EDITORIAL NOTE: NO SUPPRESSION APPLIED.

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IN THE FAMILY COURT
AT WELLINGTON

FAM-2014-085-007561
[2016] NZFC 5001

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	ROBERT JOHN HITCHINGS Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing:	10 June 2016
Appearances:	C Rieger for the Applicant T Lancaster for the Respondent
Judgment:	10 June 2016

ORAL JUDGMENT OF JUDGE J A BINNS

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[1] This is a child support appeal under the Child Support Act 1991.

[2] While there were some technical challenges, the parties agreed that the broad issue for determination is whether Matthew was in the shared (substantially equal) care of both his parents from 16 March 2014 to 3 January 2016. That encompasses three child support years, or periods, from 16 March 2014 to 31 March 2014, 1 April 2014 to 31 March 2015, and 1 April 2015 to 3 January 2016.

[3] The last period referred to, coincides with a change in the law. The relevant sections are set out in the Child Support Amendment Act (No 3) 2013.

[4] After some discussion, the parties – and I include Matthew's mother, who was here for part of the hearing – agree that I may determine the issue of whether Mr Hitchings had substantially equal care of Matthew from 16 March 2014 to 31 March 2015.

[5] Then, essentially, the recognised care for the last period. I am being asked to treat this as a challenge under s 15(3) to the established proportions of care. Of course, it is conceded by the Commissioner that there has been no formal determination about that issue. That is because of the history of these proceedings. But it is accepted there is a challenge which requires determination and that the critical portions of the Act in relation to that issue are s 15, ss (4) and (5). That is because that section requires the Commissioner to "establish the proportion of care provided by a carer, primarily on the basis of the number of nights that the child spends with the carer." Further, under s 15(5):

> If the Commissioner is satisfied, on the basis of evidence provided, that the number of nights spent with a carer is not a true reflection of the proportion of care actually provided by a carer to the child, the Commissioner must establish the proportion of care provided on the basis of the amount of time that the carer is the person responsible for the daily care of the child.
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> (my emphasis added)

It is accepted that "responsible" is much wider than financial responsibility.

[6] The background is important. I intend to set that out in some detail.

[7] Mr Hitchings and Ms Miller are the parents of Matthew. Matthew has an older sister, but this hearing relates to Matthew. He was born on 30 April 1998. His parents' marriage ended in 2006.

[8] Following separation, Ms Miller provided the primary day-to-day care for Matthew, and Mr Hitchings maintained reasonable and regular contact.

[9] Initially, Mr Hitchings paid child support through a private arrangement at the rate of $400 per week. However, this was later superseded by a formula assessment from the Inland Revenue Department.

[10] On 28 January 2014 Mr Hitchings was informed by Ms Miller that Matthew had been enrolled as a boarder at Timaru Boys' High School. Matthew had previously been a day boy at the school while living with his mother. The reason for the change was that Ms Miller was moving to Kerikeri to live and work, although it is clear from hearing from Ms Miller that she worked in other parts of New Zealand as well.

[11] When Ms Miller enrolled Matthew as a boarder, she accepts that she acted without consultation with Mr Hitchings. She said the boarding opportunity came up at very short notice. It is clear that she acted contrary to her responsibilities as a guardian. One option may have been for Matthew to live with his father and attend school in Wellington, or Matthew's parents could have discussed a joint arrangement where they met and paid equally, for Matthew's boarding and school fees. Ultimately, Mr Hitchings respected Matthew's wish and, no doubt his need, to continue to attend Timaru Boys' High School.

[12] Because of Ms Miller's move to Kerikeri, Mr Hitchings considered that his child support obligations had changed because Ms Miller no longer had the day-to-day care of Matthew. Also, Mr Hitchings was spending more time with Matthew throughout the year, than Ms Miller.

[13] Mr Hitchings approached the Inland Revenue Department on 13 March 2014. He was told by a child support officer that he remained liable for child support

because Matthew was still dependent on Ms Miller, notwithstanding that he was now boarding at school.

[14] On 16 March 2014 Mr Hitchings completed an online change of circumstances form in which he outlined the fact that Matthew was now living at boarding school and was no longer in the day-to-day care of his mother. Mr Hitchings said:

> To that end I would appreciate a review of my payments in terms of non-custodial parent, in so much as I would like to be the custodial parent and consider that I should not be making payments to a person who no longer has the day-to-day care of our son.

[15] On 18 March 2014, after discussions with Inland Revenue staff, Mr Hitchings was told to complete an administrative review to have the costs of schooling and travel for contact with Matthew, taken into account and to apply to the Family Court in regards to custody of Matthew. (Although I note that Matthew would have been outside the jurisdiction of the Family Court in relation to seeking a parenting order.)

