

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

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**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2021-020-000187
[2022] NZFC 8276**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	EMMA KATE BATE Applicant
AND	EDWIN MICHAEL BATE Respondent

Hearing: 24 March 2022

Appearances: M Sandelin for the Applicant
H Radinovich for the Respondent

Judgment: 11 September 2022

RESERVED DECISION OF JUDGE P S GINNEN

[1] Emma and Edwin Bate met in 1995. They began living together in 1998 and were engaged in 1999. They married on 12th April 2000. They have three children: [child 1 – name deleted], now aged 18; [child 2 – name deleted], now aged 17 and [child 3 – name deleted], now aged 13. On 22 July 2020 they separated after 20 years of marriage.

[2] Mrs Bate seeks an interim spousal maintenance order requiring Mr Bate to pay her \$1,761.14 per week for six months. She has set out a budget showing a weekly shortfall in that amount. Mr Bate challenges her budget. He asserts that Mrs Bate can meet her reasonable needs and if there is any shortfall (which he denies) she can meet that by either increasing her work hours; claiming the Working for Families tax credits and/or accessing capital, namely authorising the interim distribution of relationship property funds held in his law firm's trust account. He says that he can barely provide for his own reasonable needs, let alone subsidise hers.

[3] The issues are:

- (a) What are Mrs Bate's reasonable needs?
- (b) What is Mrs Bate's ability to meet those needs?
- (c) What are Mr Bate's reasonable needs?
- (d) What is Mr Bate's ability to meet Mrs Bate's reasonable needs?
- (e) Should I exercise a discretion to make an interim spousal maintenance order?

[4] A preliminary issue arises about post hearing evidence that both parties have sought leave to adduce.

Post hearing evidence

[5] I made a direction at the submissions only hearing for counsel to confer about Mrs Bate's income and file a joint memorandum of consent setting out her agreed income. That memorandum was filed on 31 March 2022.

[6] On 31 March 2022 Mr Bate sought to adduce evidence that Care of Children Act proceedings between the parties had settled and been discontinued. It was submitted the resolution of the Care of Children Act proceedings is relevant to the

amount of future legal fees Mrs Bate claimed as part of her interim spousal maintenance claim. I agree. I take into consideration that fact.

[7] On 3 May 2022 Mrs Bate's lawyer filed a memorandum seeking leave to adduce further evidence, namely a letter dated 27 April 2022 from the lawyers for RJ3¹ which advised that Mrs Bate's current account balance at RJ3 is zero, not \$44,127 as was understood by the parties at the hearing.

[8] On 17 May 2022 Mr Bate's lawyer filed a memorandum in reply advising that he consented to the letter dated 27 April 2022 being admitted into evidence provided an affidavit dated 16 May 2022 was also admitted. In that affidavit Mr Bate said his position was that Mrs Bate was owed the amounts stated in the financial statements of RJ3, ie \$44,147, however the other trustees disagreed for reasons he did not follow or agree at the time, and they sought legal advice. Following that advice, he accepted he had been incorrect and agreed that Mrs Bate is not owed \$44,147. He noted that she was still receiving consideration as a discretionary beneficiary though.

[9] This information is relevant. By consent, the letter dated 27 April 2022 is admitted into evidence.

[10] Mr Bate's 16 May 2022 affidavit went on to say that a further material change in circumstances is the firm bank account of Hansen Bate, from which any current account debt repayments to him would come, has reduced from \$170,000 at 2 March 2022 to \$75,906, due to trading conditions and the declining property market, which is expected to continue.

[11] I received no objection to Mr Bate's affidavit dated 16 May 2022 being admitted into evidence. The balance of the current account is relevant to Mr Bate's argument that he is unlikely to be paid out from his current account at Hansen Bate. Mrs Bate rejects that argument. It is an argument that I will rule on. This is a material change in circumstances since the date of the hearing and the evidence is accepted.

¹ The Remus Jems Three Trust, an intergenerational family trust that the parties and children, amongst others, are discretionary beneficiaries of.

[12] On 10 August 2022 Mr Bate sought to file further affidavit evidence about a further current account debt repayment he had received from his firm and shared with Ms Bate; and funds he advanced to the parties' Lime Tree Accommodation business to meet usual operating expenses.

[13] Mrs Bate opposed the introduction of this further evidence, arguing it was not a material change in circumstances; that this was the third time Mr Bate sought to adduce further evidence; that it is in the interests of justice that the matter be resolved as expediently as possible; and will only cause further delay and prejudice to Mrs Bate, whose original spousal maintenance application was filed over 12 months ago in July 2021.

[14] This decision was near completion when Mr Bate sought to adduce further evidence. It is not in the interests of justice to further delay the delivery of the decision. The affidavit dated 10 August 2022 is not accepted for filing.

Background – trusts and companies

[15] A feature of the parties' marriage was the financial support they had from Mr Bate's family through the Remus Jems Three Trust ("RJ3"). RJ3 is an intergenerational trust formed by Mr Bate's parents with property accumulated by their parents as well. The trustees are Mr Bate, his mother, his sister, and an independent trustee. The current discretionary beneficiaries are Mr Bate's mother, his sister, her husband, Mr Bate, Mrs Bate and their three daughters.

