

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 MAKĀURAU**

FAM-2018-004-000739

FAM-2018-004-000740

[2021] NZFC 3847

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[HAO LIN] Applicant
AND	[TIAN CHAO] Respondent

Hearing: 31 March 2021

Appearances: B Snedden for the Applicant
R Pidgeon for the Respondent

Judgment: 29 April 2021

RESERVED JUDGMENT OF JUDGE R VON KEISENBERG

Introduction

[1] This is an application by the respondent [Tian Chao] for an order under s 99 of the Family Proceedings Act 1980 (FPA) to discharge, vary or suspend an order for interim spousal maintenance made by his Honour Judge de Jong on 18 September 2020.

[2] By way of background, the applicant obtained an order for interim spousal maintenance on 10 July 2019 following a submissions-only hearing on 4 April 2019.

[3] The July decision recorded the background to the parties' dispute and many of the issues which remain in dispute in this matter including when the relationship began, the duration of the relationship, whether the relationship was continuous and what property is in the pool for division. It is not in dispute that the relationship ended in March 2017 following an alleged family violence incident by Mr [Chao] against Ms [Lin].

[4] The wife had sought interim spousal maintenance in the sum of \$1,419 per week or \$6,049 per month. The court reached the view that her reasonable needs were more likely to be about \$4,610 per month or \$1,063.93 per week and that the respondent could "reasonably be expected to meet the shortfall in the wife's reasonable needs". An order was accordingly made that the husband pay the wife \$1,063.93 per week by way of interim spousal maintenance for six months commencing on 26 July 2019.

[5] On 18 July 2019, following the issuing of the decision, Mr [Chao] applied to discharge, vary or suspend the order. The grounds relied on was that in the passage of time between the hearing and the delivery of the decision there had been a change in his circumstances. The respondent claimed that he lacked the financial means to pay and was not able to borrow funds from the family to meet his maintenance obligations. He alleged that the amount he had been ordered to pay exceeded his weekly income by \$396 per week. Mr [Chao] did not pursue this application.

[6] On 13 March 2020, Ms [Lin] applied for a second order for interim spousal maintenance. The matter was heard on 9 July 2020. Ms [Lin] sought a further interim order at the same rate of \$1,063.93 per week. (No updated declaration of financial means was filed by Ms [Lin].) For the hearing counsel for Mr [Chao] advised the court that his client was now in receipt of legal aid which indicated "an inability to pay legal costs and therefore indicated impecuniosity". He submitted that the court in exercising its discretion in awarding further interim maintenance, should take into account Ms [Lin]'s misconduct which includes her convictions for benefit fraud in 2019 which

were unsuccessfully appealed in the High Court on 7 August 2019. (Ms [Lin] was found guilty of failing to disclose at all relevant times that she had been in a relationship in the nature of marriage [with Mr [Chao]] from July 2014 to July 2016 which resulted in her being improperly paid \$47,922.31 by Work and Income.) In short, Mr Pigeon argued that Ms [Lin]’s convictions for benefit fraud were relevant to the exercise of the court’s discretion.

[7] On 18 September 2020 the court issued its decision in relation to the second application. It noted that although Mr [Chao] had applied to vary the 2019 interim spousal maintenance order, he had not proceeded with the application and had met his financial obligations under the order.

[8] While it was accepted that COVID-19 would have had an economic impact on Mr [Chao]’s tourism business which relied on inbound Chinese tourists, the court noted that Mr [Chao] had been less than forthcoming with the disclosure of relevant financial information. Overall, the court considered that Mr [Chao] had not provided sufficient evidence to support his claim that his financial circumstances had changed. (The issue regarding Ms [Lin]’s fraud convictions was not addressed.)

[9] The court observed that no real issue had been taken with Ms [Lin]’s reasonable needs of \$1,063.93 per week and accordingly made a further order that Mr [Chao] was to pay Ms [Lin] the aforesaid sum for a further six months.

[10] The Court acknowledged that Mr [Chao] was *entitled to provide full disclosure* and on that basis, leave was reserved to him to file an application to vary the interim spousal maintenance order on condition that he supplied full disclosure of all his financial information and records sought by Ms [Lin].¹ To assist Mr [Chao], the court delayed the commencement of the order until 9 October 2020 to “give him time to organise his affairs and provide disclosure.”²

[11] On 2 October 2020, Mr [Chao] filed further affidavit evidence in support of an application to stay the September 2020 order. His disclosure included copies of his

¹ Above n. 1 at [26](c).

