IN THE FAMILY COURT
AT AUCKLAND

FAM 2015-004-000810
[2016] NZFC 1795

IN THE MATTER OF	The Family Proceedings Act 1980
BETWEEN	RENEE CORNELL Applicant
AND	LEO CORNELL Respondent

Hearing:	29 February 2016
Appearances:	Ms J Hawker and Ms Dunn for the Applicant Ms J Naish-Wallis for the Respondent
Judgment:	24 March 2016

RESERVED DECISION OF JUDGE P J CALLINICOS
[Spousal Maintenance]

Introduction

[1] The parties were married on 5 January 2008 after having lived in a de facto relationship since 2000. They separated on 13 May 2015. They had three children of the marriage, all three being under the age of seven.

[2] On 3 September 2015 the applicant filed an application for a maintenance order under the Family Proceedings Act 1980 and an application for an interim maintenance order pursuant to s 82 of that Act. This decision determines the application for interim maintenance.

[3] This hearing was conducted on a submissions only basis. A number of affidavits had been filed by the parties, together with updated budgets as to their respective income and expenditure.

Law

[4] Section 82 permits the Court to make an order directing a respondent to pay such periodical sum as the Court thinks reasonable towards the future maintenance of the respondent's spouse or, as the case may be, civil union partner or de facto partner until the final determination of the proceedings or until the order sooner ceases to be in force. Section 82(4) limits the duration of an interim maintenance order to a maximum of six months after the date on which the order is made.

[5] As the learned authors of *Brookers Family Law – Family Property* correctly observe, most interim maintenance cases involve situations where parties have recently separated but have yet to conclude a property division, thereby requiring assistance in meeting any financial shortfall during that period of transition.[1]

[6] Unlike substantive maintenance, the provision lacks any express criteria by which the determination is to be assessed. The leading authority is the decision of

[1] *Brookers Family Law – Family Property* (looseleaf ed, Brookers, updated to 10 December 2015) at [FA82.01]

the Court of Appeal in *Ropiha v Ropiha*, which confirms the Court has an unfettered discretion as to whether an order ought to be made and, if so, the quantum[2].

[7] In exercising the unfettered discretion both as to liability or quantum, the court is not required to have consideration to the ss 62 to 66 factors. What the court must do is ensure that it has proper regard to all factors and circumstances relevant in the particular case. In *T v H [Spousal Maintenance]* Ellen France J commented that the mandatory considerations applying for spousal maintenance orders in ss 62 to 66 do not apply in the context of interim orders under s 82[3]. It was stated that such "distinction no doubt reflects the differing nature of the orders".[4] She added that the decision in *Langridge v Langridge*[5] held that while there was no obligation to take into account the ss 62 – 69 there was no prohibition against it.[6]

[8] In *Hodson v Hodson* Kos J confirmed that key factors identified as requiring consideration under s 82 are;

(a) the reasonable needs of the applicant over the period for which the order would subsist;

(b) the means likely to be available to the applicant to meet those needs herself; and

(c) the respondent's reasonable means to meet any shortfall.[7]

[9] In exercising discretion Courts have had regard to a range of considerations. The following principles or considerations derived from *Ropiha* are apt to the current proceeding;

a. the reasonable needs of the applicant over the period for which the order will subsist,

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[2] *Ropiha v Ropiha* [1979] 2 NZLR 245
[3] *T v H [Spousal Maintenance]* [2006] NZFLR 560, [19]
[4] At [21].
[5] *Langridge v Langridge* (1987) 3 FRNZ 272
[6] *T v H [Spousal Maintenance]*, above n 3, at [26]
[7] *Hodson v Hodson* [2012] NZFLR 252, [8]

b. in assessing such needs reference would be had to the standard of living the parties had adopted for themselves,

c. the means likely to be available to the applicant to meet those needs,

d. the term "means" is used in the broadest sense to encompass any sums the applicant could reasonably be expected to earn from his or her own efforts during the term of the order. Consideration could be given to any other funds available to the applicant in that period,

e. it is important that any moneys so taken into account should be reasonably assured to the applicant,

f. the respondent should not be called on to pay maintenance before there was any finding on the substantive proceedings unless proper weight has been given to the applicant's capacity from all sources to meet his or her needs over the period,

g. it is immaterial whether the source of funds is employment reasonably available to the applicant, private income, resources of capital, or welfare benefits.

