

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-2019-070-000374
[2020] NZFC 281**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[LENA ROTHMAN] Applicant
AND	[CALEB ROTHMAN] Respondent

Hearing: 26 November 2019

Appearances: Dr F Mackenzie for the Applicant
J Hawker for the Respondent

Judgment: 3 February 2020

RESERVED JUDGMENT OF JUDGE J P GEOGHEGAN

[1] Mr and Mrs [Rothman] commenced a relationship in 1995 and were married in [month deleted] 1997 and separated in April 2018. They have four children aged 20, 18 and [two teenagers] aged [under 16]. [The teenagers] live with their mother and are currently home schooled by her. All of the children have been the subject of home schooling.

[2] While it is clear that the parties do not see eye-to-eye on the issue of home schooling and that, in particular, Mr [Rothman] wishes to see the children engaged in mainstream schooling, the reality would appear to be that the children will be home schooled for the next year.

[3] Issues regarding division of relationship property have still not been resolved between the parties and this judgment is to determine an application by Mrs [Rothman] for interim maintenance. Mrs [Rothman] asks the Court to award interim maintenance in the sum of \$8810 per month for the next six months or until earlier resolution of relationship property issues. She also seeks a lump sum payment of \$25,000 for legal costs and disbursements.

[4] Central to Mrs [Rothman]'s application, is her contention that, given the fact that she has home schooled all of the parties' children and will continue to do so for the youngest two children, she is not in a position to obtain employment and accordingly needs ongoing support until such time as she can obtain employment or otherwise become self-sufficient.

[5] It is the position of Mr [Rothman] that he has been generous to date in his financial support of Mrs [Rothman], that he will continue to support the children generously and that Mrs [Rothman] does not need maintenance as she is able to support herself.

[6] It is also apparent from the affidavit evidence that there is a considerable difference between the parties regarding the [teenagers'] home schooling, Mrs [Rothman] alleging that both parties had agreed and committed to that style of education, Mr [Rothman] alleging that he had little choice but to agree given Mrs [Rothman]'s determination and insistence in respect of the issue. It is relevant only to

the extent that Mr [Rothman] maintains that there is no reason why the [teenagers] could not be enrolled at school and Mrs [Rothman] could then obtain employment.

[7] At the outset of this hearing there was some discussion with counsel as to how the hearing would proceed. Part of the reason for that was the extensive nature of the evidence filed, the fact that the matter had been set down for a half day hearing and that the Court may not have sufficient time to deal with the matter if it were dealt with by way of cross-examination of the parties. Counsel resolved at the end of that discussion to proceed on a submission only basis. It is also fair to say that approach recognised the broad nature of the discretion of the Court in an application of this kind. What must be said however is that there are significant differences between the parties in respect, in particular, of Mrs [Rothman]'s expenses claimed in support of her application, however I approach the matter on the basis that, in the circumstances, I will need to deal with it on a robust and broad-brush basis.

[8] Mr [Rothman] is [employment details deleted]. He is not engaged under a permanent contract of employment but is rather a contractor paid an hourly wage with an obligation to meet various costs relating to his practice. His evidence, which I accept, is that his average nett monthly wage is \$9,100 per month.

[9] From separation in April 2018, to May 2019, Mrs [Rothman] and the children were supported through a combination of Mr [Rothman]'s income and access by Mrs [Rothman] to the parties' substantial joint funds. There has been no demarcation between the amounts paid in respect of child support and the amounts paid by way of spousal maintenance.

[10] In May 2019, the parties entered into negotiations over continued payments as Mr [Rothman] was not happy with the financial arrangements. Those negotiations resulted in an agreement that Mr [Rothman] would continue to pay the sum of \$5,460 per month for a further six months. Again, it would appear that this was a broad payment encompassing elements of child support and spousal maintenance. The present hearing has come about because of the fact that the parties could not reach an agreement regarding ongoing payments.

[11] In that regard, Mr [Rothman] both prior to this hearing and again through his counsel Ms Hawker during the course of this hearing, confirmed that he would continue to pay child support equivalent to \$50,000 per annum on a monthly basis of \$4,166.66. His first payment in accordance with that undertaking would be on 14 December. It is the position of Mr [Rothman] however, that that is where his liability should end and that it is not necessary for any further sums to be paid to Mrs [Rothman]. Mr [Rothman] disputes the budgets presented by Mrs [Rothman] and says that Mrs [Rothman] is able to engage in employment which would enable her to become self-sufficient.

[12] There was considerable criticism by Ms Hawker of the budgets provided by Mrs [Rothman]. There is substance to those criticisms. It is frankly difficult to easily understand the financial position of the parties.

