

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

**NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

**<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>**

**IN THE FAMILY COURT  
AT TAURANGA**

**I TE KŌTI WHĀNAU  
KI TAURANGA MOANA**

**FAM-2019-070-000488**

**FAM-2019-070-000126**

**FAM-2019-043-000068**

**[2019] NZFC 9559**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[JOCELYN MOORE] Applicant
AND	[ELI GALLAGHER] Respondent

Hearing: 31 October 2019

Appearances: R Savage for the Applicant  
Respondent appears in Person

Judgment: 10 December 2019

---

**RESERVED JUDGMENT OF JUDGE S J COYLE  
[IN RELATION TO INTERIM SPOUSAL MAINTENANCE]**

---

[1] A hearing proceeded before me on 31 October in relation to Ms [Moore]’s application for interim spousal maintenance against Mr [Gallagher]. For the reasons set out in my Minute of 31 October<sup>1</sup> the hearing was adjourned on the basis that the

---

<sup>1</sup> [Moore] v [Gallagher], FAM-2019-070-0488, 31 October 2019.

parties would explore whether their wider relationship property issues could be resolved by consent, and if so, Ms [Moore] would no longer have any need for financial support from Mr [Gallagher]. As indicated in that Minute, there was an agreement reached between Ms Savage and Mr [Gallagher] that if there was no agreement entered into under the Property (Relationships) Act 1976, then I would issue a reserved decision in relation to the interim spousal maintenance application. Ms Savage has now confirmed to me that no agreement has been reached and I have received a memorandum from her and from Mr [Gallagher] confirming this. I, accordingly, now need to issue this reserved decision in relation to Ms [Moore]'s application for interim spousal maintenance.

### **Background**

[2] Ms [Moore] and Mr [Gallagher] began a de facto relationship in October 2002 but separated and ceased living together on 26 February 2019. They have two children, [Morgan] and [Jesse], and both children have remained in the care of Ms [Moore] following the parties' separation.

[3] Relationship property issues between Ms [Moore] and Mr [Gallagher] remain unresolved. There was an agreement that the former family home, owned by a family trust, would be sold, but as set out in Ms [Moore]'s affidavit of 15 August 2019 Mr [Gallagher] contacted the real estate agent resiling from that process. Ms [Moore] has moved out of the former family home and is renting a property with the children; Mr [Gallagher] remains in occupation. Initially, Mr [Gallagher] agreed to pay Ms [Moore] \$350 per week as spousal maintenance. However, Mr [Gallagher] then ceased making those payments on 14 June 2019, and that precipitated her application for spousal maintenance. Not only does she seek the sum of \$236.60 per week, but she also seeks a lump sum in the sum of \$15,000 to assist her with legal fees.

### **Interim Maintenance Application**

[4] The Court's jurisdiction to make an interim award of spousal maintenance is contained in s 82 of the Family Proceedings Act 1980. That section states:

## 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.
- (2) *Repealed.*
- (3) *Repealed.*
- (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.

[5] Pursuant to s 82 the test is what a Judge thinks is reasonable, with cases turning on their particular facts. An interim order lasts for six months and is a “stop gap measure designed to address any injustice or hardship which may arise between the time a substantive application is filed and the substantive hearing”: *[L] v [R]*, Judge de Jong at [14].<sup>2</sup>

[6] Whilst the discretion as to what is reasonable is a wide discretion, Ellen France J said in *Tsoi v Hua* at [19]:<sup>3</sup>

I agree with the respondent who says that the statute is clear. In particular, there has been no change to s 61 which specifically says the Court shall apply ss 62 to 66 to cases other than s 82. The test for a grant of interim maintenance is that set out in s 82. The statutory principles set out in ss 62 to 66 are not therefore mandatory considerations. In practice, they are the sorts of things that a Court may well look at in determining whether the s 82 test is met but it is not mandatory to do so. Nor is the Court necessarily limited to considering those principles.

[7] Thus, the factors which the Court may consider in regard to interim maintenance are in part those set out in s 64 of the Act which are:

---

<sup>2</sup> *L v R* FC Auckland FAM-2007-004-1465, 30 September 2008.

