

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2019-092-001019
[2021] NZFC 828**

IN THE MATTER OF	The Family Proceedings Act 1980
BETWEEN	[MONICA STRICKLAND] Applicant
AND	[LUIS MERRILL] Respondent

Hearing: 7 October 2020

Appearances: P Maskell for the Applicant
Respondent Appears in Person

Judgment: 29 January 2021

RESERVED JUDGMENT OF JUDGE A G MAHON

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[1] The parties are parents of [Rick Strickland] ([Rick]) born [date deleted] 2015.

¹ This judgment has been reissued to correct errors in conversion to New Zealand dollars.

[2] On 24 June 2019 the applicant was granted the following provisional maintenance order against the respondent in the Leyland Family Court in the United Kingdom:

The defendant, Mr [Luis Merrill], is to pay Ms [Monica Strickland] £1,000 lump sum and £400 per month as a periodical payment until the child attains the age of 18 or completes full-time education, whichever is the latter.

[3] The applicant applied under the Reciprocal Enforcement of Maintenance Order provisions of the Family Proceedings Act 1980 (the Act) to enforce the order in New Zealand. As the order was only provisional, under s 136 of the Act a hearing was required because the respondent filed a notice of defence to the application. The hearing proceeded on the basis set out in 138(4):

At the hearing it shall be open for the respondent to raise any defence which the respondent might have raised in the original proceedings had the respondent been present, but no other defence, and the statement from the Court that made the provisional order stating the grounds on which the making of the order might have been opposed shall be conclusive evidence that those grounds are grounds on which objection may be taken.

[4] The grounds of defence available to the respondent are set out in the certificate accompanying the provisional order:

- (a) That the respondent is not the father of the child.
- (b) That the respondent has insufficient means to enable him to pay maintenance.
- (c) That the respondent did not accept the child as a child of the family
- (d) That the respondent has already made sufficient financial provision for the child.
- (e) That the child has attained the age of 17 and is not or will not be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment.
- (f) That the child has attained the age of 17 and there are no special circumstances which justify the making of an order.

(g) That the Court had no jurisdiction to make the order.

[5] The respondent's defence is on the ground in [4](b) above that he has insufficient means to pay maintenance for [Rick]. By the date of hearing [Rick] was 5 ½ years old and the respondent had paid nothing for his maintenance.

[6] This Court did not have jurisdiction to require the respondent to pay the applicant the £1,000 lump sum maintenance sum directed by the Leyland Family Court.

[7] Pursuant to s 138 the Court:

(a) Assessed the respondent's ability to pay the £400 monthly sum and whether any modification was required to the order.²

(b) Considered whether the respondent should pay any additional sum for the period from the date of the provisional order on 24 June 2019 until the date of hearing.³

[8] Consideration did not need to be given to remitting the case back to the Leyland Family Court for further evidence to be taken from the applicant as the respondent did not contest the reasonableness of the monthly maintenance sum assessed by that court or the applicant's evidence on which the order was based.⁴ Rather, his challenge was in respect of his ability to pay the sum.

[9] Both parties filed the required narrative affidavits and affidavits of financial means and their sources. The applicant had filed an affidavit in reply to the respondent's affidavits. The respondent was cross examined on the contents of his affidavits by Mr Maskell, counsel for the Central Authority.

² s 138(7).

³ s 138(9).

⁴ s 138(6).

The Evidence

[10] In his affidavit sworn 4 December 2019, the respondent raised issues about the background to [Rick]'s conception, the problems he had experienced having contact with [Rick] and the applicant's unilateral decision to return with [Rick] to the United Kingdom from Australia where both parties had been living. Notwithstanding that these issues were not pursued at the hearing as they were not relevant to the exercise of the Court's discretion, the respondent's concerns remained. However, he noted in his affidavit:

At no point have I ever not wanted to pay child support or did I ever think that my son, [Rick], would not even be in the same country as me, where I couldn't even see him at any time or minute.

[11] In his further affidavit sworn 18 February 2020, the respondent referred to offers he had made to pay maintenance to the applicant which had not been rejected by the applicant. He had offered to pay £160 monthly (\$323) which the respondent had then been prepared to increase to a sum of between \$400 and \$500 a month.

[12] In his oral evidence, the respondent clarified his income and the basis upon which he had calculated his expenses.

[13] After deduction of tax and superannuation, the respondent agreed that at the time of swearing his affidavit of financial means and their sources his net income was \$50,690.63 a sum which he had calculated as follows:

Income for the period to 5 February 2020	68,176.72
Deduct tax and employee superannuation (calculated on 26 fortnightly payments)	17,486.09
Net annual income (calculated on 26 fortnightly payments of 2,304.12)	<u>59,907.11</u>

[14] The expenses in his budget for the period were clarified in the respondent's evidence to be \$50,310.00, a sum based on 26 fortnightly payments of \$1,935.00. The respondent calculated the monthly surplus available for payment of maintenance to be \$369.12:

Net fortnightly income	2,304.12
Less fortnightly expenditure	1,935.00
Balance available	<u>369.12</u> ⁵

[15] The respondent accepted the above figures were correct before any deductions were made. He agreed the following deductions were required as some of the expenditure claimed had been calculated on a monthly rather than a fortnightly basis:

Telephone	80.50
Electricity, gas and fuel	60.00
Expenditure adjustments in monthly budget	<u>140.50</u>

