EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, 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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT ALEXANDRA

FAM-2016-002-013
[2017] NZFC 1369

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	COMMISSIONER OF INLAND REVENUE Applicant
AND	[TOLANI AUTAGAVAIA] Respondent

Hearing:	In Chambers
Appearances:	On the papers
Judgment:	27 February 2017

RESERVED JUDGMENT OF JUDGE J J D STRETTELL

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[1] The Commissioner of Inland Revenue has sought to have me recall a decision I made in regard to an application for a Warrant to Seize Property under Section 183 Child Support Act 1991. When this matter was originally referred to me, I considered that the matter should proceed on notice. The basis of that decision was that the application for warrant did not fall within the rules of the Family Court, in particularly Rule 24(1) and 24(2) – (applications that may be made without notice).

[2] The Child Support Act a warrant (s 183) states:

> **183 Warrant to seize property**
>
> (1) Where any financial support that is payable by any person under this Act (and any penalty or interest imposed thereon under this Act) is in arrear and unpaid for not less than 14 days, a District Court Judge may issue a warrant to seize property against that person for the amount unpaid, or for so much of that amount as for the time being remains unpaid.
>
> (2) Every such warrant to seize property shall be in the prescribed form, with any necessary modifications.
>
> (3) Except to the extent that they are modified or varied by this section or by any rules of procedure made under this Act, the provisions of the [District Court Act 2016] that apply to warrants to seize property shall apply, with any necessary modifications, in respect of a warrant to seize property issued under this section.
>
> (4) For the purpose of executing any warrant to seize property, the bailiff executing it may at any time enter on any premises, by force if necessary, if the bailiff has reasonable cause to believe that the property in respect of which it is issued is on those premises:
>
> Provided that if any person in actual occupation of the premises requires the bailiff to produce evidence of his or her authority, the bailiff executing the warrant shall produce the warrant before entering on the premises.
>
> (5) Where a person against whom a warrant to seize property is issued pays or tenders to the bailiff executing the warrant the sum or sums therein mentioned together with the expenses of the seizure of property up to the time of the payment or tender, the warrant shall be deemed to be satisfied.
>
> (6) Where goods have been seized under a warrant to seize property and some third person claims to be entitled to the goods either as owner under a hire purchase agreement or under a bill of sale or otherwise by way of security for a debt, a Court presided over by a Family Court Judge or District Court Judge may order a sale of the whole or part of the goods upon such terms as to payment of the whole or part of the secured debt or otherwise as the Court thinks fit, and may direct the application of the proceeds of the sale in such manner and upon such terms as it deems just.

> (7) The surplus of the sale, if any, shall be handed by the bailiff to the Registrar, who shall pay the amount to the person against whom the warrant to seize property is issued.
>
> (8) Repealed
>
> (9) No seizure of property made under the authority of this Act shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, by reason of any defect or want of form in the warrant to seize property, nor shall any such person be deemed a trespasser from the beginning by reason of any irregularity afterwards committed by that person; but all persons aggrieved by any such defect or irregularity may recover satisfaction for the special damage by action at law.
>
> (10) [Section 175 of the District Court Act 2016 does not apply in relation to a warrant to seize property issued under this section.]

[3] As counsel for the Commissioner acknowledged in latter submissions there is no express provision in the Family Court Rules or the District Courts Act 1947 about how a request to issue a seizure warrant is to be handled.

[4] I invited initially the Commissioner to advise whether he wished to proceed on notice in respect to the application for a warrant.

[5] In response, counsel sought to have me review my initial decision on the basis that for reasons later referred to, the application should proceed without notice or be refused.

[6] The initial issue that arose out of the Commissioner's request, was whether in the circumstances the matter was res judicata and therefore not capable of review.