<sup>3</sup> *Tsoi v Hua* [2006] NZFLR 560 (HC).

- (a) The reasonable needs of the applicant.
- (b) The ability of each party to support themselves having regard to the division of functions within the qualifying relationship and the earning capacity of each party.
- (c) The responsibility of each party for the ongoing daily care of dependent children of the qualifying relationship.
- (d) The standard of living of the parties while they lived together.
- (e) Any reasonable period of education/training being undertaken by the applicant to become self-sufficient.
- (f) Any other relevant circumstances.

[8] I adopt the approach taken by her Honour Judge Walker in *M v M* at [25] that the Court's enquiry could proceed on the following bases:<sup>4</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?

**What can be identified as Ms [Moore]'s reasonable needs and means?**

[9] Ms [Moore]'s financial situation is contained in her affidavit of 15 August 2019 and her declaration of financial means of the same date. Attached to Ms Savage's submissions of 24 October 2019 is Ms [Moore]'s current weekly budget which shows a shortfall of \$236.60 and this is the amount that is sought by way of interim spousal

---

<sup>4</sup> *M v M* FC North Shore FAM-2006-044-2830, 20 March 2008.

maintenance. Mr [Gallagher] does not appear to challenge the reasonableness of that budget or shortfall; rather his assertion is that he is simply not in a position to pay Ms [Moore] that additional sum of money each week.

[10] The Court of Appeal in *Ropiha v Ropiha* at [247] provides a helpful summary of the approach in relation to reasonableness.<sup>5</sup>

In considering the position of an applicant for an interim order a Court will necessarily pay particular regard to the reasonable needs of the applicant over the period for which an order will subsist and the means likely to be available to the applicant to meet those needs. In assessing those needs the Court will take into account the standard of living the parties 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. What is important, if those means are to be set against the applicant’s needs in determining whether to make an interim order, is that the moneys taken into account should be reasonably assured to the applicant. What could he (or she) reasonably count on having available during the limited term of an interim order?

[11] Additionally, Heath J in the decision *K v K* stated that the issue of extravagance falls to be considered against the way in which the parties lived their married life.<sup>6</sup> However on the facts of this case, the standard of living that the parties enjoyed was no more than modest and was in no way extravagant. Consideration of the parties’ standard of living is not a significant issue on the facts of this case.

[12] Having reviewed Ms [Moore]’s expenses and budget I am satisfied that they are not extravagant or unnecessary expenses. They are simply a reflection of the reasonable and necessary costs required by Ms [Moore] to care for herself and the parties’ children on a weekly basis. I find as proven that in order for Ms [Moore] to meet her reasonable needs and those of the children, she requires a “top up” of \$236.60 per week which I will round up to \$237.

[13] As mentioned, Mrs [Moore] also seeks spousal maintenance to cover legal fees. In support she relies upon the decision of Courtney J in *B v B*,<sup>7</sup> where her Honour

---

<sup>5</sup> *Ropiha v Ropiha* [1979] 2 NZLR 245.

<sup>6</sup> *K v K* HC Auckland CIV 2009-404-4421, 20 November 2009.

<sup>7</sup> *B v B* [2008] NZFLR 789 (HC).

referred to the *Ropiha v Ropiha* decision of the Court of Appeal referred to above, and also *Z v Z (No 2)*<sup>8</sup> in which the Court of Appeal said at 277:

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.

[14] In relation to the issue of whether legal and accounting costs can be included in an interim maintenance order, Courtney J did not see any reason why those expenses could not be seen as an expense which could be the basis for an application for interim maintenance; concluding at [17] of her Honour's judgment that there was nothing objectionable about those costs being included as interim maintenance providing they were reasonable. Her Honour Courtney J in *B v B* referred to *A v A (Maintenance Pending Suit: Provision for Legal Fees)*,<sup>9</sup> a decision of the English High Court in 2001 which provided for an allowance of a monthly amount towards legal costs. In that case Holman J found that:

...the costs of the suit itself...are, after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. She could manage without holidays, though I have made some provision for them. She could no doubt manage for a while without buying new clothes. She could manage without her manicures, pedicures and yoga and keep fit classes...But she simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers.

