NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2015-009-000647
[2016] NZFC 243

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	KERRY DELANY Applicant
AND	TEGAN MULLOY Respondent

Hearing:	14 January 2016
Appearances:	D Draviztki on behalf of C Moore for the Applicant Respondent appears in Person
Judgment:	14 January 2016

ORAL JUDGMENT OF JUDGE E SMITH

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[1] There is currently before the Court an undefended application brought by the applicant for maintenance with respect to the parties' two children pursuant to s 145(C) Family Proceedings Act 1980.

[2] By way of background the applicant and respondent are the parents of two children being Craig Delany-Mulloy, born [date deleted] 2009 and Jonah Delany-Mulloy, born [date deleted] 2011.

[3] The parties were resident in Ireland and are said to have separated in 2012. After separation the applicant mother assumed the full-time care of the children and her evidence suggests father had them for approximately three hours per week.

[4] The respondent father left Ireland in about March 2014 and came to New Zealand. He obtained a work based work visa the applicant thinks by way of [occupation details deleted], or at best to her knowledge, that was the employment he sought. She says it is a condition of his work visa that he has work and is employed in New Zealand.

[5] The evidence of the applicant is that she has not received any child support directly from the respondent but at times has been in receipt of the requisite benefits in Ireland.

[6] The evidence is that when the respondent left for New Zealand in March 2014, he said to her that he would provide for the children. He has provided no maintenance whatsoever for either of his children since March 2014.

[7] As a result the applicant filed an application for a request for recovery of international maintenance, particularly pursuant to ss 145 and s 145C Family Proceedings Act 1980. That application was filed on 3 June 2015. I am satisfied it was served on the respondent on 7 July 2015. He has not filed any notice of defence, or response or affidavit.

[8] Accordingly, the matter comes before me by way of formal proof. I am satisfied a notice of the formal proof fixtures, first, for the one in December which

could not proceed, and then for today's date, was sent to the respondent at his last known address for service.

[9] Present today has been Mr Draviztki on instructions from Ms Moore who appears for the Central Authority for the applicant.

[10] There is no appearance for or by Mr Malloy and I reiterate he has filed no proceedings or documents at all.

[11] Therefore, the matter proceeds on the uncontested evidence of Ms Delany in that regard.

[12] I am satisfied that the jurisdiction confirmed by s 145 Family Proceedings Act has been established in that I have considered the certificate by the Secretary of Foreign Affairs and Trade of New Zealand confirming Ireland is a party to the United Nations Conventions on the recovery abroad of maintenance.

[13] I accept the uncontested evidence of the applicant in her affidavit of 20 March 2015 and her updating evidence albeit as sworn by the affidavit by Ms Fiona Burns of 3 December 2015.

[14] The Court therefore, has to determine whether in the circumstances it is prepared to make a maintenance order as sought and if so, at what amount including whether the Court will exercise its discretion for a lump sum payment of past maintenance which is also the application of the applicant. In that regard the considerations that a Court must consider are as outlined in s 145C of the Act.

[15] Firstly I am satisfied pursuant to s 145(C)(1), that both of the parties are the parents of these two children and are liable to maintain them until foremost they are 16, although the applicant deposes that the children are likely to remain at school until they are 18 and 17. Jurisdiction being found for the making of a maintenance order, the amount payable is at the discretion of the Court but it is not an unfettered discretion in the sense that the Court must have regards to all relevant circumstances affecting the welfare of these two children, but particularly including their

reasonable needs and the manner in which they are being educated or trained as is mandated at s 145C(1) of the Act. Further the Court, in exercising its discretion, must have regard to those matters that are applicable as outlined in s 145C(3)(a) to (h) of the Act.

[16] In considering all of those matters in s 145C(3), I find the following. In coming to my decisions it will be obvious that given no appearance by the respondent or filing of documentation by him, there is a complete absence of evidence supplied by him as to his circumstances, his needs, his means, but I agree with the advocacy of Mr Draviztki that he should not benefit from his unpreparedness to engage in these proceedings and the Court, therefore, must simply use its endeavours to find out the best evidence possible. I am also satisfied significant efforts were made to engage the respondent in taking a meaningful part in these proceedings not only by the clear service of them on him, but also the correspondence that was sent through counsel inviting him to provide statements of means, income assets and to engage in the process that he has not responded to. If this means the Court does not take into [consideration] circumstances he would want to, that is of his making.

[17] Firstly in terms of the means including potential earning capacity of each parent, I am satisfied that the current earnings of the applicant total some €485.91 per week. That is an amalgamation of in essence her part-time salary, a social welfare benefit, a rent allowance and some child benefits as she deposes. I consider her capacity is to a degree limited by the age and stage of the children and her work skills.