[16] RJ3 is described by Mrs Bate as "his parents trust", which she believes owns shares in Mt Erin Station, commercial real estate in Havelock North and Hastings, property in Taupo and a large share portfolio.

[17] Mr and Mrs Bate bought a home from his grandparents in 2000, and then did a "house swap" with Mr Bate's mother in 2013. Both transactions involved interest free loans from RJ3 for purchase and alterations. The home bought in 2013 is at

[address A], and Ms Bate and the children live there.² Mr Bate has moved in with his mother. The home at [address A] is mortgage free.

[18] Mr Bate said during the marriage he had not received any distributions from RJ3 except for a circular paper transaction in 2014 when \$200,000 was distributed to him and Mrs Bate, so they could buy [address A] at its rateable value, then \$200,000 above market value.

[19] Apart from that, he says distributions from RJ3 have been paid to Mrs Bate and were modest, on average net \$4,000 per annum. There was a loan in May 2008 of some \$10,000 to buy a car for Mrs Bate.

[20] Since separation Mr Bate said the only money he received from RJ3 is \$3,814, which is the same amount that Mrs Bate received. He said that like Mrs Bate, he can apply to RJ3 based on need.

[21] RJ3 meets the children's private school fees and health expenses for all the beneficiaries. Apart from the \$4,000 per annum referred to above, RJ3 does not provide income for living expenses.

[22] At the time of the hearing Mr Bate referred to Mrs Bate having a current account balance of \$44,147 which is payable to her on demand, while his current account was \$21,928 in deficit. He suggested she draw on that to fund any perceived shortfall in her income. As referred to above, it is now accepted that her current account balance is zero.

[23] The parties have a business called Lime Tree Student Accommodation ("Lime Tree"). The business runs out of a property owned by RJ3. Mr Bate is paid a \$15,000 per annum management fee by RJ3 to run the Lime Tree business. The \$15,000 has not been included in either of the parties' assessment of Mr Bate's income. The business produces a small income. Since March 2021 funds of \$1,500 plus \$8,666 have been paid to Mrs Bate and \$2,475 to Mr Bate.

² Although [child 1] is at [University] and stays most of the time in a hostel there.

[24] In 2020 Mr Bate inherited \$368,421 from two family trusts set up by his parents which had vested. The money was kept separate and held in RJ3. In 2021 he formed the “CAE trust”, the beneficiaries of which are the parties’ children and Mr Bate. He has gifted the inheritance to the CAE trust to invest on a long-term basis. The trust was settled in November 2021. He is a discretionary beneficiary (as are the three children) and a trustee. He has the power to appoint the CAE trustees.

[25] Mr Bate is also the beneficiary of a trust that Mrs Bate referred to as the “Grandparents Trust”. Mr Bate confirmed he is a beneficiary of this trust which was formed by his grandparents. He says he does not know what is in it, all he knows is that it does not vest until he is 72. He says that until then he will “not receive a cent”. He says that his focus is on “working and supporting a family not what I may inherit”.

[26] Mr Bate is one of three partners at the law firm Hansen Bate Limited, which employs one staff solicitor. There is a dispute about whether the money held in the Hansen Bate current account should be considered as income for the purposes of the spousal maintenance claim.

[27] During the marriage the parties owned a rental property, which has since been sold. The sale proceeds of \$1,225,158 is held in the Hansen Bate trust account pending resolution of the parties’ relationship property matters. Mr Bate is frustrated that Mrs Bate refuses to consent to an interim distribution, which he says will alleviate any perceived shortfall in Mrs Bate’s budget and would remove the need for spousal maintenance. He says she has also ignored his request that the funds be placed on term deposit rather than being on call. He says that they could have earned \$9,188.69 over six months if the funds had been placed on term deposit, which is income that could have been paid out to him and Mrs Bate.

[28] Mr Bate notes that Mrs Bate’s family also has substantial wealth, including a valuable home and valuable financial investments. Mrs Bate replied that relying on her parents’ wealth has never been a feature of their marriage, unlike their dependence on support from Mr Bate’s intergenerational wealth through the various trusts.

The Law

[29] Section 82(1) of Family Proceedings Act 1980 provides jurisdiction to make an interim spousal maintenance order. The order directs the respondent to pay a reasonable periodic sum towards future maintenance of the respondent's spouse until final determination of the proceedings. An interim spousal maintenance order can only be made for six months, although more than one interim spousal maintenance order can be made.

