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**IN THE FAMILY COURT  
AT HAMILTON**

**FAM-2016-019-000164  
[2016] NZFC 7692**

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	KADE MASTERSON Appellant
AND	ERICA MASTERSON First Respondent
AND	COMMISSIONER OF INLAND REVENUE Second Respondent

Hearing: 29 August 2016

Appearances: Appellant appears in person  
First Respondent appears in person  
J Chappell for the Commissioner

Judgment: 29 November 2016 at 12:00 pm

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**RESERVED JUDGMENT OF JUDGE G S COLLIN  
[Appeal against Decision of Commissioner of Inland Revenue]**

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## Introduction

[1] Kade Masterson and Erica Masterson are the parents of Reed Masterson aged 12 and Marina aged nine. The parties separated in November 2014, reconciled in June 2015 and finally separated in September 2015. The children currently live with Mrs Masterson. Mr Masterson is liable to pay child support.

[2] Mr Masterson appeals the decision of the Commissioner of Inland Revenue (the Commissioner) departing from the child support formula assessment for the period from 30 September 2015 to 31 March 2016. That decision increased Mr Masterson's adjusted taxable income for the purpose of calculating his child support liability from a default assessment of nil to \$80,000.00.

[3] I must decide whether the review officer was wrong.

## The task on appeal

[4] Appeals to the Family Court under the Act are by way of rehearing.<sup>1</sup>

[5] The onus is on Mr Masterson to prove that the review officer was wrong. It is an appeal against the exercise of discretion as noted by Judge Ryan in *DSJT v MAFR*<sup>2</sup>.

The usual burden that falls upon a person appealing against the exercise of a discretion applies, namely that an appeal will be upheld if the Court is persuaded that the Review Officer has acted in accordance with the wrong legal principle, failed to take into account a relevant matter, took account of some irrelevant matter, or was plainly wrong.

[6] I did not receive the notes of evidence from the review hearing. Nor have I received any documents that were produced to the review officer, although it would seem that from the review officer's decision that the evidence presented was primarily statements of the parties' respective financial positions. For the purpose of the appeal Mr Masterson has provided statements of his financial position. Given

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<sup>1</sup> Section 103B(5) Child Support Act

<sup>2</sup> FC North Shore, FAM-2007-044-001547, 4 December 2007 at Judge Ryan para [2] drawing on *Swayne v Lush* [1999] NZFLR 49. Potter J and *May v May* (1982) 1 NZFLR 165 (CA).

that the decision was based on his income and earning capacity, I am satisfied that there is adequate evidence for me to determine whether the review officer exercised the discretion appropriately.

### **Mr Masterson's argument**

[7] I identify from Mr Masterson's pleadings, evidence and submissions that he argues the review officer was wrong for the following reasons:

- (a) His taxable income was assessed at a level well exceeding his actual taxable income and so creates financial hardship for him;
- (b) That the finding that the income he was assessed at, and what he was capable of earning, was sufficient to constitute special circumstances did not take into account:
  - (i) The fact that he could not continue his previous employment and that leaving his previous employment was not a unilateral decision as found by the Review Office;
  - (ii) That in any event his reconciliation with Mrs Masterson would have required him to relocate, so that continuing with his previous employment was not realistic;
  - (iii) That Mrs Masterson was well aware of his changed circumstances at the time of their reconciliation.

### **The decision under appeal**

[8] The review officer decided that due to Mr Masterson's earning capacity, there were special circumstances which meant the application of the formula assessment would be unjust and inequitable. That is the ground in s 105(2)(c)(i) of the Child Support Act 1991 ("the Act").

[9] The review officer's reasoning is that because Mr Masterson left his employment with [employment details deleted] at which he received an annual salary of \$80,000 per annum to form a company and to be self employed at a reduced salary, his income did not reflect his earning capacity. Put another way, Mr Masterson was capable of earning more but chose not to.

[10] The review officer then determined that Mr Masterson's earning capacity upon which his child support obligations should be based was \$80,000. This was calculated having regard to the income that he received in his previous employment. As Mr Masterson had been assessed on a default basis of \$nil, the review officer was satisfied that a departure order was indeed just and equitable between the parties, and that the ground for the making of a departure order had been established.

[11] The review officer went on to consider, as required by s 105(1)(b)(i), whether it was just and equitable as regards the children and the parties to make a departure order. In doing so, she turned her mind to the mandatory requirements in s 105(4).

[12] Finally the review officer considered whether it was otherwise proper to make the departure order as required by s 105(1)(b)(ii). She concluded that there was no evidence which indicated that any party would be harshly affected by the departure order and concluded therefore that a departure order in this case was proper.

[13] The critical factor is whether the review officer was correct in assessing that there was special circumstances that meant the application of the formula assessment would result in an unjust and inequitable determination of child support liability because of Mr Masterson's earning capacity and, if so, whether given his financial position, it was correct to determine it was just and equitable to make a departure order.

