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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2020-004-000340
[2020] NZFC 5049

IN THE MATTER OF	THE FAMILY PROCEEDING ACT 1980
BETWEEN	[RUTH COLLINS] Applicant
AND	[LARRY COLLINS] Respondent

Hearing:	17 July 2020
Appearances:	M Vickerman for the Applicant S Morris and A Morris for the Respondent
Judgment:	6 July 2020

RESERVED JUDGMENT OF JUDGE L J RYAN
[Application for Interim Spousal Maintenance]

Background

[1] The parties married in February 2005, initially separating on 29 October 2019. At the beginning of January 2020 they attempted a reconciliation and finally separated around 20 April 2020. There are two children of the marriage, [Kelly] aged 14 and [Hunter] aged 12. [Kelly]'s care is shared between both parents and [Hunter] resides in the day to day care of his father.

[2] On a without notice basis the applicant obtained an interim spousal maintenance order on 1 May 2020 of $1500 per week, with the Judge directing an urgent hearing of the application for interim maintenance.

[3] The applicant asks for an interim spousal maintenance order of $6900 per week in order to meet her ongoing reasonable needs which include both her outstanding and future legal and accounting costs in respect of the litigation with the respondent.

[4] It was apparent at the commencement of the hearing that the applicant had a jurisdictional hurdle to overcome in that she had failed to apply for an order for spousal maintenance before seeking an interim spousal maintenance order. It is abundantly clear from the provisions of s 82 Family Proceedings Act that the jurisdiction to make an interim spousal maintenance order stems from the making of an application for a spousal maintenance order itself.

> **82 Interim maintenance**
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> (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 (2) [Repealed]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 (3) [Repealed]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.

[5] Mr Vickerman for the applicant made an oral application on behalf of the applicant for a spousal maintenance order and Ms Morris on behalf of the respondent did not object to that. I therefore allowed Mr Vickerman's oral application which enabled me to proceed and hear the application for interim spousal maintenance.

[6] When the parties met the applicant was working as a [job deleted]. Following the birth of [Kelly] she ceased employment and has not re-entered the workforce, instead devoting her time to the care of the children. It appears that this was done with the agreement of the respondent. She has therefore been out of the workforce for some 14 years.

[7] The respondent is self-employed, being the sole director of a [company], which on the face of it appears to be quite successful. He is also the sole director of [another company], the shares of which are owned jointly by the parties. Additionally, the parties formed a family trust settled by deed on 1 April 2017, of which the parties are beneficiaries and the children the final beneficiaries.

Issues

[8] The approach to the determination of an application for interim spousal maintenance is well settled, stemming from the Court of Appeal judgment in *Ropiha*[1] and *Langridge v Langridge.*[2]

[9] Orders for interim spousal maintenance are a stop-gap mechanism. By that I mean that by virtue of the legislation itself, such an order is limited to six months and is made in order to ensure that an injustice and hardship does not arise to the applicant for that order whilst he or she awaits the hearing of the substantive application for spousal maintenance. Such interim applications are in fact dealt with on a submissions only basis with no cross examination of the parties. That is the reason why the

[1] *Ropiha* [1979] 2 NZLR 245.
[2] *Langridge v Langridge* (1987) 3 FRNZ 272.

discretion that is vested in the Court when considering an application for interim spousal maintenance, is unfettered.

[10] The key factors for a Court to consider in determining an application for interim spousal maintenance were usefully captured in *Beric v Chaplain*:[3]

> (a) The reasonable needs of the applicant for the time during which the order would be in force.
>
> (b) Any means available to the applicant to assist in meeting those reasonable needs.
>
> (c) The respondent's ability to meet any short fall.

[11] Ultimately after considering the above factors the Court must then decide whether or not to exercise the discretion to make an interim order.

Applicant's Reasonable Needs

[12] When the parties initially separated in October 2019 the respondent made payments of approximately $5500 per month on average ($1269 per week) from which it appears the applicant was able to meet her day to day needs. At that stage all other expenses in relation to the home in which the applicant lived, were met by the respondent and/or the family trust. That included the servicing of a mortgage over the family home of $1.7 million.

[13] The only expense the applicant has to meet in respect of accommodation (fixed costs) is $230 per week for the utilities plus the cost of fuel for her motor vehicle.

[14] The respondent meets the children's school fees costs and other incidental costs in relation to the children's day to day needs.

[15] Looking at page 2 of the applicant's affidavit of financial means and their sources, I make the following observations:

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[3] *Beric v Chaplain* [2018] NZFC 7076.

(a) Insurance and Superannuation appear to be met by the family trust and/or the respondent.

(b) Rates and water rates are covered by the family trust and/or the utilities payment, as are repairs on the home, apart from food costs and possibly some clothing.

(c) The respondent is meeting child maintenance care and education costs.

(d) For rather obvious reasons overseas holidays are not likely to arise in the next six months and it is hard for me to ascertain without cross examination and inquiry, what the figure for miscellaneous is based on. I will deal with issues of legal fees later in this judgment.

