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

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IN THE FAMILY COURT
AT HUTT VALLEY

I TE KŌTI WHĀNAU
KI TE AWAKAIRANGI

FAM-2017-096-000602
[2019] NZFC 10644

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[ALEX BURNHAM] Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent
AND	[MELINDA WYATT] Second Respondent

Hearing:	2 September 2019
Appearances:	Ms Hannan for applicant Mr Delaney for Ms [Wyatt] Ms J Snelson for Commissioner of Inland Revenue
Judgment:	31 January 2020

RESERVED JUDGMENT OF JUDGE JUDGE P R GRACE

Background

[1] At the time the parties to these proceedings separated in [date deleted] 2009, they had three children, [Dylan] born 2001, [Chloe] born 2004 and [Rebecca] born 2009.

[2] The parties entered into a s 21 agreement in 2012, which resolved the division of their relationship property, and provided for the primary day to day care to be with the mother (second respondent) with the applicant (father) having contact on agreed terms.

[3] The parties had an agreement as to child support payments to be paid by the father. This was a voluntary arrangement between the parties but based on calculations that would have been made by the father pursuant to the provisions of the Child Support Act.

[4] At the time the parties separated, the mother was pregnant with the third child, with that child not being born until after the parties had separated. It is common ground that by virtue of the ages of the children, particularly the youngest one, the father's contact was initially limited, but increased progressively as time went by.

[5] The maintenance regime appeared to work reasonably well, until June 2017 when the mother made an application to have the father assessed for child support payments. At that point in time the father had ceased to make payments in accordance with the agreement which had been reached between the parties.

[6] The father's decision to cease payments of child support for the children appears to have been based on two grounds, which form the basis of the current proceedings. Those grounds were:

(a) The father considered that he was having more than 28% care of the children, and therefore objected to the then rate of payment being required from him.

(b) Following the parties resolving the division of their relationship property, the mother had placed her share of the equity (some $440,000) into a Family Trust which had then in turn purchased the house in which she and the three children resided. The balance of funds to acquire the property, together with subsequent remedial work required on the property, has been funded through the Family Trust by advances made from other extended family members. The mother therefore lives in the house on a freehold basis and does not pay rent nor is there any mortgage secured against the property.

[7] As time has gone by, the father considered that the mother should have returned to the workforce. Initially the mother was working part-time, but the father considers that she should have been working fulltime and has therefore sought to have a theoretical income applied to the mother's situation, thus reducing his own liability, and he now considers that he has been making overpayments, and views the mother as being indebted to him in the sum of some $29,000 due by way of a refund. The father accepts the current child support payments into the future but seeks to either work off the debt due to him by the mother being offset against future payments, or the mother paying him a lump sum payment.

[8] In the separation and property agreement dated 7 October 2011, the care arrangements for the children were set out, and paragraph 2(e) stated:

> Arrangements for holidays – trips or overseas travel are to be discussed and mutually agreed upon with as much advance notice as is practical. This includes holidays taken by either parent, with or without the children. [The parties] will endeavour the most of any such opportunities and not unnecessarily withhold consent to such arrangements. Itineraries and contact details should be supplied to the non-holidaying party.

[9] The proceedings in this matter commenced with the mother's application for assessment filed on 16 June 2017. Both parties provided information to the Commissioner for the purpose of that assessment.

[10] The assessment issued on 11 July 2017.

[11] The father filed an objection to that assessment on 7 August 2017.

[12] The objection was declined and notification of that issued on 31 August 2017.

[13] The appeal against that decision was filed on 30 October 2017 and part of this hearing deals with that appeal.

[14] In the interim there have been a number of other applications. Firstly, there is an appeal filed by the mother on 12 December 2017 in relation to the attribution of income to her for the period of 16 June 2017 to 31 March 2018.

[15] There was then an application by the father for a departure order filed on 28 March 2018 in relation to the period 16 June 2017 and 31 March 2018.

[16] Next there was an appeal filed by the mother on 10 May 2018 in relation to the attribution of income to her for the period 1 April 2018 and 31 March 2019.

[17] Next there was an application by the father for a departure order filed on 28 June 2018 in relation to the period 1 April 2018 and 31 March 2019.

[18] Finally, there was the father's application for a departure order filed on 29 May 2019 in relation to the period 1 April 2019 and 31 March 2020.

[19] All these matters have been consolidated into this hearing.

[20] The areas of dispute have narrowed, and now are limited as follows:

(a) The first issue is the question of the number of nights that the father had the care of the children. That area of dispute now relates to the period 16 June 2017 and 31 October 2017. After 31 October 2017 the parties are in agreement as to the amount of time that the children are in the father's care. So, from a future perspective, that matter does not need to be revisited, but rather the amount of care for the period 16 June 2017 to 31 October 2017 needs to be determined.

