IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA85/2019
[2019] NZCA 531

BETWEEN	P (CA85/2019) Appellant
AND	COMMISSIONER OF INLAND REVENUE First Respondent
AND	W Second Respondent
AND	ATTORNEY-GENERAL Third Respondent

Hearing:	11 September 2019
Court:	Courtney, Duffy and Wylie JJ
Counsel:	Appellant in Person E J Norris for First and Third Respondents
Judgment:	4 November 2019 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] This appeal concerns the circumstances in which the Commissioner of Inland Revenue may reassess entitlement to and liability for child support under the Child Support Act 1991.

[2] Ms P was entitled to receive child support payments in respect of her daughter, A.[1] In December 2017, A went to stay with her father, Mr W,[2] for an extended period. The Commissioner became aware of this development in March 2018. She reassessed Ms P's entitlement and terminated the child support payments on the basis that A's living arrangements had changed. When A returned to Ms P's care in July 2018, the Commissioner again reassessed Ms P's entitlement and child support payments resumed.

[3] Ms P sought judicial review of the Commissioner's decision to amend the assessment in March 2018 on the basis that the decision was contrary to the provisions of the Child Support Act.[3] She sought to have the amended assessment disallowed and for the court to direct an investigation by an external organisation. Palmer J dismissed the judicial review application.[4] Ms P appeals.

The statutory framework

[4] The basis upon which child support entitlements and liabilities are assessed were changed by the Child Support Amendment Act 2013, which was intended to provide a better response to the changing circumstances of working parents and the varying care arrangements between them. Ms Norris, for the Commissioner, explained that the general scheme of the Child Support Act was to ensure that "the money followed the child" so that the person providing the ongoing daily care has the financial support to do so.

[5] The objects of the Act include, relevantly, providing that the level of financial support by parents be determined according to their relative capacity to provide

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1 The parties' names have been anonymised to provide anonymity to their child, A.
2 Mr W is the named second respondent but has taken no steps in this appeal.
3 Specifically, Child Support Act 1991, ss 15, 25 and 79.
4 *[P] v Commissioner of Inland Revenue* [2019] NZHC 98 [High Court judgment] at [45].

financial support and their relative levels of provision of care.[5] A parent or non-parent carer of a qualifying child may apply to the Commissioner for formula assessment of child support payable for that child.[6] The Commissioner determines the proportion of care that each carer of the child provides, the income of each parent and, on the basis of that information, identifies the parent or parents who are liable to pay child support and the carer or carers entitled to receive child support.[7]

[6] Where there has been a request for a formula assessment, the Commissioner is required to establish the proportion of ongoing daily care that each parent and/or non-parent carer provides.[8] The phrase "ongoing daily care" is not defined but it is evident that this is an assessment to be made by the Commissioner on the basis of all the relevant information and with the assistance of other provisions of the Act. For example, in establishing the proportions of ongoing daily care being provided by each carer, the Commissioner is required to rely on any care order or agreement in place.[9] However a parent or carer may challenge the establishing of proportions of care on that basis if there are reasons that a care order or agreement should not be relied on.[10] In addition, if the Commissioner is satisfied that a care order or agreement does not accurately reflect the proportion of ongoing daily care provided, she must establish the proportion of care primarily on the basis of the number of nights that the child spends with the carer.[11] And if the number of nights spent with a carer is not regarded as a true reflection of the proportion of care actually provided then the Commissioner must establish that proportion on the basis of the amount of time the carer is responsible for the daily care of the child.[12]

[7] Once the proportion of ongoing daily care has been established the Commissioner determines the "care cost percentage" of each parent or carer on the basis of that proportion.[13] "Care cost percentage" is the percentage of costs associated with providing a proportion of ongoing daily care to a child; in relation to

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5 Child Support Act, s 4(d).
6 Section 4A(1).
7 Section 4A(2).
8 Section 14(1).
9 Section 15(1).
10 Section 15(3).
11 Section 15(4).
12 Section 15(5).
13 Section 16(1).

a particular parent or carer, it is the percentage set out in sch 2 that reflects the proportion of ongoing daily care established under s 14. Schedule 2 identifies the care cost percentage as a fixed percentage by reference to the proportion of ongoing daily care. For example, if the proportion of ongoing daily care being provided is 27 per cent or less, the care cost percentage is fixed at nil. If the proportion of ongoing daily care is between 73 per cent and 100 per cent, the care cost percentage is set at 100 per cent.

