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

NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2023-004-000636
FAM-2023-004-000670
[2024] NZFC 2353

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[AMOS FLORRY] Applicant
AND	[SHANAE KENNEDY] Respondent

Hearing:	20 February 2024
Appearances:	Applicant appeared in Person No appearance by the Respondent
Judgment:	6 March 2024

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to objection to a formula assessment issued by the Commissioner of Inland Revenue in its capacity as The Central Authority for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance]

Background

[1] [Shanae Kennedy] is the mother of [Hope Florry] born [date deleted] 2009 ("the child"). [Shanae Kennedy] was married to [Amos Florry] ("the applicant") in these proceedings. The child's birth was registered in [state 1 – name deleted]. Mother is a United States citizen. Mr [Florry] ("father") is also a United States citizen but lives in New Zealand and is a New Zealand citizen. Mother applied to the Child Support Agency of Idaho State in 2023 when [Hope] was approximately 14 years of age. She sought child support. Her application was successful. As the father was living in New Zealand the matter had to proceed under the Hague Convention. Accordingly, on 7 April 2023 the Commissioner of Inland Revenue, New Zealand (as the New Zealand Central Authority for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ("the Convention") received an application for the establishment of a maintenance decision in New Zealand from the Central Authority in Idaho, United States.

[2] The Idaho Central Authority transmitted the application for establishment of a decision on behalf of Ms [Kennedy]. The application was for child support in respect of that agent and named Mr [Florry] as [Hope]'s father. The Commissioner accepted the application from Idaho pursuant to the Convention and issued a formula assessment for [Hope]. He had named Ms [Kennedy] as the receiving carer and Mr [Florry] as the liable parent.

[3] As assessment notice was issued to Mr [Florry] on 18 May 2023 notifying him of his child support liability for [Hope].

[4] Mr [Florry] ("father") objected to the formula assessment. He phoned the Commissioner on 18 May 2023 and discussed how he could dispute the child support assessment as he does not believe he is [Hope]'s father.

[5] On 26 May 2023 father lodged an objection to the child support assessment by way of electronic submission. The Commissioner did not accept the objection filed by father and issued a formal notice to him recording that fact. The Commissioner considered that father met two of the criteria in s 7 of the Act in that:

(a) his name is entered in the Registrar of Birth or parentage information kept under the law of any overseas jurisdiction as a parent of the child; and

(b) he was a party to a legal marriage and the child was conceived by or born to the person or the other party to the marriage during the legal marriage.

[6] Father asserts that he did not agree to have his name added as [Hope]'s father on her birth certificate and it happened without his knowledge and consent.

[7] Pursuant to [state 1] law there is a presumption of paternity if the mother was married during her pregnancy or at birth. Father says that he was separated from the mother at the time of conception of the child and he does not accept that he is the biological father of the child. He wonders why it took so long to pursue child support and that he had never been informed that he was the father of the child. He says apart from two casual meetings with the child he had never had anything to do with her.

[8] The Commissioner's notice of decision with respect to the objection was issued on 20 June 2023. The Commissioner relied on the presumption of paternity during the parties' marriage (father acknowledging that there was not a divorce or dissolution of the marriage at the time of conception but contends that he was living apart from the mother). On or about 26 July father filed an application for a declaration of non-paternity and an appeal of the decision made by the Commissioner to make a formula assessment. He filed an objection. He said in summary in his application as follows:

- That his name is [Amos Florry] born [date deleted] 1977.

- That he was born in [city 1 - name deleted], USA and in [month deleted] 2020 became a New Zealand citizen.

- In [2001] he married [Shanae Kennedy] who then changed her name to [Florry]. They had two children together [Victor] and [Demi].

- In 2007/2008 he began to suspect [Shanae] had been unfaithful in their marriage and in early 2008 she moved to [state 2 – name deleted] to live with her mother who was in poor health.

- He said that they were separated as of 23 March 2008 with the divorce being finalised on 4 June 2009. He said the delay was purely for his two children to still be covered by his health insurance.

- During their separation he was living in [state 3 – name deleted] and Ms [Kennedy] was living with the children in [state 2].

- He said that during the separation period mother returned to [state 3] with [Victor] and [Demi] to sort out property. He said during this time she was residing with him in his home in [state 3] with the children but they slept in separate bedrooms.

- He said that one night/early morning he was awoken with mother on top of him with his penis in her vagina. He said he was uncertain how long this was going on for (his sleep patterns were very disturbed during the weeks leading up to this) and that when he was fully awake he pushed her off and asked her what she was doing. She responded with something like "I wanted to have you for the last time before it was over". He said this was the only incident of sexual connection that occurred between them during the entire separation period. He said several days after this they had their divorce papers drawn up and he moved into a friend's home in [state 3] until mother returned to [state 2] with the children.