(b) The issue here relates to the amount of income which had been attributed to the mother. She has objected to the amount which has

been attributed to her by the Commissioner, and in the course of this hearing, the father has put forward his calculations as to the income level which should be attributed to the mother, and it is on that basis that he calculates the refunds due to him.

Percentage of care provided by the father from 16 June 2017 to 31 October 2017

[21] The mother filed her application for assessment on 16 June 2017. The law is that that then becomes the date from which the assessment becomes effective, and the assessment would be applicable until 31 March 2018,

[22] In her application the mother stated the father had the children in his care for 88 nights, which was calculated on the basis of two nights per week for five out of six weeks. That was not set out in the agreement but was something that the parties had worked out between themselves. At the date of the assessment application, there was no agreement or understanding between the parties as to what the future holiday arrangements were to be for the children, with the father. Section 2(e) of the s 21 agreement left that to be negotiated between the parties and neither party was to unreasonably withhold consent for any holiday arrangements. Implicit in the wording of the clause is that the arrangements were to be worked out by negotiation between the parties.

[23] It is apparent that at the time the mother applied for the assessment, there had been discussions about the father's future contact arrangements with the children. I say that because exhibited in the documentation (page 142) is a letter from the father to the mother's lawyer dated 20 June 2017 which discusses the father's concerns about holidays with the children. The father had not been able to have contact during the April 2017 school holidays, due to his work commitments. He was expressing concern about future school holiday contact.

[24] The father then sent a further letter on 22 June 2017 to the mother's counsel, (page 40 of the documentation), and in that letter refers to the fact that he had received communication from the Commissioner on 21 June (this relates to the assessment application) and noted that he had advised the Commissioner that he had more than 88 nights because that had not taken into account any school holiday contact. As a

consequence, he gave notice under clause 2(e) that he intended to have the children in the upcoming July school holidays from 11 July at 6.00pm until 18 July at 1.00pm. He set out the holidays he sought for the October school holidays and for the summer vacation holidays.

[25] Clearly at that point there had been no consensus between the parties.

[26] The father's approach appears to be that he is entitled to holiday contact with the children in accordance with clause 2(e) of the care agreement (see clause 8 of his affidavit 30 October 2017). He takes the view that the mother has in some way unreasonably withheld her consent to his request for the dates that he specified. He bases this on the fact that in her reply of 4 July 2017 (within 14 days of his letter to the mother's solicitors), she had indicated some pre-existing plans, meaning that his contact would need to be delayed. However, on 10 July 2017, the mother must have contacted the father because he says in his affidavit that "those so-called pre-existing plans no longer existed, and my school holiday contact commenced on 11 July" as he had advised the Commissioner.

[27] As the Commissioner had no confirmation of those agreed holiday dates, whilst the assessment was being undertaken, the Commissioner fell back on historical information in an effort to try and resolve the issue, and in doing that came to the conclusion that the 88 nights was the appropriate level of care provided by the father, and that did not therefore meet the 28% threshold required, and consequently, issued the notice of assessment on 11 July 2017.

[28] On 7 August 2017, the father filed his objection to the assessment. The thrust of that objection revolved around his view that the care agreement entitled him to have time with the children over school holidays (which the agreement clearly does allow) but the father takes it further by suggesting that once he specifies the dates that he wishes to have contact, then the mother cannot withhold her consent, because if she does, that withholding is deemed to be unreasonable. That line of reasoning fails to recognise that the fixing of the father's time with the children during holiday periods is by **agreement** and negotiation between the parties so that they can reach a consensus as to the timing of such contact. Significantly the father had not had contact in the

April school holidays because his work commitments did not enable him to exercise that contact. On his approach, the fact that he could not have contact in the April school holidays could be deemed to be an unreasonable stance by him in failing to exercise contact.

[29] Be that as it may, the father claims that he was "shocked and surprised" by the Commissioner considering it to be correct that she should determine the proportions of care on the basis that the mother could breach the terms of the care agreement and unreasonably withhold consent to his request for school holiday contact. He went on to say that in his view, it was unclear how the Commissioner could "rely on the content of any care order or agreement" as required by s 15(1) of the Child Support Act, and at the same time fail to find that the father would have more than 28% proportion of care of the children as he claimed to have advised to the Commissioner.

[30] The Commissioner rejected the father's objection on the basis that at the time the assessment issued, the Commissioner had formed the view that no other decision was tenable on the basis of the information then available to the Commissioner, and consequently was not prepared to in effect, grant a rehearing.

[31] This was despite the fact that by the time the father filed his objection, he had already had the children for seven days during the July school holidays and was due to have the children for a similar period during the October school holidays.