Analysis

Post Hearing Events

[10] Prior to discussing the issues in this proceeding, comment must be made upon the applicant's attempted production to the Court of correspondence between Counsel which occurred following the hearing.

[11] Ms Hawker filed a without notice interlocutory application seeking that certain items of post-hearing correspondence should be placed before me prior to a decision on interim maintenance being released. While I am uncertain as to how this purported without notice application found its way to the respondent's counsel, by

the time I received it I had also received a memorandum from Ms Naish-Wallis clarifying her client's position on the issue of concern to the applicant.

[12] Some comment is required on the production of this correspondence. The first is that I am concerned that items of correspondence between counsel were unilaterally placed before the Court when it is obvious from the correspondence that the whole intent of the correspondence was one of negotiation over matters of child care and child support. The first letter, is an unequivocal negotiation over child care and includes conditional discussions about voluntary child support continuing. The letter expressly invites the applicant to consider matters in the 'hope that we can reach agreement without any further necessity for the Court to make a decision…". That subsequent correspondences discussed different interpretations over what may, or may not, have been said in Court does not merit the applicant in attempting to produce in Court correspondence which is unquestionably communication for the purpose of settlement or negotiations[8]. The initial letter from Ms Naish-Wallis of 11 March 2016 commenced a negotiation and that purpose carries through into subsequent correspondence.

[13] The mere fact a communication does not carry the label 'Without Prejudice' does not remove its privileged status, it is the objective intention which is the central issue. As the learned authors of *Cross on* Evidence commented, the 'label is irrelevant'[9]. There is nothing in the Evidence Act that requires that without prejudice communications be labelled as such to attract privilege.

[14] In any event, the receipt of those items of communication would not have altered my decision. As I stated in the hearing, if the amount of monies currently paid by the respondent to the applicant ceased or changed, then that could trigger an ability for the applicant to apply for a variation of any order as to maintenance I might make. In light of the comments I made at hearing, I am surprised also that the applicant saw the need to attempt to produce these privileged documents.

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[8] Evidence Act 2006, s 57(1)
[9] Cross on Evidence (online looseleaf ed. LexisNexis) at [EVA57.5]

[15] I turn to an analysis of the particular circumstances of the instant proceeding by reference to the approach indicated in *Ropiha*.

Reasonable Needs of Applicant – Standard of Living

[16] The starting point is an assessment of the reasonable needs of the applicant over the period for which the order will subsist, namely for the next six months. I have attempted to assess such needs by reference to the standard of living the parties adopted for themselves during the marriage.

[17] I have gleaned from the affidavits of the parties that they enjoyed a reasonable comfortable lifestyle from a family income in the vicinity of $200,000.00, which included a number of bonuses. They had a house of reasonable quality, which sold in late 2015 for $1,500,000.00. They had indebtedness against that property in the order of $830,000.00, meaning that they had reasonably substantial mortgage outgoings. For a family including three young children they enjoyed a reasonable standard of living which permitted them to maintain their property, buy furniture and provide the children with a comfortable and secure home life. They enjoyed regular holidays. The applicant deposed that their standard of living permitted them to save approximately $150.00 per week which was used towards such things as holidays and so forth. It will be fair to say that it was a comfortable and secure economic situation for the family, without being lavish.