[13] In May 2009, it was proposed by Mrs [Rothman] that the amount of \$12,500 per month was required to meet “child support, spousal maintenance and educational costs.” This was on the basis that at that time, Mrs [Rothman] and the children were in rental accommodation at a cost of \$750 per week. Other monthly expenses included groceries at \$350 per week, house cleaning costs of \$50 per week, diesel fuel costs and road user charges of \$150 per week and other vehicle costs such as registration, servicing and the like of \$40 per week. Ms [Rothman]’s budget included a weekly amount of \$144.23 for the cost of bi-annual trips to “visit relatives abroad”. Personal costs included amounts of \$65 per week “clothing and shoes”, \$40 per week for attendance at gym and Pilates classes, \$23 per week for “cosmetics”, \$262 per week for “camping holidays”, \$26.92 per week for “pets contingency”, \$30.76 for “gifts for kids” and \$9.61 per week for “ball/dance attendance”. The sum of \$190.66 per week or \$862.23 per month was sought in respect of medical costs which included chiropractic and physiotherapy attendances and allowance for “psychologists/counsellors” and for “vitamins – supplements”. The sum of \$445.52 per week or \$1930.60 per month was sought in respect of educational costs those costs including “printing maintenance, ink, paper”, tutor and private lessons costs, “news subscriptions”, “material and fabric” (presumably for dance performance) and “camps”. The sum of \$32.30 per week or \$140 per month was sought in respect of “postage, koha, kids’ events fees, sundries”.

[14] By the time of this hearing there had been an interim distribution in respect of relationship property and Mrs [Rothman] had received a payment of one million dollars which enabled her to buy her own home. Accordingly, she was no longer paying rental costs of \$750 per week but would still be required to pay rates and house insurance.

[15] The distribution to Mrs [Rothman] was made from the proceeds of sale of the family home, the nett proceeds being \$1,411,470. The balance of the nett proceeds is held on interest bearing deposit pending resolution of property issues. Mrs [Rothman] purchased her home for \$775,000. It is not clear what has been done with the balance of the distribution received however, on the face of it, it could be a source of investment income for Mrs [Rothman].

[16] The extent and value of the parties' relationship property is unclear however it would appear from the evidence that there are term deposits totalling approximately three million dollars. At a conservative return of 2.5% that would generate a return of \$75,000 per annum which, on the face of it, would be available to the parties to meet their living costs. The evidence indicates that these accounts are frozen however there would appear to be no reason why the income could not be divided equally between the parties in the interim.

[17] What is immediately apparent, is that Mrs [Rothman]'s budget includes significant amounts which are attributable to the costs involved in maintaining the children, those costs already being covered by Mr [Rothman]'s undertaking to pay child support in the sum of \$50,000 per annum.

[18] With the greatest of respect to Mrs [Rothman], her budget strikes me as an inflated one. In my assessment there can be no justification, for example, for seeking an allowance for a cleaner when Mrs [Rothman] would readily be able to undertake such a task herself. It is equally unreasonable, in the circumstances to expect provision for overseas trips. Similarly, an allowance for camping holidays of \$262 per month appears excessive as does a total allowance of nearly \$60 per week for "pets" and "pets' contingency".

[19] While Mrs [Rothman] and the children are entitled, to a degree consistent with reasonableness and practicality, to maintain a lifestyle which they had previously enjoyed there must also be some realistic assessment of the change of circumstances and a cutting of cloth which acknowledges those change of circumstances. Unfortunately, Mrs [Rothman] appears unable to be able to engage in such an exercise.

[20] Account must also be taken for the fact that Mr [Rothman]'s evidence nett average wage is \$9,100 per month. He is currently living in rental accommodation and needs to provide for his own living expenses. Mrs [Rothman]'s proposal would have Mr [Rothman] paying over 95% of his nett monthly income in respect of spousal maintenance. Such an arrangement would be unjustified and unsustainable.

[21] As against that Mr [Rothman] tendered his own budget in an affidavit sworn on 19 September 2019. He described that budget as:¹

A forward-looking budget that I have prepared for us both that seeks to ration the amount allocated to items of expenditure in this more balanced way.

[22] Mr [Rothman]'s budget endeavoured to separate the living costs directly attributable to the [teenagers] and those attributable to their mother. The budget figures included struck me as being more accurate and realistic than those provided by Mrs [Rothman]. The nett result of the budget was that Mr [Rothman] estimated the maintenance cost for the [teenagers] at \$46,460 per annum or \$3871.66 per month with Mrs [Rothman]'s costs being \$35,970 per annum or \$2997.50 per month.

[23] Section 82 of the Family Proceedings Act 1980 provides that:

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.

¹ Affidavit 19 September 2019 para 72.

[24] Pursuant to s 82(4) no order made under s 82 may continue in force for more than six months after the date on which it is made.

[25] There is no dispute that the leading case in respect of interim maintenance is the Court of Appeal decision in *Ropiha v Ropiha* where it was stated:²

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 proceedings, in 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.

[26] The Court of Appeal also stated that:

In considering the position of an applicant for an interim order a 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. In assessing those needs the Court will take into account the standard of living the parties adopted for themselves. And will use the term “means” 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. What is important, if those means are to be set against the applicant’s needs in determining whether to make an interim order, is that the monies taken into account should be reasonably assured to the applicant. What could he (or she) reasonably count on having available during the limited term of an interim order? By the same token, a defendant should not be called on to pay maintenance before there is any finding on the substantive proceedings 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 benefits provided by the State or some other body. This is subject, of course, in the case of welfare benefits, to consideration of the scheme of the relevant legislation or authority under which benefits are or may be provided.