[32] Two problems exist in the father's approach at that point. They are:

(a) As at the date of objection, the father's care amounted to 88 days plus the additional 7 during the July school holidays, making a total of 95 days which does not take him beyond the 28%.

(b) The fact that the father was to have contact with the children during the October school holidays was an agreed potential. Circumstances may have changed which could have meant that the contact did not occur (illness of either the children or the father, the father's work commitments or some other event).

[33] The father filed his appeal on 30 October, but by that time, the father had had the contact with the children during the October school holidays, and that clearly took the father beyond the 28% threshold of care, and the Commissioner reassessed the situation to the satisfaction of the father.

[34] The issue then comes back to what should be done regarding the period 16 June to 31 October 2017.

[35] Ms Hannan on behalf of the father argues that the Court is entitled to take into account new evidence, and indeed in the interests of justice and fairness, should do so.

[36] By 31 October 2017, the contact had in fact taken place in both the July and October school holidays. The care agreement had not specified actual periods of contact but had left the matter to be negotiated between the parties. By virtue of the approach which the parents had agreed to in that care agreement, holiday contact was merely a potential to be agreed upon. That makes it difficult to fit in with the assessment provisions of the Child Support Act. A number of things may have happened. Firstly, there may have been no agreement between the parties as to the actual contact that the father was to have, and that may have been due to a number of reasons which may have meant that the mother's refusal to agree to the father's request, was in fact reasonable. Because of that the Commissioner was entitled to draw the conclusion which she did, namely that the father's percentage of care did not exceed the threshold.

[37] However, the Court is entitled to reassess the situation, in hindsight, now that the contact has in fact occurred.

[38] In those circumstances, I come to the view that the father's percentage of care from 16 June 2017 to 31 October 2017 should be assessed as meeting the threshold of 28% or more.

Attribution of income

[39] The remaining appeals relate to Mr [Burnham]'s appeal against the Commissioner declining Mr [Burnham]'s departure applications, and Ms [Wyatt]'s

argument that she should not be attributed with an income, which she does not earn, and which Mr [Burnham] argues should be attributed to her. That attributed income forms the basis of his departure application.

[40] Ms [Wyatt] has been out of the workforce for approximately 14 years. Her stance is that she has been the primary caregiver of the children over the initial years following separation and was therefore not in a position to return to fulltime employment. As time has gone by, she has obtained part-time employment, but her aim has been to achieve part-time employment that works in and around the children's schooling and holiday periods, thus meaning that she is available for the children when they are not at school, or when they are not in the care of the father.

[41] She has undertaken re-education with the intent of converting her part-time employment into fulltime employment, but in view of her circumstances, her age, and the fact that she has been out of the workforce for the period of time that she has been, she has found it difficult to get back into fulltime employment.

[42] Upon the division of relationship property, Ms [Wyatt] received a lump sum of approximately $400,000. She advanced that to a family trust set up in her name, and that trust has then purchased the house in which she and the children reside. In addition, Ms [Wyatt]'s parents, who have a family trust themselves, have advanced funds by way of a loan from their family trust to Ms [Wyatt]'s family trust in order to carry out repairs and renovations to the house purchased by Ms [Wyatt]'s trust. Ms [Wyatt]'s trust does not pay any interest on the advances from her parents' trust. Likewise, Ms [Wyatt] is not paying any rental fees to her family trust for the benefit she and the children receive by way of occupation of the house.

[43] Mr [Burnham]'s argument is two-fold. Firstly, he argues that Ms [Wyatt] should have returned to the workforce fulltime, and he puts forward calculations of potential income he considers she should have earned, and bases this "attributed income" upon what he assesses as the average wage prevailing at the time, which he calculates at $46,354 during the 2018 year, increasing to $46,793 in the 2019 income year.

[44] Secondly, he argues that Ms [Wyatt] should be attributed with an additional sum based on an interest factor of 5.77% on the various advances from both Ms [Wyatt]'s family trust and her parents' family trust (total $698,000) for the 2018 year, giving her an income of $40,274, and a similar interest rate in the 2019 year on a total sum of $883,000 (having regard to additional advances) giving her an income of $50,949. On Mr [Burnham]'s argument that income attribution follows through to the 2020 income year.

[45] After allowing for tax and ACC deductions, his argument is that Ms [Wyatt] therefore has an attributed income, which if taken into calculation in terms of his assessments, means that Ms [Wyatt] is indebted to him. Because he has paid too much child support over the years in question

The law

[46] Pursuant to s 103B of the Child Support Act, the Court has the power to confirm, modify or reverse the determination appealed against, and can make any decision the Commissioner could have made in respect of the determination or the decision appealed against and / or exercise any of the powers that could have been exercised by the Commissioner.

