ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-007309

BETWEEN	G Appellant
AND	C Respondent

Hearing: 11 March 2009

Appearances: G Bogiatto for Appellant
G W O'Brien for Respondent

Judgment: 29 April 2009

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 29 April 2009 at 4:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

Solicitors: *G Bogiatto, P O Box 106120, Auckland 1143*
Fax: (09) 307-2725
Garth O'Brien & Associates, P O Box 79, Te Awamutu
Fax: (07) 871-7075

Introduction

[1] The appellant, Ms G and the respondent, Mr C, separated in 2004, having lived in a *de facto* relationship for three to four years. They have a daughter, A, born in June 2004. A lives in New Zealand with Ms G. Mr C lives in Australia. Mr C paid Ms G maintenance from 2005 to 2007 pursuant to an agreement reached following the end of their relationship. At the end of that period Ms G sought an order for further maintenance. Judge McHardy ordered that Mr C continue to pay maintenance of $990 per week until 21 June 2009, being A's fifth birthday. Ms G appeals this decision, asserting that:

a) The Judge incorrectly assessed the evidence in concluding that the period for which it was reasonable to require Mr C to pay maintenance was until 21 June 2009;

b) The Judge's finding that Ms G's decision to re-train was a lifestyle choice was contrary to the evidence;

c) The Judge failed to make his own assessment as to Ms G's reasonable needs and, instead, merely transposed the finding made by another Judge in the context of the earlier application for interim maintenance;

d) The Judge was wrong to refuse Ms G an award of costs.

[2] An appeal from the Family Court is an appeal by way of rehearing and the appeal court has the obligation of considering the issues afresh and reaching its own view on them.[1] The Family Court Judge saw and heard the parties give evidence and I have deferred to some of his factual findings. However, on the issues that arise in the appeal I am as well placed as the Judge to make my own determination.

Spousal Maintenance under Family Proceedings Act 1980

[3] The right to spousal maintenance following the end of a *de facto* relationship is governed by ss 64, 64A, 65 and 70A Family Proceedings Act 1980. Reflecting the

[1] *D v S* [2003] NZFLR 81 (CA) at [18]; *Stiching v Lodestar*[2007] NZSC 103

"clean break" principle, these provisions require parties to assume responsibility for meeting their own needs within a period of time that is reasonable in all the circumstances of the particular case.

[4] Under s 64(1) a party is only liable to maintain the other following the end of the relationship to the extent that such maintenance is necessary to meet the reasonable needs of the other party. This obligation only arises where the other party cannot practicably meet his or her own reasonable needs because of the effects of one or more of the circumstances specified in s 64(1)(a) – (c). These circumstances are:

a) ability of the other partner to become self-sufficient having regard to the effect of the division of functions within the *de facto* relationship, the likely earning capacity of each partner and any other circumstance;

b) responsibility for the ongoing daily care of any minor or dependent children of the relationship;

c) the standard of living enjoyed by the parties while they lived together;

d) the undertaking by one party of a reasonable period of education or training designed to increase the earning capacity of that party so as to reduce or eliminate the need for maintenance from the other party if it would be unfair in all the circumstances for the reasonable needs of the *de facto* partner undertaking the education or training to be met immediately by that partner because of the effects of any of the matters in (a) and (b) or because that partner previously maintained other partner during a period of training or education.

[5] S 64 is subject to 64A, which specifically provides that parties must assume responsibility for their own needs within a period of time that is reasonable in the circumstances. However, this requirement cannot be allowed to result in unfairness

or harshness for a party.[2] Under s 64A(2) one party may still be required to maintain the other if it is unreasonable for that party to do without maintenance and it is reasonable for the other party to provide maintenance because of the matters specified in s 64A(3)(a)-(c), which include the age of the parties, the duration of the relationship and responsibilities for minor children.

[6] The issues that arise in this case concern the assessment of the reasonable period for which Mr C should maintain Ms G because of her responsibilities for A and/or her decision to re-train, which precludes her from returning to work at present. There is no issue over Mr C's ability to meet an award of maintenance.

Is it reasonable to require Mr C to maintain Ms G while she re-trains and, if so, for what period?

[7] Ms G's claim for ongoing maintenance is based on her reluctance to work full-time while A is young and her assertion that there is no suitable part-time work available in her own field (human resources). She has decided to re-train as a lawyer in the expectation that that will allow her to work part-time and care for A. The Judge accepted that it was not possible to find suitable part-time work in her own field of expertise. There is no cross-appeal against that finding.