[30] The 1979 case of *Ropiha v Ropiha* remains the leading case, where the Court of Appeal said:

“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, and as far as it is reasonable in all the circumstances to do so.”³

[31] The Court’s discretion is broad and unfettered. Both liability and quantum are for the court to determine, depending on the circumstances of the particular case. The court must do what it thinks is just.⁴

[32] In *Rawlings v Rawlings* (spousal maintenance) Keane J noted that the focus of the court at the initial stage is:

“...to strike, as far as can be achieved, a just balance between husband and wife, against their means and needs and their shared history, at a time when they have still to accomplish a complete severance.”⁵

[33] The principles relevant to the substantive maintenance application are set out in s 62 to s 66 of Family Proceedings Act. Under section 61 it is not necessary to apply those principles to an application for interim spousal maintenance, although the Court is not prevented from doing so. While the court has an unfettered discretion whether to make an interim maintenance order, it is the practice to exercise the discretion having general regard to the principles set out in ss 62 to 66.⁶

³ *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.

⁴ *Ropiha*, above note 3.

⁵ *Rawlings v Rawlings* (spousal maintenance) [2009] NZFLR 643 at [48].

⁶ *T v M* [2006] NZFLR 561; *L v R* FC Auckland FAM-2007-004-001465, 30 September 2008, Judge de Jong.

[34] The court is not required to conduct a detailed or extensive hearing as would be expected in the context of a substantive hearing.⁷ The purpose of an interim spousal maintenance application is to provide a stopgap measure designed to address any injustice or hardship which may arise between the time the substantive application is filed and the substantive hearing. It is a “stopgap” because it temporarily supplies the need.⁸

[35] The kind of injustice or hardship which might arise, or the applicant might be affected by, includes:

- (a) delay in hearing the substantive application;
- (b) delay between hearing of the interim and substantive applications;
- (c) delays in dealing with difficult or complicated relationship property matters;
- (d) the need to provide a family or disadvantaged former partner with immediate support or financial relief;
- (e) delay in dealing with an application for interim maintenance.

[36] The approach to interim spousal maintenance orders is well established. The questions when considering the exercise of the discretion are:⁹

- (a) What are the applicant’s reasonable needs?
- (b) What is the applicant’s ability to meet those needs?
- (c) What are the respondent’s reasonable needs?
- (d) What is the respondent’s ability to meet the applicant’s reasonable needs?

⁷ *L v R*, FC Auckland FAM-2007-004-1465, 30 September 2008

⁸ *Knight v Knight* [2022] NZHC 62 at [56], where Osborne J referred to *L v R* above, note 7; *Marginson v Bahna* [2016] NZHC 2835 at [7]; *PB v PJB* [2014] NZHC 3165 at [87], citing Nicola Peart ED) *Family Law-Family Property* and (online) Brookers at [FA 82.01]; In *PB v BJB* at [87], Moore J also referred to interim maintenance providing a “financial bridge”.

⁹ *Ropiha* above, note 3; *Collins v Collins* [2014] NZHC 2121.

(e) Should the court exercise its discretion?

[37] Although the parties agree that these are the relevant questions, they disagree about the answer to every one of them.

What are Mrs Bate's reasonable needs?

[38] The applicable standard of living is that of the common household prior to the parties separating, that is the standard of living the parties had adopted for themselves.¹⁰ Such needs are not to be diminished to the mere necessities of life. They may include a respectable period of grace for re-entry (and retraining) in the work force, having regard to that person's life situation. Further, a court "should not be niggardly in its approach to the problems faced by a wife (or a husband)".¹¹

[39] Mr Bate argued that during their marriage they had a comfortable, but modest standard of living. I do not accept that. The parties lived more than comfortably. The family home is large and well equipped, with an indoor heated pool. They ate out regularly; travelled overseas until the Covid 19 pandemic closed the borders; and holidayed around New Zealand. They employed cleaners. Mrs Bate and the girls bought quality clothes and had regular hair and beauty appointments. They drove quality European cars, although not the latest models.¹² The children attended private schools. They had disposable income to spend on entertainment and sporting activities including skiing.

[40] Mr Bate referred to working as a provincial lawyer and Emma being a registered nurse, and how in the children's preschool years they lived off his income alone and finances were consistently tight with a family of five. That may have been the case when the children were younger, however by the time the parties separated they were living a more affluent lifestyle.

¹⁰ *Ropiha* above, note 3; above, note 8.

¹¹ *M v B* [2006] 25 FRNZ 171 (CA) at [256] and [257] per Hammond J. See also *Z v Z (No 2)* [1997] 2 NZFLR 258 at pp277-278 where the Court of Appeal confirmed that "reasonable needs" is not limited to a subsistence level.

¹² The parties and [child 1] use the parties' three BMW cars.

[41] Mrs Bate prepared an expense schedule made up of weekly, monthly and annual expenses.¹³ For ease of reference this is set out in one table of weekly expenses in a schedule to this decision.

[42] While Mrs Bate has calculated weekly expenses, Mr Bate has calculated annual expenses. Where relevant I have multiplied Mrs Bate's weekly expenses by 52 or divided his annual expenses by 52. A table of his annual expenses are attached in a schedule to this decision.

[43] Mr Bate criticised Mrs Bate's budgeted expenses. He carefully analysed each line item based on his examination of bank and credit card statements for the preceding year. He got the assistance of an accountant to prepare spreadsheets he could analyse. He did not provide a copy of the bank and credit card statements that he relied upon in evidence. He said Mrs Bate annexed their bank statements to her affidavit; and that both of them had access to their visa card statements, which she had at home.