[47] In exercising its powers, the Court has to be satisfied in the special circumstances of the case that one or more of the grounds for departure as set out in s 105(2) exist, and that it would be just and equitable as regards the child, the receiving carer, and the liable parent, that it would be otherwise proper to make an order for departure pursuant to s 106.

[48] Section 105 states:

> **105 Matters as to which court must be satisfied before making order**
>
> (1) Where an application is made to the Family Court under section 104 for an order in relation to a child and the court is satisfied that—
>
> (a) 1 or more of the grounds for departure mentioned in subsection (2) exists or exist; and
>
> (b) it would be—

(i) just and equitable as regards the child, the receiving carer, and the liable parent; and

(ii) otherwise proper,—

to make a particular order of the type specified in section 106,—

the court may make the order.

(2) For the purposes of subsection (1)(a), the grounds for departure are as follows:

(a) that, by virtue of special circumstances, the capacity of either parent to provide financial support for the child is significantly reduced because of—

(i) the duty of the parent to maintain any other child or another person; or

(ii) special needs of any other child or another person that the parent has a duty to maintain; or

(iii) commitments of the parent necessary to enable the parent to support—

(A) himself or herself; or

(B) any other child or another person whom the parent has a duty to maintain; or

(b) that, in the special circumstances of the case, the costs of maintaining the child are significantly affected because—

(i) of high costs incurred by a parent or a receiving carer in enabling a parent or receiving carer to have contact with the child; or

(ii) of special needs of the child; or

(iii) the child is being cared for, educated, or trained in the manner that was expected by either of his or her parents; or

(c) **that, by virtue of special circumstances, application in relation to the child of the provisions of this Act relating to formula assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of—**

(i) the income, earning capacity, property, and financial resources of either parent or the child; or

(ii) any payments, and any transfer or settlement of property, previously made (whether under this Act, the Property (Relationships) Act 1976 or otherwise) by the liable parent or a receiving carer to the child, to a liable parent or a receiving carer, or to any other person for the benefit of the child; or

(iii) an entitlement of the liable parent or receiving carer to the continued occupancy of a property in which the liable parent or receiving carer has a financial interest; or.

Re-establishment costs situation if income increases

(d) that the application in relation to the child of the provisions of this Act relating to formula assessment of child support would result in an unjust and inequitable determination of the level of child support to be provided by the liable parent for the child in respect of a child support year because—

(i) the adjusted taxable income of a parent of the child for the child support year includes income from relevant additional work (*see* subsections (3A) to (3C)); and

(ii) some or all of the income from relevant additional work has been used, or will be used, by the parent to meet, wholly or partly, actual and reasonable costs incurred to re-establish himself or herself, and any child or other person that he or she has a duty to maintain, after the child's parents ceased to live together in a marriage, civil union, or de facto relationship; or

Offsetting of liabilities situation

(e) that it would be just and equitable to offset one liability against another, if 2 persons are each liable to pay in respect of the other an amount of child support under a formula assessment (whether or not those amounts have become due and payable).

(3) For the purposes of subsection (2)(b)(i), costs incurred in enabling a parent or receiving carer to have contact with the child are not to be taken to be high unless the total of those costs during a child support year is more than 5% of the adjusted taxable income for the year of the person incurring the costs.

(3A) In subsection (2)(d), **relevant additional work** means work done by the parent during the relevant 3-year period that, in quantity or nature or both, is additional to work that he or she did before the child's parents ceased to live together in a marriage, civil union, or de facto relationship.

(3B) In subsection (3A), **the relevant 3-year period** means the 3-year period starting on the date on which the child's parents ceased to live together in a marriage, civil union, or de facto relationship.

(3C) For the purpose of calculating that 3-year period, the court may exclude a period or periods of resumed cohabitation with, or each with, the sole or main motive of reconciliation if that period does not exceed, or those periods in aggregate do not exceed, 3 months.

(3D) The ground in subsection (2)(d) applies only in relation to child support in respect of the child support year starting on 1 April 2016 or a later child support year.

(4) In determining whether it would be just and equitable as regards the child, a receiving carer, and the liable parent to make a particular order of the type specified in section 106, the court shall have regard to—

(a) the objects of this Act, and, in particular, the nature of the duty of a parent to maintain a child and the fact that it is the parents of a child themselves who have the primary duty to maintain the child; and

(b) the proper needs of the child, having regard to—

(i) the manner in which the child is being, and in which the parents expect the child to be, cared for, educated, or trained; and

(ii) any special needs of the child; and

(c) the income, earning capacity, property, and financial resources of the child; and

(d) the income, earning capacity, property, and financial resources of each parent who is a party to the proceeding; and

(e) the commitments of each parent who is a party to the proceeding that are necessary to enable the parent to support—

(i) himself or herself; or

(ii) any other child or another person that the parent has a duty to maintain; and

(f) the direct and indirect costs incurred by the receiving carer in providing care for the child, including the income and earning capacity foregone by the receiving carer in providing that care; and

(g) any hardship that would be caused to—

(i) the child or the receiving carer by the making of, or the refusal to make, the order; or

(ii) the liable parent, or any other child or another person that the liable parent has a duty to support, by the making of, or the refusal to make, the order.

