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-2022-004-000716
[2023] NZFC 4595

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[DIANA CURRAN] Appellant
AND	[EDISON CURRAN] Respondent

Hearing:	5 April 2023
Appearances:	Appellant appears in Person Respondent appears in Person
Judgment:	26 May 2023

RESERVED JUDGMENT OF JUDGE R VON KEISENBERG

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[1] This is an appeal against a decision of the Commissioner for Inland Revenue pursuant to s 103B of the Child Support Act. The appellant, Ms [Curran], and the respondent, Mr [Curran] appeared in person and are both self-representing.

[2] By way of background, the parties are the parents of two children: [Pierce], born on [date deleted] 2009 and [Robert], born on [date deleted] 2011.

[3] At the conclusion of the hearing, I issued a Minute which recorded, among other things, an agreement the parties had reached during the hearing concerning who would pay the future school fees for their younger son [Robert]. The parties reached agreement that Mr [Curran] would meet all the school fees for [Robert] until he completed [school A] in 18 months' time.

[4] I now address the substantive issue. This appeal by Ms [Curran] under s 103B of the Child Support Act is against a decision of the Commissioner of Inland Revenue dated 16 June 2022 granting a departure from the formula assessment in favour of Mr [Curran] for the 2023 child support year under Grounds 7 and 8.

[5] Ms [Curran] appeals that decision on the grounds that it was wrong, unfair and unjust.

Legal principles

[6] Section 103B(5) of the Act determines that appeals to the Family Court are by way of rehearing. The onus is on Ms [Curran] to establish that the review officer was wrong. The Court can rehear evidence or receive new evidence.

[7] The scope of the hearing is on the basis that "the court will only disturb the findings of the body appealed from if it can be shown that the body exercised its discretion on some wrong principle, disregarded a relevant consideration or took account of an irrelevant consideration".

[8] The appellant bears the onus of satisfying the court that it should differ from the decision under appeal having regard to the fact that the court "has a responsibility of arriving at its own assessment of the merits of the case".[1]

[9] The powers of the Family Court under appeal are set out in s 103D of the Act which provides:

[1] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

> **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.
>
> …

[10] Section 105(1) provides that where an application is made to the Family Court for departure orders under s 104, there are three requirements which must be satisfied. In *Re M*, Judge Keane observed:[2]

> The three matters as to which the Court has to be satisfied are cumulative, and each must be answered in favour of the applicant if his or her already existing statutory liability fixed by formula assessment is to be reduced.

[11] Accordingly, before a Court may make a departure order under s 106 it must be satisfied:

(a) One or more of the grounds for departure mentioned in subsection 105(2) exists;

(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.

[12] Mr [Curran] had sought a review of his child support assessment dated 11 February 2022 for the Child Support year 1 April 2022 to 31 March 2023. Mr [Curran] had been assessed to pay $15,243.60 per child. He sought a review of his assessment under Grounds 7 and 8 from the normal assessment.

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[2] *Re M* [1992] NZFLR 660.

[13] Ground 7 requires that by virtue of special circumstances the cost of maintaining the children is significantly affected because their being cared for, educated or trained in the manner that was expected by either parent (s 105(2)(b) and (3)).

[14] Mr [Curran] claimed that the parties' older son, [Pierce], had completed year 8 at [school A] having attended since year 2 and that the parties younger son [Robert], was still attending [school A] at the time of the hearing. Until 2020, Mr [Curran] had paid the school fees for both boys. However, in 2021 Ms [Curran] paid the school fees in total for the year.

[15] An issue arose between the parties with respect to the school fees for the year 2022. Mr [Curran] said that the parties had agreed that in 2022, each party would pay the fees for one child. Ms [Curran] paid the school fees for one term and then, according to Mr [Curran], reneged on the agreement. She had also given notice that [Robert] should be removed from [school A] because she was no longer able to afford to pay the fees.

[16] In support of his departure application, Mr [Curran] claimed that he was suffering from the economic downturn and was only able to pay the private school fees from savings which he considered was unfair. At age 70, he did not want to have to keep working.

[17] In response, Ms [Curran] claimed she could not afford private school fees; she was struggling to provide food and basics for the children because of her low income. From her perspective it was more desirable to keep the children fed and housed rather than apply her limited income to paying private school fees. She claimed that private schooling was a luxury which she could not afford. As she was now living in the [school B] zone the older boy was able to attend there.

