budget but reduced the sum to \$8,400 in her updated budget filed immediately before the hearing.

[19] Ms [Hogan] said she moved out of the family home two months after the separation because of an informal agreement reached between the parties under which she agreed to leave, and Mr [Hogan] agreed to pay her rent in alternative accommodation.

[20] Ms [Hogan] began these proceedings because of the huge reduction in the payments she was receiving from Mr [Hogan]. She stated that an application was not necessary before last May when the payments of \$1,050 weekly reduced to \$200 weekly.

[21] Ms [Hogan] had two jobs with the [first employer] before her redundancy. Since her redundancy, she had been looking for [details deleted] roles. She agreed most of these opportunities were in central Auckland but she had not looked there as by working close to [suburb deleted], she was available for children's school and extra-curricular activities. Ms [Hogan] agreed that none of the children had lived in her day-

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<sup>4</sup> *Tsoi v Hua* [2006] NZFLR 560, (2006) 25 FRNZ 930 (HC).

to-day care since shortly after separation, although [Curtis] was in a shared care arrangement until recently.

[22] Ms [Hogan] accepted that once the family home was sold, Mr [Hogan] would no longer have to pay the high costs of servicing the mortgage and she would then be in a better position financially after division of the proceeds of sale. She did not accept that Mr [Hogan] could not draw enough income from the [business] in the meantime to meet the shortfall in her day-to-day costs notwithstanding the financial evidence Mr [Hogan] has filed.

[23] One of the payments she claimed over the six-month period of an interim maintenance order was \$5,000 monthly to meet her ongoing legal costs. These legal costs were for the substantive maintenance, relationship property and parenting proceedings.

### **The Case for the Respondent**

[24] Mr [Hogan] opposed any award for interim maintenance on the following principal grounds:

- (i) The applicant had not been truthful in her evidence on key issues for the court.
- (ii) He did not have the ability to pay interim maintenance.
- (iii) There was no current evidence of the applicant's income.
- (iv) It was the applicant who was delaying resolution of relationship property division and not the respondent.

#### *Truthfulness of the applicant's evidence*

[25] Mr [Hogan] identified aspects of Mr [Hogan]'s evidence where he claimed she had not been honest:

- (a) Ms [Hogan] claimed that she lived with the three children in her [suburb deleted] rental home at the time of filing her application when [Mollie] was living independently, [Erica] was living with her father (full-time) and [Curtis] was in the shared care of the parties. It was only after this evidence was challenged by Mr [Hogan] that the applicant corrected her evidence.
- (b) Mr [Hogan] did not agree that the parties had reached an informal agreement on the financial basis for the applicant leaving the family home. It was Mr [Hogan]'s evidence that the only financial concession he made at the time Ms [Hogan] left the family home was that he would pay Ms [Hogan]'s rent, if he was reimbursed for the payments on final division of the relationship property of the parties.
- (c) Ms [Hogan] had "significantly downplayed" the extent of her alcohol use and its effect on her ability to work and parenting. Mr [Hogan] referred to an affidavit from the parties' eldest child, [Mollie], detailing the extent of her mother's alcohol problem and this evidence was supported in a report from lawyer for child of interviews with the two younger children in the parenting proceedings.

*The respondent's ability to pay maintenance*

[26] Mr [Hogan] gave evidence of the dire financial position of his [business], which is his sole source of income. [The business] was suffering from the downturn in the construction business in the period between April and June 2019. The company showed a loss of \$169,000 on assets of \$34,000.

[27] In the period between January 2017 and July 2019, Mr [Hogan] paid Ms [Hogan] \$149,904 (an average of \$1,180 weekly), while she was also receiving about \$320 net from her part time employment and a WINZ benefit of \$211. During the same period, Mr [Hogan]'s income was \$390,221, leaving him \$70,000 to meet all other expenses. This required him to draw funds from his current account with the



company, which should have been set aside for tax. He now had an outstanding tax debt of \$102,135.

[28] The maintenance payments during this period meant that Mr [Hogan] could not meet both the substantial mortgage payments and his own day-to-day living expenses from the business income.

*Lack of current evidence of the applicant's income*

[29] In a letter dated 21 November 2019, Mr [Hogan] requested further evidence from Ms [Hogan] of her current income and employment status as there is no independent evidence in support of her contention that she could not find full-time work. While Mr [Hogan] suspected Mrs [Hogan]'s problem with alcohol limited her ability to work, she claimed there was no impediment to her working full-time. However, she had not filed corroborative evidence in support of this contention.