(5) In having regard to the income, earning capacity, property, and financial resources of the child or a parent of the child, the court must—

(a) have regard to the capacity of the child or parent to earn or derive income, including having regard to any assets of, under the control of, or held for the benefit of, the child or parent that do not produce, but are capable of producing, income; and

(b) disregard the income, earning capacity, property, and financial resources of any person who does not have a duty to maintain the child, or who has such a duty but is not a party to the proceeding, unless, in the special circumstances of the case, the court considers that it is appropriate to have regard to them.

(6) The court may have regard to other matters beyond those specified in subsections (4) and (5).

Discussion

[49] The general approach to applications for departure is that the applicant needs to establish

(a) One of the grounds for departure in s 105(2) exists: and

(b) That the departure order sought is both just and equitable: and

(c) That departure is "otherwise proper"

[50] To establish a ground in s 105 the applicant must show that there are "special circumstances" that warrant departure. There are no hard and fast rules as to what is covered by these words and therefore each case will turn on its own factual matrix. But that factual matrix should show something out of the usual.

[51] The applicant asserts that Ms [Wyatt] should be attributed with income based on an interest factor on the funds tied up with the family home. The argument is that because Ms [Wyatt] does not pay for the accommodation she and the children share, she therefore has theoretical money at her disposal, and the amount of that money is assessed as the gross interest factor on the stated value of the advances from her Family Trust and her parents' family trust.

[52] The approach of the applicant relies on one of two possible constructions of the facts:

(a) The benefit of an interest free loan constitutes a financial resource under s 105(2)(c)(i). If this were the case, then the financial value of the interest free loan could be assessed as the interest that would otherwise be paid on the loan. This seems to be the rationale behind assessing the theoretical income using a gross interest factor.

(b) The loans from the trusts has allowed Ms [Wyatt] to live without accommodation costs. The benefit of free accommodation is a financial resource or property under s 105(2)(c)(i), and the applicant argues this constitutes theoretical money at her disposal. He fixes the value of the benefit as the potential interest that could be derived on the total advances to buy the home.

[53] The alleged benefits may be taken into account in two ways. The financial resource may constitute a "special circumstance" that justifies departure from the formula assessment, or it may be relevant in deciding whether the departure sought is "just and equitable". The applicant touches upon this in his written submissions, relying on the following dictum from the Court of Appeal in *[EJV v AJCB]*:[1]

> We do not agree that it is logical to exclude [benefits] when considering an application for a departure from a formula. This proceeding is, by definition, about the departure from the formula assessment, and it is illogical to conclude that what cannot be included in the formula assessment, can by extension not be included in considering a departure from the formula assessment. The reason for allowing a departure is that the formula assessment is unable to take into account certain things, such as for use of a car and of interest free loans, which affect the financial position and resources of the liable parent and which it is equitable and just and otherwise proper to take into account.

[54] The applicant asserts that this provides support for extracting a theoretical income from the presence of a financial benefit. It is correct that free accommodation or an interest free loan *may* be taken into account when considering a departure from the formula assessment.

[55] However, the presence of an unaccounted benefit will not invariably be a "special circumstance" and constitute grounds for departure. There is still a requirement that the presence of such a benefit is out of the ordinary or unusual.

[56] Moreover, the dictum does not provide support for the notion that it will always be "fair and equitable" to take into account benefits of the described nature. There will be situations where it is not fair and equitable to depart from the formula assessment on the basis that a parent receives a benefit not captured by the formula assessment.

Interest free loan construction

[57] It is not appropriate to value the advances made between the two trusts as an income, or as interest saved on a loan. It is important to look at the bigger picture. The practical benefit of the advances between trusts to Ms [Wyatt] is free accommodation, not the benefit of having access to interest free credit. It is not appropriate to quantify

[1] *EJV v AJCB* [2013] NZCA 100.

financial benefit as savings made on loan interest, or as a theoretical income for the following reasons,

(a) Mr [Burnham]'s gross interest factor approach values the advances as if the loans were made directly to Ms [Wyatt]. This method of valuation deviates too far from reality to be correct.

(i) The loans were made not to Ms [Wyatt], but to Ms [Wyatt]'s Family Trust.

(ii) Ms [Wyatt] claims to have no control over either trust. She clearly has no control over her parent's trust.

(iii) Ms [Wyatt] does not have access to a large interest free loan. Ms [Wyatt] does not even have equity in the home.

