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

NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT HAWERA

I TE KŌTI WHĀNAU
KI HĀWERA

FAM-2022-021-000068
[2023] NZFC 2889

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[HELEN COULTER] Applicant
AND	[MILES BRAND] COMMISSIONER OF INLAND REVENUE Respondents

Hearing:	24 March 2023
Appearances:	Applicant appeared in person Respondent [Brand] appeared in person (via AVL) No appearance by or for the Commissioner of Inland Revenue C Gelston as Lawyer to Assist
Judgment:	30 March 2023

RESERVED JUDGMENT OF JUDGE A S GREIG

Introduction

[1] [Ms Coulter] seeks a departure order, an order that would reduce the amount of child support that she is obliged to pay.

[2] She does so under several of the grounds set out in the s 105 of the Child Support Act ("the Act") being the matters on which I must be satisfied before making a departure order. [Ms Coulter] has fulfilled the preliminary requirements set out in s 104 of the Act.

[3] The grounds under which she applies are, in colloquial terms:

(a) That she is unable to support herself if she has to pay the assessed rate of child support – s 105(2)(a)(iii).

(b) That she incurs high costs in maintaining contact with her children to an extent that her ability to pay child support is significantly affected – s 105(2)(b)(i).

(c) That the assessment is unjust and inequitable due to [Mr Brand]'s income – s 105(2)(c)(i).

[4] In summary her case is that, having initially been assessed to pay child support at the rate of $763.80 per month, a sum that already caused her some difficulties, the new assessment, directing that she pay $1,229.40 per month, means that she will not be able to feed and otherwise support herself. She also doubts that the children's father, who is self-employed, is earning as little as he claims to be earning. That, colloquially and in a nutshell, is [Ms Coulter]'s case.

The law

[5] I must be satisfied that the applicant has met the three requirements set out in s 105(1). The three matters are cumulative and each must be answered in favour of the applicant if the amount she has been required to pay is to be reduced.[1] The three matters are that:

(a) One or more of the grounds on which [Ms Coulter] has applied exist;

[1] *Re M (child support)* (no.2) (1992) 9 FRNZ 693.

(b) It would be "just and equitable" as regards the child, the receiving carer and the liable parent; and

(c) It would be "otherwise proper".

[6] Each of the three grounds under s 105(2) under which [Ms Coulter] applies requires that her case involves "special circumstances". That means that there must be "facts peculiar to the particular case which set it apart from other cases".[2] Special circumstances will include unfair or inappropriate devices that have been adopted to diminish liability. This is relevant to [Ms Coulter]'s allegation that [Mr Brand] is earning more than he declares. If that were the case then I am entitled to have regard to his "real income".[3]

[7] "Just and equitable" and "otherwise proper" are cumulative requirements and the onus is on [Ms Coulter] to satisfy me that a departure order should be made, an onus not easily discharged. [4]

[8] In summary therefore [Ms Coulter] has the difficult task of satisfying me that there are facts, peculiar to her situation, such that her assessed rate of child support is unjust and inequitable. The tests are stringent, she must past through a narrow gate.

[9] Dealing first with [Ms Coulter]'s third ground, her claim under s 105(2)(c)(i), namely her assertion that [Mr Brand] is hiding his real income. She produced no persuasive evidence in support of that and did not seek to cross-examine [Mr Brand]. I am not therefore going to consider that claim further. The matters that do fall for consideration are whether she has enough to live on and/or whether she is incurring high costs, (meaning more than five percent of her adjusted income), in maintaining contact with her children.

---

[2] *EVJ v AJCB* [2013] NZCA 100.
[3] Ibid at 2.
[4] *Taylor v Oliver* (1997) 15 FRNZ 392; *Re M* (child support) (no.2) (1992) 9 FRNZ 693.

Relevant background

[10] The parties have two children aged eight and five. When together they lived in Auckland. Upon separation in 2019 [Ms Coulter] unilaterally relocated to [location 1 in the Taranaki region] which is where she is from and where her mother lives now.

[11] In July 2020, following a contested hearing in the Family Court, it was directed that the children return to live in Auckland. [Ms Coulter] was at that point provided with two options. If she chose to move back to Auckland the care of the children was to be shared on an equal basis. If she elected to remain in [location 1], something that she had told the Court in evidence that she would do, the children were to be living in the day-to-day care of their father with clearly defined contact provisions for [Ms Coulter] and the children.

[12] [Ms Coulter] elected to stay behind in [location 1] and the children therefore live in Auckland with their father.

[13] They have contact with their mother on the third and sixth weekend of each school term, from Friday afternoon until Sunday afternoon, for 10 days during the school term holidays and for half of the Christmas holidays.

[14] The changeover for contact occurs in Ōtorohanga, which is a little closer to Auckland than [location 1], but, considering the Auckland traffic, about midway in terms of drive time.

[15] [Ms Coulter] is employed as a social worker on a salary of $90,715 per annum. [Mr Brand] is self-employed, he has his own food/catering businesses. His declared income, before child support, is $55,000 per year. He lives with a partner whose earnings are assessed at approximately $25,000 per year and they have just had their first child, [Mr Brand]'s third child.