[18] Mr [Curran] also sought a review under Ground 8 at the hearing before the Commissioner, on grounds that Ms [Curran] had an earning capacity that she was not utilising. Ground 8 provides that:

> By virtue of special circumstances, the assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by reliable parent for the child because of the income, earning capacity, property and financial resources of either parent or the child (s 105(2)(c)(i)).

[19] Mr [Curran] claimed that Ms [Curran] had obtained a Bachelor of Business and Accounting, a Diploma in Translating and that she was earning little to "manipulate the system and collect government benefits". He claimed that at 45 years old, she was fit to work, had a capacity to earn $50,000 and would earn at least $54,000 as a receptionist. He contended that she could easily earn $50,00 per annum plus but chose not to work.

[20] Mrs [Curran] rejected the claim that she could be earning more as a self-employed person for the reasons she outlined: a change of care arrangements and COVID-19.

The Commissioner's findings

[21] The Commissioner found that for the 2023 year, Mr [Curran] was assessed to pay $15,243.60 for the older child and for the younger child the earlier assessment was reduced by $12,000 to $3,232.60 per annum. The assessment was based on Mr [Curran] having 98.98 per cent of the combined child support income of $368,439.22 and zero per cent of the care cost percentage.

[22] In reaching this decision, the Commissioner found that "the fees that must be paid, significantly affect the cost of the boys' education and are sufficiently high that they are a special circumstance." The Commissioner determined that the parties had an expectation that the child was to be trained or educated in a particular manner observing that the expectation did not need to be joint but must be reasonable and have existed prior to the hearing of the application and that this expectation was confirmed by their joint decision to enrol the children in private schools.

[23] The result of the Commissioner's determination was that Mr [Curran] liability to pay child support in respect of the younger child was reduced by $12,000 for the 2022/2023 year. The decision stated that:[3]

> Given the high costs of educating the boys at present and to ensure Ms [Curran] pays her share of the fees by paying for [Robert], the child support for [Robert] is to be reduced by $12,000. That is not a full dollar for dollar reduction on account of additional costs Mr [Curran] is picking up for the fees and other incidentals at [school A]. However, it pays some regard to the fact that he has the much higher income.

[24] The Commissioner found that although Ms [Curran] had the day-to-day care of the boys there was an expectation that she would continue to live and raise the boys in one of "Auckland's more expensive suburbs so that [Pierce] can be enrolled and attend [school B] next year".

[25] In determining the review under Ground 8: whether the child support incomes used in the assessment fairly represent each party's capacity to provide for the children, the Commissioner made the following observations:

> …Ms [Curran] is assessed on an income of $28,217. I agree entirely with the conclusion of the last review that her qualifications means that she could be earning significantly more than $28,000 if she chose to work and not study." While it may have been reasonable to obtain a graduate degree including a legal executive qualification, it is not reasonable to continue studying indefinitely and asking Mr [Curran] to pick up the tab for this via increased child support payment. She could be earning a decent income that could assist with the school fees and other costs.

[26] The Commissioner determined that Mr [Curran] should be assessed on the current child support income and determined that Ms [Curran] had the capacity to earn a higher income of $54,000. The commissioner said:[4]

> I also find that Ms [Curran] has the capacity to earn an income of $54,000. That is a little higher than the income assessed last year, a little lower that the average wage which makes some allowance for her care responsibilities and in my view a fair income having regard to ger earning capacity which she has an obligation to utilise.

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[3] Page 9 Notice of Determination.
[4] Page 7 Notice of Determination.

[27] The Commissioner found that the significant disparity between the income Ms [Curran] is assessed on and what she is capable of earning is sufficiently wide to constitute a special circumstance under Ground 8.

[28] The Commissioner determined that a departure order under grounds 7 and 8 would be "just and equitable" between the parties as provided in s 105(4), (5) and (6) and that Mrs [Curran]'s current minimal income did not reflect her capacity to provide for the children and that her income should be adjusted to reflect her earning capacity.

[29] In summary, Mr [Curran] was successful in his application on Grounds 7 and 8 the effect of which was that:

(a) Mr [Curran] is to be assessed on an adjusted income of $389,126.

(b) Ms [Curran] is to be assessed on an assessed income of $54,000.

(c) The child support Mr [Curran] assessed for [Robert] is to be reduced by $12,000 for the period 1 April 2022 to 31 March 2023.

[30] The effect of the decision by the Commissioner was that the assessment of what Mr [Curran] had to pay for [Pierce] was unchanged ($15,243.60), but that he was now only required to pay $3,243 in respect of [Robert].