(b) Ms [Wyatt] does not draw an income from her Family Trust, nor were the advances made for that reason. The advances were made to purchase and maintain the family home and were in fact applied for that purpose.

Free accommodation argument

[58] The essence of the applicant's argument is that having the benefit of free accommodation should result in a theoretical income being extrapolated to account for the financial benefit of said occupation. In the case of *Upshon v Windleborn* the Judge said that a family trust owning a family home and allowing the liable parent to live in it rent free did not result in a distortion of his financial position.[2] The child support assessment was not determined by what he owns but by what he earns.[3]

[2] *Upshon v Windleborn* (2004) 23 FRNZ 526 at [24].
[3] At [24].

[59] I do not consider the fact of Ms [Wyatt] living in a freehold home of itself constitutes a "special circumstance" that would justify departure from the formula assessment. It is not uncommon or unusual for a parent to live in a freehold home.

[60] Ultimately, the applicant's desire to extract a theoretical income from a financial benefit requires the Court to accept that a penny saved is indeed a penny earned in the domestic context. However, money saved on accommodation does not translate into additional money being placed in Ms [Wyatt]'s pocket. For example, one cannot purchase a discounted good and use the value of said discount at the grocery store, or to pay for tennis coaching. To say that a saving is an income is not appropriate.

The theoretical full-time income

[61] Mr [Burnham]'s argument is that Ms [Wyatt] has now reached the point where she should be regarded as being in fulltime employment as there is no need for her to be at home for the benefit of the children. The relevant test is whether Ms [Wyatt]'s earning capacity is a "special circumstance" that justifies departure from the formula assessment.[4] His argument is that she is capable of working more than part-time, but because she has elected to remain at home, the Court (and the Commissioner) should attribute an income to her. Mr [Burnham] assesses that income as the average wage, or alternatively in a second calculation he has assessed that income as being based on the minimum wage.

[62] The leading authority about earning capacity is *Johnson v Commissioner of Inland Revenue*.[5] That case establishes that where a liable parent has the requisite skills and the available opportunity to earn more than he or she currently does, then a failure to take that opportunity resulting from an unwillingness to do so will count against the parent. However, only the reasonable abilities of the liable parent and the opportunities reasonably available to him or her will be assessed. It does not take into account what the liable parent could earn if they took steps to better themselves.

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[4] Child Support Act 1991, s 105(2)(c)(i).
[5] *Johnson v Commissioner of Inland Revenue* [2002] 2 NZLR 816.

[63] In the case of *Upshon v Windleborn* there was an issue as to whether an IT professional had been deliberately earning below his true capacity to minimise his liability for child support.[6] The liable parent had previously worked on a three-year contract earning in excess of $80,000 per annum. When the contract came to term in 2000, the parent was unable to find similar employment for comparable remuneration. Instead, he set up his own business, which was not successful in generating substantial income; making $18,000 in 2003. His former partner alleged that the liable parent was deliberately choosing not to take up lucrative employment available to him as an expert in the IT industry. The review officers agreed and assessed the liable parent to the statutory maximum.

[64] The application of s 105(2)(c)(i) of the Act was the central issue of the case: whether special circumstances meant the original assessment resulted in an unjust and inequitable determination of the level of financial support, because of the income earning capacity, property and financial resources of either parent or the child.[7] The Judge said that it was immediately apparent that it could not be other than special, unusual and sufficiently out of the ordinary for a liable parent to be paying child support on a basis of four times his real income in one year, and three times in the next.[8] The Judge in *Upshon* agreed to grant a departure order, varying the amount assessed for the relevant year from $86,684 to $18,449.[9]

[65] The case of *Upshon* bears on a number of points raised by the present application. Firstly, the argument that an IT professional, considered an expert in his field, was not earning to his true capacity was rejected. The argument was rejected despite the fact that in some years the liable parent earnt less than $20,000 per annum and had entered the inherently risky enterprise of starting a business rather than continuing to seek secure employment.

[66] Ms [Wyatt] has displayed genuine efforts to upskill and obtain more hours with her current employer, while also facing the realities of being the primary caregiver and other obstacles to entering full time employ, such as her absence from the workforce.

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[6] *Upshon*, above n 7, at [5] – [6].
[7] At [32].
[8] At [32].
[9] At [33].

It would be an odd result if Ms [Wyatt] were treated as earning below her true capacity, while a non-custodial, skilled IT professional was found to *not* be earning below his capacity. Both parents' actual income is three to four times lower than what was originally assessed. In my view neither case warrants the application of a theoretical income.

