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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM 2022-004-000014
[2022] NZFC 10816

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[HUANG CHEN] Applicant
AND	[YUN HAI] Respondent

Hearing:	12 September 2022
Appearances:	Applicant in person Respondent in person
Judgment:	25 October 2022

RESERVED JUDGMENT OF JUDGE I A McHARDY
[S 103 APPEAL AGAINST ASSESSMENT]

Background

[1] The appellant was assessed for the 2022 child support year to pay $80.60 per month for the 2022 year in relation to the parties' children. His income represents nil per cent of the combined child support income of $0 and the care cost percentage was

100 per cent to the respondent. The respondent made application pursuant to s 96B for a departure from the formula assessment of the child support payment.

[2] That application was dealt with by way of an administrative review hearing. The review officer heard from both parties. The respondent claimed the appellant earned around $2,000 per week in rental income from three properties he owned. She said the rent was paid in cash. These three properties are [address 1], [address 2] and [address 3]. The respondent disputed that the appellant lived in the [address 1] property alleging that there were international students there. She believed he earned $730 per week from this property.

[3] The appellant claimed he could not rent the property because there was no air conditioning and insulation and that it was not up to the healthy home standard. The respondent however challenged this as being incorrect claiming that he had been paid a subsidy to get this done.

[4] In respect of [address 2], the respondent challenged the appellant's claim that he was keeping that so that she and the children could move in on the basis that he had served on her a trespass notice on 27 May 2021. This was a six bedroom home.

[5] In respect of [address 3], the appellant claimed that this is for his parents. This is not accepted by the respondent. She claims that an Indian family was living there, and they had been there for two to three years. It was a four bedroom home. His parents live overseas.

[6] The properties are all registered in the appellant's sole name. The appellant says he has no income to declare from these properties. The [address 1] property is a three bedroom home. He says he cannot afford to fix it and it is not insulated. There was no subsidy and it has not been upgraded. He said he could not have students now because of his criminal convictions resulting from allegations the respondent had made against him. There have been no students there since separation.

[7] The appellant says that [address 2] was financed by his parents. He was leaving it vacant so that the respondent and children can move in later. He accepts he issued

a trespass notice, the respondent had a protection order against him and had changed the locks on the property that had been vacant for a long time. He indicated he does not want to rent it out as he might move in there with the children later.

[8] In respect of [address 3], the appellant says this is his parents' home. Despite the houses being registered in his name he says the finance is mainly from his parents but there is $700,000 fixed term loan from ANZ as well as the $300,000 floating loan from his parents. He normally pays the mortgage on it but this is sometimes done by his parents. He said he earns no income apart from the part-time work he does and from what he receives from the WINZ benefit. His parents are retired and living in China. When they can, they will come to New Zealand. They are not citizens however, and will be coming on a visa. He says his parents would like to come to New Zealand soon.

The determination

[9] The determination departed from the formula assessment by increasing the appellant's adjusted taxable income from $4,717.72 to $73,331.40 for the period 1 September 2021 to 31 March 2022. The basis of the determination was the appellant has property and financial sources available to him that were not reflected under his child support formula assessment. As a result, there were special circumstances, it was just and equitable and it was otherwise proper to make a departure from the child support formula.

The appellant's position

[10] The appellant's objection to this determination is that the appellant says it was incorrect to consider as a financial resource the three properties registered in his name. He says that he did not have any income being generated from them and that they were not able to rented out as they were not compliant with the healthy home standard. Also, he claims the properties were in fact funded by his mother from China and any income made from them by way of rental cannot be treated as his income.

[11] In this regard the appellant provided to the Court the affirmation made by his mother in support of his relationship property claim that is before this Court. That affirmation is dated 2 May 2022. In there the appellant's mother says that in 2008 her son told her about a potential investment at [address 1] which she then discussed with the appellant's father. The appellant's parents decided to purchase it as an investment property and asked the appellant to purchase the property for them. [Address 1] was accordingly purchased using money provided to the appellant by his parents and a home loan that the appellant obtained from Westpac bank. All mortgage payments were made using money provided to the appellant from his parents. [Address 1] has been mortgage-free since 29 January 2015.