[18] In the transition period following separation, the applicant wishes to maintain a lifestyle of a level close to that which that was enjoyed during marriage but with the acceptance by her that both she and the respondent will need to live frugally now that their separation has occurred. This is a sad consequence where a once joint income has become severed in order to support the increased costs of the two households, where previously once existed.

Reasonable Needs of Applicant – Budgeted Expenses

[19] I had been provided with four budgets from both parties and an updated budget from the applicant at the close of submissions. The applicant has a net weekly income from employment of $1,056.00. Until recently she had the potential

additional income from interest of approximately $150.00 per week from her share of the proceeds of sale of the family home. However, as she has now purchased a new home for herself and the three children, that additional income is no longer possible.

[20] She receives the sum of $462.00 per week by way of child support from the respondent. While I was not provided with a precise amount as to what the respondent's child support liability would be from formula assessment, I am told that the payment by him of $24,024.00 per annum is well in excess of that which he would be ordered to pay under the formula assessment process. One cannot ignore that he has been paying such sum and is also willing to contribute towards other aspects of the children's extracurricular and schooling activities.

[21] Taking into account the applicant's salary and the monies she receives from the respondent, her total net weekly income is approximately $1,520.00.

[22] I have carefully analysed the detailed budget for weekly expenditure. By and large the expenditure appears to be conservative and the applicant has pared back some of her claims after reasonably considering the view point of the respondent. It is helpful that both parties have been reasonable in their budgets.

[23] There were a few aspects where I considered the applicant's budgeted expenses to be a little excessive. These were in respect of her claim for allowance for savings and legal fees. In saying that, I appreciate that she did refer to the item of "savings", which she claimed at $100.00 per week. In some respects the sum included a component to cover contingencies. I would regard a claim for savings alone as unreasonable, as an accumulation of savings derived from maintenance has an inescapable element of the respondent being asked to subsidise the other party's savings programme. However, as will follow, I have considered the need for each party to have an allowance for contingency and hence the issue of any claim for savings is not pivotal in this decision.

[24] The applicant sought a weekly allowance of $507.00 for legal fees. While the Court has jurisdiction to include legal fees as a permissible expense, there are

some limitations to this. In *C v G [Maintenance]*[10], the Court of Appeal[11] concluded that it was wrong in principle to include legal costs in a maintenance order unless such costs are likely to be an ongoing expense. That determination was in respect of substantive maintenance application. Nonetheless, the Court of Appeal felt the proper course was to deal with litigation costs as a separate issue in accordance with the Rules of the Court and that the inclusion of costs in a maintenance order assumes an outcome in favour of the beneficiary of the order, which may not be justified for a range of reasons when the maintenance order is made.

[25] In *Hodson*[12] the High Court felt that in an interim maintenance situation, a more liberal approach ought to be taken as to legal costs. In the present situation both parties are still engaged in litigation disputes. There are some disputes remaining; such as matters of day to day care, the proportion of care between the parties. I am uncertain whether any property issues remain. While it is likely each party will incur some ongoing legal costs, the remaining issues did not appear to be significant ones.

[26] Having regard to the evidence, the quantum claimed by the applicant does appear somewhat excessive in terms of the type of issues I was advised still exist. The estimated budget of the applicant equates to a claim of something in excess of $26,000.00 of legal fees over a year. The respondent claimed a budgetary figure of $135.00 per week which, on the other hand, did appear a little light. While, it is impossible for me to determine precisely what legal fees will be, as that is regulated by the extent of any disputes between the parties, I have adopted an even handed approach.

[27] On the evidence, I determine that each party may include as an expense the sum of $250.00 per week towards ongoing legal fees.

[28] Where possible, I have tried to ascertain items of expense between the parties, separate from child issues, on a parity basis. I have done so in order to keep a focus on the pre-separation lifestyle enjoyed when the parties were a couple. By

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10 *C v G [Maintenance]* [2010] NZFLR 497
11 at [52]
12 Ibid at [36]

way of example, I have allowed a similar amount between the parties for such things as family entertainment by reason of the fact that both parents are involved fairly equally in terms of their roles with the children and are therefore likely to have similar expenses in a number of respects.