[8] Once the care cost percentage has been determined, the Commissioner determines who the liable parents and receiving carers are,[14] and then assesses the annual amount of child support payable for that child support year by reference to the provisions in pt 2.[15] Subsequent child support years are similarly assessed. A "child support year" runs from 1 April to 31 March, though an assessment for child support may relate to the whole or only part of a child support year.[16] This enables the Commissioner to make an assessment that begins part-way through the child support year as defined to ensure that the objects of the Act are met. In doing so, she is entitled to apply the Act as if the beginning and end of the period being assessed were the beginning and end of a full child support year.[17]

[9] Liability to pay child support in accordance with a formula assessment continues until one of the dates specified for termination.[18] These include "the day before the date on which the receiving carer ceases to provide at least 35% of ongoing daily care to the child".[19]

[10] However, assessments made in accordance with the provisions just summarised can be altered or amended for various reasons, including where the parties' circumstances change. Parties have an obligation to advise the Commissioner of a change in the parent's or carer's living circumstances occurring during the child support year that may affect the care cost percentage and calculation

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14 Section 17.
15 Section 29.
16 Section 79.
17 Section 80.
18 Section 25.
19 Section 25(3)(b).

of allowances.[20] When the Commissioner receives notice of a change in circumstances she is required to take such action as is necessary to take account of the change in circumstances.[21] She has the specific power to amend assessments on this ground.[22]

Factual background

[11] A was born in June 2009 and Mr W was assessed as liable for child support in respect of A from October 2009.[23] Subsequent annual assessments continued to be made on the basis that Ms P was primarily responsible for A's ongoing daily care.[24] In 2011, parenting orders were made by the Family Court under which Ms P had day to day care of A and Mr W weekend contact with A for three out of every four weeks, with the fourth week to be determined by mutual arrangement with no contact if no arrangement was made.

[12] Mr W moved to Australia in 2012, but still wanted contact with A. In 2016 Ms P and Mr W agreed that A should spend three months with her father in Australia. It appears that the parenting orders were not varied but the arrangements were simply agreed to by the parties themselves. We were told from the bar that Mr W contacted the Inland Revenue Department in 2016 to enquire whether his liability for child support would be altered during this three months but was told that an extended stay in the context of the existing care arrangements did not justify a change to the parties' respective entitlement and liability.

[13] In 2017 the parties again agreed that A should have an extended stay with Mr W. On 24 December 2017, A flew to Australia to stay with her father. Although the exact arrangements are not known, there was sufficient information for the Commissioner to conclude that A was to stay for at least six months. Ms P maintains that the visit was only for six months, though A did not actually return until

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20 Section 82(1).
21 Section 86(1).
22 Section 87(3)(c).
23 By operation of s 142(1) of the Act, no amount of the child support paid by Mr W in relation to the period 14 October 2009 to 14 February 2017 was paid by the Commissioner to the appellant.
24 The assessment was initially made in 2009 on the basis that Ms P was the "principal provider of ongoing daily care" under s 11 of the Act, which has since been repealed by the Child Support Amendment Act 2013. Subsequent assessments were made on the basis that Ms P provided 100 per cent of A's ongoing daily care under a formula assessment undertaken under pt 2 of the Child Support Act (as amended).

July (and only then, it appears, in the face of threatened Hague Convention proceedings).

[14] Mr W was liable to make child support payments in accordance with the 2018 child support year assessment until March 2018 (the relevant child support year being identified by the 31 March year-end). But he queried the annual child support assessment for the 2019 child support year, which was based on him not providing any level of care for A. He advised Inland Revenue that A had been living with him since 24 December 2017. There was no record of Mr W indicating how long A was expected to stay with him.