[67] Secondly, *Upshon* stands for the proposition that departure from the child support assessment may be ordered on the grounds that it is unusual and out of the ordinary for a parent to be assessed on the basis that their income that is three to four times higher than their actual income. In the relevant period between 1 September 2017 and 31 March 2018 Ms [Wyatt] earned between $8,000 and $10,000 a year. The Commissioner's decision of 12 October 2017 attributed a full-time minimum wage of $32,760 to Ms [Wyatt]. The attributed income is three times higher than the respondent's actual income. The theoretical income of the median full-time wage, proposed by the applicant, is four times higher than Ms [Wyatt]'s actual earnings.

[68] Also of relevance is the decision of *Shaw v Sutherland.*[10] In that case the applicant was seeking a departure order because he had elected to engage in full-time study rather than renewing his contract of employment.[11] The issue was whether the applicant would be underemployed, in the sense that he was intentionally earning below his capacity.[12]

[69] The Judge in *Shaw* found that the choice to retrain or seek lower paid employment should not override the obligation to support that liable parent's children.[13] After considering the objects of the Child Support Act, Judge Walsh found that:[14]

> … where there is ability to work and an opportunity to work, it will be far more difficult for an applicant to obtain a departure order in those circumstances, compared to an applicant who has been compelled for whatever reason, to find new employment or undertake a period of retraining in circumstances which were beyond his/her control.

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[10] *Shaw v Sutherland* [2002] NZFLR 145; (2001) 22 FRNZ 500.
[11] At [2].
[12] At [37].
[13] At [59].
[14] At [56].

[70] The Judgment of *Shaw* was followed in *GPF v CKW*.[15] The applicant seeking a departure order was a financial consultant. He had left secure, well remunerated employment to start his own business.[16] The market salary of his former position was between $77,000 and $97,000. His new business produced a personal income of $30,000 per annum. The Judge found that the applicant had left employment in circumstances under his control, with no evidence produced that he sought similar alternative employment.[17] The Judge found that the applicant was underemployed and elected to fix his assessable income as two thirds of his previous remuneration.[18]

[71] *Shaw* and *GPF* are both examples where parents have been found to be underemployed, as is alleged of Ms [Wyatt]. However, the facts of each case can be distinguished:

(a) Ms [Wyatt] has not left full time employment to seek lower paid employment or education. Rather, she is on the opposite trajectory. She has left unemployment to seek paid part time work, while retraining so she might seek higher paid work.

(b) New Zealand case law about underemployment is concerned with the non-custodial parent's true earning capacity. One might more readily infer that a liable parent who does not bear the majority of childcare could be making a greater effort to take advantage of employment opportunities. Different considerations apply to the custodial parent. Arguably the earning capacity of a custodial parent is lowered by a situation out of their control, the fact that they have childcare obligations. Unpaid care work should certainly be taken into account, as suggested by the respondent's submissions.

(c) Counsel have all referred to various decisions in which the Court has considered the impact of arrangements made, primarily by the liable parent, in arranging their financial circumstances in an effort to reduce

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[15] *GPF v CKW* FC Hamilton FAM-2009-019-1242, 17 June 2010.
[16] At [20].
[17] At [64].
[18] At [89].

> their net taxable income figure which forms the basis of any child support assessment. The Courts have taken the view that a liable parent should not be able to manipulate or arrange their financial affairs in such a way as to result in a reduction in their taxable income, where those arrangements have clearly been designed to benefit the liable parent, usually resulting in a financial benefit to the liable parent, and thus reduce the amount of child support, which eventually results in the State picking up the shortfall by way of benefit payments to the caring parent. The approach adopted by the Courts therefore is the proper one.

[72] It is also relevant that the underlying principle behind underemployment jurisprudence is that the liable parent has an obligation to support their children, which overrides the liable parent's autonomy in making decisions which lower their earning capacity.[19] It is a different situation entirely when a custodial parent prioritises childcare and consequentially lowers their earning capacity. In that situation, the obligation to support one's children is not in conflict with the decision to remain home and engage in unpaid care work for the purposes of supporting one's children.

[73] In fact, a reduction in income may be reasonably justified if it results in more contact with the parent's children. In *Fleet v Fleet* a departure order was granted to lower the assessed income of a father who moved cities to be physically closer to his children, despite the move resulting in a significant decrease in assessable income.[20] *Fleet* is an example of a case where a decision to reduce one's income was not in conflict with the overriding obligation to support their children, because the decision resulted in more parental contact.

[74] Overall, Ms [Wyatt] does not sit in the position of a non-custodial parent who has demonstrated an unwillingness to take advantage of requisite skills and opportunity to earn more than she currently does. Ms [Wyatt] has demonstrated a willingness to work and to take advantage of the skills and opportunities she has. Beyond that, she has also demonstrated a desire to upskill and increase her earning potential. She has done this against a backdrop of constraints that affect the

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[19] *Shaw,* above n 15, at [17].
[20] *Fleet v Fleet* (1999) 18 FRNZ 665.

opportunities available to a full-time mother. It must be acknowledged that it is not easy to find fulltime work that fits around the demands of being a full-time parent.