(e) There likewise in the next six months, is no apparent requirement for purchasing furniture and homewares.

[16] Taking a broad brush approach, bearing in mind that I am looking at the next six months and excluding the claim for legal fees for which I give my reasons in a moment, I find that the applicant's reasonable needs are $1800 per week.

Is the Applicant Likely to be Able to Provide in Part for Any of Her Reasonable Needs?

[17] As I indicated to counsel at the hearing, given the applicant has been out of the workforce for 14 years it would be unfair and unreasonable of me to expect that within the timeframe of this interim order, she is able to find gainful employment and I find as a result that she is not able to meet any of her reasonable needs at this particular time.

Does the Respondent have the Ability to Meet the Applicant's Reasonable Needs?

[18] Noting that initially following the separation in October 2019 the respondent was contributing $1269 per week towards the applicant's reasonable needs and that he is clearly able to, at least for the short term, meet the interim order made by Judge

Burns on 1 May 2020, I am confident that with careful management the respondent is able to meet in full the applicant's reasonable needs. I reiterate, this is only until a full enquiry can be conducted at the substantive hearing. It is difficult to properly examine the respondent's financial situation in any detail in part due to the absence of any financial statements of the family trust.

Legal/Accounting Costs

[19] Mr Vickerman argued strongly in favour of my taking into account the applicant's legal and accounting costs in respect of the litigation she has embarked upon in respect of maintenance and relationship property matters with the respondent. In particular he referred to Courtenay J's judgment in *Clayton v Clayton*.[4] In this judgment Her Honour's interpretation of the Court of Appeal judgment in *C v G*[5] was that, in assessing reasonable needs, it was acceptable to include ongoing legal costs. With respect, I prefer the interpretation of the Court of Appeal judgment in *C v G* contained in the judgment of *Hodson v Hodson*[6] where Kos J held, following the Court of Appeal's judgment in *C v G*:

> "Legal costs should only be included in a s 64 final maintenance order if likely to be a continuing expense."

[20] In *R K v D K*[7] Venning J, again referring to the Court of Appeal in *C v G* said this:

> "[58] Section 69(1)(b) and (c) are broad enough in their terms to support a lump sum payment for legal costs where the costs may be existing at the date of separation or may have been incurred on a discrete and unrelated matter. But where, as in this case, the legal costs are ongoing and have been incurred in relation to the proceedings in issue, the Court of Appeal in *C v G* made it clear that such costs should be dealt with in accordance with the Rules of Court."

[21] In my respectful view Kos and Venning JJ have adopted the correct interpretation of the Court of Appeal judgment in *C v G*. It would be unjust and unfair to require a party to contribute towards the funding of another's litigation against

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[4] *Clayton v Clayton* [2015] NZHC 765.
[5] *C v G* [2010] NZCA 128.
[6] *Hodson v Hodson* HC Napier CIV-2011-441-618, 6 December 2011.
[7] *R K v D K* HC Auckland CIV-2010-404-2052, 17 September 2010.

them. The costs of litigating a discrete issue around a separation and the ancillary matters relating to that separation, are not ongoing in the sense contemplated by the Court of Appeal in *C v G*. If the applicant is successful in the litigation against the respondent then the Court at the time judgment is made, can consider where the burden of costs should fall, being in a much better position than I am currently, to weigh up the merits of each parties' respective positions. For instance, it would be wrong to require the respondent to contribute to the applicant's costs in pursuing a totally unmeritorious case, should that be the situation. I hasten to add that I am not necessarily suggesting that to be the case here.

Result

[22] Accordingly, I make an interim spousal maintenance order in favour of the applicant in the sum of $1800 per week, first payment 13 July 2020. The current interim spousal maintenance order made by Judge Burns on 1 May 2020 is discharged as from that date. The interim maintenance order I make in terms of this judgment is to expire in six months from 13 July 2020.

[23] I direct that the applicant is to file forthwith an amended application for a spousal maintenance order in terms of the oral application made by Mr Vickerman at the commencement of the hearing.

[24] Given that this is an interim order it is essential that the substantive application for spousal maintenance be heard promptly. Consequently, I make the following directions in relation to that application:

(a) Within 28 days from the date of delivery of this judgment the applicant is to file updating affidavits in support of the substantive application for spousal maintenance.

(b) Within 28 days thereafter the respondent is to file any affidavits updating his position and in response to the applicant's affidavit.

(c) There are to be no further affidavits filed without leave.

(d) Upon completion of the timetable directions as above, the proceedings are to be transferred to the long cause fixture program for the allocation of a one-day fixture. I note it will be open to counsel to indicate to the management Judge at the long cause fixture callover, should they be of the view that more than one day is required.

[25] Finally, costs in respect of this application should follow the event. The applicant has been successful. I direct the Registrar to fix costs in favour of the applicant on a category 2B basis.

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Judge LJ Ryan
Family Court Judge

Date of authentication: 06/07/2020
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