[44] Mr Bate's approach was to divide each annual expense for the year before separation by 5 and to attribute one fifth of the expense to Mrs Bate. He said that was fair because the children's expenses were paid by child support, his voluntary payments and RJ3. Accordingly, by his calculations Mrs Bate's expenses should only be one fifth of the family's actual spending for the year before separation.

[45] He made an allowance for the likelihood that he and Mrs Bate ate more than the children and allowed an apportionment of 1.5 to him and Mrs Bate for food. He allocated himself 1/5th of their holiday and entertainment costs but half their presents and café costs. He allocated 2/3rds of the cash withdrawals to him because he used cash much more than Mrs Bate. He allocated half the skiing costs to him as in the past year the girls did not ski much. The other half of the cost was not allocated because Mrs Bate does not ski.

[46] I do not adopt Mr Bate's approach of calculating Mrs Bate's reasonable expenses. I accept Mrs Bate's lawyer's submission that some of the children's

¹³ Exhibit C to Mrs Bate's affidavit dated 26 July 2021.

expenses are inextricably linked with Mrs Bate's expenses in the household. I prefer the approach adopted by Judge Burns in *AMG v SSG*.¹⁴

The practical reality is that people live in households and maintain a household budget. With reference to bank statements and other financial information most households can accurately assess how much it costs to run a household which can include children in it. It is then very difficult to precisely work out how much expense is related directly to the children and how much to the adult. Inevitably making that division or distinction involves some arbitrary judgment. The methodology also has to be practicable and workable.

[...]

I consider as a matter of practicality that it is nearly impossible to do anything else but specify the household budget. That the most workable solution is to then take that budget and assess its reasonableness and then deduct the quantum that would be payable by way of child support. As child support is assessed under a formula in most cases it is predictable as to what will be assessed.

[47] The reality is that Mrs Bate's expenses are not limited to a one fifth share of what was paid in the preceding year. She must pay the entirety of the household expenses, regardless of whether Mr Bate is absent and not consuming his one fifth share. His absence does not decrease fixed costs such as gardening, cleaning, pool maintenance, chimney sweep, dog expenses, pay TV. His evidence is not clear about whether he took the one fifth approach to these expenses. Apart from airfares and food his absence does not greatly decrease the cost of holidays, Christmas and Entertainment; and does not impact at all on Mrs Bate's personal expenses such as her memberships, counselling, podiatrist.

[48] The practical, and less niggardly approach is to assess the reasonableness of the household budget, then deduct from that the amount paid for child support. The same result is achieved by adding the child support amount to Mrs Bate's income.

[49] Mr Bate said Mrs Bate's budget was inflated:

(a) Generally, by the inclusion of children's expenses which are not her personal expenses and are more than paid by child support, Mr Bate's voluntary payments and RJ3's payments.

¹⁴ *AMG v SSG*, FC Auckland FAM-2011-004-002021, 16 December 2011 at [23].

- (b) By including insurance and superannuation – not incurred or paid before separation.
- (c) By stating medical and dental expenses as \$8,890. He calculated the actual family medical and dental expenses for the year to separation were \$1,870. A one fifth share is \$374. In any event she can, and is currently, having her dental and medical costs met by RJ3.
- (d) By including rates of \$4,708 which she has, through her lawyers, denied any liability to pay. Her trustee sister pays these as she refused to use the \$1,225,158 on deposit.
- (e) Overstating electricity and diesel heating as \$9,600 per annum where past actuals of electricity and wood were \$4,370 plus \$1,600 diesel.
- (f) Holidays, entertainment and presents are costed at \$15,500 when her share of past actuals is \$3,314.
- (g) By stating expenses for two cars are \$12,398, when her car has free servicing and repairs until mid 2022 and the eldest daughter’s car has been substantially maintained by Mr Bate. \$2,037 is the actual running cost for 11,571km (but does not allow for her new tyres).
- (h) By 30% in respect of her “Lifestyle Expenses”, which in her first affidavit she claimed were \$13,885 but using her recent figures, adjusted for 12 months not 14, were \$9,817.

[50] I answer each in turn below:

- (a) The children’s expenses are properly included in Mrs Bate’s budget on the basis that the total child support payable is added to Mrs Bate’s income (or that quantum is deducted from the household expenses, which achieves the same result). Mr Bate’s voluntary payments and discretionary funding by RJ3 are different. While child support payments are predictable in that there is a formula assessment applied;

Mr Bate's voluntary payments and discretionary funding by RJ3, by their very nature, are not predictable. For example, a payment from RJ3 that even Mr Bate thought was payable was not, because of a differing decision by the other trustees.¹⁵ As discretionary beneficiaries neither Mrs Bate nor the children are guaranteed payment of their future expenses by RJ3. They are certainly not guaranteed voluntary payments by Mr Bate.

Mrs Bate has already addressed this in her budget by excluding costs that she is confident will continue to be met by RJ3, which are the children's school fees, school activity fees and other school costs.