- He said that at some time in September after their divorce agreement had been signed but not filed she told him she was pregnant. He suspected the child was not his because the due date put conception several weeks prior to her coming to [state 3].

- He said that in [month deleted] 2009 she moved to [state 1] with her mother to live.

- That [Hope] was born on [date deleted] in [state 1].

- That he was not in [state 1] nor had ever been to [state 1].

- He said that she had put his name as the father of the child on the birth certificate without his knowledge or consent. That he had no knowledge of being on the birth certificate until he was informed by the Commissioner and he has never had any relationship with [Hope].

- That [Victor] came to live with him for a period of time in New Zealand.

- He says that he is concerned that after 14 years child support is now being ordered by Inland Revenue through the application made by Ms [Kennedy]. That he does not believe the child is his and she has never claimed her as his.

- He was concerned that his wages would be attached and he would be required to make a payment for a child that he had no biological relationship with. He sought a stay in the interim until the question of paternity could be resolved.

[9] The Commissioner still seeks to have the objection filed by father to be dismissed and for the formula assessment imposed as a result of the Convention ratified. The Commissioner seeks to have the stay order made dismissed and for the father to pay child support pursuant to the formula assessment made. The Commissioner filed a notice of defence to the s 102 appeal for child support and/or an objection in support of the notice of defence with an affidavit from one of the technical specialists of the Inland Revenue Child Support section.

[10] Ms J M Chappell solicitor acting on behalf of the Commissioner filed written submissions in support of the notice of defence dated 31 January 2024 and I set out paragraphs 1-15 of those submissions:

> 1. The Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the Convention) came into effect in New Zealand on 1 November 2021.

Inland Revenue is New Zealand's designated Central Authority for the Convention.

2. The Child Support Act 1991 ("the CSA") has been modified by the Child Support (Reciprocal Agreement with Hague Convention Countries) Order 2021.

3. The definition of children who qualify for child support in section 5 of the CSA has been extended beyond children who are New Zealand citizens or ordinarily resident in New Zealand. It now includes children ordinarily resident in contracting states to the Convention.

4. The Convention allows for certain applications to be made when the party resides in a contracting state.

5. On 7 April 2023 the Commissioner received an application for establishment of a maintenance decision in New Zealand from the Central Authority in Idaho, USA.

6. The Idaho Central Authority transmitted the application for establishment of a decision on behalf of the Respondent Ms [Kennedy]. The application was for child support in respect of [Hope Florry] ("[Hope]") born on [date deleted] 2009, who is in the full-time care of the Respondent. The application named the Applicant as [Hope]'s father.

7. In the absence of a USA Court order the application for child support then became subject to the child support formula in accordance with the CSA.

8. The Applicant is the parent of [Hope] in accordance with section 7(1)(a) and (b) of the CSA.

Section Meaning of parent (emphasis added).

(1) For the purposes of this Act, a person is a parent of a child if-

(a) the person's name is entered in the child's birth record under the Births, Deaths, Marriages, and Relationships Registration Act 2021, or is entered in a register of births or parentage information kept under the law of any overseas jurisdiction, as a parent of the child; or

(b) the person is or was a party to a legal marriage and the child was conceived by or born to the person, or the other party to the marriage, during the legal marriage; or

(c) the person adopted the child under the Adoption Act 1955 or under an adoption to which section 17 of that Act applies and that adoption order has not been discharged; or

(d) a New Zealand court, or a court or public authority of any overseas jurisdiction, has at any time found that the person is a parent of the child, and the finding has not been cancelled or set aside; or

(e) the person has, at any time in any proceeding before any court in New Zealand, or before any court or public authority in an overseas jurisdiction, or in writing signed by the person, acknowledged that he or she is a parent of the child and a court has not made a finding of paternity of the child that is to the contrary of that acknowledgment; or

(f) a court has, under the Family Proceedings Act 1980, made a paternity order against the person in respect of the child; or

(g) the person is the natural mother of the child; or

(h) the person has been declared to be a step-parent of the child by the Family Court under section 99; or

(i) a New Zealand court, or a court or public authority of any overseas jurisdiction, has appointed the person to be a guardian of the child, or has declared the person to be a guardian of the child, by reason of being the father of the child, and that appointment has not been cancelled or set aside.