[16] On 15 April 2014 Ms Miller spoke to a child support officer. She claimed to be the principal provider of care for Matthew. She noted that she paid all of Matthew's expenses including his boarding school fees. As a result, a letter was sent to Mr Hitchings confirming that Matthew was still a qualifying child and that Ms Miller was the eligible custodian.

[17] On 15 May 2014, Mr Hitchings objected under s 90(1)(j) Child Support Act. The grounds for his objection can be summarised as follows:

(a) Matthew is 16 and there are no parenting orders in force.

(b) Mr Hitchings and Ms Miller and joint guardians and have equivalent status in law in regard to decisions relating to Matthew.

(c) Ms Miller has moved to Kerikeri, leaving Matthew behind as a boarder at Timaru Boys' High School. She no longer provides day-to-day care for Matthew. She has therefore relinquished her role as

eligible custodian and is in turn no longer eligible for child support payments.

(d) Mr Hitchings has a close relationship with Matthew. They are in constant contact. They generally spend school holidays together. Mr Hitchings therefore meets Matthew's emotional and developmental needs to the same extent, if not more, than Ms Miller.

(e) Mr Hitchings closely follows Matthew's schooling and has regular communication with his teachers.

(f) While Ms Miller pays the boarding fees of $10,800 per annum, schooling costs, miscellaneous living needs and a small stipend for Matthew, the reality is that these costs are met from the child support payments of over $20,500 per annum paid by Mr Hitchings

(g) Mr Hitchings was concerned that this will, after payment of these expenses, result in a considerable surplus, which will not be made available to Matthew. Although not specifically stated, he was concerned about the inequity of the situation.

(h) Mr Hitchings pays for numerous other items and services for Matthew. He quantified and listed those.

(i) Ms Miller has previously accepted that Matthew is an adult and responsible for making his own decisions.

(j) Mr Hitchings also noted that Ms Miller no longer provided financial, emotional or decision-making support for Matthew, so as to qualify as an eligible custodian.

(k) Ms Miller did not advise the Inland Revenue Department of her change in circumstances when she moved to Kerikeri.

(l) A previous officer of the Inland Revenue Department advised Mr Hitchings that, philosophically, the Department did not wish to impose an unnecessary administrative transactional process if it was not necessary. It would be better for a party to pay costs directly, rather than the Department acting as a conduit for those payments.

[18] Ms Miller confirmed to a child support officer on 19 June 2014 that Matthew spent seven nights a week at boarding school, he can leave on the weekends if he wishes, and that he gets to choose which parent he spends his holidays with. Ms Miller also said that she pays more for Matthew than she receives in child support.

[19] On 1 September 2014 a decision was made that Mr Hitchings and Ms Miller shared Matthew's care. However, this decision was reversed by a technical and service adviser on 3 September 2014.

[20] It was accepted that Mr Hitchings' level of care outside the school terms was significantly higher than Ms Miller's and that he had taken an active role in Matthew's care during school terms as well. The decision focused on Mr Hitchings' nights of care. It was determined that they would only be, approximately 84 nights out of 365 days per annum. It was assessed that, that was only 23 percent and not the required 40 percent under s 13(1) of the Child Support Act, which is the section that applied at the time.

[21] It was determined, that Ms Miller continues to be the principal provider of care.

[22] The primary factor appeared to be that she was meeting the boarding school costs and that in principle, she was equally responsible for care at other times during the majority of the year.

[23] Mr Hitchings' objection was disallowed. He was invited to consider making an application for shared care of Matthew. That application was made on 6 November 2014.

[24] On 10 April 2015, Mr Hitchings applied to the Commissioner for the shared care decision to be back dated to the date when Matthew started attending boarding school. Ms Miller then objected to the shared care decision, saying that she had, in effect, 282 nights with Matthew, She included in that calculation the time that he was at boarding school.

[25] The decision on shared care was reversed on 4 August 2015 under s 87 Child Support Act. The letter to Mr Hitchings stated and I summarise the key aspects:

> We acknowledge that you have made significant contribution to Matthew's life. However, the contributions made are not significant enough to bridge the difference between actual overnight care and the level of care determined for shared care at 40 percent. Therefore, shared care has been removed for the 2015 year, and your assessment has been returned to its original amount.

Further on, the letter stated:

> The most generous calculation of nights of care you provided for Matthew falls below the minimum 28 percent care percentage required for recognised care assessment purposes.