[75] In this case however, Mr [Burnham]'s argument is that Ms [Wyatt] has now reached the point where she should be regarded as being in fulltime employment as there is no need for her to be at home for the benefit of the children. His argument is that she is capable of working more than part-time as she currently does, but because she has elected to remain at home, the Court (and the Commissioner) should attribute an income to her. Mr [Burnham] assesses that income as the average wage, or in a second calculation has assessed it as being based on the minimum wage.

[76] In addition, he argues that Ms [Wyatt] should be attributed with income based on the interest factor on the funds tied up in the family home.

[77] When considering the argument over attribution of the interest factor, it seems the argument is put forward on the basis that because Ms [Wyatt] does not pay any money for the benefit of occupation of the home she occupies with the children, she therefore has theoretical money at her disposal, and the amount of that money is assessed as the nett interest factor on the stated value of the advances from her family trust and her parents' family trust.

[78] This aspect of the argument ignores the fact that:

(a) Firstly, there is no money actually involved. It is all theoretical money;

(b) If Ms [Wyatt] were to pay the figure as suggested by Mr [Burnham], then the payments would be made by her to her parents' family trust and that does not produce any financial advantage to Ms [Wyatt]. That money would pass to the parents' family trust, as income in the hands of that family trust. Any money paid to Ms [Wyatt]'s family trust would be income of that family trust, and not income of Ms [Wyatt]. The end result is that she would therefore have a liability, based upon Mr [Burnham]'s own calculations, which would exceed her theoretical income based on the average wage.

[79] Mr Delaney raised an argument on behalf of Ms [Wyatt] that if one took the approach adopted by Mr [Burnham], and then applied it to Mr [Burnham]'s own situation, Mr [Burnham] is living in a house owed by him. He has his partner and her two children living in the house with him. Mr Delaney argues that it would be appropriate therefore to attribute a theoretical income to Mr [Burnham], from his partner and her two children for the benefit of their occupation, with him, in the house owned by him. That argument, as I understood it, was advanced in an effort to demonstrate the inappropriateness of the approach adopted by Mr [Burnham] when seeking to attribute this particular income to Ms [Wyatt].

[80] Not only does Ms [Wyatt] have the benefit of this occupation, but the couples' three children also have the benefit of the occupation. Clearly the children have no assets and are not in a position to pay a share for their occupation of the home. Mr [Burnham]'s argument is that the sole responsibility therefore falls on Ms [Wyatt].

[81] The other side of the argument on this topic is that Ms [Wyatt] derives a "benefit" by not paying the usual costs of accommodation and Mr [Burnham] considers that she should somehow have that "benefit" recognised in a concrete manner, and therefore his view is that can be achieved by attributing an income to her, which is based on his interest calculation.

[82] It seems Mr [Burnham]'s argument is directed at s 105(2)(c)(i), namely he is saying that the earning capacity of Ms [Wyatt] is greater than she claims, and he bases this view on his argument around attribution of income to Ms [Wyatt].

[83] There needs to be a degree of reality, and not just a strict accountancy approach adopted. Ms [Wyatt] does not earn this money. Certainly, she receives a benefit by reason of the occupation, but the children also derive that benefit. Both parents have an obligation to house their children, and this is how Ms [Wyatt] has chosen to do that.

[84] Ms [Wyatt] could have chosen to invest the property settlement and then she would have derived an income. But then she would have had to pay rental outgoings. Any income derived by Ms [Wyatt] from investing her initial $400,000 would, after

payment of tax, likely to have been insufficient to meet rental outgoing required to house the children.

[85] I do not consider therefore that this approach taken by Mr [Burnham] could be regarded as being just and equitable, or otherwise proper, and accordingly that aspect of Mr [Burnham]'s argument must fail.

[86] As to the attribution of a theoretical income, whether it be based on the average wage or the minimum wage, Ms [Wyatt]'s argument is that she is currently fully employed as a caregiver for her children, coupled with her part-time employment.

[87] The evidence in this case has been that the eldest child suffers from depression, and there is evidence of potential psychiatric illness within the family unit. This is one of the reasons why Ms [Wyatt] has considered it is important to be available for the children. In the circumstances of this case, I do not consider that that is an unrealistic or unreasonable consideration on her part.

[88] In the circumstances of this case, I do not consider the approach taken by Mr [Burnham] is just and equitable or "otherwise proper" and in those circumstances, this aspect of his claim also fails.

[89] That means that his appeal against the Commissioner's determination is dismissed. It also results in the cross-appeal by Ms [Wyatt] being successful.

[90] The matter is referred back to the Commissioner to make the necessary adjustments which arise out of this decision.

Judge P R Grace
Family Court Judge