Current proceedings

[31] In July 2022, Ms [Curran] filed her notice of appeal against the Commissioner's determination in respect of both Grounds 7 and 8.

[32] By way of background the parties had married in April 2008, they had separated in May 2017 and divorced in May 2019. Between 2017 and separation to May 2020, the parties shared the care of their two sons, [Pierce] and [Robert]. However, in May 2020 following an urgent application to the Family Court, the care arrangements were varied so that Ms [Curran] now has 83 per cent of the care of the children. The respondent has the boys in his care every second weekend from Friday

through to Sunday, one week in the July school holidays and a week in the January school holidays.

[33] Ms [Curran]'s principal points of appeal on Ground 7 were:

(a) Although the children's schooling was a joint agreement during the marriage, Ms [Curran] disputed there was an agreement or obligation to continue with private schooling after separation.

(b) Mr [Curran] had provided financially for the family while they lived together; she was a full-time stay-at-home mum for the nine years they were together. The payment of private schooling fees was not a term of the parenting order.

(c) Other issues had arisen previously with the boys' schooling. It was not in dispute that in September 2020, Mr [Curran] had sent a letter to [school A] without consultation or agreement with her that the children would be withdrawn from the school.

[34] It is not disputed by Mr [Curran] that Ms [Curran] paid the school fees in total in 2021. She deposed she had paid these from a relationship property settlement and borrowed funds from family and friends, totalling $44,000.

[35] Ms [Curran]'s principal grounds of appeal for Ground 8 was that in 2021, as a result of an extended COVID-19 lock down in Auckland of approximately 180 days, Ms [Curran]'s self-employment as a [employment details deleted] suffered a serious setback. Following the lock-down she had to work from home and because of the change in care arrangements had the full-time care of both boys with the sole responsibility for their home schooling.

[36] In January 2022, she contacted Mr [Curran] explaining that because of financial hardship arising from COVID-19, she could not meet the school fees for the year. She had attempted to maintain her share of the fees as much as possible during

2021 but, because of the ongoing economic issues, she said was unable to continue this. However, she paid [Robert]'s first term school fees in 2022 by credit card.[5]

[37] Ms [Curran] also argued that the reviewer was biased and had failed to take into account the impact of COVID-19 on her income and classifying the luxury of private schooling as "special circumstances". She argued that the decision was unjust and unrealistic.

[38] Ms [Curran] submitted that the original assessment of $15,243.60 per child was reasonable and realistic and the new assessment of "taking off $12,000 from one child's proportion instead of the overall income combined by two parents was unjust, unsatisfactory and unfair".

[39] Mr [Curran]'s response to her appeal to the Family Court is set out in his affidavit of 26 August 2022. He reaffirmed his position with respect to the boys attending [school A]. There was little dispute with many aspects of Ms [Curran]'s evidence. He maintained that there was an agreement that the boys would remain at [school A] until they completed their schooling but nevertheless accepted, he had attempted to withdraw the boys out of school in 2020. He acknowledged that Ms [Curran] had paid the school fees in 2021. (It is unclear form the proceedings whether he told the Commissioner at the review that she had done this.)

[40] Mr [Curran] also acknowledged that she had contacted him in 2022 advising she was unable to meet the fees because of her reduced income and that her priority was to pay bills and ensure she and the boys did not live in poverty. In her letter to Mr [Curran], she confirmed that she was not refusing for the boys to attend [school A] but that she could not afford to pay the school fees on her income.

[41] Mr [Curran]'s submission to the Court was that Ms [Curran] was simply manipulating him into paying the school fees for both boys.[6] However, at the hearing, and as recorded in my earlier Minute, Mr [Curran] acknowledged he had laboured under the belief that Ms [Curran] was receiving more money than she was in reality.

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[5] Affidavit of [Diana Curran], 31 July 2022
[6] Affidavit of Mr [Curran], 26 August 2022, para 21.

He believed that not only was she receiving approximately $900 per week from WINZ that she also received his child support payments of $1,500 per month. Based on his misconception he claimed that she had "little or no incentive to get seriously involved in a career and that she was manipulating the system."

[42] As this was ultimately proven to be incorrect at the hearing Mr [Curran] to his credit acknowledged his error and then offered to pay the school fees for the younger boy until he completed [school A] as I have earlier recorded.

