EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, 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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT NORTH SHORE

FAM-2014-044-000721
[2017] NZFC 2010

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[WILL CARTER] [BROOKE ASHTON] Applicants
AND	[NAOMI PARKINSON] Respondent

Hearing:	23 February 2017
Appearances:	C L Armstrong for the Applicants S Bennett for the Respondent
Judgment:	24 April 2017 at 4.30 pm

RESERVED JUDGMENT OF JUDGE A J TWADDLE
[Application for Departure from Formula Assessment]

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[1] This is an application for departure from a formula assessment under the Child Support Act by [Will Carter] and [Brooke Ashton] in respect of their adopted daughter, [Tilly], who was born on [date deleted] February 1996 and is now aged 21.

[2] The application is opposed by [Tilly]'s biological mother, [Naomi Parkinson].

Background

[3] When she was aged about two, [Tilly] was removed from the care of her biological parents and placed in CYFS care. She had been neglected in her parents' care and had developmental delays. She had a number of CYFS placements which failed to meet her needs and she went to stay with Dingwall Trust in 2003. She was diagnosed with ADHD.

[4] In 2006 when she was just under ten, [Tilly] went to live with Mr [Carter] and Ms [Ashton]. They obtained parenting and additional guardianship orders under COCA and on 31 October 2013 a final adoption order was made in their favour.

[5] [Tilly] required intense counselling and other significant emotional and financial support from Mr [Carter] and Ms [Ashton].

[6] Some time after the adoption order was made, [Tilly] began having contact with her biological family and formed a relationship with her boyfriend, [Edward Sanderson].

[7] On [date deleted] February 2014, when she was 18, [Tilly] ran away to be with her boyfriend.

[8] Ms [Parkinson] applied for a child support assessment, and on 23 June 2014, for the child support period 9 June 2014 to 31 March 2015, Ms [Ashton] was assessed to pay child support at the minimum rate of $73.75 per month, and Mr [Carter] was assessed to pay child support at the rate of $1455.90 per month. The assessment was made on the basis that [Tilly] was in Ms [Parkinson]'s care.

[9] Ms [Ashton] and Mr [Carter] objected to the formula assessment but their objection was disallowed by the Commissioner.

[10] On 22 October 2014 the liability of Ms [Ashton] and Mr [Carter] to pay child support was suspended, pending the hearing of the substantive proceedings.

[11] On 23 March last year a direction was made that no evidence other than the mandatory affidavits of financial means and their sources was to be filed without leave. No affidavits as to financial means and their sources have been filed.

[12] Ms [Ashton] and Mr [Carter] want their liability to be reassessed at nil. The grounds for their application are those in s 105(2)(b)(iii) of the Act, although in her submissions Ms Armstrong submitted that the most applicable ground was that in s 105(2)(c).

[13] There was reference in counsel's submissions to Ms [Ashton] and Mr [Carter] being liable for the period February to October 2014, during which time Ms [Parkinson] said she was supporting [Tilly]. The contention of Ms [Ashton] and Mr [Carter] was that Ms [Parkinson] was not supporting [Tilly] during this time but that she was being supported by her boyfriend [Edward].

[14] Section 104(1)(a) of the Act provides that an application for departure from a formula assessment can be made only if a formula assessment is in force. There was no evidence that a formula assessment was in force before 9 June 2014 so the period in question is 9 June to the end of October 2014. In broad terms the amount of money involved is $7,600.

Evidence

[15] I heard brief evidence from Mr [Carter], Ms [Ashton]and Ms [Parkinson].

[16] Mr [Carter] is [occupation deleted]. He and Ms [Ashton] live in [country deleted]. The last time Mr [Carter] saw [Tilly] was in [location deleted] in mid 2015.

[17] Mr [Carter] said he anticipated at the time [Tilly] came into the care of himself and Ms [Ashton] she might have behaviour and learning issues. CYFS provided some funds to support [Tilly] through a Home For Life package.

[18] Mr [Carter] accepted that at the relevant time he was employed, had assets and was able to pay child support. But, he said, he was disputing liability because he and Ms [Ashton] had worked very hard when [Tilly] was in their care to integrate her into society. They had provided everything she required and met all of her needs, which had at times caused them to struggle financially. They had sold their business and maintained homes in [locations deleted], at least partly because of [Tilly]'s high needs so that they could give her time as she went into her teenage years. He felt all the progress they had made was lost when [Tilly] left them, and they were being punished for doing the right thing. He did not, he said, want to reward someone who had "destroyed their daughter's life". The case was not about the money, but about paying a caregiver who was unsuitable and had always been unable to meet [Tilly]'s complex needs.