[29] As noted the applicant was claiming $100.00 per week towards savings, in addition to which she sought $20.00 per week for miscellaneous items. Whether the sums be called savings or contingencies, she was seeking a budget figure of $120.00 per week. Again, I have approached the matter by considering matters of parity between the parties, as both should be permitted a component for contingencies and savings. This is consistent with the budgeting approach they operated when together. For these reasons I include $15.00 per week each for "savings" and $50.00 per week for matters of contingency, or miscellaneous expenditure. This in fact increases the applicant's claim for miscellaneous items from $20.00 per week to $50.00 per week.

[30] The collective outcome of my assessment of expenses for the applicant is that I have calculated just in excess of $2,000.00 per week being required to operate the household.

Applicant's Likely Means to Meet Her Assessed Needs

[31] In terms of the applicant's likely means to meet her assessed needs it can be seen that the deficit between her weekly income of $1,520.00 and her weekly expenses of $2,002.00 is $482.00 per week, or $25,000.00 over an annual period.

The Respondent's Reasonable Means to Meet Shortfall

[32] In assessing the respondent's reasonable means to meet the applicant's shortfall, I commence with determination of his income.

[33] He indicated a weekly net income of $1,783.00. I have added to that, however, the sum of $157.00 per week which was the sum that he had calculated the applicant would have been able to earn on her half share of the proceeds of the sale of the former family home. While she has used her proportion of that share towards purchase of a new home, the respondent has not and therefore, using the same approach advanced by him, I have assumed he would be able to earn $157.00 per

week by way of interest income calculated at 3%. Accordingly, his total weekly income is in the order of $1,940.00.

[34] In terms of the respondent's budgeted expense he pays the sum of $462.00 per week towards the support of his children, and the household in which they live. He has rent of $820.00 per week. I have allowed groceries at $150.00 per week, $30.00 for takeaway foods (being the same amount that the applicant claimed). I have accepted his figures for his budget for clothing for himself, his modest medical expenses, his modest insurances and his household outgoings as in his budget filed in Court. I have also accepted the various miscellaneous expenses including such things as family entertainment (again claimed at the same rate as the budget by the applicant), alcohol, gym membership, gifts which I have increased to $50.00 per week, being the same amount as the applicant claimed. I have also included his contribution towards the children's ballet and swimming and school materials, which he is paying in addition to the current voluntary child support. As indicated, I have permitted him the same claims for savings, legal fees and miscellaneous expenses as that permitted for the applicant.

[35] The total expenses calculated for the respondent amount to $2,298.00 per week which, after deduction from his income of $1,940.00 equates to a weekly deficit of expenses over income in the amount of $358.00.

[36] Accordingly, when viewing the two household budgets it would require something in the order of $126.00 per week to be paid by the respondent to the applicant to create an approximate parity between the two homes. By parity, I am referring to each of the parties inevitably having a budget shortfall per week and that the amount to balance their respective deficits would be $126.00. The applicant's shortfall is $482.00 per week and the respondent's $358.00. I emphasise that this approach is not the determinative factor in any maintenance award. Rather, in order to achieve, as required, a just outcome, I cannot ignore the economic consequences impacting each home following separation.

[37] Inevitably, as indicated in *Hodson* the court must identify these economic consequences and assess to what extent the respondent can and should assist in

diminishing any identified shortfall. I turn now to the task of standing back and assessing all these circumstances in order to do what is a just outcome.