[15] Inland Revenue contacted Ms P to confirm whether there had been a change in A's care arrangements and Ms P said that A had left New Zealand on for an extended holiday with her father and was due to return in the June/July holidays.[25] Ms P did not consider that there had been any change in the care arrangements because the first three months that A was with Mr W (December 2017 to March 2018) fell within the 2018 child support year and the next three months (April to June 2018) would fall within the 2019 child support year.[26] So Ms P was (on her view) continuing to provide the same level of care as she had in all previous child support years, that is at least 75 per cent of care over each child support year.

[16] The Commissioner took a different view. She considered that, because both Ms P and Mr W had confirmed that A would be in Mr W's care for at least six months, the care arrangements had changed and A was to be viewed as having left Ms P's care on 26 December 2017.[27] She amended the 2018 assessment to reflect that change, with the result that Mr W's liability for child support payments from late December 2017 was extinguished, with Ms P's entitlement to child support payments altered accordingly.

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25 A actually left on 24 December 2017 and we use that date in preference to the later date given by Ms P, which was clearly an error.

26 Ms P told the Commissioner that A had left on 26 December 2017 but, as already noted, "child support year" is defined in the Act as being from 1 April to 31 March.

27 Although A had actually left New Zealand on 24 December 2017 the Commissioner proceeded on the basis of Ms P's advice that it had been 26 December 2017.

[17] Ms P objected.[28] The objection was later determined by Grant Norton, a technical specialist with the Inland Revenue Department. He considered that A had been out of Ms P's care for a sufficient time (by then four months) to make a finding that there had been a change in carer. He considered it would not be appropriate to charge Mr W for child support for a period of six months or longer when he had the full-time care of A.

[18] Ms P had a right of appeal from that decision but commenced the judicial review proceedings instead.[29]

[19] As earlier indicated, A returned to Ms P's care in July 2018. Ms P applied to have the child support payments reassessed and that was done, with her entitlement assessed on the basis that she was providing all of the ongoing daily care for A.

Decision in the High Court

[20] The Judge recorded Ms P's case in the following way:[30]

> [32] Ms [P] submits that the Commissioner's decisions to apply a change of circumstances, refuse to make a formula assessment and to amend an assessment were not lawful. She submits entitlement to child support only ceases the day before the receiving carer ceases to provide at least 35 % of ongoing daily care under s 25(3)(b). She submits child support is assessed relating to a single child support year under s 79 and the Commissioner must assume every year has 365 days in determining proportions of care under s 15(6). She submits it is not lawful for the Commissioner to discontinue an active formula assessment without properly regarding the relevant proportions of care provided by each carer. …

[21] The Judge viewed the main legal issue in the case as the meaning of "ongoing daily care", which is the critical reference point for liability ceasing under s 25(3)(b).[31] As we have already noted, this phrase is not defined in the Act. The Judge noted that fact and that no assistance was to be gained from the legislative history of

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28 Although the objection was based on both s 90(1)(a) (make or refuse to make a formula assessment) and s 90(1)(j) (amend or refuse to amend an assessment for change of circumstances) the Commissioner treated the objection as only being advanced on the second ground because there had been no application for a formula assessment in respect of which the first ground might have applied.

29 We were advised from the bar that Ms P did commence an appeal in the Family Court which is the subject of an application by the Commissioner to strike out for abuse of process.

30 High Court judgment, above n 4.

31 At [34].

the Child Support Act and that there was no case law directly on point. The Judge did not, however, attempt a definition of the phrase but said:

> [35] I do not accept Ms [P's] submission that the child support year is the only possible basis for calculating the period over which ongoing daily care is assessed. That is inconsistent with the purposes of the 2013 amendments in taking into account a wider range of circumstances. Sections 79 and 80 support that by enabling the Commissioner to make an assessment on the basis of less than a year. The relative capacity of parents to provide financial support and their relative levels of care, recognised in s 4(d), must not be determined artificially or mechanistically accordingly only to the Act's definition of a child support year. Rather, it must equitably reflect the circumstances of those involved.

