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**IN THE FAMILY COURT  
AT BLENHEIM**

**I TE KŌTI WHĀNAU  
KI TE WAIHARA KEKE**

**FAM-2019-006-000139  
[2020] NZFC 8386**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[ANTON HOWARD] Applicant
AND	[MARIA HOWARD] Respondent

Hearing: 24 September 2020

Appearances: Applicant appears in Person  
P Radich and S Wadworth for the Respondent

Judgment: 24 September 2020

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**ORAL JUDGMENT OF JUDGE R J RUSSELL  
[as to an interim maintenance order under s 82  
of the Family Proceedings Act 1980]**

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**Introduction**

[1] These proceedings are under the Family Proceedings Act 1980 between [Anton Howard] and [Maria Howard]. In particular, it is an application by [Mr Howard] for an interim maintenance order under s 82 of the Family Proceedings Act.

[2] This application has been opposed by [Ms Howard] and the proceedings have been tracked forward to a half day hearing. I am giving my decision immediately following the hearing of the evidence from both parties.

### **Brief background**

[3] There has been an acrimonious dispute between Mr and [Ms Howard]. They have been embroiled in proceedings under the Domestic Violence Act 1995 and the Care of Children Act 2004 which has now been determined. Significant legal costs have been incurred by each of them to date.

[4] The parties separated on 2 December 2016. [Mr Howard] is now aged 60 and he is not able to work for medical reasons and is in receipt of an income protection insurance monthly payment which he will receive until he is aged 65 years of age.

[5] [Ms Howard] is a primary school teacher employed full-time in the Marlborough area.

[6] Prior to their separation, the parties lived in a home at [location 1] and owned an investment property in [address A] in [location 2]. The [address B] property has a value of \$885,000 and [address A] is said to have a value of \$270,000. Both of these properties are held in the name of the parties' family trust known as the [Howard Bright] Family Trust in which they are the trustees and themselves and their one child, [Kieran], are beneficiaries.

[7] In addition to the properties which are owned by their trust, the parties own motor vehicles, shares, furniture, bank accounts and various other items of relationship property. Their current position is that [Ms Howard] lives in the [address B] property and [Mr Howard] lives in the [address A] property. Neither of them pay rent to the trust but there are mortgage obligations to the bank for which the parties are required to make payments in lieu of rent.

[8] Relationship property proceedings have been commenced and have been tracked forward to a judicial settlement conference.

## **The evidence**

[9] [Mr Howard] filed this application seeking interim spousal maintenance in October 2019. Defences were filed and the affidavit evidence and exhibits filed in support of this particular application are voluminous on any view of it. Some 228 pages are contained in the booklet of documents and cross-examination of the parties has taken most of the morning to complete.

[10] [Mr Howard]'s case is that the parties enjoyed a reasonably good standard of living whilst they were living together. [Ms Howard] provided the bulk of their family income from her employment. [Mr Howard] also provided income from his insurance policy but is not able to work to supplement this. They have acquired the relationship home and the investment property as a result of their joint efforts. They have undertaken overseas travel and enjoyed what appears to have been a reasonably good standard of living.

[11] Upon separation, however, the standard of living of both parties has been adversely affected and which is common in almost all situations such as this. [Ms Howard] has continued with her employment as a teacher. [Mr Howard] has continued to receive his insurance payments, but these payments have not been pooled together. They have agreed to reside in the properties as I have recorded.

[12] The care of their one child, [Kieran], has been the subject of the Care of Children Act proceedings. The end result is the parties share the care of their son on a 50/50 week about basis. Because of [Ms Howard]'s greater income, she is required to pay \$100 per week to [Mr Howard] for child support. [Mr Howard] receives income from his insurance policy and these child support payments.

[13] Both parties agreed during the course of this hearing that the trust property issues need to be resolved. Both agree that these properties can be placed on the market and sold and/or be valued and, using the resettlement provisions in the trust deed, future ownership of the properties in which they live in can be addressed. [Mr Howard]'s evidence is that he wants to keep living in the [address A] property, he feeling he has no other option given his current financial position.

