Interim maintenance orders — how many can the Family Court make?

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For the previous 35 odd years, the courts have proceeded on the assumption that there is jurisdiction to make a second award of interim maintenance in proceedings[1], although the position has been less than clear.

The purpose of interim maintenance is "*obvious enough*" in the words of the Court of Appeal.[2] It is to protect an applicant's position, who does not otherwise have the means to meet their needs, pending the determination of substantive maintenance proceedings.[3]

Unlike substantive maintenance, the interim maintenance provisions in the Family Proceedings Act 1980 do not contain any express conditions or criteria.[4] The Family Court has an unfettered discretion as to whether an order ought to be made and, if so, the quantum.[5] It depends on the circumstances of the particular case and the court "*must do what it thinks just*".[6] The only restriction is that an order can only be for six months.[7] What does this restriction mean exactly?

The issue was fully argued for the first time in late 2015 in the Family Court at Auckland.[8] His Honour Judge de Jong concluded that there was jurisdiction to make a second award. Around the same time, in late 2015 the Family Court at Greymouth considered the issue and decided there was no jurisdiction. On appeal, the High Court determined otherwise.[9] These decisions are discussed below.

Zola v Abel

In September 2015, the Family Court at Auckland considered whether a second interim spousal maintenance order could be made.[10] This was the first time the issue had been fully argued, previous cases having just assumed there was jurisdiction for such an order.

Mr Zola and Ms Abel had been in a de facto relationship for around 10 years. They had three dependent children, the youngest having Down Syndrome. Mr Zola worked as a general practitioner but claimed that he had a condition which affected his ability to work. The court granted Ms Abel interim maintenance of $1,250 per week. Ms Abel then filed a without notice application for a second interim maintenance order, which was granted on the papers, increasing her interim maintenance to $1,421 per week.

The Family Court observed that the purpose of interim maintenance is to be a "*stop gap measure*" that addresses "*any injustice or hardship which may arise between the time the substantive spousal maintenance application is filed and the substantive hearing*"[11] It was held that a second spousal maintenance order could be made. The six-month time limit was not designed or intended to preclude a further application. Rather, it was just to ensure that the court had the benefit of up to date evidence. The court accepted that there may be a variety of reasons why a final spousal maintenance hearing is delayed.

Cooper v Pinney

Three months later in December 2015, the Family Court at Greymouth considered the same issue.[12] Ms Cooper and Mr Pinney had been in a de facto relationship for nine and a half years. The Family Court made an order by consent for interim maintenance of $25,000 over six months. Ms Cooper was given a hearing date less than three months later, but instead of pursuing her substantive application, she filed a second application for interim spousal maintenance.

The Family Court observed that if an applicant believes there is a tactical advantage in delaying the substantive maintenance hearing, they are free to do so, but they cannot expect interim spousal maintenance to be extended as a stop-gap measure. The court considered that parliament had intentionally limited the duration of interim maintenance orders and applicants are expected to bring substantive maintenance proceedings to a hearing within six months. The Greymouth registry was easily able to offer hearing dates within that time frame.

The court also pointed to the fact that if six months turned out to be insufficient, the court was empowered at the hearing of the substantive application, to award past maintenance. The court was concerned that subsequent interim maintenance orders could be made where there was no jurisdiction to make final orders and more than two hearings might be required, causing unnecessary expense.

On appeal, the High Court at Greymouth reversed the Family Court's decision.[13] The starting point for the High Court was that the interim maintenance section does not expressly prohibit a further application for interim maintenance. The court ran through the principles that are mandatory for substantive maintenance applications and relevant to interim applications.[14] It expressed the purpose of maintenance as being:[15]

> "*...where, as a result of the end of a relationship, the resulting circumstances render one party financially vulnerable in terms of being able to meet their reasonable needs, the Act provides a comprehensive scheme for maintenance. Its broad purpose is to assist in meeting the reasonable needs of a party who cannot practicably provide for those needs in a way that is just to both parties*".

The court concluded that it was:

> "*unable to discern a parliamentary intention to deny the Court the flexibility to meet the wide range of circumstances with which it may be presented to achieve the Act's purpose. This may include the need to consider exercising its discretion on a second application for interim maintenance*".

This conclusion is in line with the Court of Appeal's understanding of the purpose of interim maintenance.[16] The High Court confirmed the position courts had previously taken, that there is jurisdiction to make further orders for interim maintenance. The court found that section 82 did not restrict the Family Court to a single exercise of its discretion to order interim maintenance and remitted the proceedings back to the Family Court. Continued on next page...

