NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, 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 THAMES

FAM-2015-075-000088
[2016] NZFC 2733

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	FIONA PERCY Applicant
AND	DARREN PERCY Respondent

Hearing: 22 March 2016

Appearances: E Dawe for the Applicant
J Hunter for the Respondent

Judgment: 4 April 2016

RESERVED JUDGMENT OF JUDGE S J COYLE
[in relation to confirmation of provisional maintenance order (s 138 Family Proceedings Act 1980)]

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[1] On 8 June 2015 Ms Percy obtained a maintenance order from the Sheffield Family Court in the United Kingdom. That order provided for the payment of child maintenance by the children's father Mr Percy as follows:

> 1. That the father shall pay £300 per calendar month for each child until age 18 years of age or completes full time further education, whichever is the later.
>
> It is right that the orders extend beyond the children's 17 birthday as the special circumstances are that they will all be in education until at least 18 and if they go on to further education they will require financial support.
>
> 2. There are arrears of £2000 based on the agreement between the parties to pay £500 per calendar month from January 2015.
>
> 3. That the said order is PROVISIONAL ONLY and has no force or effect unless and until confirmed (either with or without modification) by a competent Court in a reciprocating jurisdiction or a jurisdiction with restricted reciprocity in which the father is resident at the time of that confirmation.

[2] Ms Percy now seeks that that order be confirmed pursuant to s 138 of the Family Proceedings Act 1980 ("the Act"). Its confirmation without modification is opposed by Mr Percy.

Background

[3] Mr and Ms Percy have four children: William Percy born [date deleted] 1995, Jackson Percy born [date deleted] 1997, Alexander Percy born [date deleted] 2003 and Lily Percy born [date deleted] 2005. The order made by the Sheffield Family Court only relates to Jackson, Alexander and Lily.

[4] Mr and Ms Percy are English, but in 2010 they immigrated to New Zealand. However William, and to a lesser extent Jackson, did not settle into New Zealand and wanted to return to England. Ms Percy took the four children back to the United Kingdom, returning to New Zealand in August 2013 but leaving William who remained to attend a University in England. In January 2015 Ms Percy left New Zealand with Jackson, Alexander and Lily. In support of her application Ms Percy deposes that she did so with the full knowledge and agreement of Mr Percy. Mr Percy however deposes that he simply arrived at their former family home to find that Ms Percy and the children were no longer there, and it was not until

subsequently accessing her facebook page that he realised she had returned to the United Kingdom. No proceedings were initiated under the Hague Convention to force the return of the children to New Zealand.

[5] Mr Percy was not cross-examined on that issue by Ms Dawe and I accept his evidence that Ms Percy unilaterally relocated with the children to the United Kingdom. Since their removal from New Zealand Mr Percy has made no contribution towards the ongoing maintenance of his children, and he has had no contact with them. In his notice of defence to Ms Percy's application seeking confirmation of the overseas maintenance order, Mr Percy indicated a willingness to pay £300 per calendar month for Alexander and Lily but denied any liability to support Jackson on the basis that he believed Jackson has completed his full time education and is now in the paid work force.

[6] Whilst the terms of the existing order provide for the payment of arrears, Ms Dawe accepts that that is not an issue that can be pursued by this Court, and she accepts Ms Percy can only seek child maintenance from the date of the filing of the Sheffield Family Court order.

[7] The position at the hearing however of Mr Percy has changed in that he now asserts that he is unable to pay any maintenance at all in relation to any of the children. He accepts that there is now evidence from the "[name of college deleted]" confirming that Jackson is undertaking a course of full time study, commencing 7 September 2015 ending on 27 June 2016. Ms Dawe in her submissions asserts that it can be taken that Jackson's study will continue beyond 27 June next but there is simply no evidence to substantiate that submission.

The Law

[8] Section 138 of the Act states as follows:

> **138 Confirmation of provisional orders made in Commonwealth or designated countries**
>
> (1) This section shall apply—
>
> (a) To a maintenance order; and

(b) To an order varying a maintenance order where that maintenance order has been either registered or confirmed in New Zealand—

in any case where the maintenance order or the order varying the maintenance order, as the case may be, has been made provisionally only by a Court in a Commonwealth or designated country and has no effect unless and until confirmed elsewhere.

(2) Where a certified copy of an order to which this section applies, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed, has been transmitted to the Secretary …, he shall cause those documents to be sent to a District Court for the hearing of proceedings for confirmation of the order.

(3) On receipt of those documents by the Court—

(a) Any District Court Judge or Justice **[**or Community Magistrate**]** or any Registrar (not being a constable) may issue a summons to the respondent:

(b) Any District Court Judge **[**or Registrar**]** may issue a warrant to arrest the respondent and bring the respondent before the Court in any case where the respondent's address is unknown or where a summons has been issued but cannot be served because the respondent cannot be found.