- (b) Mrs Bate's evidence is that insurance and superannuation were not paid during the marriage because they could rely on ongoing financial support from RJ3 to meet their insurance and superannuation needs. I find that her diminished confidence in her ability to rely on ongoing financial support from RJ3 is realistic. Insurance and superannuation are properly included in her budget.
- (c) Mrs Bate has estimated her and the children's weekly medical and dental needs are \$170.96. The annual figure is \$8,889.92. Her budget includes medical; dental; optician/glasses for [child 1] and [child 2]; orthodontist for [child 3] and podiatrist costs. I do not have any evidence that the optician and orthodontist costs for the children or the podiatrist costs were costs that arose in the year before separation. I do have evidence that the children's health and education needs were well provided for during the marriage.

Mrs Bate said that the RJ3 Trust did not pay for [child 1] and [child 2]'s orthodontic treatment because Mr Bate did not want his sister to receive an equivalent amount from RJ3 to balance this out.

¹⁵ The \$44,147 allocated in the RJ3 financial statements to Mrs Bate's current account.

I have already found that Mrs Bate's diminished confidence in her future needs being met by RJ3 is realistic; so, it is proper that her medical and dental expenses are included in her budget. I have also rejected the approach to divide the past expenses by 5, so it is proper to include the children's medical, dental and optician expenses in her budget.

- (d) The rates are properly included in Mrs Bate's budget as she has occupation of the home. It would be difficult for her to argue that she does not need to pay rates during the term of the interim spousal maintenance order when rates are included in her budget.
- (e) I accept Mr Bate's analysis that actual electricity and diesel costs are less than what Mrs Bate has estimated. Her annual budget will be reduced by \$3,630 per annum; and her weekly budget by \$69.80 per week for electricity and diesel costs.
- (f) I decline to reduce Mrs Bate's budget for holiday, entertainment, Christmas and presents on the basis that I have not adopted Mr Bate's approach of dividing expenses by 5.
- (g) I decline to reduce Mrs Bate's budget for maintenance of the cars. Mr Bate said she was entitled to free servicing of her car until mid 2022, but it is now past mid 2022, so she will no longer be entitled to that. Mr Bate may have substantially maintained [child 1]'s car, but it is not guaranteed that he will continue to do so.
- (h) Mr Bate alleged that Mrs Bate inflated her budget by 30% in respect of her "Lifestyle Expenses". He has clustered them up in a table, including hairdresser; beautician eye treatment; Gym and Pilates memberships, boutique clothes; and transfers made to her account some of which she could not recall. He rejected her evidence of spending \$600 a month on clothing, so allocated no money for boutique clothing in the table.

Both parties deposed to using cash during the marriage, accordingly not all expenses will be revealed by Mr Bate's examination of bank and credit card statements. Mrs Bate filed evidence in reply of average monthly spending of \$469.90 on a credit card not included in Mr Bate's analysis. She also provided additional evidence of spending on hair and beauty appointments; gym and Pilates.

In his lawyer's submissions Mr Bate has conceded "Lifestyle Expenditure" of \$9,817, which differs from Mrs Bate's budget of \$13,885. The difference is \$4,068 per annum, or \$78.23 per week. Mrs Bate has included the children's hairdresser, clothing, shoes and recreation/membership fees in her budget. The amounts she has estimated are not unreasonable, or without evidential foundation, considering the needs of teenage girls and the lifestyle that they enjoyed during the marriage. I decline to reduce her budget for what Mr Bate has categorised as lifestyle expenses.

Legal fees

[51] The major expense objected to is for Mrs Bate's legal fees. Legal fees are a legitimate expense in an interim spousal maintenance claim, provided they are an ongoing expense. Payment of a one-off debt for past legal fees should not be included in a spousal maintenance award.¹⁶

[52] Mr Bate criticises Mrs Bate for having three lawyers. She has instructed a firm of solicitors who have retained a barrister. That is not unusual or unreasonable in the circumstances. It is also reasonable for her to have instructed lawyers outside of Hastings, given Mr Bate's professional presence there.

[53] There is a power imbalance. Mr Bate is a senior lawyer and a partner in a law firm, able to conduct some legal work on his own behalf. He has access to accountants through his firm and his own business dealings. I accept he still needs to pay for legal

¹⁶ *B v B* [2008] NZFLR 789 at [17]; *C v G* [2010] NZFLR 497 at [52]; *Able v Able* [2020] NZHC 177

and accounting fees, but he is at an advantage to Mrs Bate who does not have those professional skills or contacts.

[54] I reject his suggestion that since Mrs Bate's brother used to work at Hansen Bate she can rely on him to help her interpret the firm's accounts. That is neither appropriate nor in Mrs Bate's interests. She is entitled to engage an accountant for advice about the various financial entities that Mr Bate derives his income from. Mr Bate himself has engaged his accountants to assist him in his defence of the interim spousal maintenance claim.