[12] The appellant's mother says that because [address 1] was registered in the appellant's name in New Zealand, they asked him to provide security by signing a debt acknowledgment letter to protect the monies they had investment. This was done with all monies that were transferred to the appellant. They did not see a lawyer at the time because it was a family arrangement and they trusted their son would protect their investment.

[13] The appellant's mother says that between 2014 and 2020 she travelled to New Zealand frequently, once or twice a year. She stayed in New Zealand for three to six months when she visited. In 2013 she made the decision to retire and sell all her shares in the Chinese stock market to minimise investment risk. She wanted to make a secure plan for her retirement.

[14] After travelling to New Zealand with the appellant in 2014 she decided to invest in more real estate in New Zealand. [Address 2] was on the market for sale. She liked the property very much and told the appellant she wanted him to purchase it for her using her money. Again, she says they did not take formal legal advice at the time. She had no reason to believe that the appellant would not honour the agreement he made with her and protect her interests. She pointed out that the appellant was single at the time; he was not in a relationship with the respondent; they were not even dating.

[15] Her affirmation confirms that she started gradually selling her shares from the stock market and transferring the funds to the appellant's China Construction bank account from January 2014. The appellant agreed to buy New Zealand dollars and transfer money to a New Zealand bank account. All this was done with the intention of the appellant purchasing property for her in New Zealand. She says she did not gift any money to him. All the money that was transferred to him was to be used to purchase real estate for her. To protect her interests in the properties the appellant signed letters confirming that the money she transferred to her was owed to her. This was done in a traditional Chinese family way where the appellant wrote her acknowledgment on paper and signed it. She did not think of going to a lawyer to make this arrangement more formal because she trusted her son.

[16] The appellant's mother in the affirmation says that the appellant signed a sale and purchase agreement in respect of [address 2] in August 2014. She did not have enough money at the time to purchase this property without a mortgage, so the appellant arranged a home loan with ASB. He agreed to do this and arranged a home loan to complete the purchase of [address 2]. Money was transferred from China for settlement in December 2014. The appellant and his mother travelled to New Zealand in December 2014 again to settle the purchase of [address 2] and went back to China in January 2015. She says the respondent was not part of any decision made by her to purchase [address 2].

[17] The appellant's mother says that [address 2] was rented in 2015. After her son decided to marry the respondent and she became pregnant, there was a discussion with the appellant to vacate the tenants at [address 2]. She did this because she wanted her first grandchild to live in a well-presented house in a nice area in Auckland. The appellant was living in [address 1] at the time. She did not consider this to be a nice property and not in a good area so she said the appellant and the respondent could live in her property at [address 2] when they travelled to New Zealand in October 2016. She thought the house was in a better condition than [address 1] and was in a better area.

[18] The appellant's mother says that between January 2014 and December 2015 she transferred ¥7.7 million RMB to the appellant for purchasing properties (including

mortgages and deferred expenses in New Zealand). She says she did not gift this money to him. The money was transferred to him for the sole purpose of purchasing property for her in New Zealand.

[19] The appellant signed two debt acknowledgement letters for ¥3.25 million RMB on 3 December 2014 and the ¥4.55 million RMB on 29 December 2015 to acknowledge total monies of ¥7.7 million RMB transferred by her to him to purchase the properties in New Zealand for her. Annexed to the affirmation were exhibits of the copies of those two debt acknowledgement letters.

[20] The affirmation says that due to the exchange rate and the foreign currency exchange control in China (maximum USD$50,000 per year per person) family members in China helped to transfer the property monies to the appellant in New Zealand including the respondent. The deponent says that it is a well-known fact to family members, including the respondent's parents who live in the same building as them in China and mutual friends in both China and New Zealand, that she transferred the money to the appellant to purchase the properties in [address 2] and [address 3]. She says that all these people know that the appellant did not have the money to purchase the properties and that they were purchased by her using her money and money borrowed from the bank.