² [23] Decision of Judge de Jong, 20 September 2020, [2020] NZFC 8014.

bank statements from 2017 to September 2020, credit card statements, and bank statements on behalf of his parents to “cross link with his Westpac statements to show that EveryDay accounts and loan accounts belonged to them.”³ Mr [Chao] deposed that he was now a full-time student and provided evidence of his Study Link loan.

[12] On 12 October 2020, Mr [Chao] filed a further affidavit attaching additional disclosure which included evidence of proof of income from IRD for the years ending 1 April 2019 to 31 March 2021. (His income as assessed by IRD was \$113,000 for year ending March 2018; 108,000 for year ending March 2019; \$30,394 for the year ending 31 March 2020; and \$14,946 for year ending 31 March 2021.⁴ He deposed that his personal circumstances had changed to the extent that he was now living with his parents and because of the effects of COVID-19 on the tourist industry, the business in which he had an interest was no longer operating.⁵

[13] On the same date, Mr [Chao] filed a declaration of financial means and their sources. His income, including student allowance, was declared as \$42,899 for the previous 12 months. His total expenses were \$41,000 for the same period which included payment of child support at the rate of \$88.66 per week. He claimed his only assets (pending resolution of property matters) were some motor vehicles, cash and shareholdings with a total value of \$33,000.⁶ In short Mr [Chao] claims he is unable to pay interim maintenance of \$1,063.93 per week based on his present income.

[14] The second aspect of Mr [Chao]’s application for a stay and/or variation of the maintenance order was on the basis the order should be reopened due to the failure by Ms [Lin] to disclose sums received by her in the relevant period. These included a settlement sum of \$40,000 paid to her solicitors on or about 4 May 2018 in respect of an employment claim. (The basis of Ms [Lin]’s claim had been that her employment with the company Mr [Chao] had an interest in, was terminated when the relationship ended.) He also alleged that he had paid \$39,000 to Ms [Lin] in two tranches; \$33,000 on 19 September 2017 and \$6,000 on 11 October 2017 ostensibly for child support. He claimed that neither sums had been declared by Ms [Lin] in her first affidavit.

³ [7] Affidavit of [Tian Chao] dated 1 October 2020.

⁴ Affidavit of [Tian Chao], 1 October 2020, Annexure E.

⁵ [5] Affidavit of [Tian Chao], 12 October 2020.

⁶ Affidavit of Financial Means and their Sources, 12 October 2020, p 5 (d) and (g).

[15] On 22 January 2021, Ms [Lin] filed an affidavit in response. She claimed that:

- (a) Mr [Chao] was earning more than \$42,000 a year;
- (b) That Mr [Chao]'s bank statements did not provide clear evidence as to his income;
- (c) He owned other assets including a [vehicle] which he had not declared;
- (d) Mr [Chao] was still gambling at Sky City.
- (e) Mr [Chao] was not living with his parents as claimed but was living in [suburb deleted] on the North Shore.
- (f) She rejected that there had been any miscarriage of justice;

[16] Little or no evidence was produced by Ms [Lin] in support of these claims and other allegations she made. Ms [Lin] however did acknowledge that although she had not disclosed the amount of \$40,000 she had received by way of a settlement sum, she had made reference to the employment dispute in her first affidavit of 27 July 2018.⁷ In her most recent affidavit of 22 January 2021, she deposed that she had applied this money to payment of her legal bills. She referred to her earlier evidence in her first narrative affidavit of 7 November 2018. (On that point at paragraph 72 (s) of that affidavit, she said that she had paid \$41,824 in legal bills by *selling a motor vehicle* and using the proceeds.)⁸

[17] Ms [Lin] acknowledged that Mr [Chao] had paid her \$39,000 in the period claimed. She said that she had referred to receipt of these funds in her second affidavit of 23 November 2018 and that these funds had been paid into her son [Sammie]'s account. Her explanation [for not declaring these funds] was:⁹

...They were not paid into my personal account. However, I have already said I used these monies for living costs, legal fees, travel in China and in support of our two children.