[26] Mr Hitchings objected to this decision on 1 September 2015. The objection was disallowed on 14 October 2015. The decision confirmed that Mr Hitchings did not meet the criteria for shared care (the standard prior to 1 April 2015) or recognised care (the standard after that date).

[27] As I have already indicated, it has now been agreed that the issue can, in effect, be back dated to 16 March 2014, when Mr Hitchings placed the Commissioner on notice about the issue. With respect, I agree with that approach. It was supported by the evidence as Ms Davis, who appeared for the Commissioner. She noted that Mr Hitchings should have been advised to make that application at the earlier point in time, when he first approached the Inland Revenue Department.

[28] I am going to first deal with the position before the Act was amended. The key sections are as follows:

11 Person who is principal provider of care for child

For the purposes of this Act, the person who has the greatest responsibility for a child shall be the person who is the principal provider of ongoing daily care for the child.

[29] Section 12 provides:

12 Position where there is no agreement as to who is the principal provider of care.

Where there is disagreement as to who is the principal provider of ongoing daily care for a child, the following guidelines shall apply:

(a) …

(b) Where paragraph (a) of this section does not apply, the Commissioner shall have regard primarily to the periods the child is in the care of each person, and then to the following factors:

(i) How the responsibility for decisions about the daily activities of the child is shared; and

(ii) Who is responsible for taking the child to and from school and supervising that child's leisure activities; and

(iii) How decisions about the education or health care of the child are made; and

(iv) The financial arrangements for the child's material support; and

(v) Which parent pays for which expenses of the child.

[30] Under section 13,

13 Substantially equal sharing of care of the child

(1) For the purposes of this Act, if—

(a) A person is the principal provider of ongoing daily care for a child; and

(b) Another person has care of the child for at least 40 percent of the nights of the child support year concerned,—

the other person is to be taken to share ongoing daily care of the child substantially equally with the first-mentioned person.

(2) Subsection (1) of this section is not to be taken to limit by implication the circumstances in which a person shares ongoing daily care of a child substantially equally with another person.

[31] Based on the evidence I have read and heard, it is clear that Matthew was 16 or older at the relevant time and very clearly aware of the poor relationship between his parents. Unfortunately, they do not communicate with each other. What seems apparent is that Matthew has carefully managed his interaction with his parents to ensure that he discussed any guardianship issues directly with each parent. It seems clear that he ensured that his non-school time (so, non-boarding time) was negotiated directly with each parent, as opposed to there being a discussion between his parents and agreement by them.

[32] Counsel provided me with a significant body of case law to consider. I have read those decisions.

[33] In the decision of Judge Bisphan in *Inder v Commissioner of Inland Revenue* DC Christchurch FP009/1627/93, 2 September 1996, His Honour discussed the decision in *Boulton v Van Eycken* [1994] NZFLR 16 relating to the interpretation of s 13. The Judge in that decision said:

> In interpreting the section thus, a) if a person has care for at least 40 percent of the nights, then regardless of any other circumstance that person will be deemed to share ongoing daily care substantially equally with the other person; b) a person who does not have care for at least 40 percent of the nights may, by calling in all other circumstances, satisfy the Commissioner or the Court that that person still nevertheless shares ongoing care of the children substantially equally. This follows from the wording of subs (2), which refers to those persons who are sharing the relevant care rather than to such persons who are not so sharing.
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> In other words, a person who meets the 40 percent criteria cannot by other depreciating factors lose the deemed status of substantially equal sharing. The issue is a factual one to be decided on the circumstances of each case.

[34] In this case I consider that there was an error in approach, in focusing on the 40 percent of nights without an evaluation of all relevant circumstances of the case; in particular, the factors in s 13 of the Act; the definition of principal provider; and the objects of the Act. There was a focus on who was paying the school fees which, in my assessment, was simplistic in terms of the facts of this case, which required a much wider inquiry.

[35] At the start of events which led rise to these proceedings, Matthew was soon to turn 16. There were no parenting orders in force. Matthew was due to turn 16 only a matter of about 13 weeks after he started as a boarder.

[36] I did note, also, the wording of s 11, which refers to the person who has the "greatest responsibility for a child." This suggests, in my view, a need to consider not just the situation as between two parents but, in this case, the care provided and the responsibility for care provided by persons at the boarding school. Obviously, there are other cases where children are in care for example, – foster care or care by other family members.

[37] After Matthew was enrolled as a boarder, his mother physically left the area, although I note she did return on occasion.