[14] [Mr Howard]'s case is that the income that each of the parties received prior to separation should be added together and then divided equally, meaning he would receive a payment of \$250 a week in maintenance from [Ms Howard] to equalise.

[15] The parties have jointly held shares through the ASB Bank. [Ms Howard] agrees these should be sold now and the proceeds divided equally. [Mr Howard] does not agree, preferring to leave resolution of those issues to the judicial settlement conference.

[16] I have beside me the relationship property file and, prior to giving this decision, did give the parties the opportunity to agree to sell and then divide the sale proceeds of the shares. [Ms Howard] was agreeable to this. [Mr Howard] was not for the reasons that I have recorded.

[17] Before I proceed further, each party has acknowledged that I have correctly recorded a summary of their respective cases.

### **The law**

[18] Section 82 of the Act provides the jurisdiction to make an interim spousal maintenance order. The relevant parts of s 82 provide:

#### **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.
- (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 a Family Court.

[19] Section 82 of the Act enables me to make an order directing a party to pay such periodical sum as is thought reasonable towards the future maintenance of the other

party. Any such order is to remain in force for not more than six months. Although I may have regard to the criteria for determining a substantive award of spousal maintenance under s 63 and as to quantum under s 65, I am not bound to do so. My discretion to decide an award of interim maintenance is broad and unfettered.

[20] The approach to be taken was considered in *B v B* by Courtney J.<sup>1</sup> At para [8] the principles to be applied are set out as follows:

[8] The discretion under s 82 is frequently referred to as unfettered, though as Ellen France J recognised in *T v H* the discretion is not unfettered in the sense of not being subject to interference if incorrectly exercised. The approach to be taken is that described in *Ropiha v Ropiha*:

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 the proceedings, if and 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 under s 25. There the Court is required to have regard to the matters set out in s 27(1) and (2). In hearing and determining an application for an interim maintenance order the Court is not required to approach the matter in terms of s 27. 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.

In considering the position of an applicant for an interim order the Court will necessarily pay particular regard to the reasonable needs of the applicant over the period for which the 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 had adopted for themselves. And we 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.

And more recently in *Z v Z (No 2)* at 6:

Obviously, “reasonable needs” is not limited to a subsistence level. Nor are reasonable needs necessarily uniform. What constitutes the reasonable needs of one person may not be sufficient to meet the reasonable needs of another. What is appropriate provision for the reasonable needs of a wife in some circumstances may not be adequate for a wife in other circumstances.

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<sup>1</sup> *B v B* [2008] NZFLR 789 (HC).

[21] The High Court in *Dalrymple v Dalrymple* summarised the key principles derived from the leading decision, *Rophia v Rophia* as being:<sup>2</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 so far as it is reasonable in all the circumstances to do so.
- (b) The Court has “an unfettered discretion both 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”.
- (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 reasonable available to the

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<sup>2</sup> *Dalrymple v Dalrymple* [2019] NZHC 637; and *Rophia v Rophia* [1979] 2 NZLR 245 (CA).

applicant, private income, resources of capital, or welfare benefits provided by the State or some other body”.

[22] In *YM v MJM*, the Court’s inquiry when considering s 82 interim spousal maintenance applications proceeded as follows:<sup>3</sup>

- (a) What can be identified as the applicant’s reasonable needs and means?
- (b) What is the ability of the respondent to meet those reasonable needs?
- (c) In assessing the ability of the respondent to meet those reasonable needs, can capital assets be taken into account?
- (d) Should judicial discretion be exercised to make an interim order?

I intend to adopt the same approach in this decision.