[22] Referring to the provisions of ss 15, and 85 to 87, the Judge noted the difficulties that might arise in circumstances where parents otherwise subject to a fixed care arrangement agree to vary it to allow for example, a school holiday break.[32] He considered that:

> [38] These are matters of degree to be assessed by the Commissioner. [Counsel for the Commissioner] advises that the Commissioner's practice is not to treat short term changes in the pattern of care as a change of circumstances. The Commissioner considers 13 weeks or more is "long term", drawing on s 89B in part 5 of the Act. That period allows parents to agree on temporary exceptions to their child care arrangements without necessarily disturbing their relative financial flows. I do not consider that pragmatic approach is inconsistent with the Act, as long as the Commissioner genuinely examines the circumstances of each case and does not fetter her own discretion by applying such a policy mechanistically.

[23] Applying that approach to the facts before him, the Judge considered that the information available to Inland Revenue did not establish with certainty that A would return to Ms P's care by June 2018 and that, as things had transpired, she did not do so until early July 2018, following threats of proceedings under the Hague Convention.[33] In those circumstances the Judge considered that:[34]

> …it was reasonable, and consistent with the requirements of the Act, for the Commissioner to assess the previous care arrangements under which Ms [P] had 100 per cent care of their daughter, as having ceased. At that time, in March 2018, Mr [W] had had full-time care of their daughter for 11 weeks. On the basis of the information available to the Commissioner, the new arrangement would last until at least June 2018. After that it was unclear what would happen. It was reasonable for the Commissioner to consider Mr [W]

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32 At [37].
33 At [42].
34 At [43].

> was likely to have ongoing daily care until at least June 2018, and since December 2017. He had ongoing daily care of their daughter over that period. Ms [P] did not; and neither did she have more than 28 or 35 per cent of her daughter's ongoing daily care over that period. Ms [P's] care cost percentage was therefore nil, under sch 2 of the Act, and no annual amount of child support was payable to her, under s 31(1). That equitably reflected the parents' relative levels of provision of care at the time.

[24] The Judge concluded therefore that the Commissioner's decisions were not unlawful.[35]

Appeal

[25] Before this Court Ms P commenced her argument by maintaining the position she had done in the Court below, namely that the assessment for the 2018 child support year ought to have remained unaffected by A's three month stay with Mr W at the end of that year. This was because, even if A was in her father's care for the last three months of the 2018 child support year, Ms P had provided ongoing daily care for A for the first nine months of the year and was therefore entitled to be treated as providing 100 per cent of the ongoing daily care for the 2018 child support year. As discussed, that is the effect of the fixed care cost percentages in sch 2. Likewise, because the period from 1 April 2018 to 1 July 2018 fell at the beginning of the 2019 child support year and A would be back in her care for the subsequent nine months of that year. The fact that A was in her father's care for a total of six months by virtue of the back-to-back arrangement the parties had reached ought not alter the substantive arrangements for care that had been agreed for each child support year and on which the child support assessments had been made.

[26] Ms P also pointed out that the three months A had spent with Mr W in 2016 had not resulted in any change in the child support assessment, though it appears from Ms Norris' explanation that the Commissioner treated 2016 as a one-off situation that did not indicate a change in the overall pattern of care. A different view would likely have been taken if, as a matter of course, A spent a substantial amount of time under Mr W's care.

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35 At [44].

[27] However, during Ms P's submissions she conceded that, faced with the fact that A would be in Mr W's care for a continuous six-month period, the Commissioner was entitled to conclude that a change in circumstances had occurred and to have assessed the 2019 child support year on that basis. This was a responsible concession. Although "ongoing daily care" is not defined, the ordinary meaning of that phrase conveys continuity of present circumstances into the future. Who has the ongoing daily care of a child is not a retrospective enquiry; rather, it is directed towards the current and prospective situations. Only once that assessment is made does the past becomes relevant in order to determine (by reference to the past arrangements) whether there has been a change in circumstances.