[18] In terms of father's means and potential earning capacity, there is little or no information. The best I have is that deposed by the applicant that the respondent came to New Zealand on a work approved visa for the purpose of [occupation details deleted] or similar. I am satisfied he would have had to have employment or continue to have employment for that work visa to continue. The applicant knew he was going to engage in that type of work.

[19] The only information the Court has is some cursory exploration the applicant has undertaken or the type of salary terms and conditions an [occupation details deleted] or an [occupation details deleted] might expect in New Zealand. In that regard I refer to exhibit E, of the affidavit of 3 December 2015.

[20] Roughly that information suggests someone working in that area might expect to receive New Zealand dollars, $25 to $32 per hour for a 50 to 60 hours week. Work of that type similar or associated may or course earn somewhat less or somewhat more depending on a whole host of circumstances.

[21] If, however, one takes say $30 per hour for a 50 hour week, it would render gross to the respondent approximately $1500 per week and gross $78,000 New Zealand dollars per year. While that particular arithmetic may, of course, change depending on work conditions (both up and down) what I do find is that the respondent clearly has that potential earning capacity whether he is exercising it or not.

[22] In terms of the reasonable needs of each parent I take into account as uncontested the outgoings of the applicant at some €469.79 per week. Those costs, of course, include the costs she sustains on behalf of the children. There is at this time only a very small amount of funds available to the applicant per week that are not consumed by her living costs and, of course, any contingency in her life, unexpected bills or the like, would quickly assume that.

[23] I know nothing of the reasonable needs of the respondent.

[24] With respect to support, clearly the applicant is supporting the two children without any compensation or contribution from the respondent. There is no information if the respondent has a dependent partner with children or others.

[25] In terms of contribution, the applicant is solely contributing to meeting the complete needs of the children in all of their daily outgoings and future costs.

[26] The respondent has failed to contribute in the past in any way whatsoever and he has failed to meet his obligations to maintain the children in that regard.

[27] I have also considered the applicant's capital position in terms of any assets and they are minimal given she rents the property and all that she likely owns are the purchases of day-to-day care and furniture. She has not deposed of any investments or any other capital items that I take into account. I repeat, I know nothing of the respondent's capital or asset position. Similarly I do not know if he has income from other sources.

[28] Clearly the children have no ability to earn any income.

[29] When I consider all of those matters I am satisfied this is a matter where there must be an award of maintenance to the applicant. Without, there is clearly an appreciable risk the respondent will make no contribution.

[30] In terms of the quantum, the applicant claims that a reasonable contribution by the respondent would be €80 Euros per child per week (€160 Euros per week). At today's New Zealand conversion that approximates to some $269.06 New Zealand.

[31] It is not for this Court to simply assess what the respondent would be required to pay in New Zealand Child Support. It might be a matter that helps in terms of indication but it is not required or should it in and of itself make any award that reflects exactly what his child support calculation might be in New Zealand. That said, simply as a very thumbnail sketch to give a sense of parameters, if the respondent has earning capacity of $78,000 on an estimated basis (I continue to acknowledge it could be less or more), a New Zealand Child Support calculation for someone earning that amount per year or not in a relationship and has no dependents and paying child support for two children would render him having to pay child support of NZ$295 per week. That is only slightly more than the $269 New Zealand dollars that €160 Euros would render him.

[32] For my part there are contingencies and I am going to make some allowance for them. In the round, therefore, I do not think it would be inappropriate having

regard to the welfare and interests of these children a mandatory matter that I take into account that the respondent pay New Zealand dollars $250 per week for two children (that is $125 New Zealand dollars per child). That will be the future maintenance order that I make.

[33] In terms of past maintenance it is always difficult to assess but I am of the view that this respondent knew he had obligations to pay maintenance. He professed that he would and he has roundly taken no steps. He comes to New Zealand on a work visa. He must have had reasonable income or potential earning capacity available.

[34] I am going to set past maintenance from the time he left Ireland, say, in March 2014 to today's date of past maintenance of 88 weeks at $250 per week, gives a total of $22,000 New Zealand dollars. For the above reasons, therefore, with my thanks to counsel I make the following orders and directions:

(a) There shall be accordance with the Act, an order and a lump sum past maintenance against the respondent in favour of the applicant in the sum of New Zealand dollars $22,000, payable within 14 days of today’s date (s 145G(3))..

(b) There shall be an order for maintenance from today's date for each of the children per week of $125 (that is in total $250 New Zealand dollars per week for both children).

(c) I direct that Ms Moore prepare the requisite for sealing and file the same.

(d) I being satisfied that it is likely that these children shall be in satisfactory education until they are 18, I direct that this order shall cease to have effect in respect of each child when they become 18 unless otherwise varied, discharged or extended prior.

E Smith
Family Court Judge