MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 161/98

BETWEEN JOHNS

Appellant

A N D THE COMMISSIONER OF INLAND REVENUE

Respondent

**Hearing:** 16 October 1998

**Counsel:** E J Tait for Appellant
C Lange for Commissioner

**Judgment:** 29 October 1998

---

JUDGMENT OF PANCKHURST J

---

Solicitors:
Malley & Co, Christchurch, for Appellant
Crown Solicitor, Christchurch, for the Commissioner of Inland Revenue

The Child Support Act 1991 (the Act) provides that the parent who has the *"greatest responsibility for a child"* is that child's *"principal provider"*. Pursuant to s13 of the Act the other parent may *"share ongoing daily care of the child substantially equally, with the principal provider"*. The issues in this appeal are two-fold : whether the test of substantially equally shared care was correctly defined, and whether the learned Family Court Judge erred in the application of the statutory test to the facts of the case.

**Background:**

The parties, whom I shall refer to as the mother and the father, were married in 1986. They had two children S born April 1990 and K born November 1991. In January 1994 the parents separated. On 12 April 1995 a joint custody order was made by consent. It provided that the children were to reside with and be in the care of their father from *"day one"* until *"day four"* of his *"off duty days"*. At all other times the children were to reside with their mother. A short time later on 5 May 1995 the shared custody order was refined by clarification that where day one or day four were school days the change over time would be the end of the school day, whereas if such days fell in the weekend the change over time was midday. Further, on 12 November 1996 the order was further varied to provide that the mother should only take the children out of New Zealand during school holiday periods, and in the event that she did the father would be entitled to *"the care of the children for an extended period to make up for time with the children that he had missed while they were on holiday"*.

The father is employed as a fireman. His work regime is four days on duty and four days off. This means that if, for example, the father's first off duty day falls on a Tuesday he uplifts the children after school and cares for them until they are uplifted from school by their mother on day four, being the Friday. As a result the father has the children in his care for three nights of every eight day roster cycle.

The child support year mirrors the financial year. It is not altogether clear to me whether the child support year ended 31 March 1995, or 31 March 1996, was the focus of the original objection and therefore eventually of this appeal. In the event it does not matter since ample evidence was adduced of the position from 1994 to the present time. Moreover despite some variation in the total nights per annum spent by the children with their father the essential pattern has not changed.

The genesis of the appeal was a decision communicated to the father on 10 September 1996 that he did not in the Commissioner's view share the care of the children substantially equally with their mother. On 2 October the father objected to that decision. An administrative review followed which culminated in a decision by letter dated 14 November 1996 that the objection was disallowed. There matters rested until 10 July 1997 when, as a result of further representations made by the father, the case was reconsidered by an officer based in Dunedin rather than someone from the Christchurch office. On 23 December 1997 the father was advised that the earlier disallowance of his

objection was confirmed. Finally, on 4 February 1998 the father gave notice of appeal against the assessment which resulted.

The appeal was heard in the Family Court on 19 May 1998. The father represented himself. He relied upon extensive affidavit evidence from himself, his mother, and from three solo mothers who made comment upon his care of the children. On the other side there were affidavits from an officer of Inland Revenue Child Support, Christchurch and from the mother. The officer provided detailed material relevant to process : since the father contended that his case had not been fairly dealt with at an administrative level. At this stage those aspects may be put aside, since the Family Court Judge approached the case afresh, in terms of s103(4):

> *"A Family Court hearing an appeal under this section shall make such order correcting the assessment to which the appeal relates as the circumstances require."*

Accordingly the focus was upon whether care was shared substantially equally, rather than the departmental decision process.

**The Family Court Decision:**

The learned Judge adopted an interpretation of s13 derived from ***Inder v CIR*** (Christchurch 009/1627/93, 2 September 1996) a decision of Judge Bisphan:

> *"I interpret the section thus:*
>
> *a. If a person has care for at least 40% of the nights, then regardless of any other circumstance, that person will be deemed to share on-going daily care substantially equally with the other person.*
>
> *b. A person who does not have care for at least 40% of the nights may, by calling in all other circumstances, satisfy the Commissioner*

> *(or the Court) that that person still nevertheless shares on-going care of the children substantially equally. This follows from the wording of subsection (2), which refers to those persons who are sharing the relevant care rather than to such persons who are not so sharing (emphasis is mine). In other words the person who meets a 40% criteria cannot by other diminishing or depreciating factors lose the deemed status of substantially equal sharing.*
>
> *The issue is a factual one to be decided in the circumstances of each case. Because there is statutory reference to 40% of nights, consideration in these cases must necessarily extend to calculations of days, nights, or even hours."*

Returning to the decision under appeal, a review of the evidence then followed, which resulted in the conclusion that the father did not share the care of the children substantially equally. The final paragraph read:

> *"Having considered all of the circumstances de novo I am quite satisfied that there has been no evidence adduced by Mr Johns which would establish circumstances that are so out of the ordinary as to warrant special note or consideration. Given that finding, the appeal is accordingly dismissed."*

Counsel for the father criticised this passage in particular, as importing a test or approach which was not indicated by s13 itself. It is apparent that the concluding paragraph had its origins in the ***Inder*** case, in which Judge Bisphan concluded with the remark that although the appellant's efforts were commendable they were not *"so out of the ordinary as to warrant special note"*.