⁷ Affidavit of [Hao Lin], 22 January 2021, para 25.

⁸ [73 (s)] Affidavit of [Hao Lin], 27 July 2018.

⁹ [42-43] Affidavit of [Hao Lin], 22 January 2021.

In retrospect, I was not trying to mislead the court. I can see now that my affidavit of financial means is not complete.

[18] She deposed that she had paid invoices to her lawyers at Amicus Law and that these had been “paid with borrowed funds from friends and from family”.¹⁰ She claimed that she had not withheld information but rather by the time that she had filed her original application in 2018, she no longer had the \$40,000 (or the other sum of \$39,000).¹¹ She said in that regard:

[39] I did not withhold information. I misunderstood perhaps what was being asked of me. The reason is that by the time I filed my original documents in July 2018 I no longer had \$40,000. I have tried to demonstrate by attaching the exhibits how that money was spent.

[40] The point I am making is that by the time I saw my lawyer and filed my documents in July 2018 I had already received the money and had used it to pay off debts.

[19] I return to this issue later in this decision.

[20] Mr [Chao] argued that had Ms [Lin] properly disclosed her income 12 months prior to her application on 7 September 2018, she may not have received spousal maintenance and “the actual needs of [Hao Lin] would have been much less than what was shown in the 2019 order which flowed on to the 2020 (conditional order).”¹²

[21] At the hearing, Mr Snedden, counsel for Ms [Lin] submitted that based on Mr [Chao]’s own evidence, he had surplus means of \$730.43 per week. Counsel disputed that Mr [Chao] paid rent to his parents and argued that the alleged rent of \$250 should be added back into his available funds.

[22] Mr Snedden acknowledged in his submissions that neither the \$40,000 settlement payment nor the \$39,000 had been declared in the wife’s affidavit of financial means in July 2018. He submitted that the wife’s disclosure of the solicitor’s trust account records showed a payment of the \$40,000 to [her mother]¹³ and the \$39,000 had been used for “living costs, travel in China and child support.”

¹⁰ [27] Affidavit of [Hao Lin], 22 January 2021.

¹¹ [39-40] Affidavit of [Hao Lin], 22 January 2021.

¹² Affidavit of [Tian Chao], 12 October 2020, para 32.

¹³ This does not accord with Ms [Lin]’s explanation.

[23] Counsel for Mr [Chao] in response disputed Mr Snedden's calculations and assessment of Mr [Chao]'s disposable income- these had not been put to him earlier for his response. He submitted that the court could rely on the documentary evidence from third party sources; IRD and bank statements to support Mr [Chao]'s position that his income had dropped dramatically.

[24] **The Law**

S 99 Discharge, variation, and suspension of maintenance orders

(1) Where [[the Family Court or the District Court]] is satisfied that it ought to do so having regard to the principles of maintenance set out in sections 62 to 66 and in section 81 of this Act, the Court may from time to time, in respect of any maintenance order, make any of the following orders:

- (a) an order discharging the maintenance order:
- (b) an order varying or suspending the maintenance order:
- (c) an order temporarily suspending the maintenance order, as to the whole or any part of the money ordered to be paid:
- (d) an order discharging the maintenance order, and substituting in its place a new maintenance order, whether of the same kind or not:
- (e) an order extending the term for which the maintenance order was made.

(2) Where a maintenance order is discharged or any such order otherwise ceases to have effect, all arrears due under the order at the time when it was discharged or otherwise ceased to have effect shall, unless and to the extent that they are remitted by a Court, be recoverable by the party to whom they are owing as if the order were still in force.

(3) An order under this section varying a maintenance order by increasing the amount payable under it may, if the Court thinks fit, take effect from a date that is earlier than the date of the order of variation, but is not earlier than the date on which the grounds for the variation arose.

(4) A Court may from time to time—

- (a) remit the whole or part of any arrears due under a maintenance order; or
- (b) suspend, on such terms and conditions (if any) as it specifies, the payment of the whole or part of any such arrears—

whether or not the order has ceased to be in force.

