IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

H.C. 172/96

BETWEEN ABERCROMBIE

Appellant

AND ABERCROMBIE

Respondent

Hearing: 14 April 1997

Counsel: S. Fleming for appellant
R.C. Knight for respondent

Judgment: 14 April 1997

(ORAL) JUDGMENT OF BARKER ACJ

Solicitors: Phillips Fox, Auckland, for appellant
Knight & Associates, Auckland, for respondent

This appeal from a decision of Judge MacCormick, given in the Family Court at North Shore on 14 November 1996, is against the quantum of interim maintenance fixed by the Judge on an application under S.82 of the Family Proceedings Act 1980 ("the Act").

The parties were married on 30 April 1982; they separated on 21 April 1995. There were two children of the marriage, both boys now aged 9 and 7. Despite their separation it will be convenient to refer to the parties as "the husband" and "the wife".

The husband did not object to the making of an order under S.82 but contested the amount properly payable. In his reserved judgment, the learned Family Court Judge ordered that the husband pay $700 per week for interim maintenance for the wife. This was in addition to the husband's responsibilities for child support which at the date of the hearing, namely 17 October 1986, had been assessed under the appropriate formula at $230 per week. Child support has now been reassessed at $300 per week and is being paid by the husband at that rate.

In a subsequent reserved decision issued on 10 December 1996, the learned Judge gave leave to the husband to appeal against his decision on the basis that, if leave were required in terms of S.71A of the District Courts Act 1948, then leave would be given; if leave were not

required, then the appellant had the right to appeal, having given notice within the appropriate time limits.

Counsel for the respondent did not submit that there was no jurisdiction to bring this appeal. It is not clear whether an order under S.82 is a final or interlocutory order for the purposes of appeal. There are two conflicting decisions of this Court, namely **Langridge v Langridge** (1986), 4 NZFLR 240 where Sinclair J held that an interim maintenance order was to be regarded as a final order for the purposes of appeal and **Norris v O'Sullivan** (1988) 5 NZFLR 24 where Holland J took a contrary view.

There is also **Colby v Forde** [1994] NZFLR 743 where I held that the decision of a Family Court to grant a rehearing of a paternity case was not a final determination or dismissal of the proceedings and was an interlocutory order. I held that there was no right of appeal under S.174(1) of the Act. Without pronouncing definitely, that decision may have been per incuriam. I do not there appear to have been referred to the decision of the Court of Appeal in **Craig v Craig** [1993] 1 NZLR 29 where that Court considered that there was a right of interlocutory appeal in family proceedings. I refer to the judgment of Anderson J at 37 which summarises the situation.

The parties in this case enjoyed a very favourable lifestyle prior to their separation. Both were qualified as physiotherapists; the husband conducted a physiotherapy practice whilst the wife looked after the children. The building from which the practice was and is conducted is partly rented. The parties lived elsewhere.

The former matrimonial home was sold; out of the proceeds the wife has purchased another home for herself and the children mortgage-free; she lived there at the date of the hearing before the Family Court. Outgoings on the mortgages on both the family home and the building housing the physiotherapy practice were paid out of the physiotherapy practice, although it is not clear how the mortgage on the matrimonial home could have been seen as a practice expense. However, that is not an issue for this Court. The amount of the mortgage outgoings which no longer have to be paid by the practice was noted by the Family Court Judge at approximately $33,000 net per annum after tax.

An interim maintenance order lasts only for six months. One of the aims is to enable one party (in this case the wife) to obtain fresh skills to assist her in fending for herself financially after the separation and the division of matrimonial property. As indicated, there was no dispute but that an order should be made. The only question was the amount.

At the time of the hearing, the total matrimonial assets had not been divided. There is going to be no dispute over the entitlement of each party to an equal division of the principal assets set out in the Family Court Judge's judgment. This would give each party roughly $675,000 on a division. That is only an estimate.

At the time of the hearing, the wife was in some employment, earning on her statement to the Court, $6,500 per annum which she applied in the establishment of the new business. However, it was nevertheless income.