[7] Having considered the matter, however, I am satisfied that in the circumstances I am able to review the decision and recall the decision based on rule 11.9 of the District Court Rules 2014 which states:

> A judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[8] Additionally, the Court has inherent jurisdiction to revisit a decision in exceptional circumstances where required by the interests of justice.[1] The issue does raise matters of particular and relevant public interest given such applications under

[1] *R v Smith* [2003] 3 NZLR 617.

s 183 are not specifically subject to or dealt with under the District Court Rules or Family Court Rules or Child Support Act 1991. It is apparent also that as noted in *Leigh v Commissioner of Inland Revenue*: [2]

> The issue of a warrant of distress is in the nature of an administrative step taking the course of post-adjudication phase.

[9] It follows there is no right of appeal with respect to this decision, which was made without the benefit of detailed submission on the point.

[10] For all those reasons I am satisfied that I am entitled and should recall the decision made and review the matter in the light of the further submissions by the Commissioner.

[11] The starting point is Rule 24 of the Family Court Rules which states:

> **24 Applications that may be made without notice**
>
> (1) An application need not be made on notice if the family law Act under which it is made provides, or any other of these rules provide, that the application, or an application of that kind, may be made without notice.
>
> (2) An application need not be made on notice if subclause (1) does not apply and the application, or an application of that kind, is not expressly required to be made on notice by the family law Act under which it is made or by any other of these rules, and the Court is satisfied that—
>
> (a) the delay that would be caused by making the application on notice would or might entail,
>
> (i) in proceedings under the Child Support Act 1991 or the Family Proceedings Act 1980 or subpart 4 of Part 2 of the Care of Children Act 2004, serious injury or undue hardship, or risk to the personal safety of the applicant or any child of the applicant's family, or both; and
>
> (ii) in proceedings under the Domestic Violence Act 1995, a risk of harm or undue hardship to the applicant or any child of the applicant's family, or both; and
>
> (iii) in proceedings under the Property (Relationships) Act 1976, irreparable injury; or
>
> (b) the application affects the applicant only, or is in respect of a routine matter, or is about a matter that does not affect the interests of any other person; or

[2] [2015] NZHC 2962, Brown J.

> (c) every person in respect of whom the order is sought has either died or cannot be found.

[12] A close examination of the rule clearly indicates that it is difficult to see how the rule applies to the application for a warrant. Nor does the Child Support Act or applicable rules give any guidance.

[13] The thrust of counsel's submissions is that the issue of the warrant is a subspecies of the execution process, until recently known as the distress warrant. Counsel detailed a number of reasons why that approach is appropriate and if accepted, then neither the specific District Court Rules or Family Court Rules regarding applications generally being on notice should apply.

[14] Counsel is on strong ground. In *Leigh v Commissioner of Inland Revenue* (supra) Brown J held that the issuance of a warrant to seize property for unpaid child support is equivalent to the process under s 85 of the District Courts Act 1947 and rule 19.47 of the District Court Rules 2014. Rule 19.47 states:

> **19.47 Application for warrant to seize property**
>
> (1) A judgment creditor who wants a warrant to seize property issued must file an application in form 56.
>
> (2) The application must not be filed until 48 hours after judgment has been given, or the order made, unless the Judge gives leave for immediate enforcement.
>
> (3) The Registrar must record the precise time when the application is made to issue the warrant.

[15] The following rules do not give the issuing officer, i.e. the registrar, a discretion but simply directs that the warrant must be issued by a registrar in an approved form (rule 19.49).

[16] Accordingly, I am satisfied that the Court's discretion is either to either issue the warrant or if the evidence does not support the issue of the warrant (which is not the case here) to decline to issue the warrant.

[17] In this case I am satisfied that the respondent is a liable parent and that there is arrears of child support due. The respondent has been advised of his liability and

due date for payment, that he has failed, and that there are arrears of child support due.

[18] Accordingly, the issue of the warrant is in fact akin to the enforcement of a judgment and given the supporting evidence identifying the respondent as the liable parent and the fact of the arrears, that the warrant should be issued as sought.

J J D Strettell
Family Court Judge

Signed at Christchurch on 27 February 2017 at pm.