(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.

(5) Notwithstanding subsection (4) of this section, where the provisional order is made in or is consequent on an affiliation order, the respondent may raise the defence—

(a) That he is not the father of the child; and

(b) That the proceedings in which the affiliation order was made were not brought to his notice (either by the service of a summons on him or by any other method permitted by the law of the country in which the affiliation order was made).

(6) Where the respondent appears at the hearing and it appears to the Court to be necessary for the purpose of any defence to remit the case to the Court that made the provisional order for the taking of any further evidence, the Court of hearing may so remit the case, and may adjourn the proceedings for the purpose.

> (7) Where at the hearing (whether following an adjournment or otherwise) the respondent does not appear, or on appearing fails to satisfy the Court that the order ought not to be confirmed, the Court may confirm the order either without modification or with such modifications as it thinks just.
>
> (8) An order that has been confirmed with modifications shall for all the purposes of this Act have effect in the form in which it is confirmed.
>
> (9) The Court confirming a maintenance order to which subsection (1)(a) of this section applies may also, if it is satisfied that the respondent is of sufficient ability, at the same time order the respondent to pay, at such time or times and in such manner as the Court thinks fit, any sum on account of the maintenance of the person or persons in whose favour the provisional order was made between the date of the making of that order and its confirmation.
>
> (10) An order made under subsection (9) of this section shall be a maintenance order for the purposes of this Act.

[9] Once an order is registered or confirmed, a party can subsequently apply to vary it pursuant to s 142 of the Act.

[10] Specifically, in terms of confirmation, Mr Percy can raise any defence which he might have been able to raise in the proceedings in the Sheffield Family Court. Pursuant to subs (7), if Mr Percy fails to satisfy the Court that the order should not be confirmed, then the Court can either confirm the order with or without modifications. An order can be modified even if a defence is not made out; *Pearson v Pearson.*[1] Ms Hunter in her submissions sought to rely upon s 145 and specifically s 145C and 145G of the Act; those sections are not relevant to the issue of confirmation and only the provisions of ss 138 and 139 are to be considered.

[11] Thus, the following steps must be followed in an application under s 138:

(a) First there must be a maintenance order or an order varying a maintenance order is made provisionally by a Court in a Commonwealth or designated country which has no effect until confirmed elsewhere (s 138(1));

[1] *Pearson v Pearson* [2014] NZFC 8623 at [22]-[23].

(b) The certified copy of the order as well as statements of witnesses is transmitted to the Secretary (Chief Executive of the Department of Courts) and this is sent to a District Court Judge for a hearing of proceedings or for confirmation of the order (s 138(2)).

(c) A District Court Judge can then issue a summons to a respondent to appear at a hearing, and the matter needs to be set down for hearing.

[12] At the hearing it is open for Mr Percy to raise any defence which he might have raised in the original proceedings if he had been present, but no other defence. It is accepted by Ms Dawe on behalf of Ms Percy and by Ms Hunter on behalf of Mr Percy that there are seven possible defences that were available to Mr Percy namely:

(a) That he is not the father of the children.

(b) That he has insufficient means to enable him to pay maintenance.

(c) That he did not accept the child is a child of the family.

(d) That he has already made sufficient financial provision for the children.

(e) That the children have attained the age of 17 and are not or will not be receiving instruction at an educational establishment or undergoing training for a trade, professional vocation, whether or not while in gainful employment.

(f) That the children have attained the age of 17 and there are no special circumstances which would justify the making of the order.

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

[13] For the purpose of this hearing Mr Percy relies upon the second ground (insufficient means to enable him to pay maintenance), and in relation to Jackson, that he is over 17 years of age and is not receiving ongoing training. In cross-

examination from Ms Dawe, Mr Percy accepted that Jackson is currently in training and will be until June of this year.

Mr Percy's financial situation

[14] Mr Percy has a base salary of $82,000, however in the last financial year he was paid a bonus, and he is clearly paid more than the base salary as a matter of course. Following Ms Dawe's cross-examination of Mr Percy it was apparent to me that for the year ending 31 March 2016 he has received gross income of around $97,000. He lives by himself and apart from these children has no other dependent children and there is no one else who is financially dependent upon him.

[15] Ms Hunter has provided a summary in an affidavit sworn by her secretary, Ms Taipari, of the expenses of Mr Percy from the 1 April 2015 to 19 February 2016. During that financial year it appears that Mr Percy has entered into a contract, which he tells me is for a minimum of 12 months with Sky TV, and he regularly attends a local gym. The gym fees amount to $1173.67 and there are ongoing medical costs amounting to $976.41.

