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

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IN THE FAMILY COURT
AT PUKEKOHE

I TE KŌTI WHĀNAU
KI PUKEKOHE

FAM-2020-057-000073
[2022] NZFC 862

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[TIFFANY BYERS] Applicant
AND	[SCOTT JENNINGS] Respondent

Hearing:	23 April 2021; 17 December 2021
Appearances:	Applicant appears in Person Respondent appears in Person Ms Chappell for IRD (for December 2021 hearing only)
Judgment:	31 January 2022

RESERVED DECISION OF JUDGE MAUREEN SOUTHWICK QC

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[1] The applicant applies pursuant to s 104 of the Child Support Act 1991 ("the Act") for a departure from the formula assessment of the Commissioner of Inland Revenue ("the Commissioner"). The applicant has been assessed as being liable to pay defined child support for the son, and now also daughter, of the parties' relationship.

[2] Neither party is represented and the Commissioner took no steps to intervene (but did appear at the December 2021 hearing referred to below). Written submissions were not filed for the initial hearing although this would normally be the case. I find it difficult to offer criticism of this omission given the manner in which proceedings have reached this point. Departure applications and appeals can be complex and it is not always a simple process to represent oneself in such proceedings.

[3] Multiple assessments were produced in court, and the applicant has done her best to deal with these by reference to the various provisions of the Act.

[4] There have been a number of reviews and hearings which, as yet, have not finalised the major matters at issue. If both parties have found themselves exhausted and at times confused by this process it would not be surprising.

Background

[5] On 24 October 2019 the parties entered into a relationship property agreement consequent upon their separation. Within that document it was noted in the recital that the parties had reached agreement in relation to the care and education of their two children. The respondent was to pay all school fees and disbursements incidental to weekly boarding which was the form of education agreed upon.

[6] As a result of this agreement, the applicant argues that she received less cash out of the balance of the property settlement. It is the nature and implications of this agreement which the applicant submits created the "special circumstances" referred to in s 104.

[7] On 19 January 2020 the parties' son commenced boarding at [school 1].

[8] On 21 February 2020 the applicant filed an application for administrative review of the assessment made that she was liable to pay child support to the respondent. The Commissioner assessed the applicant as having nil care of their son on the basis that the respondent was paying the school fees. This finding is consistent with case law relating to review applications. The applicant objected to the

proportionate care finding and to the sum calculated as being due by her. The applicant also maintained that the assessment of the respondent's income was too low.

[9] On 2 April 2020 the Commissioner released his decision. The respondent's assessed income was increased to $70,000 but it was not accepted that the effect of the property settlement relieved the applicant from liability. The Commissioner held that there was insufficient evidence to lead to that conclusion.

[10] On 25 May 2020 the applicant filed an appeal against the decisions of the Commissioner pursuant to s 102 and s 103 of the Act. The s 102 appeal was ultimately struck out as it was filed out of time (the prescribed period being two months after the date of being advised of the decision). The Commissioner filed a defence in response to the appeal filed pursuant to s 103 (appeal against assessment).

[11] On 15 August 2020 the Inland Revenue Department advised that it would not take any steps to intervene in connection with the applicant's s 104 departure application.

[12] On 27 August 2020 the court advised that the applicant could not proceed with a s 117 suspension application which had been filed by the applicant because it was not served on the respondent. The evidence suggested that service was proving particularly difficult.

[13] On 1 September 2020 the respondent was finally served and on 4 September a notice of defence was filed. This defence included considerable complaint that the applicant's applications were "frivolous and vexatious" and that it was time challenges to the assessments ceased. The respondent denied the terms of the relationship property agreement relieved the applicant of child support payments.

[14] On 7 September 2020 a Judge directed that the application for suspension was to be on notice. That Judge also suggested that the case may have merited lawyer to assist the Court being appointed. In hindsight that suggestion would have assisted the Court.

[15] On 22 September the application for suspension was finally able to be served together with notice of a judicial conference which was allocated for 2 October. On that date it appears that the Judge was led to believe that the s 117 application had still not been served and so it was not dealt with. That was through no fault of the applicant.

[16] On 20 October 2020 the applicant's notice of appeal against the Commissioner's decision of 12 March 2020 disallowing her objection to assessment under s 91(1)(b) and s 91(1)(d), was struck out.