[16] For the first year or so when [Ms Coulter] moved to [location 1] in 2019 she did not work. Shortly before the hearing in the Family Court to determine care and contact she secured employment with Oranga Tamariki as a social worker. After the

children moved to live with her father she was assessed to pay child support. Because she had only worked for part of the year her assessed income by the end of the first financial year was less than her actual salary, meaning that she was assessed to pay $763.80. She has more recently been reassessed based on her actual income, hence the requirement that she now pay $1,229.40.

[17] [Ms Coulter] sought a review of that assessment but, by determination dated 25 May 2022, her application was rejected and no departure from the formula assessment was ordered.

[18] [Ms Coulter]'s gross weekly income is $1,744.52. She owns her own home in [location 1], with an estimated value of $400,000, together with a motor vehicle worth an estimated $20,000. Her total assets are therefore $420,000. Her home is subject to a mortgage that is close to $300,000.

[19] [Ms Coulter] has provided an affidavit of financial means and their sources. In that she has set out her weekly expenses as follows:

(a)	income tax	425.37
(b)	student loan repayments	162.54
(c)	superannuation	69.78
(d)	PSA fees	10.50
(e)	insurance (house and contents)	60.00
(f)	rates	55.30
(g)	mortgage payments	416.41
(h)	food and household supplies	120.00
(i)	electricity, gas and internet	94.70

(j)	telephone	15.00
(k)	lawns	25.00
(l)	child maintenance, care and education	283.47
(m)	car running and registration	50.00
(n)	car maintenance	50.00
(o)	other expenses: costs of contact to children (petrol for contact visits)	75.00
	Total weekly expenses:	$1,949.70

[20] [Ms Coulter] emphasised that it was important to her to maintain a home in [location 1] so to maintain the children's connections with her whānau and referred to the United Nations Convention of the Rights of Child along with the observation by Judge Inglis QC who stated that:

> If payment of the formula assessment at the assessed rate effectively deprived the children of the opportunity to maintain personal relations and direct contact with both parents on a regular basis, as article 9.3 of the United Nations Convention of the Rights of Child provides then I would without hesitation have taken the view that such a situation produced "special circumstances" to support one or other grounds of departure.[5]

Analysis

[21] Certain aspects of [Ms Coulter] evidence and submissions led me to worry that [Ms Coulter] was trying to hold the Court to ransom, to try and impress upon me that if her present level of child support remained the same she would be forced to stop seeing the children because she would not be able to afford to travel. I questioned [Ms Coulter] carefully on this point and she assured me that that was not the case. She said that she would stop eating rather than do that.

---

[5] *Cockrem v Cockrem* FC Palmerston North FP 054463,96 22 August 1997, at [22].

[22] A few points should be noted about [Ms Coulter]'s expenses. The "child maintenance, care and education" that she has listed as requiring an outgoing of $283.47 would be the payment she would be required to make if her application is unsuccessful, if she were to pay at the assessed rate. Her current weekly commitment is $190.95.

[23] Her student loan repayments will run for another three years.

[24] Her reference to superannuation is a reference to KiwiSaver, it was established under cross-examination that she could reduce her contributions.

[25] [Ms Coulter] has someone to mow her lawns, at a cost of $25 per week. This is definitely a cost that I believe she could forgo. In evidence [Ms Coulter] said she could not afford to buy a lawnmower but lawnmowers, particularly second-hand ones, or even manual mowers if her lawns are reasonably small, are not that expensive. I regard that expenditure as a luxury.

[26] Her "other expenses: costs of contact to children (petrol for contact visits)" are assessed as being $75 per week. Under cross-examination it was established that this is not the true cost. In providing the figure of $75 per week [Ms Coulter] went to the IRD website which apparently allows a calculation of 43 cents per kilometre. [Location 1] to Ōtorohanga and return is a journey of 490 kilometres, hence her calculation. Her actual costs in terms of petrol are about $45 per week, they being about $200 per visit and she having 12 such visits per year.

[27] It was established during cross-examination that flying the children might be a cheaper option for her, however it would be a more expensive option for [Mr Brand].

[28] [Ms Coulter] rejected the option of having a boarder as it would mean the children sharing a bedroom, something she believes that they would feel very keenly.

[29] The figures are therefore not as harsh for [Ms Coulter] as she sets out in her affidavit but it is clear however that the combination of child support and mortgage payments in particular, along with all of her other outgoings, are squeezing her tightly.