### **Discussion**

[23] As I have observed, there are the four questions that I need to ask and answer in an interim spousal maintenance application. The application under s 82 is to be a prompt assessment of the parties’ position following separation and prior to resolving their relationship property issues. The order is to be made for a maximum six-month period commencing from the date of this hearing. There is no jurisdiction under s 82 to provide an award for past maintenance. Section 82 is specific when it refers to a maintenance award which a judge thinks reasonable towards the future maintenance of the spouse or de facto partner until final determination of the proceedings. I mention this because [Mr Howard]’s application seek a claim for past maintenance. As I explained at the outset of the hearing, there is no jurisdiction under s 82 to do this.

*What can be identified as [Mr Howard]’s reasonable needs and means?*

[24] [Mr Howard] has represented himself throughout these proceedings and there is a volume of material which he has filed, some of which has only marginal relevance

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<sup>3</sup> *YM v MJM* FC North Shore FAM-2006-044-2830, 20 March 2008.

to the issues which I need to determine. At page 80 of the booklet of documents he has set out his monthly expenses as follows:

Toyota	\$987.27
[Howard Bright] Trust mortgage	\$336.44
Rates	\$250.00
Insurance	\$140.78
[Howard] Trust mortgage	\$48.00
[Howard] Trust mortgage	\$133.50
Personal Loan	\$202.78
Personal Loan	\$202.78
Personal Loan	\$418.00
Personal Insurance	\$89.62
Credit card	\$252.58
Phone/internet	\$130.00
Power	\$176.00
Firewood	\$80.00
[Charitable donation]	\$80.00
Food	\$736.00
Netflix/X-Box	\$28.00
School Fees	\$10.00
Car	\$298.10
Medical	\$148.83
Total	\$4,545.90
	or per week \$1,048.00

[25] [Mr Howard] receives \$4,083 per month from the income protection insurance policy. He has to account for tax for this which he has calculated at \$618 per month, leaving a net of \$3,465 plus child support of \$100, meaning that his net monthly income is \$3,655 or \$799 per week.

[26] Several points need to be made about the financial information he has put before me.

[27] Firstly, while I have made provision for \$618 per month for tax, the reality is that this tax has not been paid, and it appears no tax returns have been filed. The future



position with the Inland Revenue Department for [Mr Howard] is, therefore, unknown. [Mr Howard] talked about filing a provisional return and it is not exactly clear what this would mean for him. His evidence is that he receives \$4,083 into his account each month.

[28] Secondly, the two personal loans referred to in [Mr Howard]'s budget are for loans of \$25,000 and \$20,000 respectively which have been obtained from the bank after separation. It is not clear exactly to where these monies have been applied.

[29] [Mr Howard]'s evidence is that much of this sum has been paid towards his legal costs in respect of the care of children and family violence proceedings. That there was a high level of costs incurred by both parties in respect of those proceedings is accepted. [Mr Howard]'s evidence is that other loans proceeds have been paid towards the properties which are owned by the trust, details of which [Mr Howard] does not want to give today, he contending this issue belongs to the relationship property proceedings.

[30] Thirdly, there is the question of the motor vehicles. At the time of separation, [Ms Howard] retained a Toyota Hilux vehicle, which was subsequently seized by the registrar pursuant to a distress warrant, to assist with payment of [Mr Howard]'s court-ordered costs in respect of the Family Violence Act/Care of Children Act proceedings. This vehicle was later returned to her on payment of an undisclosed sum of money. [Ms Howard] estimates this vehicle is worth \$34,000.

[31] On separation [Mr Howard] retained a [truck] which he then elected to sell. He received \$10,000 which he put towards his legal costs. The decision to do this was a matter entirely for [Mr Howard]. He then replaced this vehicle with a Toyota Hilux vehicle which cost \$35,000. He borrowed \$6,000 from his father and funded the balance of \$29,000 from a loan obtained through the Toyota Motor Group. The costs of this loan have a significant impact on his monthly budget. \$987.27 is taken from his account each month to meet this hire purchase commitment and there are some 16 months to go before this loan has been repaid.

