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**IN THE FAMILY COURT  
AT MANUKAU**

**FAM-2015-092-001240  
[2017] NZFC 1630**

IN THE MATTER OF      THE CHILD SUPPORT ACT 1991  
  
BETWEEN                      [RYAN BULEY]  
   Applicant  
  
AND                              [ANGELA BELOVA]  
   Respondent

Hearing:                      8 December 2016  
  
Appearances:                Mr [Buley] by AVL (self-represented)  
   Ms [Belova] by AVL (self-represented)  
  
Judgment:                    3 April 2017

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**RESERVED JUDGMENT OF JUDGE A P GOODWIN**

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### **Introduction**

[1] This is an appeal pursuant to s 103B Child Support Act 1991 against a departure order dated 29 September 2015.

[2] [Ryan Buley] and [Angela Belova] are the parents of [Blake] (aged 9 at the time of order) and [Georgia] (aged 8 at the time of the order). Mr [Buley] and Ms [Belova] have lived apart for a number of years. The children live with

Ms [Belova] and have contact with Mr [Buley]. Mr [Buley] is liable to pay child support.

[3] Mr [Buley] appeals the decision of the Commissioner of Inland Revenue (“the Commissioner”) departing from the child support formula assessment for the period 1 April 2015 to 31 March 2016. That decision increased Mr [Buley]’s child support payment by \$2,000.

### **Legal principles**

[4] Appeals to the Family Court are by way of re-hearing.<sup>1</sup>

[5] The onus is on Mr [Buley] to prove that the review officer was wrong. It is an appeal against the exercise of a discretion so 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 do not have the notes of evidence from the review hearing. For the purpose of the appeal Mr [Buley] has provided affidavits of 17 November 2015, the 19 May 2016 and 22 November 2016. In reply Ms [Belova] has filed affidavits of 5 February 2016 and 18 August 2016. Given the appeal grounds raised by Mr [Buley], and the evidence that has been filed, together with the submissions made orally by both Mr [Buley] and Ms [Belova] at the hearing on 8 December 2016, I am satisfied that there is adequate evidence for me to determine whether the review officer exercised the discretion appropriately.

[7] The power of the Family Court on appeal is set out at s 103D of the Child Support Act 1991.

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

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

### **[103D Powers of Family Court on appeal**

- (1) In determining an appeal under any of sections 103A to 103C, [[the Family Court]] may—
  - (a) confirm, modify, or reverse any determination or decision appealed against (in whole or in part):
  - (b) make any decision that the Commissioner could have made in respect of the determination or decision appealed against:
  - (c) exercise any of the powers that could have been exercised by the Commissioner.
- (2) Without limiting subsection (1),—
  - (a) in reversing a decision or part of a decision, [[the Family Court]] may make an order that the provisions of this Act relating to the formula assessment of child support should not be departed from:
  - (b) in reversing a decision made under subpart 3 of Part 5A to refuse to make a determination, [[the Family Court]] may exercise any of the powers that could have been exercised by the Commissioner to make a determination under that subpart.
- (3) An order under this section may make different provision in relation to different child support years and in relation to different parts of a child support year.
- (4) Subject to section 98(2), an order made under this section does not operate so as to increase or reduce the amount of child support payable in relation to any child to whom the order does not apply, and the child support payable in relation to any child to whom the order does not apply must be calculated as if the order had not been made.
- (5) Every order made under this section must specify the period of time in which the order is to apply or specify the event the occurrence of which will cause the order to terminate.]

[8] The matters as to which Court must be satisfied before making a departure order is set out a s 105 of the Child Support Act 1991.

### **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 of this Act for an order in relation to a child and the Court is satisfied that—
  - (a) one or more of the grounds for departure mentioned in subsection (2) of this section 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 of this Act,—  
the Court may make the order.
- (2) For the purposes of subsection (1)(a) of this section, 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 of this Act, 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) of this section.