[17] On 30 November 2020 the court heard the s 103 appeal, which focused upon the assessment by the Inland Revenue Department, that as from 19 January 2020 (the date the parties' son commenced boarding school) the applicant's proportion of ongoing care of their son was zero per cent. The applicant argued that this was wrong given the financial compromise she had suffered as a result of the terms of the relationship property settlement. This was not accepted given the authorities by which the court was bound. The court concluded:

> "The argument Ms [Byers] raises is more properly considered in determining whether a ground for departure is made out. She has raised that argument administratively. She was unsuccessful and she has appealed the decision of the review officer to this Court. That appeal is yet to be heard, but I anticipate Ms [Byers] raising the issue for consideration at that hearing"

[18] On 1 February 2021 the parties' daughter started at [school 2], the applicant having been her primary caregiver until that time. The applicant is now assessed as having zero care of both children and therefore liable for both children's support. This finding is based upon case law which concludes that the payer of the private school fees (the respondent in this case) has 100% care of the child.

Applicable Law

[19] Pursuant to s 104 of the Act the applicant seeks a departure from formula assessment. It is her submission, firstly, that the respondent's income has been inadequately calculated at $70,000. Secondly, she submits that she should not be liable to pay child support as a consequence of the terms of the relationship property agreement.

[20] Section 104 of the Act provides that a person who has been found to be liable to pay child support may make application for departure from that assessment. Section 105 sets out the matters of which the court must be satisfied before making the order. Section 105(2)(c) provides:

> "For the purposes of subs (1)(a) of this section the grounds for departure are as follows: …
>
> (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 of 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 to the child to the qualifying custodian or to any other person for the benefit of the child; or
>
> (iii) An entitlement of the custodian to the continued occupancy of a property in which the liable parent has financial interest".

[21] Section 105 (c) (i) and (ii) are directly relevant to the present case.

[22] Section 105(1)(a) and (b) provide that the court must be satisfied that one or more of the grounds for departure exist and that it would be "just and equitable" and "otherwise proper" to make the order. Hence, even if the court is satisfied that special circumstances exist which relate to one of the grounds for departure, it must then be satisfied that the result is just and equitable for the child and the two parties.

[23] The term "otherwise proper" has been quite liberally interpreted although emphasis is placed upon the context of each case. For example, *Hilgendorf v Hilgendorf* Judge Bisphan said:[1]

[1] *Hilgendorf v Hilgendorf* [1993] NZFLR 177.

> "The words 'otherwise proper' are simple words of everyday use and must be given their ordinary meaning in the context. Whilst it is not overly helpful to define everyday words with other everyday words "otherwise" means 'in other ways' and 'proper' means 'appropriate to the circumstances', or 'in conformity with the demands and usages of society' (the Shorter Oxford English Dictionary). The words 'otherwise proper' have to be considered against the background of the Act itself and particular objects of the Act set out in s 4. Each case needs to be assessed against its own background."

[24] Section 106 requires that the form of a granted departure must specify a variation of one of the components of the formula. This provision is intended to avoid repeated applications to the court.

The Relationship Property Agreement

[25] The applicant submits that the effect of the formula assessment is that she is paying twice for the maintenance of her son, and now also her daughter. She refers firstly to the specific terms of the agreement dated 24 October 2019. With respect, these do not appear to have been fully understood by the Commissioner. I refer to the most relevant terms in the context of this case:

(a) The applicant's "property and entitlements" are defined in the agreement as including the respondent's agreement to pay the applicant $1,800,000 and "[Scott]'s agreement to pay all school fees for weekly boarding facilities".

(b) Sole responsibility for payment of these fees and disbursements is described as "part of this property settlement".

(c) At paragraph 6.1 it is agreed that "the child support to be paid by [Scott] shall be assessed pursuant to the provisions of the Child Support Act". Whilst the intent of this provision is not altogether clear, it is possible to conclude that it was anticipated that on the basis of shared care whilst the children attended weekly boarding, the respondent would be the liable parent as having the greater income.

(d) In paragraph 18 under the heading "Confidentiality" the parties record that the agreement may be produced to the Inland Revenue Department

> "for the purpose of assessing child support obligations". Producing the agreement would have confirmed the fact that although the respondent was obliged to meet all of the school fees and disbursements for the children, the sum held by the respondent included the applicant's 50% contribution.