[32] Subject to these comments, and for the purposes of this decision, I accept the budget [Mr Howard] has submitted. It leaves him in the position where he has monthly expenses of \$4,545.90, \$1,607 per month of which have been incurred by him for the debts that he has incurred following the parties' separation.

[33] In my view, [Mr Howard] does need to take and accept some responsibility for these decisions which he has made. Mr Radich has validly made the point that a more modestly priced vehicle could have been an option for [Mr Howard] to purchase when he sold the truck. [Mr Howard]'s response was that he considered he should have a vehicle of equivalent value to that which was retained by [Ms Howard]. This was [Mr Howard]'s choice to make.

[34] In terms of [Mr Howard]'s ability to access other capital assets to meet these costs which have been incurred, [Mr Howard] does have the ability, as I have recorded, to access the sale proceeds of the shares which [Ms Howard] agreed could be sold. He declined to accept this. This is entirely a matter for him, but it is relevant to my assessment of whether he has the ability to, for example, obtain funds and reduce his indebtedness. \$1,607 of his monthly expenditure relates to debts that he has incurred following the parties' separation. It appears a significant portion has gone towards payment of legal expenses, some of which will be able to be recovered by [Mr Howard] in court-ordered costs amounting to \$32,574 which was ordered by Judge Grace to be paid by [Ms Howard] in his decision of 30 August 2019. This is money [Mr Howard] is and will be entitled to receive from [Ms Howard].

*What is the ability of [Mr Howard] to meet his reasonable needs?*

[35] [Mr Howard] will receive his ongoing insurance payment income and child support payments which I have recorded. I accept his evidence any additional paid income which he might be able to receive will have a reducing effect on the insurance payment he is able to receive. It also seems clear that the disabilities which [Mr Howard] continues to suffer from which led to the insurance claim, which was eventually settled after some 22 assessments, mean his ability to obtain future paid employment is somewhat limited.

[36] [Mr Howard], as I have recorded, does have the ability to access relationship property capital to assist with his needs. He is able to recover the court-ordered costs awarded to him by Judge Grace.

[37] It also should be noted that since the parties have separated, it appears that from the joint accounts, significant funds have already been withdrawn. [Mr Howard] has withdrawn \$79,924, and [Ms Howard] \$19,075. [Mr Howard] also received \$9,274.60 for earthquake repairs and has been receiving \$100 per week on account of the costs order. This has, I am told, been paid sporadically. I have not included this in my income calculations for this reason but note that it is an additional payment that [Mr Howard] is entitled to receive from [Ms Howard].

*What is [Ms Howard]’s ability to help meet [Mr Howard]’s reasonable needs?*

[38] [Ms Howard] has filed extensive affidavit evidence. In her most recent affidavit she sets out her income and asset position to the extent that she can. She has debts owed to her parents who assisted her with legal expenses and to the [Bright] Family Trust. Those debts are \$20,000 and \$54,000 respectively. She has obligations towards the mortgage over the trust properties in which I am told total \$121,130.32. She receives a net fortnightly sum of \$2,534.60 from her employment which equates to \$1,267 per week. She has limited savings of \$2,000 which comprise the fortnightly pay which she has just received and from which she needs to pay her expenses. [Ms Howard] does have \$5,000 which is for [Kieran] and which is held by her parents on [Kieran]’s behalf. She wants that money left for [Kieran] and does not seek to have access to it for her own personal use or benefit and I accept her evidence in this regard.

[39] [Ms Howard]’s expenses per week can be summarised as follows:

Insurance	\$41.00
Contents insurance	\$23.00
Medical and hospital benefits	\$28.00
Rates	\$28.00
Mortgage payments	\$133.00
Food and household supplies	\$200.00
Electricity, gas and fuel	\$50.00
Telephone and internet	\$38.00

Clothing	\$19.00
[Name deleted]'s care and education	\$80.00
Child support	\$101.00
Entertainment	\$60.00
Fares	\$9.00
Car maintenance, running and registration	\$79.00
Legal fees for the payments to her parents	\$100.00
Cost contribution order for the Care of Children Act proceedings	\$50.00
Payment to [Mr Howard]	\$100.00
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Total	\$1,139 .00
Creating a weekly surplus of	\$128.00

[40] As I recorded, there is no agreement to access the capital sum from the sale of the shares to assist either Mr or [Ms Howard] with their expenses or debt reduction.

