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 TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT ROTORUA

FAM-2016-063-000490
[2017] NZFC 7600

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[MOLLIE GRIFFITHS] Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing:	28 June 2017
Appearances:	Applicant appears in Person T Saunders for the Commissioner
Judgment:	29 September 2017

RESERVED JUDGMENT OF JUDGE A C WILLS

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[1] The appellant Ms [Griffiths] (the Appellant) has lodged an application for leave to file an appeal out of time and an appeal under s 102 Child Support Act 1991 (the Act) following a decision made by the Commissioner of Inland Revenue (the Commissioner) to disallow an objection under s 90(1)(j) of the Act.

[2] The Commissioner has filed an application to strike out the appeal and refuse the application for leave to file out of time. Submissions were filed for the hearing by Mr Saunders counsel for the Commissioner.

[3] Ms [Griffiths] was self-represented. She had received the submissions filed by Mr Saunders and was prepared for and gave submissions.

Background

[4] Ms [Griffiths] was entitled to child support for her [child] from [date deleted] 2013 because she had the primary care of [the child]. At that time Mr [Fry], [the child's] father was the liable parent.

[5] On 6 May 2016 the Commissioner of Inland Revenue was notified of a change in [the child's] care arrangements. The Commissioner determined that [the child] was no longer in Ms [Griffiths'] care and had not been since [date deleted] April 2016 when an interim parenting order had been made placing [the child] in the day to day care of Mr [Fry]. That finding of a change in circumstances led to an assessment by the Commissioner that Ms [Griffiths] was liable to pay child support for [the child].

[6] The Commissioner received an objection from Ms [Griffiths] to the decision to make her liable for child support on 25 July 2016. On 16 August 2016 the Commissioner disallowed that objection. The Commissioner was required to give notice to the objector - in this case Ms [Griffiths]. There was a two month period in which an appeal could be filed.

[7] The Commissioner says that a letter was sent to Ms [Griffiths] at her address [address deleted] on 25 August 2016 advising her that her objection had been disallowed. Ms [Griffiths] says that she did not receive notification that her objection

had been disallowed until 26 September 2016 when she spoke by telephone with a staff member of the Child Support Agency (CSA).

[8] The preliminary inquiry required is whether Ms [Griffiths] has filed her appeal within the statutory timeframe provided in the Act. Arising from that are two issues:

(a) Whether leave can be granted to file an appeal out of time.

(b) Whether Ms [Griffiths] is deemed to have received notice by the posting of a letter to her last known address.

[9] If Ms [Griffiths] has filed her appeal within time or leave can be granted, then the substantive issue as to grounds for the appeal can be considered.

Has Ms [Griffiths] filed her appeal within the statutory timeframe?

[10] The position of the Commissioner is that the appeal should be struck out because it is filed out of time, and further that there are no substantive grounds identified for the appeal.

[11] Dealing with the issue of leave, Mr Saunders for the Commissioner in his submissions, sets out the appeal provision under which Ms [Griffiths] appeals s102 of the Act. That section provides as follows:

> 102 Appeals against … decisions of Commissioner
>
> (1) Where the Commissioner disallows an objection made under section 90 …, the objector may appeal to **[**the Family Court**]** against that decision.
>
> (2) The appeal must be lodged within 2 months after the date upon which notice of disallowance of the objection is given to the objector by or on behalf of the Commissioner.
>
> **[**(3) Subject to section 125, the parties to the appeal are the objector and the Commissioner.**]**
>
> (4) A Court hearing such an appeal may make such order as it considers appropriate in relation to the decision to which the appeal relates, including an order confirming or varying the decision.
>
> (5) When an order is made by a Court under this section, the Commissioner shall, as soon as practicable, take such action as is necessary to give effect to the decision (whether by amending any assessment or otherwise).

[12] Section 102 makes no provision for an extension of time to file an appeal. Mr Saunders refers to the decision of Judge Inglis QC *[E] v Commissioner of Inland*

Revenue.[1] The judge found that s100 Child Support Act (the predecessor to s102) made no provision for an extension of time to file an appeal and there was no jurisdiction for the Court to grant leave to extend time.

[13] Ms [Griffiths] was unable to answer that legal submission.