- (5) A Court may—
- (a) from time to time vary or extend an order made by it under this Act for the giving of security for the payment of maintenance, whether as to the term of the order or the nature of any security, or by increasing or diminishing the amount of any security, or otherwise; or
 - (b) discharge an order made by it under this Act for the giving of such security.
- (6) A Court may exercise the powers given by this section notwithstanding that the order that is varied, extended, suspended, or discharged was made by consent of the parties.]

[25] Section 99 provides jurisdiction to the Family Court to change a maintenance order, vary or suspend it or temporarily suspend the whole or any part of the money ordered to be paid. The court has a discretion to:

- (a) Remit arrears due under a maintenance order;
- (b) Suspend the payment of the arrears;
- (c) Varying, extend or discharge an order for the giving of security;
- (d) Increase or diminish the amount ordered.

[26] The wording of s 99 has led to some uncertainty as to whether the court has a duty or a discretion to vary when it is satisfied that the required criteria are met. The preferred view seems to be that the court has a discretion.¹⁴ In *Mason v Mason and the Maintenance Officer* the court held that the discretion conferred by s 99 Family Proceedings Act was unfettered.¹⁵

[27] Although the court's power to vary, suspend or discharge a maintenance order does not depend on the change of circumstances, it has been held it requires some explanation for the application. Justice Tipping in *Frost v Frost* said:¹⁶

In my view when an application is made to vary the terms of a registered maintenance agreement the Court is entitled to consider what circumstances have led to the application for variation, even if those circumstances be simply the effluxion of time. Although the jurisdiction under s 99 is not circumscribed by reference to a change in circumstances or any other criterion,

¹⁴ *H v C* (1985) 3 NZFLR 749 FC.

¹⁵ *Mason v Mason and the Maintenance Officer* FC Nelson, FP042/75/00, 14 December 2000.

¹⁶ *Frost v Frost* (1989) 5 FRNZ 655 at 659.

it can hardly have been Parliament's intention to facilitate a change to an order of the Court or an agreement of the parties unless something had happened to justify that change or there was or had become something inherently unfair or unreasonable in the terms of the agreement which justifies a re-examination.

[28] The Family Law Service has provided a brief summary of the scope of s 99 including reference to s 66 FPA (Relevance of conduct to maintenance of spouses, civil union partners or de facto partners) which is set out below:¹⁷

Typical reasons which are likely to justify the change are inflation,¹⁸ change in income by either party, the assumption of new responsibilities,¹⁹ repartnering, change in custodial arrangements, change in a child's education, adoption of the child, etc.²⁰ Misconduct by the recipient will not per se be sufficient unless, for the purposes of adult maintenance only, it amounts to a device to prolong the need for maintenance, or is of such a nature and degree that it would be repugnant to justice to require the continuation of the payment of maintenance.²¹ Deliberate failure to comply with the child access has not in the past usually justified variation of a child maintenance order.²² Dissolution of the parties' marriage or civil union will not of itself affect the maintenance order²³ but may give rise to consequential grounds for variation. ...

Findings

Should the court exercise its discretion under s 99 and vary or suspend the interim maintenance order made on 18 September 2020?

[29] While s 99 provides the court with a discretion to vary, suspend or discharge an interim maintenance order, the section makes it clear the court is required to have regard to the principles of maintenance as set out in ss 62-66 and s 81 of the Act. In this decision I do not intend to address the principles underpinning liability for the payment of maintenance. These were addressed at length in the two earlier decisions of Judge de Jong in which he granted interim spousal maintenance in favour of the

¹⁷ Family Law Service (NZ), Maintenance: Discharge and Variation, November 2020, 5.35 The basis for changing a maintenance order: ss 62-66, 81, 94, Family Proceedings Act 1980.

¹⁸ Compare *Hagglow v Hagglow* [1969] NZLR 339. But see also *Hudson-Owen v Hudson-Owen* (High Court, Rotorua, 18 August 1981, M134/81, Greig J.

¹⁹ *Caron v Caruana* [1975] 2 NZLR 372.

²⁰ *Maintenance Officer v Stark* [1977] 1 NZLR 78, 82.

²¹ Section 66, Family Proceedings Act 1980.

²² *Shrimski v Shrimski* (1985) 3 NZFLR 707.