[21] The deponent says she discussed these dealings with the respondent and she is fully aware of the source of the funds.

[22] She says that the appellant used her money to pay off the bank mortgage over [address 2] in January 2018. She agreed that he could use the rest of the loan money as a deposit to finance the purchase of [address 3]. She agreed to the purchase of [address 3] because it was right next door to [address 2] and she liked it "so much."

[23] The deponent says it is not unusual in Chinese culture for a son or daughter to do these sorts of things for their parents. She says it is very unusual that a parent would give all of her money to a child and not protect his or her interest. She did not give the money to the appellant as a gift. Although she trusted her son she asked for some protection and he signed the two debt acknowledgement letters. In Chinese

families this is sufficient and she says they do not go to lawyers to make the family arrangements more formal.

[24] The deponent says her position in respect of [address 1] is that it was purchased by her son for her. It was financed entirely by her. It is in the appellant's name but is owned by her. Her position in respect of [address 2] is that it was purchased by her son for her. [Address 2] was purchased using her money and a loan from a bank. The bank loan was repaid using her money. [Address 2] is in the appellant's name but is owned by her. Her position in respect of [address 3] is that it was purchased by the appellant for her. It was purchased using her money and a loan from the bank. The bank loan is still outstanding and will need to be repaid. The appellant does not have funds to repay the bank loan. If it is to be repaid this will be done using her money or money she raises in China. [Address 3] is in the appellant's name but is owned by her.

[25] I have listed in some detail this evidence that has been provided to the relationship property proceedings. The parties were asked questions by me at the hearing to endeavour to understand better the specific positions that they had. I have to say that the answers given by the appellant simply confirmed the statements made by his mother in her affirmation.

[26] I was left with no confidence in respect of the answers that the respondent gave. There seemed to be a wish on the respondent's part to paint a situation which indicated that the three properties exist not because of the appellant's mother's funds but somehow from earnings made by the appellant.

[27] The respondent endeavoured to argue that rent from these properties had been paid to the appellant's mother and then reimbursed to him. The explanation came across as being bizarre.

[28] The appellant is saying that the departure made by the review officer is wrong, basically for two reasons:

(a) he does not own the properties but is holding them on a resulting trust for his parents. He has never been in a final position to buy real estate. The properties only exist because of his parents' money;

(b) in any event, the calculation that was made by the review officer is unfair as the properties were not able to earn the rental ascribed to them due to their bulk compliance with the healthy homes legislation.

Cultural perspective

[29] It has now been recognised that foreign cultures cannot be ignored. The Supreme Court in *Deng v Zheng*[1] in obiter comments promulgated a useful framework to guide fact-finding when Judges encounter parties who hold different cultural and social values. Given that New Zealand is increasingly multi-cultural and diverse population, the Supreme Court observation regarding cultural considerations are timely and relevant for Judges conducting fact-finding exercises in civil disputes.

[30] In the High Court decision *Li v Wu & Fan*[2] Gendall J had "expert" evidence provided to him at the trial in this way:

> [31] It is a fundamental virtue of Chinese Culture that parents support their children financially until they become comfortably financially independent, and in exchange for their financial support, there is an obligation on adult children to care for their children when they are older and repay the financial support provided to them when they were young.
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> …
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> [38] … Chinese parents expect that any funds advanced to their children to buy property and chattels will be repaid when children become financially independent, and that in the meantime, their interests in the property is recognised.

[31] At para [5] Gendall J said:

> [5] Issues arise, and indeed surface regularly in this case, as to how in New Zealand those Chinese cultural imperatives fit with the PRA in circumstances where it is claimed that family financial assistance is provided to young Chinese who enter into a marriage relationship which subsequently ends. In a way, discussion of this is integral to a final decision in the present case.

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[1] *Deng v Zheng* [2022] NZSC 76 (SC judgment).
[2] *Li v Wu & Fan* [2019] NZHC 2461.