[38] In terms of the greatest responsibility for care, that role was undertaken by persons at the school. As between Matthew's parents, I could not determine that one or other had a greater role. By all accounts, their roles were relatively equal, even though Ms Miller paid the school fees. However, that largely came about due to her unwillingness to discuss the issue with Mr Hitchings. It is clear that he was willing to meet the costs of school fees. The practical reality, though, is that, that did not happen.

[39] I note that s 12(b) provides that where paragraph (a) does not apply, and clearly it did not, the Commissioner shall have regard primarily to the periods the child is in the care of each person, and then to the following factors:

> (i) How the responsibility for decisions about the daily activities of the child is shared; and
>
> (ii) Who is responsible for taking the child to and from school and supervising that child's leisure activities; and
>
> (iii) How decisions about the education or health care of the child are made; and
>
> (iv) The financial arrangements for the child's material support; and
>
> (v) Which parent pays for which expenses of the child.

[40] Certainly, on one account, during a one year period, Matthew was in the care of his mother for 83 nights, his father for 83 nights, and the school for 199 nights. Matthew's mother was meeting the school fees at $10,800, approximately, per annum. Mr Hitchings was living in Wellington, Ms Miller in Kerikeri, and at times Auckland, Christchurch and Timaru, but, the amounts of time were not defined. I understand her primary place of residence was Kerikeri.

[41] Responsibility for decisions about daily activities appeared to be managed, as I have said, by Matthew. Certainly, after the time Matthew became a boarder, Mr Hitchings appeared to have greater responsibility for decisions about Matthew's daily activities. No parent was responsible for physically taking Matthew to and from school or supervising leisure activities, due to Matthew's age, the fact that he was a boarder and that both parents resided geographically outside the area.

[42] Mr Hitchings paid airfares for Matthew to travel to Wellington, but both parents met airfares at different times. In her most recent affidavit, Matthew's mother set out costs in relation to the French trip and costs incurred when the French student with whom Matthew was due to live, came to New Zealand.

[43] Primarily, decisions about education or health care were made by Matthew.

[44] It is clear that no financial arrangements for the child's material support were made at the time Matthew commenced boarding school, due to the lack of consultation by Ms Miller.

[45] I agree with the decisions I have read, that ss 12 and 13 should be considered together. Section 13(2) specifically provides that subs (1) is not by implication to be taken to limit the circumstances in which a person shares ongoing daily care of a child substantially equally with another person.

[46] I note and agree with the observation of Panckhurst J in *Johns v Commissioner of Inland Revenue* [1999] NZFLR 15; (1998) 18 NZTC 14,019 (HC) when, in referring to the s 12 factors, His Honour noted:

> These factors, by implication I think, are of equal relevance to determination of the substantially equal sharing issue. It is logical that if determination of who is the principal provider flows from a consideration primarily of the duration of care, with reference also to acceptance of responsibility in each of the other defined areas, a similar approach is apposite to determine whether the secondary provider's contribution is substantially equal. Accordingly, care the duration of which equates to 40% of nights constitutes substantially equal sharing: s 13(1) But in addition where the percentage of nights falls short but such measure of responsibility is accepted in relation to other aspects of child care identified in factors (i) to (v), a finding of substantial equality may result: s 13(2) Plainly therefore the statutory inquiry is a factual one and must be undertaken on a case by case basis.

[47] In my view, it led to an unfair result to credit Matthew's mother with care for all the nights when Matthew was at boarding school, when he was not physically in her care. There will, of course, be cases where a child is at boarding school where it is important to look behind "bed nights" and analyse the factors in s 12(b). Also, in certain cases, while a child may not physically stay in a parent's home, that parent can still be the principal provider of care, due primarily to being physically and emotionally available to the child.

[48] Ms Miller clearly saw herself in that role due to her close emotional relationship with Matthew. She had been his primary caregiver since he was seven.

[49] Looking at matters objectively, I consider that, that changed when she shifted to Kerikeri and Matthew became a boarder. Based on her own account, and probably due to her commitments at that time in developing new business endeavours, her contact with Matthew was about three to four percent. Mr Hitchings' contact with Matthew was about 13.42 percent. The balance of time, Matthew was at school.

[50] At the heart of this issue and inability to resolve it, is the parties' inability to talk to each other, their entrenched positions, no doubt influenced by their past hurts and beliefs. At the hearing my assessment was that Ms Miller had difficulty in valuing Mr Hitchings' input as a parent. Sadly, the parents' relationship is conflictual and, has become competitive.

[51] There were a number of cases referred to me in relation to school fees which I read, but I consider that they are distinguishable as they are all based on different

factual scenarios which do not apply in this case. Many related to situations where the children were living primarily with their mother, who was actively involved in school in terms of fundraising, sports and activities. Also, where the child was attending school from the mother's home.

