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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-4421

IN THE MATTER OF	the Family Proceedings Act 1980
BETWEEN	DCK Appellant
AND	RK Respondent

Hearing: 18 November 2009

Counsel: G L Harrison for Appellant
A H Bean for Respondent

Judgment: 20 November 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 20 November 2009 at 9.30am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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The appeal

[1] DCK and RK met in September 2005, began to live together on 26 December 2005 and married on 31 January 2006. They separated on 3 May 2009, when DCK left his wife to go to Spain.

[2] Not long after separation, RK sought an interim order for spousal maintenance. After a defended hearing, Judge McHardy ordered that DCK pay the sum of $10,000 per calendar month while RK remained in the family home; to be increased to $12,600 if she were to move elsewhere. In addition, DCK was directed to meet the reasonable costs of major dental work that RK wishes to have carried out.

[3] DCK appeals against the interim maintenance order made, in the Family Court at Auckland on 3 July 2009.

Submissions

[4] On behalf of DCK, Mr Harrison submitted that the award was too high and that the Judge failed to analyse critically RK's budgeted expenditure. He submitted that the Judge had failed to take account of the fact that she continued to live in a mortgage free home. While there was no evidence from DCK in opposition to the application (he was overseas at the time), Mr Harrison submitted that the Judge ought to have ordered a lower sum.

[5] Ms Bean, for RK, supported the Family Court's decision, for the reasons given by the Judge.

Appellate approach

[6] There was some debate between counsel as to the approach I should take to the appeal. Mr Harrison submitted that *Austin Nicols v Stichting Lodestar* [2008] 2

NZLR 141 (SC) applied and that I should look afresh at the application and form my own judgment on the issues addressed by the Judge. On the other hand, Ms Bean submitted that the decision to award interim maintenance was discretionary in character. In those circumstances, she submitted that the principles set out in *May v May* (1982) 1 NZFLR 165 (CA) applied.

[7] In my view, a Family Court's decision on the quantum of an award of interim maintenance is an exercise of a discretion falling within the *May v May* test. The Court of Appeal has held that the approach set out in *Austin Nichols* does not apply to discretionary decisions: see *Blackstone v Blackstone* (2008) 19 PRNZ 40 (CA).

[8] Once DCK accepted that the threshold for ordering interim maintenance was met, it was for the Judge to determine, as a matter of discretion, the amount to be ordered. The amount of interim maintenance to be ordered is something on which different judicial minds might reasonably differ; though, in any given case, there will be a range outside of which it would be unreasonable to go.

[9] Mr Harrison submitted that the approach adopted by Barker J, (in *Abercrombie v Abercrombie* [1997] NZFLR 666 (HC)) to an appeal from a spousal maintenance order suggested that the appeal process was more akin to that set out in *Austin Nichols*.

[10] I do not accept that submission. It is clear that Barker J, approached the family Court's decision as the exercise of an "unfettered" discretion (at 669) and determined the appeal on the basis of the *May v May* test. At 671, the Judge said:

> 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.

Factual background

[11] On the basis of the evidence before him, Judge McHardy found that when DCK left his wife on 3 May 2009 he did so "without warning". RK found a note

from DCK in the letterbox stating that the marriage was over. A "without prejudice" letter was located with the note, containing an offer to settle relationship property issues. Indeed, DCK had gone to the trouble of having a formal agreement drafted, signed by him and certified by a solicitor, as required by law.

[12] The "offer" remained open for 21 days. In his note, DCK added that, if the "offer" were rejected, a monthly payment he agreed to make of $3000 to RK would cease and her cellphone would be "cut off". RK did not accept the proposal. The cellphone account was, subsequently terminated.

[13] RK said that, when she married DCK she gave up employment to fit in with his lifestyle. The lifestyle the couple enjoyed involved much overseas travel and regular expenditure involving what ordinary New Zealanders would regard as large sums of money. RK placed a budget before the Court which included costs estimated at $18,000 to complete major dental work (for which temporary crowns are currently in place) and estimated legal and accountancy costs to be incurred over the next six months of $50,000. Her budget sought a periodic payment of $10,000 per month for so long as she remained in the unmortgaged family home, on the basis that it would be increased to $12,820 per month if she were to obtain alternative rental accommodation.

[14] A clothing allowance (to buy winter clothes - she had not spent a winter in New Zealand for some time) was also sought, in the sum of $50,000. Her estimated annual expenditure was $118,480.

[15] Mr Harrison criticised the budget as "extravagant". He submitted that a more reasonable budget would be $2400 per calendar month, to be increased to $2600 if alternative accommodation were required. On the basis of the former, the annual amount payable by DCK to RK would be $28,800.

[16] The issue of extravagance falls to be considered against the way in which the parties lived their married life. For example, while an allowance of $50,000 for clothes seems extreme, RK had the benefit of a similar allowance each year, when in Europe, of €20,000.

The Family Court Judge's decision

[17] Judge McHardy approached the case on the basis that an interim spousal maintenance award should provide for immediate financial needs arising to maintain the standard of living that existed before separation. In approaching the case in that way, the Judge properly identified the fact that he was dealing with parties who had never had to budget carefully: money was no object in meeting the type of lifestyle they enjoyed.

[18] The Judge referred to evidence that the former family home may be worth as much as $7,000,000 and the husband appeared to have an interest in a yacht moored in the Mediterranean that is hired out at between €35,000 and €50,000 per week. He pointed also to RK's clothing allowance of €20,000, while on their annual European holiday; as well as her an initial credit card limit of $10,000 per month - though this was later reduced to $3000 per month. That evidence supports his view that the couple lived "luxuriously".