Overview of Principles and Factors

[38] In *Hodson v Hodson*[13], Kos J made observations which are helpful to the ultimate determination;

> [27] In assessing the applicant's "reasonable needs", Hammond J (in the Court of Appeal in *M v B*) has said that such needs are not to be diminished to the mere necessities of life. They 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)".
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> [28] Close reference should be made to the lifestyles the parties enjoyed during their marriage. As Judge Callinicos noted, the reasonable needs of the applicant are not to be diminished as to create a "sudden and traumatic end to that lifestyle, regardless of what the respondent might wish". It also seems logical, in assessing what is reasonable, to consider and compare the *continuing* lifestyle of the respondent. If he is living in comparative luxury, it hardly lies in his mouth to say that the applicant should cut her cloth more closely than he is prepared to do.
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> [29] Again a measure of realistic comparison is appropriate. The possession of children in the day-to-day care of an applicant will constrain the extent to which she)or he) can obtain employment. Applicants are not expected to take employment at a significant geographical remove from their present location, or of a form for which they are not fit. A robust sense of fairness must prevail."
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> (emphasis mine)

[56] While such observations arose in respect of the assessment of reasonable needs, they serve to confirm the overarching approach the Court must take in assessing reasonable needs in the context of the standard of living of the particular case and how the ability to maintain such standard has been affected by the changes effected by the fact of separation. A separation of any couple brings into sharp and immediate focus any disparity in income (real or potential) and control of assets, and the comparative consequences upon each of those former spouses or partners.

[39] In assessing as best I can how the applicant may gain assistance from the respondent to maintain as close as possible the lifestyle commensurate with that the

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[13] *Hodson v Hodson* HC Napier CIV-2011-441-618, 6 December 2011

couple enjoyed during the marriage, the financial reality is that as both parties have separated, they inevitably suffer a degree of reduction in their respective lifestyles by virtue of the fact that they are now having to fund two homes from what was essentially the same pool of income. That inevitably increases the cost of living to each of them as they are now funding the same family group, but in two households.

[40] While the applicant was seeking a weekly spousal maintenance payment of $1,000.00, that sum is manifestly excessive when one has regard to the reasonable means of the respondent to meet such a sum. It cannot be ignored that he has been more generous than the law requires him to be in terms of child maintenance and that the excess in the amount he is paying by way of child support over his liability must be seen as a contribution to the applicant's and children's economic situation, rather than limited to support of the children. He has a deficit in his weekly expenses over income, one which is not far short of that claimed by the applicant and I would not regard it as being a display of a "robust sense of fairness" to order him to pay anything approaching that sought by the applicant.

[41] Unlike the situation described in *Hodson v Hodson,* the present respondent is not living in comparative luxury while demanding the applicant "cut her cloth" more than he was prepared to do. I was well aware of the unique circumstances in *Hodson*, given I was the Judge at first instance. The circumstances before me are not ones akin to those in *Hodson*.

[42] The situation of the present case are ones where the parties have each recognised the fiscal disadvantages that now accrue from them living in a separated situation. Neither is pursuing what could be described as luxurious lifestyle. They are each adopting a frugal and responsible approach to their new life situation and both of them are attempting to nurture the children through a difficult time in a responsible and fiscally responsible manner.

[43] Against that approach, I determine that the respondent should contribute more than he currently is, but certainly significantly less than the extent sought by the applicant.

Decision

[44] It follows from my determinations that I make an interim spousal maintenance order pursuant to s 82 of the Family Proceedings Act 1980. I order that the respondent is to pay to the applicant the periodical sum of $200.00 per week for the period of 26 weeks commencing from the date of release of this judgment.

Costs

[45] While both parties are entitled to consider whether any award of costs are sought I do observe that neither has been successful in obtaining what each sought. Subject to considering any application for costs and submissions, I would encourage the parties to each try and save their precious resources by avoiding the additional cost incurred in seeking a costs award in the situation before them. However, if either or both seek costs then they are directed to file any application, supported by full submissions and authority, within 21 of release of this decision, with any respondent to such claim having 14 days thereafter to respond. The registrar should refer any submissions to me after that timeframe for a ruling.

Delivered at am/pm on 24 March 2016

P J Callinicos
Family Court Judge