[52] The decision in *Hilgendorf v Hilgendorf* [1993] NZFLR 177 was a case where the decision ensured equity in view of the fact that significant sums were paid for school fees and a home was provided for the children and their mother, by Mr Hilgendorf.

[53] It is important that the objects of the Act are not lost sight of. I will refer to those later.

[54] My impression from the evidence is that both parents have each provided a high level of financial support for Matthew. That is not, just from the direct costs they pay but also from their respective lifestyles and what they provided for Matthew when he was visiting each of them.

[55] Though there has been much in the evidence about the procedural history, it was quite clear, that as soon as Matthew started as a boarder and his mother was physically absent, that there was a dispute between his parents as to who the principal provider of care was. There was quite clearly a disagreement in terms of s 12.

[56] In this case (and I am dealing with the position before the legislation was amended) I am satisfied that once Matthew started boarding school, there was a disagreement as to who was the principal provider of ongoing daily care for Matthew.

[57] The factors in s 12(b) that the Commissioner had to have regard to were mandatory. Having considered those matters and notwithstanding that Matthew's mother was paying the school fees, I determine that Matthew's parents shared ongoing daily care of Matthew substantially equally for the period 16 March 2014 to 31 March 2015.

[58] I discussed at the hearing with the Commissioner's witness, Ms Davis, the practical outcome of such a decision. I am told that up until 31 March 2015 the result will be that Mr Hitchings' liability will reduce from $1737 a month to $1020 per month, or just under $1000 depending on differences in his income.

[59] Counsel for Mr Hitchings asked that I, in effect, require the Commissioner to go back and do an accounting exercise to look at the income of Mr Hitchings, the income of Ms Miller for the relevant period, apply the formula assessment and then order a departure so that Mr Hitchings could, in effect, credit back half the school fees to Ms Miller.

[60] I am not prepared to do that because, in my view, it is clear that for the relevant period, Matthew's mother's income was reduced. Looking at matters overall based on the evidence, I consider that the outcome which will reduce Mr Hitchings child support payment in the way that I have been told, is consistent with the objects of the Act. In particular, not just the right of Matthew to be maintained and the obligation of his parents to maintain him, but, it will ensure that the financial support provided by the parents will be according to their relative capacity to provide financial support, the relative levels of provision of care, and will also ensure that parents with a like capacity to provide financial support for their child will provide like amounts of financial support.

[61] Overall, it will ensure that equity exists between the parents in respect of the costs of supporting children, in this case Matthew. As far as I can, in considering what each parent will have paid (and I know that there can be no perfect science to this, and that I do not have all the information), but looking at the school fees alone and then at what Mr Hitchings will now have to pay the overall care provided by the parents at different times, I consider that, that the result will be equitable, notwithstanding that, Mr Hitchings considers that Ms Miller's income should be considered.

[62] In terms of the next issue, I have referred to s 15 of the Act. In this case, I consider that s 15 needs to be considered in conjunction with the objects of the Act, in particular the object relating to equity.

[63] Again, I have discussed, before giving this decision, the practical outcome of my decision. Ms Davis was kind enough to give me an assessment of the amounts which Mr Hitchings will be required to pay, based on his proportion of care being assessed at 28 percent, 40 percent, or 50 percent.

[64] Primarily, in order to do justice between these parties and come to an equitable outcome, the determination for Mr Hitchings' care for the period from 1 April 2015 to 3 January 2016 is to be 40 percent. The reason that is different to my earlier determination of "substantially equal", is that the tests are different.

[65] Section 15(5) uses the words "the amount of time that the carer is the person responsible for the daily care of the child." While that was substantially equal, it would be unjust to Ms Miller if I did not take into account the fact that she has paid the school fees. I consider that a formal determination establishing Mr Hitchings' proportion of daily care for Matthew, at 40 percent will lead to a fairer result.

[66] In conclusion, I cite with approval the comments of Judge Somerville in *FB v Inland Revenue Department [Child Support]* [2007] NZFLR 1115, where Her Honour said, "It is unfortunate that the Inland Revenue Department has become involved in a situation whereby the parents needed to support this child emotionally and financially in a cooperative way."

[67] I make this observation because at the heart of this is the parents' poor relationship and inability to communicate in the interests of Matthew. While Mr Hitchings may feel inclined to make criticisms of the Commissioner, for the various case officers to try and work their way through this and deal with two people who are so conflicted, must have been extremely difficult.

[68] I hope that this brings matters to a conclusion, because the last thing Matthew needs to know about, is more acrimony between his parents.

J A Binns
Family Court Judge