

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-006546**

IN THE MATTER OF s 174 of the Family Proceedings Act 1980

AND

IN THE MATTER OF s 39 of the Property (Relationships) Act  
1976

BETWEEN LESLEY ROSALIND RAWLINGS  
Appellant

AND DAVID ERIC RAWLINGS  
Respondent

Hearing: 11 November 2008

Appearances: R C Knight for Appellant  
L J Kearns for Respondent

Judgment: 11 November 2008

---

**ORAL JUDGMENT OF VENNING J**

---

Solicitors: Peter E Newfield, Auckland  
Shieff Angland, Auckland  
Copy to: R C Knight, Auckland  
L J Kearns, Auckland

[1] This is an appeal from a decision of the Family Court declining the appellant's application for spousal maintenance and an interim occupation order. The appeal has been allocated a fixture for 26 February next year.

[2] The applications before the Court today are:

- Application for waiver of security;
- Application for a priority fixture;
- Application to adduce further evidence on the appeal.

### **Waiver of security**

[3] Security is required in appeals to ensure that a successful respondent is not out of pocket in the event the appeal fails. Generally security will be ordered as is provided for in the Rules.

[4] In the present case, however, the parties have substantial issues in relation to the matrimonial property to be resolved between them. On any view of it there will be a significant sum of money available to them both at the end of that process. In the circumstances of this case I accept, given the appellant's present financial situation, it would not be in the interests of justice to require security. I do not accept the submission that her counsel should provide security.

[5] I make an order waiving security for costs in this case. In doing so I make it clear that I anticipate if the appeal is unsuccessful then any award of costs in the respondent's favour will be a matter taken into account on the ultimate division of property.

### **Priority fixture**

[6] The appellant makes application for a priority hearing of the appeal. Counsel observes the matter is swift-track and refers to the evidence of Dr Cutfield. Dr

Cutfield has given evidence of the appellant's medical condition, particularly the stress on the appellant, which impacts upon her diabetes control. Diabetes is a condition she has suffered from for a number of years.

[7] While I accept that the appellant is subject to stress pending the hearing of this appeal I note that the doctor observes that ideally the best outcome for the appellant would be a settlement of all outstanding matters between her and the respondent. That is undoubtedly the case. The appellant and respondent should focus their attention on resolution of those substantive issues.

[8] In relation to this particular appeal the difficulty is, and I understand counsel to acknowledge it, that the Court simply does not have alternative hearing dates earlier than the date allocated. The appeal was first lodged in October. The fixture date for February was allocated at first call. Taking into account the Christmas vacation period the appeal will be heard within three months or so of being lodged.

[9] There are also the interests of other litigants before the Court to be considered. They also, for a variety of reasons and in a number of different ways, are subject to stress while awaiting hearing.

[10] In the circumstances I am not prepared to direct a priority fixture in this case. The fixture date allocated remains but I direct that if a date becomes available earlier in February the Registrar is to contact counsel and if they are available then that date may be allocated for the fixture. I note that a half day will be sufficient for this appeal.

### **Further evidence**

[11] The last issue before the Court is the appellant's application to adduce further evidence on the hearing of the appeal. Rule 716 of the High Court Rules applies, particularly subclause (3).

[12] Leave will be granted to adduce further evidence on the appeal only if there are special reasons, if for example the evidence relates to matters that have arisen

after the date of the decision appealed against and that may be relevant to the determination of the appeal.

[13] The evidence in the present case relates to the applicant's financial circumstances. She has deposed that at the time of the interim maintenance hearing the respondent was paying all fixed and recurring outgoings as well as paying her an allowance of \$625 a month. Out of that allowance she paid her superannuation, life insurance and personal expenses. She says that on 9 September she received an email from the respondent in which he signalled his intentions to make some alterations to finances. The effect of that would have been to reduce her financial support by \$625 a month. She also notes counsel's reference to her being in receipt of National Superannuation. She says that is not correct.

[14] The respondent opposes the introduction of that further evidence and has himself deposed that while he sent that email threatening to reduce funding, subsequently he has advised that while he is not prepared to continue payment of her salary from the practice or service her superannuation he was prepared to allow the appellant to continue to have access to the 03 and flexi accounts and both credit cards on the basis they were "sensibly used". He says he continues to meet all household expenditure to a total of \$1,413.00 per month, including food.

[15] The evidence the appellant seeks to introduce is fresh evidence. It is directly on the issue of her current financial circumstances. It is a matter that may be material to the hearing of the appeal.

[16] During the course of submissions counsel for the appellant suggested that the appellant does not accept the respondent's reply to her affidavit and wished to further clarify the matter.

[17] In my assessment the appropriate way forward is to grant leave to the appellant to adduce further evidence restricted strictly to the issue of her financial position since the hearing in the Family Court and directed at the issue identified in the letter from the respondent and the respondent's reply. Those matters could be material to the determination of the appeal as they relate to her application for

interim maintenance. The respondent, however, must be entitled to reply and I will make provision for that.

[18] Leave will be granted on that limited basis to adduce further evidence.

### **General discussion**

[19] During the course of the hearing this morning Ms Kearns indicated that the respondent wished to advance an overall resolution of issues. That undoubtedly would be in the interests of both parties. Ms Rawlings' own doctor is also of that view. To advance that issue and to reduce unnecessary expense to the parties counsel have agreed that the existing timetable could be varied so that the focus of the parties, at least between now and Christmas, could be on a resolution of substantive issues rather than preparation of this appeal, which if substantive issues can be resolved, would be unnecessary.

[20] I vary the existing timetable as follows.

- a) The existing fixture for 26 February 2009 at 10.00 a.m. (half day) is confirmed subject to the allocation of an earlier fixture in February on the basis set out above.
- b) The appellant is now to file and serve the common bundle and submissions by Tuesday 27 January 2009.
- c) The respondent is to file submissions in response by Tuesday 3 February 2009.
- d) The appellant's further evidence, which is to be restricted to the matters identified above, is also to be filed and served by way of affidavit on 27 January 2009.
- e) Any response by the respondent is to be filed and served by 3 February 2009.

## **Costs**

[21] Costs on the applications before the Court are to lie where they fall.

## **Conclusion**

[22] I endorse counsels' suggestion that the parties' focus should be on the overall resolution of issues between them. Both parties to this proceeding are fortunate in that they are represented by experienced and responsible counsel. They should take counsels' advice on the issues of an overall settlement.

---

Venning J