#### **Did Mr Masterson's earning capacity give rise to special circumstances?**

[14] The first matter I address is whether the review officer was correct to determine that Mr Masterson's earning capacity is sufficient enough to constitute a

special circumstance so as to make his assessment for the year applied for, an unjust and inequitable determination of the level of financial support which he is to pay to Ms Masterson. In reaching findings the review officer emphasised the decision in the cases of *Johnson v Commissioner of Inland Revenue*<sup>3</sup>, the Australian Family Court case of *DJM v JLM*<sup>4</sup>, *Shaw v Sutherland*<sup>5</sup> and *Clough v Cooper*<sup>6</sup>. These decisions deal with situations where a liable parent makes a choice to change employment, as a consequence of which there is a reduction in income.

[15] In *Clough v Cooper*, Judge Neal said:

In my view that voluntary reduction in income should not affect the amount to be paid for child support adversely. The responsibility to pay for the children's support must come first.

[16] In *Shaw v Sutherland*, Judge Walsh states:

Where a liable parent who is in fulltime employment and assessed to pay child support elects voluntarily to seek lower paid employment, or to retrain or to undertake a period of study to obtain qualifications, that choice should not override the obligation to support the liable parent's children.

He went on to say:

In principle, it appears wrong to me to permit a situation to occur where a liable parent, as the result of a unilateral decision which has the effect of reducing his income, can benefit from that decision to the financial detriment of the children whereby increasing the burden for the support of those children on the qualifying custodian.

[17] The review officer placed a heavy emphasis on these decisions in determining that the unilateral decision of Mr Masterson to leave his employment should not have had a detrimental financial effect on Mrs Masterson or the children and that as a consequence, he should be assessed having regard to his income prior to leaving [employment details deleted] and starting up his own company. The review officer emphasised that it was Mr Masterson's choice to leave his previous role, thus reducing his income.

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<sup>3</sup> [2002] 2 NZLR 816

<sup>4</sup> (1998) 23 Fam LR 396 ; (1998) FLC 92-816

<sup>5</sup> [2002] NZFLR 145

<sup>6</sup> CS5/99, Tauranga, 11 November 1999, Judge Neal

[18] I am satisfied Mr Masterson did not make a conscious unilateral decision to leave his employment and reduce his income. I reached that conclusion for the following reasons:

- (a) At the time of the parties' initial separation in November 2014 they were living in Auckland. Mr Masterson had lived in Auckland all his life and was working in Auckland when they separated. Mrs Masterson relocated to [location deleted] with the children. The relocation was agreed to by Mr Masterson. Mr Masterson remained in Auckland at his previous employment and saw the children by commuting to [location deleted] in the weekends for that purpose.
- (b) It is Mr Masterson's evidence that his employment became untenable. Although he is unable to provide any written notice of dismissal, nor were any steps taken by him for wrongful dismissal, his undisputed evidence is that his employer was unhappy that weekend work he had obtained in the Hamilton area was in conflict with his employment in Auckland. There was talk that he would be dismissed. This is confirmed in a letter provided to the Court by Mr Masterson.
- (c) Mr Masterson with two others set up a company in Hamilton. From 30 March 2015 they took wages calculated at an annual salary of \$60,000, initially taken at \$925.50 per week. Mr Masterson believed that the company would prosper and considered that an income of \$80,000.00 plus was achievable, initially his belief appeared well founded.
- (d) By June 2015 Mr Masterson's wages started being paid irregularly. By about August Mr Masterson was being short paid. By February 2016 the company appears to have ceased trading. The evidence suggests that the business partner who was responsible for the financial aspects of the company, failed to pay GST, PAYE and other tax liabilities.

- (e) Due to the failure of the company Mr Masterson is not currently in employment.
- (f) Mr Masterson left the employment of [employment details deleted] to establish the company in March 2015. Although Mr Masterson deliberately left the employment of [employment details deleted] to establish the company in March 2015, I am not satisfied that the reduction in income was voluntary, conscious or deliberate but rather a combination of his work circumstances at [employment details deleted], the reasonable prospects of employment in Hamilton and the movement of his children to [location deleted] and his decision to be closer to them.
- (g) In June 2015 Mr Masterson reconciled with Mrs Masterson. They jointly purchased a house together in [location deleted] and lived there from June 2015 until their final separation in September 2015. It would not have been possible for Mr Masterson to have reconciled with Mrs Masterson and lived in [location deleted] whilst retaining his employment with [employment details deleted]. This is acknowledged by Mrs Masterson in her affidavit of 11 March 2016 in which she states “Had Kade remained at his place of employment in Auckland it would have meant seeking a position in the Waikato if we had still attempted reconciliation in June 2015.”
- (h) Although she was not privy to Mr Masterson’s financial arrangements, and believed that he was earning a similar amount to that which he had received with [employment details deleted], she knew that he had left the employment of [employment details deleted] and moved to Hamilton where he had started up his own business.
- (i) In determining that Mr Masterson had unilaterally or deliberately reduced his income, the review officer failed to take into account the circumstances relating to Mr Masterson leaving his employment setting up a new company, moving to Hamilton, reconciling with Mrs

Masterson, and the certainty that this could not have occurred whilst maintaining his prior employment at [employment details deleted].