[16] The following further deductions were required after the respondent's oral evidence:

- (a) The respondent roughly estimated maintenance costs for his 2010 [car] with a mileage of 189,000 kms to be \$200 per week or approximately \$10,000 a year. The respondent agreed that this estimate was out of proportion to the car's value. Nor did he produce evidence of incurring such expenditure in the previous 12 months although he said he had spent about this amount on 'one off' repairs. A sum of \$2,500 annually is a generous vehicle maintenance figure⁶ (approx. \$408 monthly / \$96 fortnightly / \$48 weekly) and I adopt this sum for the vehicle maintenance.
- (b) The fortnightly hire purchase payments of \$337.19 claimed were to Afterpay and Zip, sites through which the respondent regularly pays for goods he purchases. The balance owing at the date of hearing was approximately \$60 and so the respondent agreed this item of expenditure should therefore be deducted from his budget.
- (c) Entertainment costs of \$120 weekly were too high and a more reasonable figure was \$60 weekly.

⁵ Equivalent to a surplus of \$799.76 monthly / \$ 9,597.12 annually.

⁶ This sum excludes fuel and insurance costs.

[17] The following deductions were then required from the fortnightly expenditure:

Vehicle maintenance	304.00
Hire purchase payments	337.19
Entertainment	60.00
Total deductions	<u>701.19</u>

[18] The fortnightly surplus of \$369.12 the respondent had estimated to be available to pay maintenance then increased by \$841.69 to \$1,210.81 from the following adjustments:

Adjustments to make all expenditure fortnightly	140.50
Adjustment for over calculation of expenditure	701.19
Additional fortnightly sum available	<u>841.69</u>
Monthly figure available	<u>1,562.97</u>

[19] Other than the quantum for vehicle maintenance and entertainment costs, the respondent agreed that the hire purchase deduction and the other adjustments necessary to make all his expenditure based on fortnightly and not weekly figures, were appropriately made.

[20] During the hearing, the respondent repeated his commitment to paying an appropriate sum in child maintenance for [Rick]'s care. He had chosen to continue to defend the provisional sum directed by the Leyland Family Court so that a Family Court judge could determine the appropriate amount. It was clear that the respondent could pay £400 monthly in maintenance.

[21] Mr Maskell then raised the issue of the Court's discretion under s138(9) to require the respondent to pay an additional sum(s) to the applicant for the period from the date of the provisional order to the date of hearing. The total I could direct the

respondent pay for this period is £6,400 (ie £400 x 16 months = £6,400) (NZ\$12,928). Under s 138(9) “any such sum can be paid in such manner as the Court thinks fit” and I can therefore require any payment to be in a lump sum or by instalments.

[22] I have decided that the respondent should pay the maximum sum of £6,400 for the following reasons:

- (a) He has paid no maintenance of the first 5 years of [Rick]’s life.
- (b) He was prepared to pay the applicant as much as \$500 per month. He could have paid this sum from the date of the provisional order until the date of hearing but chose not to do so.
- (c) The above adjustments to his budget indicate that the respondent has the ability to pay this sum if it is to be paid by instalments.

Outcome

[23] There was little dispute about the respondent’s ability to pay maintenance and, while the respondent could not guarantee the same overtime each year, the role of the Court is not to make a predictive assessment as to the future income of either party.

Orders

[24] I make the following orders:⁷

- (a) I confirm the provisional order that the respondent for the applicant to pay £400 (NZ\$808) monthly for the period of that provisional order calculated from the date of hearing on 7 October 2020.

⁷ I have adopted the exchange rate Mr Maskell used for the hearing in judgment. The maintenance sum payable in NZ dollars at the date this judgment is more favourable to the respondent and used in estimating the NZ dollar cost to the respondent in the orders made in paragraph [24].

- (b) Payment of the £400 (NZ\$808) monthly sums since the hearing date due on 7 October, November, December 2020 and 7 January, February 2021 of £2,000 (NZ\$4,040), is to be made:
- (i) by 10 instalments of £200 (NZ\$404) each to be added to regular monthly payments of £400 (NZ\$808); and
 - (ii) the first instalment is to be paid on 7 March 2021 and the last instalment paid on 7 December 2021, making the monthly payments for that 10-month period the sum of £600 (NZ\$1,212).
- (c) In addition, the respondent is to pay the applicant a further sum of £6,400 (NZ\$12,928) additional maintenance for the period from the date of the provisional order to the date of hearing. Payment of the £6,400 (NZ\$12,928) is to be on the following basis:
- (i) by 36 monthly instalments of £175 (\$354) commencing 7 January 2022, and a final instalment of £100 (NZ\$202) on 7 January 2025; and
 - (ii) these payments to be added to the £400 (NZ\$808) monthly sum increasing the total monthly payment:
 - a. from 7 January 2022 to 7 December 2025 to £575 (£400 +£175) (NZ\$1,162); and
 - b. on January 2025 £500 (NZ\$1,010) (£400 + £100); and
 - c. thereafter monthly payments continue in the sum of £400 (NZ\$808) being the amount in the Provisional Order now confirmed by the Court.

[25] Mr Maskell is requested to forward a draft order for sealing and I reserve leave to him to seek any further directions in respect of the judgment.

AG Mahon
Family Court Judge