[26] The fact that the respondent is required to attend to payment of these fees "as part of the property settlement" results in the applicant receiving considerably less than the respondent in cash and other assets. This fact is confirmed in the respondent's response to the Inland Revenue Department review when he stated "my ex-wife [Tiffany Jennings] has had a generous property settlement of $1,800,000 plus $375,000 (held by him) in future schooling for our children" (this figure included other related sums over and above the $250k).

[27] In a further exhibit produced, the respondent's handwritten calculations alongside the typed schedule of the applicant's assets include the words "$125k schooling [Kent], $25,000 for five years, $125k [Sofia], $25,000 for five years". From this can be reasonably concluded, that had the respondent not undertaken to pay these fees the applicant would have been entitled to receive at least an additional $125,000 in cash. Put differently, the respondent held the applicant's contribution to pay half of each child's boarding fees and disbursements. If this fact is not recognised there is unfair duplication of child support payments by the applicant because there is a failure to acknowledge provision already made.

[28] The respondent makes little detailed comment in his notice of defence, except to say "for some absurd reason the applicant thinks the monetary value of our children's education is her own". Despite this statement he offered no opposition to the proposition that the figure retained by him for both of the children's education is part of the parties' property settlement.

[29] Whilst the review officer held that he/she did not have jurisdiction to alter the care allocation, it was acknowledged that that matter could be dealt with by way of departure based upon special circumstances.

[30] In cross-examination the respondent was not able, or was not prepared to acknowledge the significance of the agreement to pay school fees. When asked whether the applicant received less in settlement on the basis that he held approximately $250,000 for school fees, the respondent deflected any answer by referring to the cost of court proceedings and the mediator.

[31] When asked why reference to child support assessment referred only to him, he could not explain except to say "my barrister said it's fairly clear". The respondent confirmed his own handwriting which defined the sum held for the children, and set out also the applicant's resultant lesser cash payment. When asked to explain why he produced that to the Inland Revenue Department, he said he was "trying to explain that, you know, she's not as poor as she's trying to make out to be". This, of course, did not answer the proposition that by virtue of the provision, both parties were paying the children's fees.

Decision as to Special Circumstances Arising out of Provisions in Relationship Property Agreement

[32] I find that there is sufficient reliable evidence to conclude that special circumstances exist by reason of the provisions in the relationship property agreement. Those provisions result in the conclusion that each party is paying half of all the children's boarding and related school fees.

[33] By virtue of these special circumstances it would neither just, equitable nor otherwise proper for the applicant to be liable to pay child support at the level assessed.

[34] I reach that conclusion because of the payment made by the applicant to the respondent pursuant to the relationship property agreement signed by the parties, that payment being specifically assigned to the cost of the children's private school education.

[35] Pursuant to s 106 of the Act and in order to reflect the finding of this Court, the applicant's income is therefore adjusted, by reducing her earnings for the 2021 Child Support year by $25,000.

[36] It is unfortunate that the Court does not have the ability to ensure that the same finding must apply to future assessments for both children of the parties whilst they continue to attend boarding school.

[37] In order to achieve such a conclusion, the applicant would have been required to appeal Judge Otene's decision as to proportionate care. The wording of that decision is likely to have led the applicant, particularly as a litigant in person, to believe that initiating an appeal was not necessary.

[38] The result of this is that the applicant will now need to initiate annual review on each occasion that she receives an assessment. This is an unfortunate and burdensome consequence for the applicant and probably also for the respondent father.

17 December 2021 Hearing

[39] Subsequent to the decision of 17 May 2021 being released, the Commissioner indicated concern that the nature of the decision created difficulties of implementation. This resulted in my recall of the decision and a request for an urgent hearing which the Commissioner was to attend. Submissions were directed.

[40] My decision to adopt this course of action was prompted by concern that the self represented parties would once again find themselves caught up in legal representations which would lead to further confusion and delays. At that stage the Court had not been made fully aware of the Commissioner's submissions. No appeal had been lodged.

[41] At the subsequent hearing on 17 December 2021 (Covid delays having been experienced), Ms Chappell for the IRD provided helpful submissions which she amplified at hearing – that amplification included practical suggestions as to how the core findings in the decision could be effectively implemented.

[42] Both parties filed submissions and addressed the proposals made by Ms Chappell.

[43] Ultimately the parties agreed that they wished for no further assessments to be undertaken and that they would each complete and execute the necessary Inland Revenue Department documentation to ensure that this could occur.