**Care Shared Substantially Equally:**

S13 is in these terms:

> *"**13. Substantially equal sharing of care of 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."*

Where a parent satisfies the statutory test s35 applies in relation to the assessment of child support. The end result is that the father would in this case pay child support at the rate of 18% of his gross income after deduction of the appropriate living allowance. By contrast if he does not share daily care substantially equally the relevant formula percentage would be 24%.

Read in isolation s13 is not easy to appreciate. The concept which underpins it is that of shared care on a substantially equal basis. However, ss(1) prescribes that care for 40% of nights per year *"is to be taken"* to satisfy the test. Thus, a temporal approach is indicated. The two notions may seem at odds.

However when s13 is read in the context of the Act generally its interpretation is plain enough. First, S4 defines the objects of the Act. These include:

*"**Objects** - The objects of this Act are -*

*(a) To affirm the right of children to be maintained by their parents:*

*(b) To affirm the obligation of parents to maintain their children;*

*(c) To affirm the right of caregivers of children to receive financial support in respect of those children from non-custodial parents of the children:*

*(d) To provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support:*

*(e) To ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support:*

*(f) To provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined:*

*(g) To enable caregivers of children to receive support in respect of those children from parents without the need to resort to Court proceedings:*

> *(h) To ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children:"*

The aims : proper financial support for children, administrative determination of levels of support, and equity as between parents according to their means, are manifest.

Next is s11 which provides:

> ***"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."*

Then is s12 which I regard as a companion section to s13. It governs the determination of which parent is the principal provider of daily care where there is no agreement on that issue. Paragraph (a) of s12 applies where the Director-General of Social Welfare has determined that a person has *"primary responsibility"* for a child in terms of the Social Security Act 1964. More generally however, paragraph (b) prescribes:

> *"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."*

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 : s13(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 : s13(2). Plainly therefore the statutory inquiry is a factual one and must be undertaken on a case by case basis.

It is apparent from a reading of the decision in the present case that, although reference was not made to s12(b), the approach which it mandates was adopted. There was a primary focus upon the duration of care provided by the father. But in addition his acceptance of responsibility in relation to the children's daily activities, schooling, leisure time, health and material support were all brought to account.

It remains to consider the argument that the statutory test was departed from in the final paragraph of the decision, which contained the finding that the father had not established *"circumstances ... so out of the ordinary as to warrant special note or consideration"*. I accept that this sentence may be construed as indicating that a gloss was placed upon the statutory test prescribed by ss12(b) and 13. That test is subjective : the inquiry is who cares for the child, or children, on a time basis principally, but with regard also to other

defined inputs. A comparison between the instant case and the run of cases, to see whether the former is out of the ordinary is not required. However, I doubt that the last paragraph should be read in the way counsel suggested. The decision must be read as a whole. Once that is done, it is plain that the Judge found the father's contribution to the care of the children over and above the three days care in each eight day roster cycle was not significant. In other words, what I understand the out of the ordinary observation to mean was that not only did the father not meet the 40% criteria, but that his further contributions were insufficient to enable a finding that day to day care of the children was shared on a substantially equal basis.

**The Evidence:**

As noted earlier the father was unrepresented in the Family Court. This circumstance did not help on appeal, since counsel was of course fixed with the evidence adduced earlier. Much of that evidence was of little or no relevance, once the focus of the case was narrowed to an assessment of the child care provided, as opposed to the administrative process which attended determination of the objection. In support of his case the father filed three affidavits from mothers who said, for example, that his *"input* (was) *out of the ordinary so far as time spent and support provided for his two children* (was) *concerned".* Unfortunately these opinions could be afforded little if any weight because they stood alone. The deponents did not detail the basis of their opinions, nor did they sufficiently demonstrate that they were in a position to make such judgments.

Inevitably the principal evidence was that provided by the father in support, and the mother in reply. I do not propose to review that evidence in detail. Such was done in the Family Court judgment. Reference to certain features will suffice. First, the Judge accepted evidence from the mother that although extended time was available the father *"religiously stuck to the four day custody cycle and returned the children at midday of the day that the cycle ended, notwithstanding that it fell on a day that was a holiday for the children"*. This was obviously a telling factor which indicated that the father was not prepared to go the extra mile. Second, reliance was placed upon reimbursement of the mother for the cost of medical expenses. On examination the total amount involved proved to be insignificant. Moreover, it became evident that assistance of this kind was grudging and ceased to apply after a relatively short period punctuated by difficulties and disputes. Reliance was also placed on the provision of clothing for the children. It transpired however that such clothing was not made available for the children's general use. Rather, the father followed the practice of allowing the children to use the clothing during his three day care of them. It was then laundered to await the return of the children on the next occasion. These references are sufficient to expose the flavour of the case.

Mr Tait mustered every argument that was available both factually and in relation to the interpretation of the Act. However, I am not brought to the view that the Family Court Judge erred in the view which she reached. To the contrary I agree with her assessment. Unfortunately, valuable though the father's parental role no doubt is, there are signs that the bitterness which

accompanied the marriage break-up has still not dissipated. Until it does, and the attitude to care of the children becomes truly shared, I doubt that the father's parental contribution will be seen to satisfy the statutory trust.

The appeal is dismissed. I make no order as to costs.