[30] In the absence of wage slips and bank statements, Mr [Hogan] was not prepared to accept Ms [Hogan]'s evidence about her income and employment opportunities. He believed Ms [Hogan] could work longer hours but chose not to and yet she continued to live in a four bedroom home when she didn't have any child in her day-to-day care.

[31] Prior to being made redundant, Ms [Hogan] claimed she could have worked longer hours as a waitress if she had not been restricted by her child care commitments. It seemed ironic to Mr [Hogan] that on the one hand Ms [Hogan] claimed she could have worked longer hours in this job if she hadn't had responsibility for the children who were no longer in her day-to-day care, and then on the other hand, she was claimed to have been made redundant by this employer who had full-time waitressing jobs available. Quite simply in the absence of evidence, the court could have no confidence about the income or employment potential of the applicant.

**Discussion and Analysis**

[32] The court has a broad and unfettered discretion in determining an application for interim maintenance.

[33] I declined the application of Ms [Hogan] as she had not persuaded me on the balance of probabilities:

- (a) I am not convinced that during the period of nearly three-years since the separation she could not have earned a greater income, especially in the period after the children were no longer in her day-to-day care.
- (b) The evidence does not establish that Ms [Hogan] left the family home on a condition that Mr [Hogan] would pay her rental costs. Rather, negotiations to this effect occurred via lawyers for the parties and Ms [Hogan]’s lawyer referred to an informal arrangement reached on this basis, an agreement denied by Mr [Hogan]. Independent evidence of an exchange of legal correspondence confirming this agreement would have been required to persuade me of Ms [Hogan]’s claim. A letter from Ms [Hogan]’s lawyer claiming such an agreement had been reached is not evidence of the agreement.
- (c) I agree with counsel for the applicant that if Ms [Hogan] was drinking excessively, it would only be relevant if her drinking affected her ability to work. The applicant denied both that she had been drinking excessively and that her drinking affected her ability to work. The sum Ms [Hogan] originally claimed in her budget for alcohol suggests high alcohol use for one person.
- (d) An applicant seeking interim maintenance is required to provide independent evidence of income and expenses<sup>5</sup>. In this case, the respondent’s lawyer put the applicant on notice of this requirement in November 2019. In the absence of the evidence of her employment and bank statements, the applicant has not satisfied the court of her inability to earn a higher income.
- (e) I agree with Mr [Hogan] that Ms [Hogan] has no need of a four-bedroom home but looking at the rental for her property in the context

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<sup>5</sup> *Dalrymple v Dalrymple*, above n 2, at [53].

of what is generally known of Auckland rental prices, the difference in her week-to-week rental with a smaller property may not be substantial and this was not a significant factor in my decision.<sup>6</sup>

- (f) I did not take a great account of the standard of living the parties enjoyed prior to separation. While this is a factor to consider under s 63 in determining a final maintenance award, I accept that the financial position of the [business] had significantly deteriorated following separation and the parties' ability to maintain a pre-separation lifestyle after separation was much more limited.
- (g) While it is appropriate in some cases that a respondent resorts to capital to pay interim maintenance<sup>7</sup>, it is not so in this case as the respondent provided independent evidence of the solvency of the [business], to which I refer above.
- (h) While I accept that, in most cases, it is not reasonable to accept that an applicant is required to support herself from capital<sup>8</sup>, the inability of the applicant to pay more than \$200 in maintenance over the next six months rebuts this presumption.
- (i) The applicant has not provided evidence to establish why she needs \$5,000 monthly for legal costs over the next six months.
- (j) Counsel Ms [Hogan] acknowledged that following the sale of the family home, the situation for the applicant would be very different. The respondent's claim that he had agreed to sale of the family home late last year was not disputed by Ms [Hogan].

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<sup>6</sup> The reasonable needs of Ms [Hogan] in her amended budget were not substantially challenged by Mr [Hogan] as he had challenged expenses in the previous budget, such alcohol purchases which had been deleted from the budget filed for the hearing.

<sup>7</sup> *L v T* [spousal maintenance] [2008] NZFLR 975 (HC).

<sup>8</sup> *Tsoi v Hua*, above n 4.

- (k) I did not have clear evidence of why it would be necessary to incur such substantial legal costs over the next six months, when substantial costs had already been incurred to-date (and I did not have detailed evidence either of why such costs were incurred). I rejected the claim for legal costs entirely in the budget.

[34] I dismissed the application for the above reasons.

A G Mahon  
Family Court Judge