[19] Further, in a joint affidavit Mr [Carter] and Ms [Ashton] said that:

> …seven months in her biological mother's care damaged eight years of hard work her parents, family members, the education system and Child, Youth and Family invested whilst caring for [Tilly]. More disturbing is [Tilly']s child is likely to be exposed to the same dysfunctions [Tilly] was. This is the reason her parents are refusing to pay child support. Not because of money but because of the moral, ethical unjustness and unfairness surrounding this case.

[20] Ms [Ashton] deposed that when [Tilly] left home, she indicated to her and Mr [Carter] she was living with her boyfriend, [Edward Sanderson] and Mr [Sanderson] had indicated he was financially supporting [Tilly]; in a phone call she had with him on 23 August 2014, he said [Tilly] was "pretty much" being supported by him and he was prepared to say to IRD that [Tilly] was dependent on him.

[21] Ms [Ashton] said Mr [Sanderson] was living with [Tilly] at the time of her phone call. He was "working, then not for a period, then had two jobs". She acknowledged it was possible that what Mr [Sanderson] said was not true and that he

was reacting out of concern for her. She did not know if it was possible [Tilly] and Mr [Sanderson] were living with Ms [Parkinson]. Directly after [Tilly] left, Ms [Ashton] said she received a number of abusive text messages from Ms [Parkinson] and Mr [Sanderson].

[22] Ms [Parkinson]'s evidence was that she heard from [Tilly] when she was 14 but Ms [Ashton] and Mr [Carter] blocked her Facebook account and would not permit cellphone contact. She had consistently met her liability to pay child support for [Tilly].

[23] Ms [Parkinson] said [Tilly]was in her care from February 2014 until October 2014 when she and Mr [Sanderson] moved to [location deleted]. She was working at the time and spent her earnings on "accommodation, food for [Tilly], her grandchildren, travel costs, power, doctors and so on". Mr [Sanderson] did not, she said, support [Tilly]; he was abusive towards [Tilly] and her and was not welcome in her home, but he lived with her and [Tilly] from February 2014 until he left to go to [location deleted]; she could not get rid of him. He had no job, he did not support [Tilly]; she had no choice but to support them both. She felt she deserved compensation for supporting [Tilly] for about four months between May or June and October.

[24] [Tilly] filed an affidavit in which she said:

(a) She left the care of Ms [Ashton] and Mr [Carter] after a big argument on [date deleted] February 2014;

(b) She then stayed with her boyfriend at her mother's house. She said:

> Mum supported me and my boyfriend financially for the period. She bought all our food, paid for the power, rent and other outgoings. I was not receiving any money at the time.

In October she left her mother's house to live with her boyfriend and his family.

[25] [Tilly] was not present for cross-examination.

Submissions

[26] In essence, Ms Armstrong submitted:

(a) The circumstances of the case are out of the ordinary and special because [Tilly] in effect "divorced her adoptive parents" and returned to the care of her biological mother;

(b) [Tilly] was being supported during the relevant period by her boyfriend and was financially independent of her biological mother;

(c) Although Ms [Parkinson] did not have a legal duty to maintain her daughter, as her biological mother she had a moral duty to do so;

(d) The Court should give weight to the financial and other contributions Ms [Ashton] and Mr [Carter] made to [Tilly] during the eight years she was in their care.

[27] Ms Armstrong referred to *Ruru v Waddell*[1], *Mazengarb v Ambler*[2], *and O v H*[3].

[28] Ms Bennett submitted:

(a) There are no special circumstances in the case, which involved a change in care resulting in a change of obligation to pay child support (the applicants had divorced [Tilly], rather than the other way round);

(b) Ms [Parkinson] met any moral duty she had; she had paid child support throughout [Tilly]'s life at $106 per week and she was expected at short notice to support [Tilly] and her boyfriend which she did;

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[1] *Ruru v Waddell* FC Levin, CSO 31/160/92, 2 April 1993.
[2] *Mazengarb v Ambler* [2001] NZFLR 1009.
[3] *O v H* [1998] NZFLR 673.

(c) The applicants have been in a superior financial position from the outset, and when [Tilly] was in their care, they received a Home For Life package and child support.

[29] Ms Bennett submitted that *Mazengarb v Ambler* and *O v H* are distinguishable and do not apply to the current facts.

Findings

[30] I make these factual findings:

(a) While [Tilly] was living with Ms [Ashton] and Mr [Carter], they did their very best to meet her often challenging needs and gave her significant emotional and financial support. They were very hurt emotionally when she chose to leave their care and effectively to cut her ties with them;

(b) It is more likely than not that when [Tilly] left the care of Ms [Ashton] and Mr [Carter], she lived with her boyfriend at Ms [Parkinson]'s home and Ms [Parkinson] financially supported them.