[14] Having considered the legislation, it is clear that Parliament drew a distinction between appeals from decisions of the Commissioner in respect to objections under Part 6, and appeals in relation to Determinations. The Court is able to extend time for the filing of an appeal in relation to Determinations. The provisions for those appeals are set out in ss 103A, 103B and 103C of the Act, all of which enable the Court to grant an extension of time for the filing of an appeal. The Part 6 appeals provided for in ss 102 and 103 make no similar provision.

[15] The position taken by Judge Inglis QC is clearly the legal position and leave cannot be granted to file the appeal outside the statutory timeframe of two months.

Was Ms [Griffiths'] appeal filed outside the statutory period?

[16] The Commissioner relies on the affidavit of Mr Meredith sworn 25 January 2017. Mr Meredith annexed as exhibit "E" a copy of a letter dated 25 August 2016 advising Ms [Griffiths] that her objection had been disallowed, and says that the evidence shows that the letter was sent to Ms [Griffiths].

[17] Ms [Griffiths] says that she did not receive that letter by post and was unaware that her objection had been disallowed until a telephone discussion that took place on 26 September 2016. She says that she was told at that time, that she would have two months to appeal the decision. From her point of view, the two month period began on 26 September 2016 and therefore her appeal was within time.

The legal requirement for notice to be given

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[1] *[E] v Commissioner of Inland Revenue (Family Court) New Plymouth CS043/365/95, 13 December 1995*.

[18] Section 102(2) Child Support Act 1991 does not require personal service by the Commissioner on the objector. It requires that the notice of disallowance of an objection be "given to the objector". That process is not defined, but clearly something less than formal service is contemplated. Sending to the objector by ordinary mail to their last mail address is the approach that has been adopted as adequate by the Commissioner.

[19] The applicable legislation is s 93 Child Support Act 1991 which provides as follows:

> 93 Notice of result of objection
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> The Commissioner shall, as soon as practicable, notify the objector in writing—
> (a) whether the objection has been allowed or disallowed:
> (b) in a case where the objection has been allowed in whole or in part, the effect of allowing the objection, or that part of it:
> (c) in a case where the objection has been disallowed in whole or in part, that the objector can appeal to **[**the Family Court**]** against that decision.

[20] That section requires notification in writing and it is clear that personal service is not required. The Act does not provide further clarification or impose any deeming provisions in terms of the giving of notice by post to an address. As a consequence it is helpful to consider the comments made by Simon France J in a case which deals with deemed notice. Although it is an immigration case[2] the principles remain applicable.

> "In the end one must come back to the apparent purpose of the provisions. At the general level that aim seems to be to prescribe a method that can be relied upon to achieve notice being given; at the more specific level it seems to be to provide a methodology that allows a deeming provision to take effect, so that time will run. It is important to recall that the particular statutory method has no intrinsic value or significance. It is not an end in itself but is purely functional. Other methods could have been chosen, and indeed email suffices. It seems difficult to infer there is any magic or intrinsic importance in the method. Rather, the key issue is when service is achieved or deemed to be achieved."

[21] The Child Support Rules contain deeming provisions for documents once Court proceedings have been filed. Service is deemed to have been effected five working days after posting to a post office box address, and despite the changes to postal delivery that would seem sufficient in this case.

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[2] *Rao v Minister of Immigration* 2015 NZHC 2669

[22] It is then necessary to consider whether in this particular case, notice has in fact been received by Ms [Griffiths]. Mr Meredith's affidavit of 5 May 2017 sets out the process of sending, and recording the sending of correspondence within Inland Revenue. He is trained in the use of the Inland Revenue Department's computer data bases including Letters on Line Application ("LoLA") and Electronic Document Storage and Retrieval ("EDSR"). LoLA letters are manually generated by staff and EDSR is a computer archival system for documents that have been sent to a recipient by Inland Revenue.

[23] A copy of the letter dated 25 August 2016 is annexure "E" to Mr Meredith's affidavit of 25 January 2017. It was his evidence that the letter contains a reference number "[number deleted]", in the top right hand corner of the document. That reference number means that the letter was printed in hardcopy and manually posted to Ms [Griffiths] at the street address of [address deleted].