[44] The applicant made it clear that this agreement was provided by her on the basis that all sums already deducted from her income, contrary to the terms of this decision, would be reimbursed to her. The respondent offered no objection to this.

[45] Ms Chapell has undertaken to assist the parties by providing each with the forms to be completed in order to achieve the terms of this agreement.

Income of the Respondent

[46] The respondent's assessed income was increased at review to an adjusted taxable income of $70,000 for the period 1 April 2020 to 31 March 2021. The applicant refers to s 105(2) (c) (i) in submitting that the respondent's income was considerably higher than that figure or that he had the capacity to earn a much higher income.

[47] In evidence the respondent produced his latest IR4, at that time showing his income as being $71,500. The respondent was unable to explain that figure in relation to the work he undertook saying "that's what the accountant put in there".

[48] The [farm] he works on is owned by a trust of which he is trustee and also holds the power of appointment. The farm he manages is [detail deleted]. He described his job as being "the boss of it all". I find that the level of salary shown in the books was indeed an accounting exercise and not one that fairly reflected properly calculated remuneration.

[49] The day before the April hearing the respondent filed an updated affidavit of assets and liabilities, which revealed income of $71,500, that being akin to the salary found by the Commissioner to be more accurate. The applicant says that when the

Commissioner increased the respondent's income from $65,000 to $70,000 that figure was still a gross understatement.

[50] The respondent acknowledged that a significant number of items in the outgoings column of his affidavit of assets and liabilities were marked as nil because they were paid for by the company associated with the running of the farm. These included insurance, rates, electricity, fuel, telephone, car expenses, fares, mortgage, car registration, Sky TV, indemnity insurance, life insurance and medical insurance.

[51] Having at one stage been a director of that company, the applicant assessed these additional costs as totalling approximately $44,706 per annum. A schedule to that effect was provided. This was said to result in the respondent's corrected income as being $116,206. The respondent offered no opposition to this assessment except to point out that that figure now appeared in his beneficiary's current account as a loan.

[52] It was suggested also to the witness that there were cash sales which had not been disclosed. This was more difficult to establish, and there was insufficient evidence to make a finding in that regard.

[53] There is no evidence presented by the parties that either of their children have any independent source of income or any earning capacity which would impact upon the decision I have come to.

[54] Neither is there any reliable evidence presented which would cause the Court to question the income disclosed by the applicant in the relevant year. Furthermore I note that this was not a subject upon which the respondent chose to cross examine the applicant.

Decision as to Income of Respondent

[55] I find that by virtue of special circumstances relating to the income and earning capacity of the respondent, it is just and equitable as regards the child, the applicant and the respondent, to assess the respondent's adjusted taxable income as being in excess of $71,500. This conclusion is reached after taking into account the costs and

expenses paid on his behalf by the company and/or the trust associated with his farming enterprise.

[56] Whilst the respondent attempted to argue that the sum paid on his behalf was a loan, that too is an "accounting exercise" designed to reduce tax payable by the respondent. Even if that was not the case, I find that the respondent has the capacity to earn in the vicinity of $116,000, given his experience and the responsibilities he has referred to in his role as a farm manager.

[57] Accordingly, I find that it is proper that for the 2020/21 child support year in relation to James, the adjusted taxable income of the respondent is to be increased to $116,000.

Summary of Orders at Conclusion of Hearings

[51] Pursuant to s 106 of the Act, there is a departure order for the 2021 child support year in relation to the parties' son [Kent], so that the adjusted taxable income of the applicant is reduced by the sum of $25,000.

[52] Pursuant to s 105 of the Act there is a departure order for the 2021 child support year in relation to the parties' son [Kent], so that the adjusted taxable income of the respondent is increased to $116,000.

[53] By consent there is an order pursuant to s 27 of the Act that the parties act immediately upon their stated election to end formula assessments as they apply to their children, [Kent] and [Sofia].

[54] The consent provided by the applicant to the election referred to in paragraph [53] is conditional upon any child support payments already made by the applicant in conflict with the departure orders now made, being reimbursed to the applicant.

[55] Pursuant to s 180 of the Act this court records the election of the Respondent to provide written notice to the Commissioner not to pursue payment of any amount payable by the applicant that is currently unpaid and in arrears.

[56] This matter is to be placed in a case manager's review list in 4 weeks time to monitor compliance with these orders. In the event of non compliance and/or any implementation problems the file is to be referred to me.

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Judge M J Southwick
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 31/01/2022