[27] In *Hodson v Hodson* Justice Kos referred to the need for a measure of realistic comparison between the lifestyle and needs of each party and observed that a robust sense of fairness must prevail. That approach included looking at the reasonable needs

² *Ropiha v Ropiha* [1979] 2 NZLR 245.

of the applicant, the means likely to be available to the applicant to meet those needs herself and the respondent's reasonable means to meet any shortfall.³

[28] As previously noted, Mrs [Rothman] also seeks a lump sum payment of \$25,000 to meet her legal costs and disbursements.

[29] In support of this claim, Ms Mackenzie refers to the High Court authority of *B v B*⁴ and the Court of Appeal decision in *C v G*.⁵ In *B v B* Courtney J held that the legal and accounting expenses claimed by an applicant should be viewed in the same way as any other expense incurred in meeting their reasonable needs and that the viewing costs are simply a matter to be dealt with at the end of proceedings was not appropriate. In *C v G* the Court of Appeal distinguished between legal fees which might be regarded as a one off and legal fees that were ongoing. Ongoing legal fees could properly be included as part of maintenance proceedings.

[30] For Mr [Rothman], Ms Hawker points out that s 82 empowers the Court to make a periodical order for maintenance only, for a maximum of six months and that accordingly there is no jurisdiction for the Court to make the orders sought by Ms [Rothman] as part of this application.

[31] With reference to Ms Hawker's submission, I consider that there is nothing in the wording of s 82 which would prevent the Court from considering an expense such as legal costs as a component of an interim maintenance order where such a course is justified. I do not read s 82 as depriving the Court of an ability to consider such a matter.

[32] I am not, however, required to determine that issue, as I have come to the conclusion that, on the basis of the evidence in this case, there is no justification for making such an award. As previously referred to, Mrs [Rothman] received an interim distribution of \$1 million which appears to have been utilised by her for the purposes of buying a home. It is apparent that there is a balance of \$ 225,000.00 which is available to Mrs [Rothman] which could be utilised, not just to generate an income but

³ *Hodson v Hodson* [2012] NZFLR 252.

⁴ *B v B* [2008] NZFLR 789.

⁵ *C v G* [2010] NZCA 128.

to meet her legal costs. In such circumstances, Mr [Rothman] should not be required to contribute to those costs subject, of course, to any application for costs in the course of the property proceedings before the Court or, indeed, these proceedings.

[33] In addition, it appears clear that the parties each receive interest from various investments held by them. There is no reason why Mrs [Rothman] cannot apply a portion of those funds to meet her own legal costs. It would simply be inequitable to require Mr [Rothman] to meet Mrs [Rothman]'s legal costs in the current circumstances, and I decline to do so.

[34] As to the issue of interim maintenance, having considered the evidence I have come to the following conclusions:

- (a) The budget evidence provided by Mrs [Rothman] is, in my assessment, unrealistic, inflated and unreliable. It is difficult to interpret and does not endeavour in any way to separate the costs of maintaining the children and the costs of maintaining Mrs [Rothman].
- (b) I consider Mr [Rothman]'s budget figures to be more realistic and reliable.
- (c) Given that I have accepted Mr [Rothman]'s nett average wage as \$9100 per month, a claim for interim spousal maintenance in the sum of \$8810 per month is completely unrealistic and totally unsustainable. It would amount to Mr [Rothman] paying maintenance in the sum of \$105,720 per annum when he receives only \$109,200 per annum. It simply would not enable Mr [Rothman] to have sufficient funds to maintain himself.
- (d) While it was suggested in submissions that resort could be had to the interest being earned on various investments (the details of which are unclear) I do not consider that that approach is appropriate or justified. Mrs [Rothman] has a clear obligation to support herself where reasonably possible and therefore has the means to utilise any interest from her share of investments for her own cost of living.

- (e) Mr [Rothman] has undertaken to pay the sum of \$50,000 per year or \$4166 per month in respect of child support. That sum would appear to be appropriate and even generous and Ms Hawker has advised in her submissions that those monthly payments would commence on 13 December the last monthly payment of \$5460 having been received on 13 November.
- (f) Even on Mr [Rothman]'s own figures there is recognition that Mrs [Rothman] has living costs of some \$2900 per month.

[35] While Ms Hawker submitted that the child support costs of \$50,000 would be sufficient to meet Mrs [Rothman]'s living costs I consider that there should be provision for Mrs [Rothman]'s maintenance over and above those costs.

[36] Having considered the figures tendered by the parties and taking into account the need for Mr [Rothman] being able to provide for his own living expenses, I consider that an appropriate sum in respect of interim maintenance is the sum of \$2000 per month. I consider that that strikes an appropriate balance given the myriad figures provided by both parties in these proceedings. It also takes appropriate account of the need for Mr [Rothman] to provide for his own living costs.

[37] I accordingly make an order pursuant to s 82 of the Family Proceedings Act 1980 requiring Mr [Rothman] to pay to Mrs [Rothman] the sum of \$2000 per month, effective from December 14, 2019 which is one month after the last payment by Mr [Rothman] of maintenance under the parties previous arrangement.

J P Geoghegan
Family Court Judge