[30] [Ms Coulter] must point to special circumstances, which has been defined as meaning that she must take her case "to the point where it is quite out of the ordinary where the case can properly be described as being set apart from other cases".[6]

[31] When it comes to the special circumstances necessary to establish [Ms Coulter]'s claim that if she pays child support at the assessed rate she will not be able to support herself, Justice Tipping observed that "the word necessary is not intended to denote the bare necessities of life. Equally, it is not intended to permit an unreasonably high standard of living".[7] And in another case on the same issue it was held that:

> It is not enough that there be qualifying commitments which significantly reduce the capacity of the liable parent to provide financial support for the child in question. Not only must that be shown, but it also must be demonstrated that the significant reduction in capacity arises by virtue of special circumstances."[8]

[32] As is so often the case, everything turns on its particular facts. In this case [Ms Coulter] has ways of reducing her outgoings. [Ms Coulter] has chosen to live in [location 1] whilst her children live in Auckland. She did not have to do this. I have no doubt that she could be employed as a social worker in Auckland, on a salary of over $90,000 per annum. She could have equal shared care of her children whilst living in Auckland. In her evidence in court she referred to having just that morning explored the issue of renting property in [location 1] and learnt that there was only one three-bedroomed house available for rent, at a rental of $615 per week. It would appear therefore that she could rent out her house for whatever she is paying to the bank by way of mortgage payments and live in Auckland. Even in Auckland I am sure that people can survive on $90,000 per annum.

[33] She drives a Nissan X-Trail, a four-wheel drive vehicle. There are cheaper cars to run. She could take in a boarder. One of the children might be upset at losing a spare bedroom but I suspect that [Ms Coulter] has already upset the children enough by choosing to live a long distance away from them. I am not satisfied that she is entirely genuine on this point. She could mow her own lawns. I certainly accept that

---

[6] *Patrick v Boxen* 919930 11 FRNZ 32, at [36].
[7] *Wilcox v Lion* (1992) 11 FRNZ 1, at [723].
[8] *In the marriage of Gyselman* (1992) FLC 92-297, at 79-068.

she could not take a second job however. She is a social worker, a very demanding and stressful occupation with no room for further employment.

[34] All in all, I accept that [Ms Coulter] is hard-pressed financially, but that is the lot of many people, particularly in the relatively early period post-separation whilst they are re-establishing themselves, whilst their debts are high and their child commitments are high. There is nothing in this ground to take it out of the run of ordinary cases. There are no special circumstances.

[35] The second ground under which [Ms Coulter] applies is her costs of travel. To succeed in this application she must, firstly, satisfy the Court that she does have high costs, meaning more than five per cent of her adjusted income. Her adjusted income is $63,127.60. [Ms Coulter] claims that her travelling costs are $4,737.60 a year, a figure being more than five per cent of her adjusted income. However, I am not convinced that she is entitled to claim that amount, notwithstanding the IRD's apparent method of calculation. I am concerned with her actual expenses, which are about $45 per week or $2,340 per annum, which is less than five per cent of her adjusted income.

[36] Further, as already discussed, she could buy a cheaper vehicle and she has opted to live that far away from her children.

[37] Even if I am wrong about the calculation being less than five per cent of her adjusted income, the above two factors persuade me that this does not amount to special circumstances. As [Mr Brand] pointed out, he also has high costs in travelling because of [Ms Coulter]'s choice as to where she is to live and he is obliged to travel in order to fulfil his obligations under the parenting order.

[38] Some cases have allowed a claim under this heading, some have not. The tenor of the cases suggests that the factors of [Ms Coulter]'s choice of where to live and choice of vehicle mitigate against finding that there are special circumstances in this case. Even if there were, it would not be just and equitable to allow this reduction given the parties relative financial positions and the reasons for [Ms Coulter]'s high costs of travel.

[39] In any case, as will be seen in the final order that I make, any diminution of her contribution on this ground would be significantly less than will in fact be the case in the final order that I am going to make.

[40] I have already found that there is no evidence to support [Ms Coulter]'s application on the third ground, which is that [Mr Brand]'s real income makes her assessment unjust and inequitable. The evidence is that [Mr Brand] has outgoings that are the equivalent if not greater than [Ms Coulter], that he has a lower income because he is in the process of trying to establish businesses that were badly effected by COVID-19, he has a third child to support and, at least up until recently when the youngest child turned five, he was spending a lot on child care fees. There is nothing unjust and inequitable about this assessment.

Conclusion

[41] [Ms Coulter] has failed to satisfy me, by quite some margin, that there are special circumstances justifying a departure order. That being the case, her application for a departure order is dismissed.

[42] That is not quite the end of the matter however. During the hearing [Mr Brand] made two offers, offers that I regard as being generous but ones that I am happy to take up.

[43] [Ms Coulter]'s obligation to pay the assessed amount was suspended by order of the Court and she is liable therefore to pay the arrears that have accrued in the meantime. During the hearing however [Mr Brand] said that he was willing to waive any arrears.

[44] [Mr Brand] also said during the hearing that he would be willing to accept a payment of $1,000 per month, rather than the assessed $1,229.40.

[45] Utilising my powers under s 106 of the Act. I therefore direct as follows:

(a) From the date of this judgment, [Ms Coulter] is to pay $1,000 per month in child support payments.

(b) This assessment is for three years' duration, up to the financial year ending 31 March 2026 (at which time her student loan will have been repaid).

(c) All arrears are waived by [Mr Brand].

(d) [Mr Brand] may revoke these concessions in the event of an appeal.

_____
Judge AS Greig
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 30/03/2023