The hearing

[43] The matter proceeded by way of oral submissions. I found both parties' arguments at times difficult to follow. It was evident that communications between the parties remains difficult and strained.

[44] Ms [Curran] confirmed that her income was still unstable because self-employment had been made more difficult since taking over the majority of their sons' care following the father's suspension of contact in May 2020. Mr [Curran] continued to argue that she could do more to progress her career. Ms [Curran] claimed that she had been seriously disadvantaged in the employment sector because of a lack of work experience having been a full time mother and English being a second language for her. She railed at the suggestion that she should work as a receptionist as contended by Mr [Curran].

[45] At the hearing, Ms [Curran] confirmed that the parties' older son was now attending [school B] and it was agreed that [Robert] will join him once he has completed his education at [school A].

[46] Ms [Curran] confirmed that she used $21,000 of her capital to meet the school fees in 2021. In terms of her personal circumstances, Ms [Curran] rents and subcontracts as a [employment details deleted]. She requires a benefit to supplement her income. She produced her bank statements following a brief adjournment which confirmed that she received $970 per week from WINZ which incorporated the child support payable by Mr [Curran].

[47] Her appeal under Ground 8 is that the findings by the Commissioner were wrong and had not taken into account that her earning ability from self-employment had been affected by the change in care arrangements in May 2020 and reduced income form COVID 19

[48] Mr [Curran] maintained that the Commissioner was not in error in granting a departure on Grounds 7 and 8. Although the decision by the Commissioner to determine his income for 2023 year at $389,126 was in error but nevertheless did not appeal the decision.

Analysis

[49] The Commissioner determined that Ground 7 had been made out that by virtue of "special circumstances", that the costs of maintaining the children are significantly affected because they are being cared for, educated or trained in the manner expected by either parent. This ground reflects the wording in s 105(2)(b)(iii). Section 105 provides:

> **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 for an order in relation to a child and the court is satisfied that—
>
> (a) 1 or more of the grounds for departure mentioned in subsection (2) 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,—
>
> the court may make the order.
>
> (2) For the purposes of subsection (1)(a), 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.

…

[50] It is well-established that each of the grounds relied on under s 105 require the establishment of "special circumstances". These are described as "facts particular to the case that set it apart from others".[7]

[51] The special circumstances in question must be relevant to the ground relied on by the applicant.[8] In *Lyon v Wilcocks and Commissioner of Inland Revenue*, the Court of Appeal confirmed that:

> The formula assessment is the norm; and departure from it will be allowed only if stringent tests are satisfied. As has been said in a number of cases, those seeking departure must pass through a narrow gate.

[52] It is well-settled that a Court can and should look past accounting analysis of income to find true income.[9]

[53] In regard to educational costs, Tipping J said in *Ewing v Ewing:*[10]

> All that needs to be said is that the legislation recognises that the costs of maintaining children may be significantly affected by the fact that the children are being looked after at a higher standard than normal because of the expectations of the parents. Indeed, the concept focuses on either parent so it seems that the expectations need not be a joint one. It can be one pertaining to only one of the parents. The expectation must of course be reasonable and there as always be special circumstances in the case.

[54] It is not in dispute that the parties had agreed prior to separation that the boys would attend at [school A]. This agreement continued until the point that Ms [Curran] was no longer able to afford it. The issue is whether the review officer's decision to reduce the child support payable by Mr [Curran] by the same amount of the school fees should have taken into account Ms [Curran]'s change in circumstances. Having considered the matter and applied the applicable principles, I am satisfied that the decision to grant a departure under Ground 7 in these circumstances was unreasonable and unfair.

[55] While a joint expectation that the children would attend a private school prior to separation was established, it is evident from the mother's declared income and her

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[7] *Re M* [1993] NZFLR 74.
[8] *Lyon v Wilcocks and Commissioner of Inland Revenue* [1994] NZFLR 634 (CA).
[9] *Clasper v Clasper* [1995] 13 FRNZ 604.
[10] *Ewing v Ewing* [1993] NZFLR 849 at 855.

submission which was unchallenged by Mr [Curran] that after 2021 and for part of 2022, she was financially unable to meet her share of private school fees. Mr [Curran] also acknowledged, that he had laboured under misapprehension as to what she was receiving from WINZ benefits.

[56] It is relevant that Ms [Curran] wrote to Mr [Curran] in 2022 advising that she was no longer able to pay school fees as a result of COVID-19, her contract having been discontinued and her available working hours been restrained as a solo parent.[11] She offered to pay for the first term but wanted their son withdrawn from the school because of her inability to pay.