[24] Mr Meredith explained in his affidavit that he frequently assists Child Support officers to locate letters sent to a tax payer within EDSR. It was his evidence that one of the categories of the EDSR system ("outbound correspondence") held the letter of 25 August 2016. He had not found the letter in a search under categories "all documents" and "Child Support". That, said Mr Meredith, means that the letter was posted to Ms [Griffiths]. Mr Meredith confirmed that the letter of 25 August 2016 was not electronically sent to Ms [Griffiths] on that date.

[25] If the letter was sent on 25 August 2016 the date five working days thereafter is 31 August 2016 and that would be the date that notice is deemed to have been given.

[26] If Ms [Griffiths] had not disputed receipt of the posted document that would have been the end of the matter. The appeal would have been filed out of time and the Court would have no jurisdiction to hear it. It was however her evidence that the letter did not reach her until it was emailed to her on Monday 26 September at 3.51 pm.

[27] There is some contemporaneous support for her position. Exhibit "F" to Mr Meredith's affidavit of 25 January 2017 contains the notes of a telephone discussion

between a staff member at the IRD and Ms [Griffiths]. That telephone call took place on 26 September 2016. The caller records the following:

> [Mollie] was advised by previous officer that her objection had been disallowed. She advised she was told that a decision would be made on 26 September and she has been mislead and misguided by us throughout this whole process. She could not remember who told her that a decision would be made on 26 September.
>
> Advised: [Mollie] that I could not see that the decision letter had been sent. I explained that it was disallowed and she would need to lodge an appeal if she disagreed with our decision. Appeal would need to be within two months of receiving decision letter. [Mollie] asked if this would be against IR? I advised that the appeal would be against IR decision for CS. Our legal services would be the ones dealing with this. [Mollie] understood. ….
>
> I offered to send IR174 to her and confirmed address. ….
>
> After call located decision letter for objection in EDSR, contacted [Mollie] to advise - [reference number deleted] - issued IR174 via SVOC.

[28] What is clear is that Ms [Griffiths] indicated to the staff member that she had not received any notice of the objection being disallowed, that the staff member sent her a copy of the letter by email, together with an IR form and made it clear to her that the two months would run from the time she received notice of the objection being disallowed.

[29] Ms [Griffiths] has given sworn evidence that she did not receive the posted letter and that is supported by contemporaneous evidence. On a balance of probabilities test, Ms [Griffiths] did not receive notice until 26 September 2016. This of course is a decision which is confined to its own particular facts.

[30] As a result Ms [Griffiths'] appeal has not been filed out of time and it is therefore necessary to consider the substantive appeal.

The substantive appeal

[31] Ms [Griffiths] has set out in writing the basis for her appeal which I summarise as follows:

(a) Although [the child] is not physically in her day-to-day care she remains legally responsible for him as a guardian and was responsible for him from the time of his birth.

(b) That the Court orders which gave effect to the changed care arrangements for [the child] were interim and the subject of challenge by her in the Family Court. Ms [Griffiths] accepts that on 22 April 2016 orders were made providing for Mr [Fry] to have day to day care of [the child].

[32] Effectively, Ms [Griffiths] is saying that [the child] was still in her care. There is no doubt that she remains [the child]'s guardian and a person responsible for making decisions in his welfare and best interests. As a parent she remains liable to support [the child]. The practical reality however, is that [the child's] day-to-day material needs are being met by [the child's] father, who has the day-to-day care of [the child].

[33] The Child Support Act 1991 is specifically tailored to ensure that both parents of a child contribute to the financial costs of caring day-to-day for their children. The Act sets out the formula by which that will be calculated. The Act applies in this situation and accordingly, although Ms [Griffiths] is a guardian of [the child], she is not the person who has his day-to-day care. The Act requires that in those circumstances she be assessed as a liable parent.

[34] The Commissioner is required by s 86 of the Act to give effect to changed circumstances. In this case circumstances changed significantly on 22 April 2016 and the Commissioner was required to address that in terms of s 86 of the Act.

[35] In all of the circumstances there is no foundation for Ms [Griffiths'] substantive appeal and it is refused.

A C Wills
Family Court Judge