[55] Mr Bate asserts that the relationship property matters are straight forward and resolvable. The evidence does not reflect that. The parties' relationship and separate property include the family home, various investments; and a range of company and trust structures that will require expert accounting analysis. There is a disagreement about what information Mrs Bate is entitled to from RJ3. Mr Bate has recently disagreed with his fellow trustees on RJ3 about whether Mrs Bate was entitled to draw on the RJ3 current account as reflected in the financial statements, and legal advice was sought by the trustees about that.

[56] All this points to there being future legal fees and expert accountant fees to either resolve the relationship property matters or to issue proceedings. There are the past and future spousal maintenance claims to be argued.

[57] Both parties have estimated legal fees of \$5,000 per month. Neither of them budgeted separate fees for expert accounting advice, so I assume the cost of that is included in the legal fees. The parties' legal fees will be less now the Care of Children Act proceedings have resolved, but the relationship property and spousal maintenance matters will easily require legal advice and representation costing \$5,000 per month. Mrs Bate's inclusion of \$5,000 per month for legal fees in her budgeted expenses is reasonable.

[58] I find that Mrs Bate requires \$3,402.34 per week to meet her reasonable needs. That is her budgeted weekly expenses, less \$69.80 for electricity and diesel costs.

What is Mrs Bate's ability to meet those needs?

[59] Counsel for the parties helpfully filed a joint memorandum setting out the income Mrs Bate earns from her job as a registered nurse, calculated by analysing her payslips. It is agreed that:

- (a) Mrs Bate's gross annual income is \$65,753.78 and net annual income is \$50,121.06 (after tax and KiwiSaver at a rate of 3% is deducted).
- (b) Mrs Bate's gross monthly income is \$5,479.48 and net monthly income is \$4,176.76 (after tax and KiwiSaver at a rate of 3% is deducted).
- (c) Mrs Bate's gross weekly income is \$1,264.50 and net weekly income is \$963.87 (after tax and KiwiSaver at a rate of 3% is deducted).

[60] For the purposes of calculating the shortfall between her income and her reasonable needs, I add the child support Mr Bate has been assessed to pay, which is \$756 per week. I disregard the net dividend of \$84.11 from the Port of Napier which is only \$1.62 per week when divided by 52. Mrs Bate's weekly income including child support is \$1,719.87.

[61] The shortfall between Mrs Bate's net weekly income of \$1,719.87 and her weekly reasonable needs of \$3,402.34 is \$1,682.47.

[62] Mr Bate argues that she can easily meet any shortfall by applying for Working for Families tax credits; or increasing her work hours; or authorising the distribution of the relationship property funds held in the Hansen Bate trust account. He also argued at hearing that she could access the \$44,147 held in her RJ3 current account, but the post hearing evidence showed that was incorrect.

[63] Mrs Bate has not applied for Working for Families Tax credits. Even if she had, those funds would be disregarded when calculating her ability to meet her needs. The leading authority is *Richardson v Richardson*¹⁷ where the Court of Appeal held

¹⁷ *Richardson v Richardson* [2011] NZCA 652, [2012] 1 NZLR 796; see also *Knight v Knight* [2022]

that the Family Court judge was right not to take into account the wife's receipt of a domestic purpose benefit or Working for Families tax credits. The Court of Appeal found that a requirement to bring into account both the domestic purposes benefit regime and the Working for Families tax credits scheme, with their complexities, would impose on Courts a very difficult, if not impossible task.

[64] Ms Bate resists the idea of increasing her work hours, saying her work hours are limited due to her responsibilities with two school aged children. The parties structured their responsibilities in that way when they were married: Mr Bate worked full time and Mrs Bate worked part time and took on many of the childcare and household responsibilities. The children have had to deal with the fallout of their parents' separation, a time of significant adjustment for them, and are in their teenage years which, by their very nature, are tumultuous. They need their mother to continue to be available to them as she was during the marriage. Mrs Bate will need to work towards independence, and the time may well come that she can and should increase her working hours. Now is not the time though. I find that she is not currently able to increase her work hours to meet the shortfall.

[65] Should Mrs Bate use her share of the capital sitting in the Hansen Bate trust account to meet her needs? There is \$1,225,158 held on trust for the parties, following the sale of their rental property. She does not consent to an interim distribution, which would provide her with \$612,579.17.

[66] In some interim spousal maintenance cases the court has declined to include legal and accounting fees in awards of spousal maintenance if there is some other means to pay them¹⁸, for example by making a "like for like distribution to the parties" from a Trust to cover legal expenses.¹⁹ Whata J held that this outcome preserves the appellant's position on any subsequent costs award, while achieving s 82's interim protective purpose. When doing so he noted that it was correct in principle that interim maintenance may include provision for legal expenses when those expenses are ongoing and does not pre-empt an award of costs.²⁰

NZHC 62.

¹⁸ *Luyk v Luyk* [2020] NZFLR 617 at [54].

¹⁹ *GCH v SMH* [2014] NZHC 211 at [44].

²⁰ At [47].