[57] Mr [Curran]'s responded to her email as follows:[12]

> I replied to you on 14 January.
>
> You made a deal … You honour it. You have enough left from [name deleted] and Co money to pay for this year for [Robert].

[58] It was plain from this exchange and their interactions during the hearing that they both struggled to communicate civilly and that there is a great deal of distrust between them.

[59] Ultimately, the decision on where parents educate their children is a guardianship issue. However, I do not accept the premise that even if there was an expectation by the parents during the marriage that the children would receive a private school education that following separation this expectation is irreversible. By that I mean that if there are special circumstances particular to that person as claimed by Ms [Curran] that her income was seriously affected by a change in childcare arrangements (from equal share to 83 per cent of the time) plus reduced income because of COVID-19, this should in my view have been taken into account. There is no dispute that the disparity between the earning capacity of the parties is significant.

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[11] Affidavit of [Diana Curran], dated 12 October 2020, Annexure H.
[12] [Edison Curran] email 26 January, Annexure H.

[60] I am satisfied the review officer did not undertake a thorough analysis of Ms [Curran]'s ability to meet the cost of private school education. The review officer said in relation to that:

> While Ms [Curran] may have now changed her views about the desirability of a private school education in light of what she perceives to be more pressing financial priorities this does not alter the joint expectation that existed. Fees that must be paid significantly affect the cost of the boys' education and are sufficiently high that they are a special circumstance.

[61] The review officer, having determined under Ground 7 there was an expectation for the child to be trained or educated in a particular manner, then had to decide whether making a departure order was just and equitable and otherwise proper between the parties before the departure was granted.

[62] In *Hilgendorf,* Judge Bisphan considered the meaning of "otherwise proper".[13] He observed:

> The words "otherwise proper" are simple words of everyday use and must be given their ordinary meaning in the context. While it is not over 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 words "others proper" have to be considered against the background of the Act itself and particularly the objects which are set out in s 4.

[63] In *C v D*, Judge Inglis QC refused to grant a departure order holding that a disparity in the parents' incomes and earning capacity did not provide grounds for a departure order. The parties shared custody – two of the children received private schooling and the youngest child was in a state school. The applicant was earning $168,400. The applicant had an income of $14,383.

[64] The applicant sought an increase in the respondent's contributions focusing on the standard of living enjoyed by the children before the separation. The decision was successfully appealed. In the High Court Justice Durie found that the formula assessment had brought an unjust and unequitable determination because of the parents' income and earning capacity. The disparity in income with the special

[13] *Hilgendorf* [1993] NZFLR 177 at [182].

circumstance made possible a departure from the formula assessment. Justice Durie observed:[14]

> One obvious consequence is that the statutory formula is not to be departed from lightly. Another is that a departure order is not for the purposes of making exceptions but is rather for the purpose of making adjustments where the formula is prescribed does not best promote the underlying objects because of some particular circumstances…Departure orders are to be made by fine tuning the statutory machine to make it run more smoothly for the particular case.

[65] Justice Durie did not agree with Judge Inglis decision to distinguish *Ewing v Ewing* on the ground that *Ewing*, the applicant, had sole custody. His Honour observed:[15]

> The Act implies no principle that if the love and labour of caring is shared equally, then the costs must be equally shared as well or that each party should pay their own costs. On the contrary…the intention of the Act is plainly that the cost of child support whether it be a sole custody or shared custody situation is to be proportionate to the capacity to provide.

[66] In *C v D* Durie J referred to the objects of the Act (s 4 of the Child Support Act). Section 4(d) and (e) says:

> …
>
> (d) to provide that level of financial support be provided by parents for their children is to be determined according to their relative capacity to provide financial support and their relative levels of provision of care.
>
> (e) to ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support.
>
> …

[67] The decision to grant a departure under Ground 7 to equalise the payment of private school fees in my view was contrary to s 4(d) of the Act, that the level of financial support to be provided by the parents for their children is determined according to "their relative capacity and their relative levels of provision of care". There is a significant disparity in these parties' earning abilities.

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[14] *C v D* [2000] FRNZ 121, [2001] NZFLR 433 at [34].
[15] At [43].

[68] Applying the principles outlined in C *v D* it is my clear view that the Commissioner in making a departure order in favour of Mr [Curran] to reflect the high costs of educating the parties children by simply reducing the amount of child support payable to Ms [Curran] by $12,000 in order that Mr [Curran] "paid her share of fees" was not just or equitable or otherwise proper.