Legal principles

[31] Section 105 of the Act sets out the grounds which must be satisfied for departure from a formula assessment. The Court must be satisfied:

(a) One or more of the grounds for departure mentioned in s 105(2) is or are made out;

(b) A departure is just and equitable as between the child, receiving carer and liable parent;

(c) A departure otherwise would be proper.

[32] The application was made under the provisions of s 105(2)(b)(iii), which provides as a ground:

> That, in the special circumstances of the case, the costs of maintaining the child are significantly affected because—
>
> (iii) The child is being cared for, educated, or trained in a manner that was expected by either of his or her parents.

[33] Ms Armstrong also relied on the ground in s 105(2)(c), which relevantly provides as a ground that, by virtue of special circumstances, application in relation to the child of the provisions of the 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—

> (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

[34] I note also the provisions of s 105(2)(b)(ii), which provides as a ground:

> That, in the special circumstances of the case, the costs of maintaining the child are significantly affected by:
>
> (ii) Special needs of the child.

[35] In *O v H*, the Court held that circumstances in which two children had been effectively divorced from their father, had become fully incorporated into the family unit of their mother and stepfather and the relationship with the father destroyed, were special. Further, the Court held that heavy financial commitments the father had been forced to make in pursuing proceedings about contact and guardianship issues and defending domestic protection and criminal proceedings could be taken into account in relation to the requirements of justice and equity, and that departure would otherwise be proper.

Decision

[36] Although there is no detailed evidence as to the basis for diagnosis of ADHD in respect of [Tilly] and as to her behaviour, or as to the cost of the assistance given

by Ms [Ashton] and Mr [Carter] to her, I find that the combined effect of [Tilly]'s earlier dysfunctional upbringing in the care of her biological parents, her removal from their care by CYFS, and the subsequent changes in her care arrangements, would have been highly disruptive and upsetting for her. Her upbringing is likely to have caused her to have had an attachment disorder and she was diagnosed with ADHD. Her behaviour was likely to have been very challenging and, I find, would have set her apart from other children. On this basis I find that she had special needs in terms of s 105(2)(b)(ii) of the Act. Further, I find the steps taken by Ms [Ashton] and Mr [Carter] to meet [Tilly]'s needs significantly increased the costs of maintaining her. I find that the ground for departure in s 1095(2)(b)(ii) is made out.

[37] I do not consider that the ground in s 105(2)(b)(iii) is relevant and the ground in s 105(2)(b)(iii) is not made out because the significant financial support and payments made by Ms [Ashton] and Mr [Carter] in respect of [Tilly]'s special needs did not provide for her future financial security.

[38] In determining whether departure would be just and equitable as regards the child, Ms [Parkinson] and Ms [Ashton] and Mr [Carter], I take into account the matters referred to in s 105(4) of the Act. I can also take into account other matters (see s 6) which include factors other than financial considerations; see *AB v CD*[4].

[39] I give significant weight to [Tilly]'s decision to leave the care of Ms [Ashton] and Mr [Carter] and to live with her boyfriend and biological mother. [Tilly] was 18 when she made this decision and must have been aware of the financial implications of the decision. As is demonstrated by the payment by Ms [Parkinson] of child support, she retained some obligation to support [Tilly] and she at least acquiesced in [Tilly] leaving the home of Ms [Ashton] and Mr [Carter] to live with her boyfriend at her house.

[40] Weighing the various factors, and taking into account the support given to [Tilly] to meet her special needs when she was in the care of Ms [Ashton] and Mr [Carter], [Tilly']s decision to leave their care, and the relatively short time she was supported by Ms [Parkinson], I find that the injustice and inequitability which would

[4] [2011] NZFLR 529.

be caused to Ms [Ashton] and Mr [Carter] if they have to pay child support, outweighs any injustice and inequitability to [Tilly] and Ms [Parkinson] if child support is not paid.

[41] I am satisfied, essentially for the same reasons, that an order that Ms [Ashton] and Mr [Carter] should not pay child support would be otherwise proper.

Orders

[42] Having found the grounds for departure to be established, I make these orders:

(a) The order suspending the liability of Ms [Ashton] and Mr [Carter] to pay child support is discharged;

(b) The liability of Ms [Ashton] and Mr [Carter] to pay child support for the period 9 June 2014 to 31 March 2015 is reassessed at nil.

[43] I have not heard from counsel on the question of costs. My initial assessment is that costs should lie where they fall, but if counsel wish to pursue an application for costs, memoranda are to be filed within 21 days.

A J Twaddle
Family Court Judge