[67] In *Able v Able* the court noted that “in some circumstances, an interim distribution of relationship property may be preferable and hasten the path towards independence”.²¹ In that case the maintenance paid by Mr Able was effectively funded out of his share of relationship property. Gault J held that in the circumstances the proposed interim distribution of capital for Mrs Able to fund her own maintenance was “less fair”. He also noted that ongoing maintenance incentivises earlier determination of the relationship property dispute.

[68] In *Clayton v Clayton*²² the High Court acknowledged that difficulties arise in cases where the relationship property is not amenable to interim distribution or where there is a serious dispute about whether the property is, in fact, relationship property. Neither of those difficulties arise in this case. Further, if Ms Bate wins an argument for unequal sharing (and it is not clear whether she intends to argue unequal sharing) there is enough in the rest of the relationship property pool to compensate her.

[69] In other cases, the applicant was not expected to resort to capital to meet their expenses,²³ even if the respondent was doing so.²⁴ In *Tsoi v Hua*, France J concluded that although the appellant could support herself from capital, it was open to the Family Court Judge to find that it was not reasonable to require her to do so, and to find a need for interim maintenance. In that case the husband had substantial capital assets.

[70] Mr Bate’s capital assets are not as substantial as the husband’s in *Tsoi v Hua*, however they are significantly more than Mrs Bate’s capital assets, which are essentially her share of relationship property. Mr Bate also has a higher earning capacity than her. Mrs Bate will need capital to move toward independence. Mr Bate has access to funds that she does not. In the circumstances of this case, I find that it is not reasonable or fair to require Mrs Bate to use the money held in trust for interim maintenance.

²¹ *Able v Able* [2020] NZHC 177.

²² *Clayton v Clayton* [2015] NZHC 550 at [27].

²³ *Dalrymple v Dalrymple* [2019] NZHC 637; *Tsoi v Hua* [2006] NZFLR 560, (2006) 25 FRNZ (HC).

²⁴ *Dalrymple v Dalrymple*, above at note 23; *Hodson v Hodson Knight v Knight*, above at note 17; *M v M* FC North Shore FAM-2006-044-2830, 20 March 2008, *L v T [Spousal Maintenance]* 2008 NZFLR 975.

[71] Mr Bate also asked me to consider the payments he has already made to Mrs Bate after separation, including sharing with her dividend payments from the firm; LimeTree business profits and various voluntary payments he made. The payments that he has already made will be relevant to Mrs Bate's past spousal maintenance claim. Mrs Bate's affidavit of assets and liabilities do not show significant savings so it is apparent that the money Mr Bate paid her in the past is not available for her current maintenance. Accordingly, I do not take those payments into account.

[72] I find that Mrs Bate does not have the ability to meet her reasonable needs.

What are Mr Bate's reasonable needs?

[73] There was little challenge to Mr Bate's budgeted expenses. Mrs Bate drew attention to the fact that Mr Bate's mother only started charging him \$300 per week board after she has applied for spousal maintenance. She suspects that was a cynical move to increase his weekly costs. Even if that were so, Mr Bate's mother is entitled to charge him board when he lives in her house.

[74] I accept that Mr Bate's expense schedule, attached to this decision set out his reasonable needs. His total annual expenses are listed as \$176,255.68, but he has not included estimated legal fees of \$5,000 per month in that figure. Once legal fees are included his annual expenses become \$236,255.68.

What is Mr Bate's ability to meet Mrs Bate's reasonable needs?

[75] I can examine both Mr Bate's income and assets when determining his ability to meet Mrs Bate's reasonable needs.

[76] Mr Bate's true income is disputed. He is a director and shareholder of Hansen Bate along with two other directors. In his affidavit dated 25 February 2022 he disclosed annual income in the immediately preceding 52 weeks of \$177,694.92, made up of:

- (a) Salary, wages, or other personal earnings from Hansen Bate - \$145,631.42
- (b) Drawings from Hansen Bate - \$20,000
- (c) Dividends - \$200; Interest (historic, not continuing) - \$3,434.63; PIE income (Mercer Kiwisaver) - \$8,428.56.

[77] Mrs Bate argues that he has not properly represented his income, as it fails to incorporate the dividends received from Hansen Bate of \$126,153.22; employer Kiwisaver contributions and office expenses. She points to his tax summary that provides a taxable annual income of \$293,578.56 for the year ended 31 March 2021, which she says is a more accurate reflection of his means.²⁵ The tax summary includes \$145,638.24 income from Hansen Bate; and \$125,676.39 dividend payments from Hansen Bate. She also points to an undrawn current account at Hansen Bate of over \$190,000.

[78] Mr Bate says Mrs Bate misunderstands his income. He says that:

- (a) given the cashflow position of the firm he is unlikely to receive further drawings this financial year. Future drawings are dependent on trading conditions, which are uncertain given the Covid 19 pandemic.
- (b) While a dividend can be credited to his current account and he will pay tax on that sum and be assessed for child support on that amount, those funds will not actually be paid out to him. Any attempt to call up his current account would be declined by his co-directors.
- (c) In reality he does not receive the dividend income.

