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 HAMILTON

FAM-2015-019-000604
[2016] NZFC 2935

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	JAMES BROOK Applicant
AND	COMMISSONER OF INLAND REVENUE First Respondent
AND	VAL WATSON Second Respondent

Hearing:	11 April 2016
Appearances:	R Sporle for the Applicant J Chappell for the First Respondent No appearance by or for the Second Respondent
Judgment:	11 April 2016

ORAL JUDGMENT OF JUDGE R H RIDDELL

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[1] This is an application for an appeal against the determination of the Commissioner in a review decision dated 30 June 2015.

[2] The applicant father is self–employed. He has the care of their three children for 44 percent of the time and he seeks a departure order on ground 8 under s 105(2)(b)(i) Child Support Act 1991.

[3] The administrative review decision was based on an application by the mother of the children arguing that there were extra costs to meet one of the child's special needs. The mother, Ms Watson, sought, under ground 6, for an adjustment to the father's liability for child support. She also sought, under ground 8 – namely, that the income, earning capacity, property, and financial resources of either parent of the child – should mean an adjustment to the formula assessment.

[4] Today, Mr Brook has attended Court with his counsel, Ms Sporle. The Commissioner of Inland Revenue is the first respondent. Ms Chappell is present as counsel to assist the Court.

[5] The IRD have not filed any notice of defence in the proceedings, but as a courtesy to the Court, Ms Chappell is here because of the law changes which occurred in 2015. I am grateful for that approach. It has assisted me in coming to a decision.

[6] The second respondent is the children's mother. She was served with the application but she has taken no steps and she has not attended Court today.

[7] Before the Court can make an order under s 106 of the Act, there must be grounds met under one of the numerous grounds of s 105. Mr Brook applies under s 105(2)(c)(i). That section provides that, by virtue of special circumstances, application in relation to the child would result in an unjust or inequitable determination of financial support levels because of the income, earning capacity, property, and financial resources of either parent.

[8] In this case, the Court is being asked to focus on the father's income, earning capacity, his property, and financial resources. In coming to a decision, the Court must also be satisfied that such an order would be just and equitable as regards the child.

[9] So I focus now on what precisely is the father's income, earning capacity, et cetera. In relation to his income, he has provided the Court with his first affidavit in which he set out a summary of his income over the years from 2010 through to 2015. That is set out at paragraph 13(a) to (f) of his affidavit of 19 August 2015.

[10] In those years, at no time was he earning $74,829, which was the assessment set by the Commissioner for 2015. Indeed, if I look at his income, I note it as follows:

> For the year ended 2010, $24,689.41. In 2011, –$552.36. In 2012, I note there is an error in that calculation, but the words say, "$66,9855.14". I understand for all purposes that $66,000 is the income he provided a return for. In 2013, $17,441.49. In 2014, $25,097.30. In 2015, $52,101.47.

[11] Mr Brook has also provided the Court with an affidavit of his financial means and sources. That is an updated affidavit which was sworn on 6 April 2016. That document sets out his income, which was $19,311.94. I understand that is a preliminary income as final income and expenditure has not yet been prepared by his accountant.

[12] As I say, he was assessed for 2015 at $74,829. For the 2016 year he was assessed at an income of $45,000. It is clear from the figures above that his actual income for those years did not reach the threshold assessed. He has also been assessed on his earning capacity. I note that, after a relationship division, the partnership was dissolved and the assets were divided in 2011. He then applied the stock that he had taken from the division and continued to farm.

[13] In relation to this earning capacity, he has applied that stock and continued farming. He has been able to benefit from very generous input from a third party to

the effect that he now has a 42 percent share in [name of company deleted]. That shareholding has a worth of $142,735. Mr Brook confirmed to me that there was no injection of cash from him, but the older gentleman, who has enabled him to acquire the shares, wanted to assist him to remain on the farm and also assisted Mr Brook to continue farming very close by where the mother of the children lives.

[14] There is no suggestion that he is not earning to his capacity. He has continued to farm as he had done prior to the end of the relationship and he has the care of the children for six out of 14 nights in a fortnight. That equates to 44 percent of the care and that is an important component for him that he is able to farm and he is also able to care for the children.

[15] In relation to his property or financial resources, I am satisfied they are adequately set out in the affidavit of financial means and sources. Apart from the net income from the business for the 2016 year, which has been $19,311.94, he has minimal assets. He has some limited funds in the bank and he has the shares to which I have referred. He also has a motor vehicle but no other real property.

[16] His expenses were set out at paragraph 4(a) to (r) and I find that they are modest, particularly in relation to his monthly expenses, say of food, which is $500 for the month. I would expect that his electricity, gas and fuel, telephone expenses, together with rates and rent, are nil because he has the benefit of living in a farmhouse (that is surmised on my part). But there are no paddings to the expenditure. There is no item for entertainment; gifts or card is a simple $20 for the entire year. There is no item for laundry and cleaning and his clothing bill for the year is $50. So it represents a very pared–back expenditure for the 52 weeks of the year.

[17] The objects of the Act are to ensure that caregivers are responsible for their children and that they maintain the children themselves. The Court must look at a person's income and earning ability and must weigh that against their own particular circumstances.

[18] I have come to the conclusion that the assessment of income at $74,829 for 2015 and $45,000 for 2016 are not realistic and, indeed, would be unjust and inequitable if they were visited on Mr Brook.

[19] I note that the law changed in 2015 and that should have had a bearing on the 2016 estimate of income. There is no reference in the administrative review to having taken into account the law change. But the primary reasons why I consider a departure is appropriate is as follows:

(a) Mr Brook's income, over the years from 2010, has been accompanied by an accountant's calculation of how that income came to be. It is comprehensive and it represents his actual income over those years.

(b) The law has changed and I am grateful to Ms Chappell making herself available and explaining to the Court that now the Court takes into account both incomes for parents. That care, where it is shared, is recognised. That is, particularly, the case for Mr Brook with 44 percent of the care of the children, and that the expenses of children while they are in his care, are also recognised.

(c) I consider, on Mr Brook's income and his expenditure, that it would be unjust and inequitable to set his income at those figures and it would be otherwise proper to adjust them to the rates that he seeks.

(d) Although Mr Brook has benefited from being able to acquire shares in a company, it is clear that there has been no cash injection from him for those share purchases. That was something which, if he had been able to acquire those shares from his own resources, might have made a difference. The fact is he has not.

[20] Mr Brook is seeking to adjust, under ground 8, his income for 2015 to $16,173 and his income for 2016 to $19,311.94. Under ground 8, I consider that such an adjustment is appropriate for those two years and I now order that accordingly.

[21] Mr Brook had applied on 19 August 2015, not only for a departure order, but also for a suspension of his child–support obligations under this matter could be heard. As matters transpired, it only came before the Court on 12 October to establish that the respondent had been served, and then more recently on 4 February 2016, when the presiding Judge did not address the matter of suspension of child support.

[22] I have made an order today but I do not consider I can backdate any suspension order. The order for suspension is dismissed.

[23] Finally, if there are any costs sought by Mr Brook, he may have seven days in which to file any submissions as to costs, and I will consider those in chambers.

R H Riddell
Family Court Judge