[16] On the face of it the gym expenses are a luxury. However I accept Mr Percy's evidence that during the period in which he was nursing he sustained a serious injury to his back which requires ongoing chiropractic treatment (hence the medical expenses), and that if he does not undertake regular strength based work to strengthen the muscles in his back, then he will be in danger of a significant deterioration of the injury. Thus I accept his evidence that the gym expenses are not a luxury but rather an essential requirement for his ongoing physical health. If he is crippled by the back injury then he will not be able to continue to the same extent in his current employment as I apprehend his evidence.

[17] The parties own a property at [address deleted] in Taranaki, which was their former home. There is an outstanding mortgage of around $233,000 and following a recent agreement between Mr and Ms Percy it has been listed for sale, and the listing price has been recently reduced to $265,000. If it were to sell for an amount around

that figure, then once real estate agents commission and legal costs are deducted, there is in effect no equity in the property.

[18] Ms Percy is making no payments towards the mortgage. Mr Percy has now shifted from the Taranaki to the Thames/Coromandel region and as a consequence he is solely meeting the mortgage costs of the [location deleted] property together with rental for accommodation in the Thames/Coromandel area. Ms Dawe put to him that recourse was available to him under the Property (Relationships) Act 1976 by way of post separation contributions. While it is correct in that Mr Percy could seek, pursuant to s 18A of the Property (Relationships) Act 1976, an adjustment for post-separation contributions he has made towards mortgage payments, rates and insurances, the reality is that that would be a pointless claim. For this is a couple with no other relationship property assets apart from the home, chattels and a small sum of money in Mr Percy's Kiwisaver account. Upon sale, given that there is unlikely to be any equity in the property, there will be no property from which Ms Percy could compensate Mr Percy pursuant to s18A. I cannot ignore the fact that Ms Percy has a liability for the mortgage which she is not meeting and because of that, Mr Percy has to meet these significant costs. For the period 1 April 2015 to 19 February 2016 the household insurance costs have been $1499.34, the mortgage payments $20,554.79, his own rental payments of $6440, and rates of $1295.07.

[19] He has rented out the [location deleted] property for a short period but when the tenants left after he ascertained that there was significant damage to the property he had to repair. Additionally it is an isolated rural property and very difficult to rent. Mr Percy on his evidence has made a conscious decision to not attempt to rent out the property as he is concerned that any other tenants may similarly damage the property. That may or may not occur, but as a consequence of that decision no income has been received from the [location deleted] property, and Mr Percy needs to take responsibility for that. He was receiving $150 a week or $300 a fortnight by way of rental income, which could have been used to offset the mortgage payments, or used towards payment of maintenance for his children.

[20] It is my finding that Mr Percy has insufficient means to enable him to pay maintenance as sought as a direct consequence of Ms Percy's failure to contribute

towards the mortgage. The total costs in relation to the house as referred to above amount to $23,339.30 of which Ms Percy should have been paying $11,669.65 or, averaged over 10 ½ months, $1111.40. That is less than £900 per month that should have been paid pursuant to the order and clearly does not off-set the full amount. That £900 per month equates to $1891.38 which per annum is around $22,697, or roughly equivalent to what Mr Percy has been paying in relation to costs associated with the house.

[21] The criteria in s 138(7) of the Court is to make such modifications as "[the Court] thinks just". Justice in this case demands that where Mr Percy is meeting the sole costs of a joint liability in relation to the parties' former family home that that should be taken into account in assessing whether there should be any modification to the current order. For in effect Mr Percy's liability pursuant to the provisional order made in the Sheffield Family Court is countered by the payments he is making on both his and his wife's behalf to repay the costs associated with the [location deleted] property. However I need to take into account that Ms Percy's liability is only half of that amount. Additionally Mr Percy in my view can rent out the property obtaining a further $7800 per annum by way of rental income.

[22] Mr Percy earns a significant income, and has not dependents apart from his children. He is able to contribute towards the maintenance of his children, but the order needs to be modified to reflect the fact he is solely responsible for the costs of sustaining their former home in [location deleted], costs in respect of which he is unable to receive any compensation from Ms Percy's share of the parties' relationship property. I fix a just figure at $2400 per annum being $200 per month per child.

The Result

[23] Mr Percy has failed to satisfy the Court that the order ought not to be confirmed. In relation to Alexander and Lily the father is to pay $200 per calendar month for each child until aged 18 years of age or completes full time further education, or whichever is the later.

[24] In relation to Jackson, the sum of $200 per calendar month for the period 7 September 2015 until 22 June 2016 being the period in which he is in further full time education.

[25] Finally once the [location deleted] property is sold, then it is open for either party to apply to vary this order pursuant to the relevant provisions of the Act.

S J Coyle
Family Court Judge