[79] Ms Bate filed expert accounting evidence from Shane Hussey. He requested copies of bank records that had been provided to Mr Bate's expert Brooke Wielinga

²⁵ Exhibit B to Mrs Bate's affidavit dated 14 March 2022.

but did not receive them. He was also not provided with the balance sheet in the most recent Hansen Bate management accounts; or the RJ3 financial statements.

[80] From the documents he did have, Mr Hussey was strongly of the view that, at least, the vast majority of 2023 year after-tax profits should be available for distribution within that year. He acknowledged that the issue of the specific timing of such is not straight forward and the firm's cashflow might well be "lumpy". He noted that for all years other than in 2019, the drawings have exceeded \$50,000 per annum.²⁶

[81] Mr Hussey also noted that Mr Bate had not included the \$15,000 annual management fee RJ3 pays him for managing the parties' LimeTree business.

[82] Mr Bate argues that his current account balance can be considered in the relationship property division, so Mrs Bate will not lose out on her fair share. However, he says, given his inability to access those funds without agreement from his co-directors, the balance should be disregarded for a spousal maintenance assessment. I disagree. Dividends credited to the current account are taxed and included in child support calculations. The amount of tax and child support payable is calculated according to income, therefore the dividends credited to the current account are considered income.

[83] The firm's profits credited to each director's account are available for distribution subject to the firm's cashflow policy. Mr Bate says his co-directors would not approve payment of dividends in the current economic climate, but he did not say whether he had asked them to do so; and did not adduce any evidence directly from them.

[84] Given Mr Bate's taxable income in the year ending 31 March 2021; the balance of Mr Bate's current account at the firm; Mr Hussey's evidence and the lack of evidence from Mr Bate's partners, I find that Mr Bate's income is significantly higher than what he claims.

²⁶ 2017 - \$73,000; 2018 - \$68,000; 2020 - \$55,000; 2021 - \$60,000. Affidavit of Shane Francis Hussey dated 19 March 2022, at paragraph 30 of annexure A.

[85] Should Mr Bate be required to access his capital funds to pay for spousal maintenance? He is able to do so. He is a discretionary beneficiary of RJ3 and one of its trustees. As a discretionary beneficiary he does not have no right to funds, but as Mr Hussey noted history indicates that his requests for funds “appear to find favour with the trustees”.²⁷ He has also been able to borrow significant amounts of money from RJ3 in the past, which was lent to the parties interest free.

[86] Mr Bate is also a discretionary beneficiary of CAE Trust and one of its trustees. It is reasonable to expect that the CAE trustees would act in a manner that Mr Bate seeks, especially given that he has the power to appoint the CAE trustees.

[87] Mr Bate is able to access funds, from his income and/or by seeking distributions from or borrowing from RJ3 or CAE Trust. I find that he has the means to meet Mrs Bate’s reasonable needs.

Should I exercise a discretion to make an interim spousal maintenance order?

[88] Mr Bate says I should not exercise a discretion. He notes that she continues to live in the mortgage free family home, whereas he is boarding with his mother, so she enjoys a higher standard of living than him. She did not file her application for interim maintenance until a year after they separated. She has not progressed resolution of relationship property matters and has not filed proceedings. She did not respond to his request to place their funds of \$1,225,158 on term deposit, rather than it being on call meaning they lost nearly \$10,000 in interest. Finally, he says I should consider her misconduct since separation which included nine physical assaults on him; damaging his business reputation and encouraging clients to leave him.

[89] I address the allegations of misconduct first. Mrs Bate did not comment on the assault allegations but denied the others. I could not resolve that dispute of evidence at a submissions only hearing. In any event the conduct is not directly relevant to the spousal maintenance claim.

²⁷ Affidavit of Shane Francis Hussey dated 19 March 2022, at paragraph 44 of annexure A.

[90] I am not persuaded that Mrs Bate enjoys a higher standard of living than Mr Bate. He may be boarding with his mother rather than living in the family home, but in other respects his life has continued uninterrupted. He has upgraded his car, he has had holidays, has been skiing and continues to enjoy his various outdoor pursuits.

[91] The delay in applying for interim spousal maintenance is not unreasonable. The evidence shows that Mr Bate has not progressed resolution of relationship property matters, for example his failure or refusal to provide financial statements. He has not filed relationship property proceedings either. It is unfortunate that Mrs Bate did not approve putting their funds on term deposit earlier, but I do not find that is a reason to deny her interim spousal maintenance.

[92] After 20 years of marriage, Mrs Bate finds herself unable to meet her reasonable needs from her income. It is unreasonable and unfair to require her to use capital to maintain herself when she needs those funds to establish her independence.

[93] Through his income and/or distributions or borrowings from RJ3 and CAE Trust Mr Bate is able to meet Mrs Bate's reasonable needs. It is fair and just that he does so.

[94] Accordingly, I exercise my discretion to award interim spousal maintenance and make an order that Mr Bate pay to Mrs Bate spousal maintenance in the amount of \$1,682.47 per week for six months.

Judge P Ginnen

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 11/09/2022