- (j) Although initially drawings appeared to be regular, by about the time of the parties reconciliation there appear to be difficulties in the payment of wages on a weekly basis. By 26 June 2015 there are occasions where wages were not paid on time or were short paid.

[19] Notwithstanding that I disagree with the review officer that Mr Masterson had voluntarily reduced his income, I nevertheless agree with the finding of the review officer that special circumstances exist that the default assessment of a nil income would result in an unjust and unequal determination of the level of financial support provided by Mr Masterson. I have reached that conclusion because:

- (a) Mr Masterson based his own salary expectation at a figure of \$60,000.00, and has a reasonable expectation that it would remain at or about that level. He in fact anticipated an increase.
- (b) I accept Mrs Masterson's evidence that at about the time of the reconciliation Mr Masterson represented the business as "doing well" with the potential for expansion. This is reflected in Mr Masterson's initial weekly net wages of \$925.20 per week.
- (c) At the time of the reconciliation and subsequent separation Mrs Masterson retained that expectation and that to do so was reasonable.
- (d) Mr Masterson's business income declined following separation to the point the business ceased trading by the end of March 2016. Mr Masterson's evidence is that the business failure occurred partly as a consequence of the poor management of the company by his business partner. When Mr Masterson's wages were reduced he had an obligation to make enquiries regarding his business and to be aware as to what was happening. There is no evidence that this occurred. No



evidence exists as to the steps taken by Mr Masterson to remedy the business difficulties, or alternatively to find new employment.

- (e) I am satisfied that by failing to do so Mr Masterson was neglectful in his duty to protect his income in such a way as to not adversely affect his obligation to pay child support.

[20] Accordingly although I am not satisfied that Mr Masterson voluntarily reduced his income by leaving his employment at [employment details deleted], I am satisfied that special circumstances exist on the basis that the default assessment of \$nil comprised a significant disparity between:

- (a) Mr Masterson actual income, which was significantly more than the default assessment; and
- (b) Mr Masterson's anticipated income of \$60,000.00 which I assess as his earning capacity demonstrated by the drawings taken by him.

[21] Whilst I disagree with the review officer's reasoning I accept the Review Officer's conclusion in finding that ground s 105(2)(c)(i) was made out for 2015/2016 year.

**Should a departure order be made, given Mr Masterson's financial circumstances?**

[22] Mr Masterson has filed a statement of assets and liabilities dated 26 April 2016. This was updated during the course of the appeal. Mr Masterson's income in the 52 weeks up to July 2016 appears to have been \$33,000.00. Mr Masterson's disclosed assets comprising his interest in the [location deleted] home in the region of \$62,500.00. The Relationship Property is yet to be resolved and a lump sum payment maybe received by Mr Masterson. Mr Masterson accepts that some child support should be payable, but that it should not be based on his prior income of \$80,000.00. I am satisfied that it is just and equitable that a payment is made and that this conclusion was open on the evidence available to the Review Officer.

**Is the making of an order otherwise proper?**

[23] I am satisfied that the Review Officer considered whether the making of an order would be otherwise proper. Limited reasons are given, other than by citing the objects of the act. I have regard to the circumstances of the parties and in particular to Mr Masterson and his own acknowledgment that he does not seek to deny the payment of child support but that his main objection is the level of income assessed by the Review Officer.

**Was the assessment of quantum correct?**

[24] I agree with Mr Masterson and decline to set his income at the level set by the Review Officer being his income whilst working at [employment details deleted].

[25] I consider that the appropriate figure should be determined having regard to the circumstances of Mr Masterson at the date of his reconciliation with Mrs Masterson namely drawings based on anticipated income of \$60,000.00. I set this figure having regard to:

- (a) Mr Masterson's relocation to Waikato;
- (b) Mr Masterson's reconciliation with Mrs Masterson subsequent to his relocation; and
- (c) The commencement of Mr Masterson's new employment;
- (d) Mr Masterson's reasonable expectation of income in the new company established by him.
- (e) Mrs Masterson's own evidence that she considered an assessment at the rate of \$60,000.00 to be reasonable in the circumstances.

## **Order**

[26] For the period 30 September 2015 to 31 March 2016 Mr Masterson is to be assessed to pay to Mrs Masterson child support at an adjusted taxable income of \$60,000.00 per annum.

[27] I consider it reasonable to back date this to September 2015 being the month Mr Masterson commenced paying child support.

G S Collin  
Family Court Judge