[19] The Judge accepted that Mr Harrison's proposed budget might be seen as reasonable to parties in a comfortable lifestyle. However, he differentiated that position from those who enjoyed a "luxurious lifestyle", saying that RK should not be deprived of that lifestyle "overnight".

[20] The Judge formed the view that RK was entitled to a significant award of interim spousal maintenance. He considered $10,000 per calendar month to be reasonable, to be increased only if she were to vacate the former family home. The claim for dental costs was not allowed, in the form put forward by RK. The need for DCK to meet those costs was subject to the costs being "reasonable". No specific award was made in respect of anticipated legal or accountancy costs associated with relationship property disputes.

Analysis

[21] When a married couple separate, one spouse may bring a claim for maintenance against the other. The legal obligation of each spouse is to maintain the

other, to the extent that such maintenance is necessary to meet the reasonable needs of that person, where he or she cannot practicably meet the whole or any part of those needs because of specified circumstances: s 63(1) Family Proceedings Act 1980 (the Act). One of the circumstances in which an application can be brought involves the standard of living of the parties, while they lived together: s 63(2)(c).

[22] The obligation of one spouse to maintain the other ceases on dissolution of the marriage or expiration of a reasonable time, within which the maintained spouse must assume responsibility for meeting his or her own needs: ss 64 and 64A.

[23] On separation, a spouse may seek an interim maintenance order under s 82 of the Act. If interim maintenance were awarded, it continues in force for no more than six months. The order is designed to meet the reasonable needs of the applicant pending final determination of the proceedings or until the order sooner ceases to be in force: s 82(1) and (4). An interim maintenance order may be varied, suspended or discharged in the same manner as if it were a final order of a Family Court: ss 82(5) and 99.

[24] Section 82(1) and (4) of the Act provide:

> **82 Interim maintenance**
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> (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.
>
> ...
>
> (4) No order made under this section shall continue in force for more than 6 months after the date on which it is made.
>
> ....

[25] In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 293-295, the Court of Appeal reconsidered the approach that should be taken to spousal maintenance. Adopting views expressed in *Slater v Slater* [1983] NZLR 166 (CA), at 173, the Court considered the statutes dealing with matrimonial property and spousal maintenance

to be "closely related". Both were based on an "increasing recognition in all spheres of the equality of spouses and the pursuit of economic independence and personal and family fulfilment by wives remaining in or returning to the workforce as family responsibilities allow": at 293. More specific comments in *Z v Z (No 2)* were directed to the subject of spousal maintenance, post dissolution of marriage, the issue under consideration in that case.

[26] Although the Family Court Judge declined to make an order requiring DCK to meet anticipated legal and accounting expenses for foreseeable relationship property proceedings, there is authority for the proposition that jurisdiction to do so exists.

[27] In *B v B* [2008] NZFLR 789 (HC) at paras [16]-[21], Courtney J held that spousal maintenance could be used to ensure one party to the marriage had adequate ability to meet legal and accounting costs in relation to the inevitable relationship property disputes that would arise. She saw such expenses as "a natural consequence of separation, as much as the need for a party leaving the matrimonial home to purchase new furniture": at para [17].

[28] I agree with the Judge's characterisation of the couple's pre-separation lifestyle. That is relevant to the quantum of an interim maintenance award. The Judge was alive to the fact that any award would enure for no more than six months. The award was made on the basis of evidence adduced only by RK. If, either on an application to vary the interim maintenance order or on a hearing of the spousal maintenance application, evidence were to be adduced by DCK casting doubt on the veracity or reliability of information provided by RK, the Court would have a sufficient discretion to adjust any order to reflect any excessive amount paid during the period of the interim maintenance order.

[29] Mr Harrison had a basis to submit that, on ordinary standards, the budget presented by RK was excessive. But, judged against the nature of the pre-separation lifestyle, the budget was not unreasonable. RK is entitled to maintain her previous lifestyle, in the immediate future, while she takes time to re-establish herself financially and take responsibility for her own financial situation.

[30] In the context of the family's previous expenditure, while DCK and RK were living together, an interim award of $60,000, payable over a period of six months, is not disproportionate or unreasonable. While the Judge refused a specific application for moneys to meet anticipated legal and accounting fees, it is clear that such costs will need to be met out of the interim maintenance ordered. The amount of money available for use for other budgeted items (eg clothing) will be reduced by those costs and expenses.

[31] Although DCK has also been ordered to meet the reasonable costs of dental expenses, the actual costs are not known at this stage and must, in any event, be reasonable.

[32] I do not accept Mr Harrison's submission that the Judge failed to take into account the fact that RK was receiving the benefit of living in a mortgage free home. The fact that the Judge directed that the interim maintenance payment would increase if she were to move to rented accommodation amply demonstrates that he did take that factor into account.

[33] The prerequisites for an interim maintenance order were accepted. The issue was and is quantum. That is, as I have said, a discretionary decision.

[34] I discern no error of principle in Judge McHardy's approach. Contrary to Mr Harrison's submissions, I hold that he did analyse budgetary issues sufficiently. While guided primarily by the lifestyle enjoyed prior to separation, that was an approach he was entitled to take; and one with which I agree.

[35] The Judge did not take account of any irrelevant facts. He did not fail to take account of any relevant facts. His decision was supported by the evidence. It cannot be characterised as plainly wrong.

[36] For those reasons, I decline to interfere with the exercise of his discretion.

Result

[37] The appeal is dismissed.

[38] DCK is ordered to pay costs to RK, in respect of the appeal. Costs are awarded on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar.

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P R Heath J

Delivered at 9.30am on 20 November 2009