[8] It is notable that what Ms G now asserts as a reasonable period for Mr C to pay maintenance is quite different from her claim in the Family Court. In the hearing before Judge McHardy Ms G sought maintenance until 2020, by which time A would be sixteen. Her rationale for this claim was that by 2020 she would have completed her degree and would be self supporting (I do note that she proposed any maintenance during that period would be offset against her earnings). In this Court, however, Ms G seeks maintenance only until 2011, by which time A will be eight and Ms G will have completed her degree.

The previous arrangements between the parties

[9] Mr Bogiatto's first submission was that the period of time that was reasonable in the circumstances of this case was until 2011 when A turned eight.

[2] *Z v Z* 2 NZLR 258 at 293

This submission was not related to Ms G's decision to retrain but on what he said the parties intended. He submitted that the arrangements that the parties had agreed to showed a vision for A's upbringing that would have Ms G available to care for A until she was eight rather than being put into child care. Mr Bogiatto submitted that the Judge erred in concluding that Ms G:

> [46] ….has chosen to give [A] more priority than perhaps she had in mind at the time the termination agreement was signed.

[10] In 2005 the parties reached agreement (with the benefit of legal advice) that resolved property, maintenance and child support issues. Parenting arrangements were then also agreed upon and were the subject of consent orders made by the Family Court in Australia. Mr Bogiatto submitted that the arrangements the parties had agreed upon at the end of their relationship evinced an intention that Ms G would be A's primary caregiver and would be available to care for A herself until A was eight. This would preclude Ms G taking up either full time work or part-time work of any consequence.

[11] Under the consent orders relating to parenting arrangements A was to live with Ms G in New Zealand and Ms G would have sole responsibility for her day-to-day care, welfare and development. Contact arrangements were put in place that were to be effective until A turned eight. This period was nominated because eight was the earliest age under international aviation rules that a child could travel unaccompanied. Mr C was to have contact visits with A every third weekend from 6 pm on Friday evening until 4 pm Sunday evening. These contact visits were to alternate between New Zealand and Australia. On the weekends that contact was to occur in Australia Ms G was required to travel to Australia with A. Once A turned five she was to spend each alternate school holiday with her father, the order envisaging that Ms G would sometimes travel to Australia with A to deliver her for that purpose.

[12] Plainly, in order to deliver A to her father in Australia by 6 pm on a Friday evening would have required Ms G to have left Auckland on late Friday afternoon. Mr Bogiatto submitted that the structure of these arrangements precluded Ms G from obtaining fulltime or even part-time employment of any consequence and that it was

obviously contemplated by the parties that Ms G would not work fulltime until A was eight.

[13] As against that however, Mr O'Brien, for Mr C, pointed to the terms of the termination and child support agreements which, he submitted, envisaged that Ms G would return to work before A turned eight. Under the termination agreement, which dealt with property and maintenance, Mr C was required to pay maintenance of NZ$1,180 per week until 21 June 2007. In settlement of property issues he paid AU$300,000 by June 2006 and forgave an outstanding loan to a value of about $70,000. Mr C owned a property in Westmere and as part of the property settlement granted to Ms G the exclusive right to occupy that property for her lifetime. Ms G however was to assume responsibility for rates and insurance over the property. She was also obliged to meet repair and maintenance costs up to a certain level.

[14] The parties reached a separate agreement for child support. The sums were fixed at AU$370 per week until June 2009 (adjusted in accordance with the New Zealand CPI) and subsequently AU$500 per week until A turned 18, which would be 2022 (also adjusted in accordance with the New Zealand CPI). In addition, Mr C was to pay 50% of all school expenses, medical costs and extra curricular activities. Significantly, clause 3.5 of the agreement provides that:

> Until [A] commences kindergarten, [Mr C] shall pay or cause to be paid 50% of all reasonable childcare costs incurred by [S] up to a maximum of four days each week.

[15] Viewed overall, the agreements evince an intention that Ms G would not work fulltime until A was eight. Otherwise the arrangements that were the subject of consent orders in the Family Court would not have been practicable. However, the agreements do evince an intention or expectation that Ms G would return to part-time work at an earlier stage. There can be no other explanation for spousal maintenance payments ceasing in 2007 and provision of 50% of reasonable childcare costs up to a maximum of four days per week. The capital payment of AUS$300,000 was unlikely to produce income at the same level as the spousal maintenance that had been agreed on in the termination agreement. In the absence of ongoing maintenance payments the unavoidable conclusion is that Ms G intended to return to part-time work in 2007 to supplement the return available from the capital

payment. Significantly, this is precisely what Ms G states in her affidavit 21 August 2007 at [11]:

> I had hoped that once [A] turned three years old, I would be able to obtain part-time work in that field [human resources] to supplement my earnings from my capital but I do not believe that it was either the respondent or my expectation that I would work fulltime until [A] was around the age of eight.