(2) Notwithstanding subsection (1), where the Commissioner is satisfied that a person-

(a) is not, despite being a person to whom that subsection applies, a parent of a particular child; and

(b) has not been declared to be a step-parent of that child under section 99, -

that person shall not be a parent of the child for the purposes of this Act.

(3) On being requested to make a determination under subsection (2), the Commissioner may require the production of such evidence as the Commissioner, in his or her discretion, considers appropriate.

(4) Where-

(a) a child is conceived as a result of any AHR procedure to which Part 2 of the Status of Children Act 1969 applies; and

(b) a person involved in that procedure is not the mother of the child, or a person who has the rights and liabilities of a parent of the child, in terms of that Act,-

that person shall not be a parent of the child for the purposes of this Act.

9. The Applicant is subject to the CSA and is able to challenge how the child support formula is calculated in accordance with its provisions. Accordingly, the Applicant has challenged his liability under section 102 of the CSA, and has applied correctly for a suspension under section 117 until that matter is determined by the Court. There is no suspension related to this SOCA matter.

10. The Applicant asserts that he is not the parent of [Hope] despite being named on her birth certificate, and was still married to the Respondent when [Hope] was conceived. In order to challenge this the Applicant must get a court order declaring that he is not [Hope]'s father. This can be initiated under the applicable USA legislation or under section 10 of the Status of Children Act 1969 ("SOCA") in New Zealand.

11. If a challenge was successful in the USA this would effectively remove the Applicant as a parent from [Hope]'s birth certificate, and the Idaho Central Authority would then withdraw their request for child maintenance from Inland Revenue.

12. Under SOCA a successful declaration of non-paternity made by the NZ Court would only apply to the Applicant's child support liability under the CSA. It would not be binding on the USA authorities.

13. The outcome of the DNA testing would be critical to the Court being satisfied that the Applicant is either highly likely to be [Hope]'s father, or is firmly excluded.

Conclusion

14. The suspension of liability (sl 17) applies to the section 102 Appeal under the CSA, and is not related to this SOCA matter.

15. The Court has the jurisdiction to make a paternity/ non-paternity declaration under sections 10(2)(3) SOCA. Any decision will be binding on the Applicant's liability under the CSA child support formula. If he is found to not be [Hope]'s parent Inland Revenue would then be unable to make a child support formula assessment against the Applicant.

[11] In the intervening period while the matter has been before the Court the parties have agreed to undertake a DNA test to determine scientifically whether Mr [Florry] is the father of the child or not. As at the date of the hearing the samples had been obtained and remitted to the laboratory engaged by the parties but the results were not known. Also in the intervening period father filed an application to the Auckland Family Court for a declaration of non-paternity. The Commissioner continued to seek child support on the basis primarily of the presumption of paternity arising out of the fact that the parties were married and their marriage had not been dissolved. Ms

Chappell in her submissions contended that the correct process was for an application for non-paternity under s 10(2) and (3) of the Status of Children Act. The Commissioner accepted that such a decision if made would be binding on the Commissioner.

[12] At the hearing I received further submissions from the applicant father. I indicated that if the DNA analysis establish that he was the father then his objection and appeal would be dismissed and the formula assessment made by the Commissioner would stand. If however the laboratory determined that he was not the father then it was likely that I would grant the declaration of non-paternity as sought and make the stay order on the child support being collected permanent.

[13] Following the hearing I waited for the results of the DNA test. Mr [Florry] has now provided those results supported by an affidavit. The laboratory confirms that he is the father of [Hope] by way of presumption and the conclusion section of the Labcorp result says as follows:

> The alleged father [Amos Florry] cannot be excluded as the biological father of the child [Hope Florry] since they share genetic markers. Using the above systems the probability of paternity is 99.99% as compared to an untested unrelated man of the Caucasian population.

[14] Mr [Florry] has accepted that he is the father. Accordingly as indicated at the hearing I make the following orders and directions:

(1) The application for a declaration of non-paternity is withdrawn by leave.

(2) I discharge the stay order that had been made earlier.

(3) The appeal against the formula assessment is dismissed.

(4) The objection to the formula assessment filed by Mr [Florry] is dismissed.

(5) There is no order for costs.

[15] I direct the proceedings under the Child Support Act now come to an end and the file closed. There is no cross-application for a declaration of paternity. It follows therefore that the presumption of paternity, because the parties were married at the time of conception and birth, applies. No declaration is sought by the applicant or respondent. No doubt the parties will confirm with [Hope] the outcome of the DNA test. It will be up to the parties now to make decisions as to whether [Hope] pursues a relationship with her father.

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Judge DA Burns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 06/03/2024