The Judge looked at the income of the husband; after making some pejorative comments about various overseas trips of the husband's, the Judge assessed the approximate net profit of the physiotherapy practice at $79,000 per annum, comprising $50,000 net trading profit and $29,000 rent. He then added the amount that the practice was saving from not having to pay outgoings on the mortgages which increased the net profit by $49,500 per annum. He held that after taking into account tax and child support of $230 there would be approximately $37,600 income for each party - roughly $723 per week.

The wife sought $700 per week for her own maintenance and $300 per week for the maintenance of the children. She presented an affidavit showing her annual expenditure at $63,162 or roughly $1,316 per week. I have looked at the statement. It shows, for example, expenditure on

the house of $15,900 per annum including an item for house insurance of $3,000 which seems to me excessive. Other claims are on a fairly generous scale, certainly compared with most cases that one sees in Family Proceedings appeals in this Court.

The husband's claim for living expenses was likewise fairly expansive. He claimed expenses of $1,475 per week including child maintenance, school fees and maintenance for his wife of $323. Significant in this statement was a claim for rent of $480 per week. The husband claimed that he had to rent a house so that he would have somewhere suitable to take the boys during periods of access. After the separation, he had been living with a friend at a cost of $150 per week but that his reasonable needs were for a rented house as an interim measure; hence the principal item in his budget, apart from maintenance, was the rent of $480 per week.

There was some criticism made by counsel for the husband of the wife's budget but this criticism does not seem to have been given much weight by the learned Family Court Judge. The Judge did not, however, address the husband's needs; they might have been seem as extravagant, in the circumstances where there was far less money to go around than hitherto; the wife's were equally open to criticism. The Judge considered that equity demanded equality; that the amount of the husband's projected net earnings should be divided

virtually equally between the parties after he had paid tax and child support.

The Judge referred to the criteria under S.65 of the Act which relates to permanent maintenance as providing a guide for the exercise of his discretion on this occasion. S.65 provides -

> **"Assessment of maintenance payable to husband or wife -**
>
> (1) In determining the amount payable by one party to a marriage for the maintenance of the other party (whether during the marriage or after its dissolution), the Court shall have regard to:
>
> (a) The means of each party, including -
>
> (i) Potential earning capacity;
> (ii) Means derived from any division of property between the parties under the Matrimonial Property Act 1976; and
>
> (b) The reasonable needs of each party; and
> (c) The fact that the party by whom maintenance is payable is supporting any other person; and
> (d) The financial and other responsibilities of each party; and
> (e) Any other circumstances that make one party liable to maintain the other.
>
> (2) In considering the reasonable needs of each party pursuant to subsection (1)(b) of this section, the standard of living of the common household shall be disregarded unless, in the opinion of the Court, there are special circumstances.
>
> (3) No party to a marriage shall be liable to pay to the other party by way of maintenance (whether during the marriage or after its dissolution) any amount the payment of which would have the effect of depriving the first party, or any dependent person ordinarily residing with the first party, of a reasonable standard of living."

I note that under S.65, the Judge was entitled to look at: (a) the potential earning capacity of both parties;

(b) the income derived from any division of property; (c) the reasonable needs of each party and to disregard the standard of living of the common household unless there are special circumstances.

The discretion under S.82 is unfettered. See **Langridge v Langridge** (substantive hearing) (1987) 3 FRNZ 272, 275. There Smellie J quoted from **Ropiha v Ropiha** in the Court of Appeal[1979] 2 NZLR 245, 247 as follows -

> "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? By the same token, a defendant should not be called on to pay maintenance before there is any finding on the substantive proceedings 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 reasonably available to the applicant, private income, resources of capital, or welfare benefits provided by the State or some other body. This is subject, of course, in the case of welfare benefits, to consideration of the scheme of the relevant legislation or authority under which benefits are or may be provided."