[32] Under the heading Chinese Cultural Matters and the evidence of Dr Zhou the Judge in para [93] said:

> [93] At this point it is useful also to interpolate several comments about Chinese cultural norms that arise from the evidence before me on Dr Zhou. In his evidence which I found to be thorough, carefully presented and credible, Dr Zhou confirmed, for Chinese who immigrated to other countries, and in particular New Zealand, it is often the case that they will enter into a written agreement with their child or children regarding loans and arrangements for the purchase of property by the children using the parents' monies. He indicated that he had done just that with his Chinese daughter and son-in-law in Sydney, Australia, when he and his wife needed a substantial amount of money for the purchase of a Sydney property.
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> [94] Dr Zhou said it is not always the case in such circumstances that a written agreement is required, rather than just a verbal understanding based upon Chinese norms.

[33] At para [96] he said:

> [96] Notwithstanding this, the general comments of Judge Inglis QC in the Family Court in *Speller v Chong*, a not entirely dissimilar case to the present, are usefully repeated here:[3]
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> > It seemed to me, as I watched and listened to the husband under cross-examination, and that of two family members required for cross-examination on behalf of the wife by satellite link, that it could be inappropriate to evaluate such transactions in terms of expectations of a New Zealand lawyer and without appreciation of the cultural context in which they had occurred. This was a Chinese family which, no doubt because of its cultural background, saw family transactions of this kind as a natural part of family life in which legal formalities were unnecessary and which were fixable and based on mutual assistance and trust.

[34] The Court went on to rely on these comments to provide some context in relation to the facts of that particular case.

[35] *Deng v Zheng* also has relevance to the Te Ao Marama - Enlightened Justice for All initiative that is under development in the District Court. A key focus of Te Ao Marama vision is to ensure, to the maximum extent possible, that the best available information is presented to Judges (and other triers of fact) to assist them to make well-informed decisions about people who appear before them. As the Supreme Court

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[3] *Speller v Chong* [2003] NZFLR 385.

has pointed out, Judges ought to be aware of all factual, legal and cultural information to make well-informed decisions.

Decision

[36] No such consideration was given by the review officer. The exercise became simply calculating what it was considered was an appropriate rental regardless of the cultural aspects, namely how the properties came to exist and consideration of relevance of resulting trusts. This was not an argument put to the review officer however the obligation is to look at the facts and consider what is the reality of the situation. Here the reality of the situation was that all three of the properties came into being because of the appellant's parents' monies. They had taken steps to have some documentation which could be seen as a protection. It is obvious from the appellant mother's evidence they did not consider they needed that protection because of the cultural aspects involved in this type of transaction.

[37] It has to therefore be wrong to simply do a calculation on what one thinks rental should be on properties. This would be artificial, particularly when one considers the cultural background to what has happened here.

[38] I accept the appellant's argument that these properties were not his and his alone to obtain the maximum amount of rental. He was not getting rent in any event because of the new legislation requiring such properties to be to a certain standard to meet renting requirements.

[39] It was accepted the appellant did not have an income stream from employment. I do not consider it is appropriate to then add to what income he did have a simple calculation of what a review officer considered was appropriate for rental income from the two properties which were not deemed to be the property in which the appellant was able to live.

[40] Accordingly, I do not find that there are grounds for a departure. No order is to be made. It was apparent that the appellant is open to a resolution of all issues that exists as a consequence of separation but the respondent is not. There may be an

overall resolution if the respondent were open to it but that should not be an artificial resolution such as just finding that the appellant has a potential for income which he has not.

[41] The appellant is taking on training to upskill so he can earn an income and I took it from his evidence that he would have no issue on meeting future child support liabilities as they arise. That is not the situation during the 2022 year. I am not persuaded that his parents capital investments in the 3 properties came be ignored so as to enable a possible rental income to be sheeted home to him.

[42] The appeal is therefore successful. There is to be no departure during the 2022 year.

Dated at Auckland this day of

I A McHardy
Family Court Judge