[16] Based on the agreements between the parties I consider that both expected Ms G to be self-sufficient from mid-2007. If there is any basis for maintenance after that date it could only related to her decision to retrain. This was the approach that the Judge took.

Should Ms G be maintained while she retrains?

[17] There was unchallenged evidence that prior to A's birth Ms G had enjoyed a very successful career in human resources with the salary in her last such position in AU$160,000. However, part-time work in this field appears difficult to come by and short-term contract work requires a level of flexibility that, as a solo parent, Ms G cannot offer. Having described the difficulties she had obtaining suitable part-time work and her reasons for not wishing to place A in fulltime daycare in order to secure fulltime work, Ms G deposed that:

> [19] …..I believe I will need to re-train in order to have the flexibility and means to meet [A's] needs adequately…

[18] There can be no doubt on the state of the evidence that Ms G cannot return to human resources in a part-time capacity. Nor is it realistic for her to return to human resources in a fulltime capacity. That would require A to be placed in fulltime care until she starts school and, after she starts school, in after-school and school holiday care. There did not seem to be any suggestion in the evidence that such an arrangement would be in A's interests or that Ms G was acting unreasonably in resisting a return to fulltime work. Indeed, the Judge specifically found that that A should not have to be put in daycare for a significant period of time and that suitable part-time work in Ms G's own field was unavailable.

[19] Mr Bogiatto submitted in light of the evidence and the Judge's findings, the Judge's conclusion at [70] that Ms G's decision to retrain was a "life-style choice" was an error. Instead, he asserted that it was only viable option for Ms G, given her responsibilities for A and the fact that she could not rely on Mr C to meet any of A's day-to-day needs because he was living in Australia. I agree that there was no basis for concluding that the decision to retrain was made for reasons of life-style. Clearly, Ms G cannot resume her previous career so long as she has day-to-day responsibility for A, yet must return to work in some capacity to support herself and contribute to A's care. In these circumstances the decision to retrain was both reasonable and necessary.

[20] The real issue in relation to the issue of retraining is whether Mr C should have to meet the costs of her doing so. There are a number of competing factors. Ms G, of course, says that she simply does not have sufficient money from her existing sources to meet her necessary expenses and attend to her studies. In particular, she says that the suggestion that when A starts school in mid-2009 she will have more time is incorrect; A currently attends pre-school and attending school will only provide an additional 12 hours of uncommitted time, which Ms G says will be entirely taken up with her studies.

[21] Mr C maintains that Ms G ought to be able to meet her reasonable needs from her own income, since she was provided with a capital sum and she has a house provided, save for rates, insurance and some repairs and maintenance. She has options such as moving to a different house to reduce these costs. Mr O'Brien submitted that Ms G has divested herself of all capital since signing the agreement and made herself totally dependent on Mr C or the state and has unilaterally elected to re-train without seeking any form of employment.

[22] The Judge concluded that, as a result of Ms G's responsibilities to A it was reasonable for Mr C to maintain Ms G until A turned five. However, some of the findings on which he based this conclusion were inconsistent:

> [72] Having considered the circumstances of these parties and the policy of the legislation, I do not consider that it is reasonable that the applicant be maintained until 2020. That claim goes well outside the scope of this legislation when one considers that the applicant has the ability to engage in

> a career now which would meet her reasonable needs. Her unilateral decision to change careers cannot be seen as grounds for continuing spousal maintenance. The requirement to pay maintenance should not be seen as a punishment for the breakdown of the relationship or the failure of contact arrangements in regard to children. It has to be said that there is a hint of punishment in what the applicant seeks.
>
> [73] A should not have to be put in daycare for a significant period of time. The evidence suggests this would have occurred if the applicant had found work in her previous line of employment in human resources. This may have been a misjudgment on the part of the parties when they were entering into the termination agreement. Whether this justifies spousal maintenance continuing until [A] commences school at the age of five is a finely balanced matter.
>
> [74] However, given the present reality that the respondent for whatever reason is not able to assist with day-to-day care on any significant basis I accept that spousal maintenance should run until [A's] fifth birthday. Liability exists because of the applicant's present responsibility to [A's] care. This liability should not carry on once [A] is attending school. It is for the applicant to now re-assess her position and make the necessary adjustments envisaged by the legislation.