### **Mr [Buley]’s argument**

[9] Mr [Buley] has identified three areas where he argues the review officer was wrong. They are in effect, his grounds of appeal. Those grounds are:

- (a) In making a decision of whether a departure order is just and equitable in considering the factors outlined in s 105(4) of the Child Support Act, the review officer wrongly took account of a future review by Mr [Buley] of his child support liability, and therefore wrongly concluded that the departure order was just and equitable.
- (b) The review officer wrongly concluded that Ms [Belova] had a lack of funds available and failed to take proper account of the disability allowance payable to Ms [Belova].
- (c) The award of \$2,000 was made on the basis of [Georgia]’s extra tuition (at that figure per annum) and that Mr [Buley] had reneged on an agreement to pay half. Mr [Buley] says if an award is made on that

basis (which he disputes) it should have been for half of the tuition fee, namely \$1,000.

### **Decision under appeal**

[10] The review officer decided that due to the children's disabilities (– [medical details deleted]) with regards to extra costs incurred there were special circumstances and the costs for caring for the children were significantly affected because they had special needs (s 105(2)(b)(ii) Child Support Act).

[11] The additional costs highlighted by the review officer were [Georgia]'s private tuition (for [medical details deleted]). The review officer held that those tuition costs were not covered by the disability allowance that Ms [Belova] received, and that Mr [Buley] had agreed to pay half of those costs and then changed his mind. The review officer found that that decision was unfair.

[12] In considering whether the departure order was just and equitable the review officer noted as follows:

When I talked to Mr Buley he explained that he had recently relocated to [Location 1] (from [Location 2]) for work reasons. He makes the point that there are now costs associated with his having access to [Blake] and [Georgia] and he claims that increase in his child support payments would jeopardise his ability to see the children.

At first blush, I was tempted to let the status quo remain given Mr [Buley]'s access spending. However, in the hearing he advised me that he has applied for a review of his own to have his costs considered. That review is to be heard at a later date and not by me.

Given Mr [Buley] has now sought to have his payments reduced because of his access costs (which of course is his right) I consider that it is only fair that the costs associated with [Georgia]'s special needs are accounted for in the formula assessment. As previously discussed that there are expenses associated with [Georgia]'s needs (specifically her tuition cost) which the ordinary application of the Inland Revenue formula does not take into account, and in my view it is unfair to expect Ms [Belova-Buley] to cover this cost on her own. I am therefore satisfied that a departure here, in her favour, is just and equitable.

[13] The review officer made a finding that an award was otherwise proper and determined that the tuition cost was \$2,000 per annum and that therefore the child support expenditure for [Georgia] for 2015/2016 was to be increased by \$2,000.

## **Ground One**

[14] Mr [Buley] submits that the review officer was wrong to take account of his future application to reduce child support in considering whether a departure order was just and equitable.

[15] In my view the review officer's decision is open to criticism as Mr [Buley] contends. Firstly, the possibility that Mr [Buley]'s child support might be reduced following his own application for review is not a relevant consideration in terms of s 105 (4) of the Act. The relevant factors in this case were the special needs of the child, together with the financial resources and current commitments of each parent. There is no scope to consider a cross-review as part of the assessment as it does not represent a concrete change to the financial resources or commitments of either parent. In fact, the only recent evidence the review officer had of Mr [Buley]'s contributions was that his contact costs had increased following his relocation to [Location 1] from [Location 2]. I cannot see how taking account of an indeterminate outcome meets the objective of providing financial certainty to the parties due to maintain the child.

[16] When making a determination as to whether a departure order is just and equitable, the Court must make an assessment of the financial situations of both parties at the time the application is made. However, the review officer appears to have based his findings on an undecided event which was the possible reduction of Mr [Buley]'s child support payments. It has since transpired that Mr [Buley] did not receive a decrease in payments.

[17] It is my view that it was inadmissible for the review officer to have regard to a factor which had not yet been decided.

[18] I therefore conclude that Mr [Buley]'s appeal on ground one is successful.

## **Application of s 103D**

[19] As set out above I have the power to confirm, modify or reverse any determination made.



[20] The review officer had before him all of the evidence with regard to the parties finances. The review officer's position was that apart from the issue of taking account of the cross-review, that he would have left the status quo in place. That is to say my reading of that statement is that he would have made no order for increased payments.

[21] In removing the factor that the review officer should not have taken into account, it is my view that the position is that without that factor, no increase in child support liability would have been directed.

[22] On the evidence provided I see no reason to interfere with that decision, given, as stated above the review officer had all available facts before him.

### **Result**

[23] The appeal is allowed and the order for increased payment of child support in the sum of \$2,000 is quashed.

[24] There be no order for costs.

A P Goodwin  
Family Court Judge