

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

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**IN THE FAMILY COURT
AT ROTORUA**

**I TE KŌTI WHĀNAU
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

FAM-2019-063-000210

[2020] NZFC 2079

IN THE MATTER OF THE FAMILY PROCEEDINGS ACT 1980

BETWEEN [HAZEL FAIRBANK]
Applicant

AND [JOSH FAIRBANK]
Respondent

Hearing: 24 February 2020

Appearances: P Kirk for the Applicant
R Savage for the Respondent

Judgment: 23 March 2020

RESERVED JUDGMENT OF JUDGE J F MUNRO

[1] Mr and Mrs [Fairbank] were in a relationship for 18 years. They separated in October 2018. They have three children aged 13, 11 and nine respectively. Mrs [Fairbank] continues to live in the family home with the children. The parties own another property which is currently rented out.

[2] Mrs [Fairbank] applied for and was granted an interim maintenance order in the sum of \$523 per week for 23 weeks. She has also applied for a final maintenance

order in the sum of \$1,374.68 per week, however at the time of hearing that amount had been amended to cover her weekly shortfall of between \$975 and \$1,073 depending on her mortgage payments. Mr [Fairbank] defends the application on the basis that he cannot afford to pay maintenance. There are unresolved relationship property issues.

The law

[3] Consideration of spousal maintenance falls to be considered pursuant to s 63 of the Family Proceedings Act 1980:

[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]].]

[4] Section 65(2) Family Proceedings Act provides:

- (2) The matters that the Court must have regard to are as follows:
 - (a) the means of each spouse [[, civil union partner,]] or de facto partner, including—
 - (i) potential earning capacity:
 - (ii) means derived from any division of property between the spouses or de facto partners under the Property (Relationships) Act 1976:
 - (b) the reasonable needs of each spouse [[, civil union partner,]] or de facto partner:
 - (c) the fact that the spouse [[, civil union partner,]] or de facto partner by whom maintenance is payable is supporting any other person:
 - (d) the financial and other responsibilities of each spouse [[, civil union partner,]] or de facto partner:

- (e) any other circumstances that make 1 spouse [[, civil union partner,]] or de facto partner liable to maintain the other.

The party's respective positions

Mr [Fairbank]

[5] During the relationship and at the time of separation Mr [Fairbank] was earning approximately \$90,000 per year. He had been the sole earner for the family since Mrs [Fairbank] stopped work following the birth of her first child. He was asked to resign from his job in 2019 and was paid \$30,000 as compensation. Since then Mr [Fairbank] had been unable to obtain employment despite evidence that he had made significant attempts to find work. He has now engaged a position with [employer deleted]. He is still training and as yet is not receiving an income. Given that his income will derive from commission on sales, his future earnings are completely unknown. Mr [Fairbank] has entered into a relationship with another woman with whom he is now living in [location deleted]. She is not financially dependent upon him. He does not have responsibility for any other children.

[6] At the time of these proceedings Mr [Fairbank]'s sole income was a benefit totalling \$319.49 per week. It is insufficient to meet his outgoings of approximately \$830 per week.

[7] Initially Mr [Fairbank] paid interim maintenance from the \$30,000 compensation payment received. He also used those funds to meet other debt obligations and living costs. That money is now spent, and Mr [Fairbank] does not have the resources to pay the balance owing of the interim maintenance order to Mrs [Fairbank]. That is a matter that has now been referred to IRD and steps will be taken to recover that.

[8] Currently Mr [Fairbank] is paying \$78 per month child support to Inland Revenue.

[9] Mrs [Fairbank] is sceptical about Mr [Fairbank]'s inability to obtain employment. She maintains that he could obtain employment or set up his own

business if he chose to but that he is avoiding his responsibilities to her by keeping his income low.

[10] Having heard from Mr [Fairbank] and considering his affidavit evidence which outlines the steps he has taken to obtain employment I am satisfied that Mr [Fairbank] is in a particularly impecunious state. Until he is able to establish himself with [the employer] and receive income by commission then he will struggle to meet his own outgoings.

Mrs [Fairbank]

[11] Mrs [Fairbank] has not been in employment since the birth of their eldest child, [June] in 2006. She had been an administrator, but for the past 13 years has become a fulltime mother and housewife. Since separation she has had the day-to-day care of the children with Mr [Fairbank] having the children on alternate weekends. Mrs [Fairbank] is aware of her responsibility to become self-supporting. Currently she has an income of \$830 per week, all of which is from benefits and child support. She maintains that that is insufficient to meet her reasonable needs, particularly given that she has the care of the children. She is in receipt of sole parent support, an accommodation supplement and a Working for Families payment.

[12] Mrs [Fairbank] has made some attempt to obtain employment in the area of office administration. She made four online job applications on 20 February which were unsuccessful. The constraints on her ability to obtain employment are that she has been out of the workforce for 13 years and that she has children who are between the ages of 13 and nine and so cannot work fulltime. Mrs [Fairbank] has given evidence of her intention to enrol in a Sociology course. Her evidence is quite non-specific in relation to this course and there is no evidence as to the likelihood of employment arising from any qualification that she may receive.

[13] Section 63(1)(f) refers to:

the undertaking of 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.

[14] Mrs [Fairbank] has variously referred to considering social work or psychology, a bachelor of social work, and a three year sociology course. She considers that Mr [Fairbank] should meet the cost of that training. Mrs [Fairbank] was not able to provide evidence of having enrolled in any course nor to indicate the employment that would arise from that. Whilst it is admirable that Mrs [Fairbank] wishes to engage in further education, what type of employment that would lead to is not known and if in fact it does lead to employment it would be at least three years hence. Given Mrs [Fairbank]'s minimal efforts in attempting to obtain employment and the uncertainty surrounding her desire to further her education I am not satisfied that she has taken reasonable steps to improve her financial position.

Discussion

[15] Currently both parties are dependent on welfare benefits as their sole source of income. It is therefore necessary to include benefit income in assessing the resources and the needs of each party. Mrs [Fairbank] receives \$830 per week. Mr [Fairbank] receives \$319 per week. His estimate of outgoings is approximately \$830 per week giving him a shortfall of approximately \$500 per week. Mrs [Fairbank] claims a deficit of income of around \$1000 per week. It is very clear from the evidence that even if it were determined that Mrs [Fairbank] is in need of maintenance arising out of her personal circumstances Mr [Fairbank] does not have the means to pay her maintenance.

[16] The major assets owned by Mr and Mrs [Fairbank] are two residential properties. Both are subject to mortgages but there is acceptance that the current total equity in these properties is approximately \$700,000. Mr [Fairbank] wishes to sell these properties to enable the proceeds to be divided between the parties, but Mrs [Fairbank] does not agree to the sale. She wishes to retain one of the properties for herself and the children and is concerned that the funds that she would receive from any sale would be insufficient to enable her to purchase another property. She does not indicate how she would be in a position to retain the property that she lives in given her current financial position.

[17] It is abundantly clear that both parties are in an impecunious position. Neither has employment that is as yet providing income. Both are entirely dependent on the State for income by way of benefits. They have significant asset by way of two residential properties that could be sold with the potential to benefit each party in the sum of approximately \$350,000.

[18] In those circumstances the application for final spousal maintenance is unrealistic given that there is no ability for Mr [Fairbank] to pay spousal maintenance. He is already owing Mrs [Fairbank] \$6,230 which will be recovered by the Inland Revenue Department and paid to Mrs [Fairbank] in due course.

[19] Accordingly, the application for spousal maintenance is dismissed. I make no award of costs.

J F Munro
Family Court Judge