[41] I have no particular criticism of [Ms Howard]'s budget. While her income is considerably more than [Mr Howard]'s, the reality is that she, as Mr Radich has pointed out, is working full-time as a teacher and there will be additional costs and expense in her weekly budget that she will incur relating to her employment. Indeed, her claims for clothing, car maintenance and running and registration, in my view, are very modest. Her food and household supply expenses, given that she lives at [location 1], are also well within the acceptable range.

*In assessing the ability of [Ms Howard] to meet any reasonable needs, can capital assets be taken into account?*

[42] [Ms Howard] agrees to sell the trust properties and the sale of the jointly held shares. [Mr Howard] agrees that the trust properties can be sold, but no steps have been taken to give effect to this. The parties' entitlements to the trust will have to be either negotiated as part of the property proceedings already filed, or as seems likely this will have to be determined by the Court. There is no immediate access to capital from the same.

[43] [Ms Howard] did agree to sell the jointly held shares. [Mr Howard] refused. There is no capital immediately available from this source either.

[44] [Ms Howard] has no other capital assets available, and so I have concluded there is no access to capital to help meet [Mr Howard]'s reasonable needs.

*Should judicial discretion be exercised to make an interim order?*

[45] In the end, whether or not to make an interim spousal maintenance award is a matter of judicial discretion, having regard to the established legal principles, the evidence which I have summarised, and the provisions of s 82 itself. I accept the parties did enjoy a reasonable standard of living prior to their separation and that a reduction in the standard of living does generally occur following separation. This is not a case where a respondent has a significant excess of income over their expenditure as can occur in some interim spousal maintenance cases where there is plenty of room to manoeuvre to make an interim spousal maintenance award.

[46] From the evidence that I have heard, [Mr Howard] has made some decisions about his level of indebtedness following separation which, with hindsight, is questionable. It is also clear that he is not willing to allow capital to be released to assist with the reduction of his indebtedness which might improve his budgetary position. [Ms Howard], while earning a greater level of income, obviously has a greater level and need of expenditure because of her work commitments, as I have noted.

[47] It is in the hands of the parties to sort out their relationship property issues, in particular the future of the trust owning the two homes. They both agreed these properties can be either sold or taken by either of them, and so there should be no impediment to this occurring. Undoubtedly, there will be other relationship property adjustments that will need to be made. [Mr Howard] is correct in contending these adjustments are not a matter for this hearing, but rather for the relationship property proceedings which are scheduled for a judicial settlement conference in the November session of this court, if the case can proceed at that time.

[48] Looking at the evidence in its entirety and the legal principles I have referred to, I have reached the view that:

- (a) There is no basis for [Mr Howard] contending the income each party receives after separation should be totalled and divided in two.
- (b) [Mr Howard] needs to take responsibility for the post-separation decisions he has made to take out the loan which resulted in a significant impact on his weekly budget.
- (c) There is only a marginal ability for [Ms Howard] to pay anything from her budget towards [Mr Howard]'s living expenses and she has no access to capital because of [Mr Howard]'s refusal to sell the shares.
- (d) It is in [Mr Howard]'s hands as to whether or not he wishes to access capital to assist him with restructuring of some of the indebtedness that he has incurred.

[49] For all of these reasons I have decided against exercising my discretion to make an interim spousal maintenance order.

### **Outcome and orders**

[50] The application for an interim spousal maintenance order is refused. At Mr Radich's request, there will be no order for costs.

[51] The file will be closed.

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Judge RJ Russell  
Family Court Judge

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