Who should be parties to the proceedings?

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Mary called last Tuesday saying that she had just read the article in *Law Talk* (Issue 90, page 29) about the joining of adult children to their parents' relationship property proceedings as beneficiaries of a trust. She asked if from now on we should be expected by the court to serve the proceedings on people the applicant has not named as parties.

We talked generally about why any person should be named and served as a party and agreed that a party is a person who is going to be affected by the judgment when it is given. Usually this is a person against whom the remedy is sought. Proceedings under the family law Acts determine disputes for which the boundaries are not always that clear: the remedy may affect directly or indirectly a large number of people. In relationship property cases this could include trustees, beneficiaries, creditors, children, even elderly parents living with their children. In COCA proceedings this could include half siblings, grandparents, step parents, even close relatives and more distantly particularly for rural schools, the children in those schools could be affected by the decision being made (rule 416(2)).

However in most cases the appropriate parties are just the father and the mother or parties to the relationship/marriage and they should be the only ones served with the proceedings.

Service of proceedings

If one looks at the problems simply, it is only a question of who should the proceedings be served on. Rule 36 of the Family Court Rules require service of the documents to be made on any of the parties and any persons who may be "interested in or likely to be affected by the application". This would suggest that every case would have a carnival of people served with the proceedings. This rule is modified by rule 37 which recognises where there is a statutory provision regarding the service of documents.

COCA proceedings are provided for in rule 416 (2).

The rules do not establish the status of the person served with the documents or what entitlements they may have to be heard in any proceedings. It is also not clear whether or not they are parties to the proceedings once they have been served.

Parties to proceedings

Most family law Acts provide for who may apply for an order under that statute. The person making the application must have an actual contingent legal interest in the proceedings.

The respondent is somebody who is one party who some relief is claimed against; that is to say you can have any number of respondents who are likely to be affected. Equally a respondent might be a person whose presence is necessary to enable the court to make a decision clearly and effectively in the proceedings and to prevent the multiplicity of proceedings. A respondent might be joined to prevent an injustice and to give them an opportunity to be heard.

If a person is only indirectly interested in proceedings, they should not be added as a party and it must be necessary in terms of the result to have them joined as a party. You shouldn't simply join people to proceedings to get discovery.

The whole purpose of joining a person to proceedings is to enable them to file a defence and to preserve their rights. Joining parties will and can only extend litigation and this may mean that your client is being team tagged in cross examination.

It is presumptively clear that you should not join a party to proceedings against whom no relief can be granted. If this particular court, in these particularly proceedings has no jurisdiction to grant the relief being sought then the party should not be joined in the proceedings and concurrent proceedings should be taken in a court with appropriate jurisdiction and those proceedings heard at the same time or in such a way as to avoid complications.

The procedure to be followed for adding a party is an interlocutory application on notice to the other parties.

Conclusion

If these propositions are correct, then in every proceeding the applicant should be required to apply for directions as to service and show why a person or group of people is to be or not to be included in the proceedings; how they are relevant to the issues before the court; and how they will or will not be interested in or affected by the proceedings.

So does the decision in *H v R 2017 NZFC 761* actually make a difference? The answer is probably not. However, there is no longer a presumption that the parties will only be just mum and dad, or partners to a relationship. The Family Court can only do justice between all parties whose claims to rights are within the jurisdiction established by the particular family law Act.

INTERIM MAINTENANCE ORDERS — HOW MANY CAN THE FAMILY COURT MAKE?, *Continued ...*

1 *Cooper v Pinney* [2016] NZHC 1633 at [46].
2 *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.
3 *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.
4 Section 82(4) of the Family Proceedings Act 1980; *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.
5 *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.
6 *Ropiha v Ropiha* [1979] 2 NZLR 245 at 247.
7 Section 82(4) Family Proceedings Act 1980.
8 *Zola v Abel* [2015] NZFC 9058.
9 *Cooper v Pinney [2016] NZHC 1633.*
10 *Zola v Abel* [2015] NZFC 9058.
11 *Zola v Abel* at [21].
12 *Cooper v Pinney* [2015] NZFC 511.
13 *Cooper v Pinney* [2016] NZHC 1633.
14 At [23].
15 At [32].
16 At [34], in *Rohipa v Rohipa.*