[69] In granting the departure, the Commissioner held that it was proper to do so and concluded there was no evidence which "indicated that either parties would be harshly affected by a departure. On the contrary some semblance of equity will be restored by recommending a departure to ensure the high cost of raising the children are more equally shared." I disagree with this finding.

[70] For the reasons I have outlined above, I am satisfied that this reasoning is flawed when applying the objects of the Act as Durie J refers to when "the intention of the Act is plainly that the cost of child support whether it be a sole custody or shared custody situation is to be proportionate to the capacity to provide." To determine that Ms [Curran] has the same liability as Mr [Curran] to meet substantial private school fees on her income is not proportionate in my view.

[71] Ms [Curran] has 83 per cent of the care and as a result of COVID suffered not only a reduced income (as many people did) but with a commensurate increase in the daily care of the children. Mr [Curran] acknowledged that the current care arrangements (which is effectively on weekends only and two weeks a year holiday time) does not interfere with his ability to earn or work.

[72] Accordingly, I am satisfied that a departure should not have been granted under Ground 7.

Second ground of departure order – Ground 8

[73] The review officer granted a departure from formula assessment on Mr [Curran]'s' application that Ms [Curran] was capable of earning more than she is currently, based on her education level and her qualifications.

[74] The review officer in granting a departure under Ground 8 observed that Ms [Curran] had been assessed on an income of $28,000 in February 2022 (the income amount Mr [Curran] sought a departure from). Unfortunately, neither party attached a copy of the earlier February Assessment which formed the basis of the review before the Commissioner.

[75] The Commissioner determined that under Ground 8 Mr [Curran] was assessed on an adjusted income of $389,126 up from $368,439.22 and Ms [Curran] on an income of $54,000 for the child support year of 2023 up from as best as I am able to discern from the decision in the absence of the earlier review outcome, from $50,000.

[76] The Commissioner agreed with the conclusion of the last review that Ms [Curran]'s qualifications meant that she could be earning significantly more than $28,000 if she chose to work and not study. The review officers reasoning for increasing it to $54,000 is set out below.

> I find that Ms [Curran] has the capacity to earn an income of $54,000. This is a little higher than the income assessed last year, a little lower than the average wage which makes some allowance for her care responsibilities and in my view a fair income having regard to the earning capacity, which she has an obligation to utilise.

[77] The review officer also referred in the determination to the "last review" which had assessed Ms [Curran] earning capacity at $50,000 but as I stated earlier this was not before me.

[78] Ms [Curran]'s evidence was at the time of the assessment she was earning $28,000 and that it was unreasonable for the Commissioner to assess her as capable of earning $54,000 per annum up from $50,000. However, there was little evidence before the Court why her income would not increase in 2023 from $28,000 given that COVID issues affecting workplaces were now for the most part in the past.

[79] Ms [Curran] also claimed in these proceedings that the review officer had demonstrated bias towards her. As earlier noted the review officer comments in the decision under Ground 8:

> While it may have been reasonable to obtain a graduate degree and diplomas including a legal executive qualification, it is not reasonable to continue studying indefinitely and asking Mr [Curran] to pick up the tab for this via increased child support payment. She could be earning a decent income that could assist with school fees and the costs."

[80] While I accept the general proposition that a party in child support proceedings has a duty to utilise their education and training to earn a better income, I observe that employing language such as "pick up the tab" and "earning a 'decent" income" may have been perceived by Ms [Curran] as being unnecessarily subjective. However, that being said I do not find this is evidence of bias.

[81] However, the evidence to support the Commissioner's decision to increase Ms [Curran]'s earning capacity from $50,000 to $54,000 (an increase of 8%) was based on it "being higher than last year but lower than the average wage" I find wanting. I observe it is the same salary Mr [Curran] claimed a receptionist could earn. The question is whether the review officer's decision to increase this to $54,000 was reasonable in the circumstances.

[82] I am satisfied on the evidence that although it was reasonable to have assessed Ms [Curran]'s' earning capacity at $50,000, there is little evidence to support an increase to $54,000 six months later. For that reason, I am satisfied that appeal on Ground 8 should be granted

[83] In summary I find in favour of Ms [Curran] on both Grounds 7 and 8 and on that basis her appeal is granted.

Signed at Auckland this 26th day of May 2023 at 3.45 pm.

R von Keisenberg
Family Court Judge