[28] However, Ms P maintained that the 2018 child support year must remain unaffected for the reasons already outlined. We do not accept this argument. The parties were required by s 82(1)(a) to notify the Commissioner of the change in circumstances because it was a change that might have affected the determination of the cost care percentage. Such notification is required specifically "[f]or the purpose of enabling the Commissioner to make or amend a calculation of child support payable in respect of a child".[36] The scheme of the Act is clear that the Commissioner must respond to changes in circumstances when they occur and on a prospective basis i.e. assessing entitlements on the basis of ongoing care arrangements. If the response was determined by past arrangements the integrity and purpose of the scheme would be undermined.

[29] As Ms P has accepted, the Commissioner was entitled to conclude that the parties living circumstances had changed; A was no longer living day-to-day with Ms P and nor was she expected to resume living with her for at least six months. The effect of s 25 was that Mr W's liability ceased the day before that change occurred:

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[36] Section 82(1)(a). Section 82(2) goes on to specify the dates on which a change of circumstances is to be treated as having occurred where the change either increases the liability of the liable parent or decreases the liability of the receiving carer or where notice of the change was received within 28 days of the change being notified to the Commissioner. The present case does not fall within those provisions because the result in this case was that the respective liability and entitlement ceased rather than increased or decreased. Cessation of liability is specifically governed by ss 25 and 62. So although s 82 applies generally insofar as it imposes the requirement to notify of changes in circumstances, the effect of the change where liability or entitlement ceases is not affected by s 82(2).

25 When liability to pay child support ceases

…

(3) A liable parent ceases to be liable to pay child support in respect of a particular receiving carer of a qualifying child under a formula assessment on the earliest of the following:

…

(b) the day before the date on which the receiving carer ceases to provide at least 35% of ongoing daily care to the child: …

[30] Under s 86 the Commissioner was required to take such action as was necessary to give effect to the changes in circumstances. Section 86(1) relevantly provides:

86 Commissioner to give effect to changed circumstances

(1) Where child support is payable in respect of a qualifying child and the Commissioner is notified, or otherwise becomes aware,—

(a) that the liability of a liable parent to pay child support to a carer in respect of the child has ceased in accordance with section 25 or 62; or

(b) that an event or change of circumstances has occurred that alters the respective liability or entitlement of any parent or carer of the qualifying child,—

the Commissioner shall, as soon as practicable, take such action as is necessary to take account of the event or change in circumstances (whether by amending any assessment or otherwise).

…

[31] Section 87 specifically empowers the Commissioner to amend an assessment at any time to give effect to the Act:

87 Amendment of assessments

(1) The Commissioner may, at any time, amend any assessment by making such alterations and additions as the Commissioner considers necessary to give effect to this Act.

…

(3) Without limiting subsection (1), the Commissioner may amend any assessment for the purpose of—

…

(c) giving effect to the happening of an event or change of circumstances to which the provisions of section 86 apply; or

…

[32] The effect of these sections was that the Commissioner was entitled to amend the existing assessment as she did.

[33] As noted at [18], Ms P sought to challenge the decision of the Commissioner by judicial review rather than exercising her right of appeal. As a result, the issue before the court is not whether the decision was appropriate in Ms P's circumstances but rather whether the provisions of the Child Support Act allowed the Commissioner to make the decision she did. The preceding paragraphs make it clear that the Commissioner acted within the scope of the Act. Her decision was therefore lawful and the appeal against the refusal to grant judicial review must be dismissed.

Costs

[34] The Commissioner seeks costs on the appeal. Although costs were not sought in the High Court the Commissioner takes the view that Ms P, having had the benefit of a High Court decision without being liable for costs, should now be responsible for costs in this Court.

[35] The points raised in this appeal were not entirely straight forward, partly because there is no defined meaning of "ongoing daily care" and no previous authority on that question. As a result, there is benefit to the Commissioner in having obtained clarification of that and we consider it appropriate to let costs lie where they fall.

Solicitors:
Crown Law Office, Wellington for First and Third Respondents