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 HUTT VALLEY

I TE KŌTI WHĀNAU
KI TE AWAKAIRANGI

FAM-2022-096-000303
[2024] NZFC 597

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	[JIA CHOU] Applicant
AND	COMMISSIONER OF INLAND REVENUE First Respondent
AND	[WEI SONG] Second Respondent

Appearances: Applicant appears in person
D Padmanabhan for First Respondent
No appearance by or for Second Respondent

Judgment: 21 January 2024

RESERVED DECISION OF JUDGE T M BLACK
[strike out application]

Background

[1] Ms [Chou] and Mr [Song] are the parents of [Xinyi] born [date deleted] 2013.

[2] There has been extensive litigation in relation to [Xinyi]'s care arrangements and that litigation is still on foot.

[3] On 31 October 2022, Ms [Chou] filed a s 102 appeal and a s 104 departure application.

[4] On 21 November 2022, the Commissioner filed a strike-out application.

[5] Ms [Chou] filed a notice of opposition on 23 December.

[6] A submissions-only hearing was directed. That hearing took place on 2 August 2023.

[7] On 1 August, the Commissioner applied to amend the strike out application so that the application was pursued only in relation to the s 102 appeal. The Commissioner intends to intervene in the departure order application.

[8] The issue I have to determine is whether the appeal should be struck out as not disclosing a tenable cause of action.

Legal issues

[9] Rule 193 Family Court Rules 2002 sets out that the Court may strike out an application in a number of circumstances, including relevantly where the pleading discloses no reasonable basis for the application.

[10] Section 16 Child Support Act 1991 requires the Commissioner to determine the care cost percentage of each parent and carer of a qualifying child on the basis of the proportion of care that the Commissioner has established that each carer provides to the child.

[11] The care cost percentage that applies is determined in Schedule 2 of the Act.

[12] Section 16 provides that the Commissioner must rely on the content of any care order when establishing the proportion of ongoing daily care that a carer provides to

the child although a parent or carer may, pursuant to subs 3, challenge the application of that provision by providing evidence why a care order should not be relied on.

Position/submissions

[13] The Commissioner's position is that the operative 2019 order provides for a care percentage of 68% to 32% on the basis that the order provides for Mr [Song] to have 119 nights a year.

[14] The Commissioner submits that in terms of Schedule 2, if a carer has care of a child from anywhere between 103 to 127 nights inclusive each year, then the care cost percentage remains the same, namely 24%.

[15] The Commissioner submits that giving effect to notified changes in circumstances should generally be a prospective exercise.

[16] The Commissioner submits that it was entitled to assess the change of circumstances in May 2022 as it has done and that on that basis even if Ms [Chou] was successful in challenging the analysis of the number of nights of care provided for in the order, it would not make any difference to the care cost percentage and that therefore the appeal cannot possibly succeed.

[17] Ms [Chou] submits that the order provides for Mr [Song]'s care time to be between 106 and 110 nights. She further submits that because the arrangement was not complied with for the period between 1 April 2022 and 12 May 2022 in fact Mr [Song] would only have had [Xinyi] in his care for 94 nights of the whole child support year and that the child support cost percentage should be set at zero.

Analysis

[18] I do not agree with Ms [Chou]'s assertion that the Commissioner was not entitled to take a prospective view of the care percentages. It is appropriate that the care percentage is determined prospectively, and the care percentages applied by the Commissioner are the same care percentages for the 22/23 year as they had been in previous child support years following the making of the 2019 order.

[19] In any event, I consider it relevant that it is argued by Mr [Song] that the order was not being complied with because Ms [Chou] was breaching it.

[20] Pursuant to s 79 of the Child Support Act, an assessment of child support can relate to all or part of a single child support year. Section 80 sets out that in making assessment of child support in relation to a period of less than full child support year commissioner may apply this Act as if the beginning and end of the period were the beginning and the end of a full child support year.

[21] Section 86 requires the Commissioner to give effect to notify changes of circumstances.

[22] I am bound by the Court of Appeal's decision of *P (CA85/2019) v Commissioner of Inland Revenue*.[1]

[23] That decision includes the statement that:

> 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. This enables the Commissioner to make an assessment that begins part-way through the child support year as defined to ensure 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 with a beginning and end of full child support year.

[24] At paragraph [28], the Court held:

> The scheme of the Act is clear that the Commissioner must respond to changes and 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 arrangement the integrity and purpose of the scheme would be undermined.

[25] I am not entitled to depart from the Court of Appeal authority referred to. The Commissioner was required to act prospectively to give effect in the change of circumstances (i.e. the parenting order now being complied with) which occurred on or about 12 May 2022.

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[1] *P (CA85/2019) v Commissioner of Inland Revenue* [2019] NZCA 531.

[26] Ms [Chou]'s contention that the actual care nights for the whole year should be assessed having regard to in determining the care percentage cannot be reconciled with the binding Court of Appeal authority.

[27] The result is that regardless of whether Mr [Song] is right about the number of nights which the order provides for care, there would be no difference in the cost care percentage which would remain at 24%.

[28] Given that, the appeal cannot succeed because a finding around care nights makes no difference to the care cost percentage.

[29] The application therefore does not disclose any reasonable prospects of success and must therefore be dismissed.

Result

[30] The Commissioner's strike out application is granted.

[31] The s 102 appeal is dismissed.

[32] Costs are reserved. If the Commissioner seeks costs counsel should file an application and submissions, which should include a 2B calculation, within 21 days of the release of this judgment. Ms [Chou] should file any submissions as to costs within 21 days thereafter, following which the matter should be referred to me in boxwork for consideration. One hour is to be allocated.

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Judge T M Black
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 21/01/2024

This judgment was authenticated by me at 12.05pm on 21 January 2024.