[23] The Judge, rightly, accepted that Ms G cannot find part-time work in her own field. He has also concluded, rightly, that A should not have to be put in daycare for a significant period of time. But these findings are at odds with the Judge's statement at [72] that Ms G has the ability to engage in a career now which would meet her reasonable needs. The findings should have led to the conclusion that Ms G was acting reasonably in retraining. Nor is there any rationale for limiting maintenance to the period until A commences school at the age of five. The difference between kindergarten and school hours does not make the resumption of part-time work any more practicable and, in any event part-time work would be precluded by Ms G's studies. I therefore consider that the Judge did make an error in this aspect of his judgment.

[24] The Judge was obviously influenced by the excessive nature of the claim as it stood in the Family Court and he certainly did not err in rejecting the suggestion that maintenance should be paid until 2020. However, on the evidence that he had before him he did make an error in finding that spousal maintenance was not justified beyond A turning five. Given the factual findings I have referred to the real issue is when Ms G could reasonably be expected to resume work in a part-time capacity. She is now two years into a law degree and will complete that in 2011. That, clearly,

is the time at which one could expect her to re-enter the workforce on a part-time basis. I therefore conclude that maintenance should be paid until 21 June 2011.

How much maintenance should be paid?

[25] In the Family Court Ms G sought a figure of $10,667 per month adjusted annually by CPI. That would produce an annual income of $128,000. In comparison, the agreed maintenance paid under the termination agreement between 2005 and 2007 was $61,360 per annum. By the time Judge McHardy heard the application Judge Fleming had determined that Ms G's reasonable expenses for the purposes of the interim maintenance order were $990 per week. Judge McHardy concluded that this was reasonable:

> [75] In assessing the applicant's needs I come to the same view Judge Fleming obviously did in relation to the interim spousal application. The applicant's budget is inflated. This cannot be justified by reference to a high standard of living. The budget contains items of expenditure that are in the nature of one-off payments, capital expenditure or costs that could be reduced. For instance, there has to be the possibility of the parties downsizing the Westmere home. If the applicant chooses not to consider that option then she can hardly expect that the respondent's liability will continue in respect of costs that could have been saved. On the applicant's figures the ongoing costs which could have been reduced are $48,000 per annum.

[26] The Judge did not embark on a line-by-line assessment of the budget items and simply fixed $990 per week as reflecting Ms G's reasonable needs for the purposes of maintenance. Mr Bogiatto submitted that the Judge should have made his own assessment of the reasonable needs, including taking into account the subsequent affidavit filed which updated Ms G's financial circumstances. He submitted that the reasonable needs were closer to $1,200 per week at a minimum, by reference to the schedule that had originally been annexed to Ms G's affidavit 22 August 2008.

[27] Looking at the schedule, there are two particular areas that are questionable. The first is house maintenance. A number of these items seem to me excessive and of a capital nature such as $8,000 each for carpet and curtains, expressed to be only Ms G 's share. The second item is legal expenses. In principle there is no reason that legal expenses should not be included in spousal maintenance, even if they are

directed towards litigation between the parties. On the other hand, Ms G is also seeking costs in this case and the respondent cannot be expected to meet the costs of litigation against him in the form of a maintenance order as well as paying court costs in relation to the same litigation. However, I signal now that I do not intend to interfere with the Judge's award on costs and therefore leave the legal expenses item in the budget. I would not, however, consider legal expenses to be an ongoing item.

[28] I am also mindful of the fact that Ms G has access to capital or income from capital that she received as part of her property settlement with Mr C and is able to make some contribution to her budget herself. I consider that for a person in Ms G's position, taking account of A's right to a reasonable standard of living in terms of housing and holidays, $1,100 per week would be reasonable.

Costs

[29] The final aspect of Judge McHardy's judgment that is the subject of appeal is his decision at [78] not to make an award of costs. Mr Bogiatto submitted that an award of costs should have been made because Ms G had succeeded in obtaining an order for spousal maintenance and had previously obtained an order for costs on the interim application heard by Judge Fleming.

[30] Judge McHardy did not give any reason for declining a costs award. I suspect, however, that he was significantly influenced by the excessive claim that had been advanced. Whilst it is generally the case that costs will follow the event and Ms G, having succeeded on her application for spousal maintenance, might ordinarily have had costs awarded in her favour, the level to which she succeeded was minimal in comparison to what she was seeking. Faced with a claim for maintenance at a substantial level until 2020, the respondent could hardly be criticized for opposing the application. Although Ms G did succeed in the Family Court, it was at a level much lower than what she had sought. It is relevant, too, that her success in this Court was at a level not dissimilar to the outcome in the Family Court. I do not consider that the Judge made an error in refusing to make an order for costs.

[31] As to costs in this Court, I have already signaled that part of the increase in the budget reflects an allowance for legal expenses. That being the case, it would be wrong to impose a costs award on Mr C and accordingly I make no order for costs in relation to this hearing either.

_____

P Courtney J