Smellie J also decided, and I agree with him, that whilst the discretion is completely unfettered, there is no obligation for the Family Court Judge to take into account the principles under S.65 or any other section but there is no prohibition against doing so either.

Counsel for the respondent also referred in the context of maintenance to the recent judgment of the Court of Appeal in Z v Z [1997] NZFLR 241, 277 which of course referred to the permanent maintenance provisions; the quotation from the judgment of the Court may have some relevance -

> "First, the Court must determine the reasonable needs of each party. 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. Maintenance to meet the reasonable needs of a party may vary considerably. Furthermore, the fact that the Court is to have regard to the reasonable needs of "each" party, indicates that, to some extent, it will necessarily be examining their relative needs.
>
> Secondly, in S.65(1), Parliament has directed the Court to have regard to a number of factors in determining the quantum of the maintenance, of which the reasonable needs of each party is only one factor. While the reasonable needs of the party seeking maintenance may, as a matter of jurisdiction (under S.64(1), define the upper limit of the maintenance, these other factors must be taken into account when determining the quantum of the maintenance. Included among these factors are the potential earning capacity of the parties and the means derived by them from the division of matrimonial property under the Matrimonial Property Act.
>
> Thirdly, in considering the reasonable needs of each party the standard of living in the common household

> is to be disregarded only if the Court is not of the opinion that there are special circumstances. What constitutes "special circumstances" has not been suggested in the legislation. While it would be unwise to attempt to identify all of the situations which might arise and be considered "special circumstances", we would not consider that it was untoward to include within that phrase a situation in which the parties had been married for a long duration, the party seeking maintenance is no longer youthful, and the potential earning capacity of the parties is disproportionately out of balance having regard to the statutorily recognised contributions which each party has made to the marriage partnership."

The appellant seeking to appeal against the exercise of a discretion, particularly an unfettered discretion, has a difficult task. It has to be shown that the Judge either did not take into account relevant factors or took into account factors which should not have been taken into account, or that the decision is wholly wrong.

I am concerned about three items in the judgment which, cumulatively, bring me to the view that the discretion was wrongly exercised. First, the Judge does not address the budget of the appellant husband. He accepted the wife's budget without any demur, as he was entitled to do, but he did not say that he disapproved of the husband's budget. He had some criticism of the husband renting an expensive vehicle as a practice expense, in taking a number of overseas trips and in not disclosing certain income as a physiotherapist of a sporting team until shortly before the hearing.

However, I am left with his finding as to the likely income from the practice. As I have indicated earlier, no attempt was made to say that the husband's assessment of his expenses was incorrect. The Judge seems to have given little for the husband to live on and for other expenses, allowing that the husband out of roughly $720 per week has to pay $480 per week. The assessment of the husband's expenses had to take into account the reasonable needs of a professional man; whilst one acknowledges that some expenses can be claimed on the practice, even so, it seems that the Judge did not take into account sufficiently the husband's reasonable living expenses.

Secondly, the Judge did not take into account the earnings of the wife which are disclosed at $6,500 per annum or somewhere in excess of approximately $100 per week. I see no reason why these were not taken into account.

Thirdly, child support. The Judge thought that child support was going to be fixed at $230 per week; since his judgment, it has gone up to $300 per week; this would have some impact on the Judge's calculations.

Bearing in mind the Judge wished to be generous to the wife and that he did look somewhat sceptically at some of the husband's claims, I have decided the least damage that can be done to this exercise of the discretion is to

fix the amount of maintenance at $550 per week which I do. I vacate the order at $700 per week.

Counsel for the appellant complained that the husband had not been paying the interim maintenance ordered but was using for this purpose some money which was said to be owing to the wife under matrimonial property. The husband should realise the two matters of interim maintenance and matrimonial property are separate. He has an obligation to pay such maintenance to the wife as is ordered by the Court under S.82 for such time as the order lasts.

The appeal accordingly is allowed to the extent indicated. In the circumstances of this case I make no order as to costs.

R. L. Barker. A.C.J.