[15] The Court of Appeal, however, in *C v G* appears to have disavowed the notion of legal costs forming the basis of a "reasonable needs" claim for a maintenance order.<sup>10</sup> However, it is important to note that that case is dealing with a final maintenance order whereas in this case it is clearly an interim order, and can therefore be distinguished.

## **Result**

[16] I have reached the view that the amount of spousal maintenance sought by Ms [Moore] of \$237 per week is entirely reasonable and not at all extravagant when

---

<sup>8</sup> *Z v Z (No 2)* [1997] NZFLR 241.

<sup>9</sup> *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] FLR 377.

<sup>10</sup> *C v G* [2010] NZCA 128; [2010] NZFLR 497.

measured against their prior standard of living. Additionally, contribution towards her legal fees by way of a lump sum should be included as part of any interim maintenance award and are reasonable in the circumstances.

### **Respondent's Ability to Pay**

[17] As Ms Savage sets out in her submissions Mr [Gallagher] has provided a monthly budget but no corroborating evidence. What he has done is incorporate a new company. In relation to the existing company, as set out in my Minute of 31 October there is a current account deficit of around \$155,000, and there appear to be significant debts owed to the Inland Revenue Department as for reasons that Mr [Gallagher] never quite explained. Whilst historically they have paid their tax, for some reason of late the company has not paid the parties' tax leaving a huge liability.

[18] However, as Ms Savage sets out in her submissions Mr [Gallagher] has managed to reduce the balance of the overdraft between April and September 2019 by approximately \$24,210. I agree with her submission that this is entirely inconsistent with Mr [Gallagher]'s budget and a projected shortfall of \$3720.66 per month. Additionally, Mr [Gallagher] appears to be paying a reasonably significant amount in reduction of his legal fees. I suggest he should be prioritising his monies towards supporting his former partner and their children, and that this could be achieved by way of a reduction in the amount he is choosing to pay to reduce his debt relating to legal fees. I determine therefore that there is no reasonable basis upon which it could be said that Mr [Gallagher] is unable to pay maintenance. Furthermore, given his reduction of the overdraft debt, he can either draw down on the overdraft to pay a lump sum towards legal fees, or alternatively reduce his repayments on the overdraft and apply the monies towards maintenance for Ms [Moore]'s legal fees.

### **Should I exercise my judicial discretion to make an interim maintenance order?**

[19] Taking into account the reasonable needs of Ms [Moore], the ability of Ms [Moore] and Mr [Gallagher] to support themselves, the divisions of functions within their relationship and the current income and expenses of each of them, and the standard of living they enjoyed while they were together, I am satisfied that I should

exercise my discretion in favour of making an order to provide for an award of interim spousal maintenance.

[20] I am not satisfied that Mr [Gallagher] is able to meet the full \$15,000 of legal fees. The reality is that there are significant debts owed to IRD which will need to be met at some point in time. But Mr [Gallagher] is able to contribute towards Ms [Moore]'s legal fees to some degree, particularly given the amount he has reduced off the overdraft between April and September 2019.

### **Order**

[21] I, accordingly, make an interim spousal maintenance order pursuant to s 82 of the Act that Mr [Gallagher] pay Ms [Moore] the sum of \$237 per week, payable each Tuesday commencing 24 December 2019, and thereafter payable weekly for six months, with the final payment to be made on 10 June 2020.<sup>11</sup>

[22] I further make an interim spousal maintenance order that Mr [Gallagher] is to pay the sum of \$9000 towards the interim legal fees of Ms [Moore], either payable in a lump sum by 24 December 2019, or alternatively to be paid at a rate of \$1500 per month, with the first payment due on 24 December, and thereafter for six months until 10 June 2020.

S J Coyle  
Family Court Judge

---

<sup>11</sup> Being the date six months from the date of this judgment.