²³ Family Proceedings Act 1980, s 94.

wife.²⁴ I accordingly adopt His Honour's summary of the law and applicable principles.

[30] I summarise Mr [Chao]'s application for variation or suspension. He effectively seeks relief on two grounds:

- (a) A change in circumstances in that he is no longer in receipt of sufficient income to pay \$1,063 per week for maintenance as per the order;
- (b) That had the court been fully appraised of Ms [Lin]'s true financial position and had she properly disclosed all sources of income as she was required to in her sworn documents in 2018 it would not have made the same order or possibly any order.

[31] Against that background is the claim by Ms [Lin] that she remains unable to meet her reasonable needs.

[32] Mr [Chao] filed extensive evidence that was based on his change of circumstances namely a decrease in his income as outlined earlier in this decision, he cannot meet Ms [Lin]'s shortfall of \$1,063.93 per week. I accept that based on the evidence provided, Mr [Chao]'s income for the 12 months prior to filing his declaration of financial means was \$42,889 and that his expenses were approximately \$41,000. Ms [Lin] as noted strongly disputes this and claims without providing any cogent evidence that his IRD proof of income is not an accurate record and that he has other sources of income which he has not disclosed.

[33] While there is always a disadvantage in dealing with applications of this type without giving either party the opportunity to test the evidence by way of cross-examination, I am satisfied that in the circumstances that I am entitled to rely on the documentary evidence provided by Mr [Chao] from third party sources namely IRD as to his proof of income to support his claim that at the present time he is unable to meet his obligations under the September 2020 order.

²⁴ Reserved judgment of Judge de Jong, 10 July 2019 [47-52,54-60].

[34] Overshadowing this matter is the considerable disquiet I have about the quality and reliability of the wife's evidence in relation to her income for the relevant period. As noted earlier, this matter was dealt with on a submissions only basis so there has been no opportunity to test the evidence. Despite this, there is ample evidence from Ms [Lin] herself that her declaration in July 2018 with respect to all sources of income for the relevant period was deficient.²⁵

[35] Having read the affidavits filed by Ms [Lin] in respect of these proceedings, I find there are significant conflicts in her evidence not only in respect of her failure to disclose income for the relevant period but also in her explanations in how these funds were utilised. (As earlier noted, Ms [Lin] first deposed that she sold her motor vehicle to pay legal fees²⁶ but later claimed that the \$40,000 settlement sum received was applied to legal fees. Mr Snedden in his submissions pointed to the solicitor's trust account as evidence that the funds were transferred to Ms [Lin]'s mother.)²⁷

[36] Ms [Lin] also acknowledged in her evidence that following separation she received \$60,000 from her parents²⁸ which was not included in her declaration. (Although she does not say when she received these funds, the parties separated in March 2017 so in all likelihood, receipt of these funds or part of them would have fallen in the relevant period.) She deposed that these were loans from her parents which she is required to repay although no other supporting evidence of this was provided. Ms [Lin]'s explanation that because she had utilised these funds as an explanation for not declaring the funds is neither reasonable nor valid. Clearly Ms [Lin] was obliged to declare all sources of income for the relevant period.

[37] Overall, I am satisfied on the balance of probabilities that there is sufficient evidence to make an order in favour of Mr [Chao] suspending the maintenance order made on 18 September 2020 requiring him to pay the sum of \$1,063.93 per week to Ms [Lin] by way of spousal maintenance. I do so primarily on the grounds of Mr [Chao]'s change in circumstances namely the decrease in his income. Although I have given consideration to cancelling the order, I have not done so in view of the strong

²⁵ [43] Affidavit of [Hao Lin], 22 January 2021.

²⁶ [73(s)] Affidavit of [Hao Lin], 27 July 2018.

²⁷ [19] submissions of Mr Snedden, 5 March 2021.

²⁸ [32] Affidavit 23 November 2018.

opposition by the wife to the husband's evidence. It is very clear that both parties are distrusting of the other's sworn but untested testimony.

[38] Accordingly, the September 2020 interim maintenance order is suspended pending resolution of the wife's application for final maintenance and determination of the parties' outstanding relationship property proceedings. This will provide an opportunity to the parties to test the evidence of the other.

Judge R von Keisenberg
Family Court Judge

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