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THE FIRST HURDLE - SPECIAL CIRCUMSTANCES IN THE CHILD SUPPORT ACT 1991

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I INTRODUCTION

The Child Support Act 1991 radically revises the law relating to child maintenance. In essence it is a financial statute which ignores wider guardianship issues.[1] The Act replaces the discretionary principles in section 72 of the Family Proceedings Act 1980, and the assessment procedures for contributions[2] in the Social Security legislation, with a single philosophy and procedure: a formula assessment of liability by the Commissioner of Inland Revenue. By providing "legislatively fixed standards"[3], Parliament has chosen to "decide definitively itself what used to be decided by the Court under the Family Proceedings Act 1980."[4]

The Act is a major attempt to ensure substantial uniformity of liability based on a liable parent's income after due credit for a basic living allowance. The living allowance is based on the invalid or unemployment benefit with increases in the rate allowed if the liable parent has a heterosexual[5] partner or additional children from the new relationship. The actual assessment is based on a percentage of the child support income.[6] The percentage increases depending on the number of children cared for by the custodial parent. Formula based assessments are evident in other jurisdictions but the New Zealand Act is modelled closely on the Child Support (Assessment) Act 1989 from Australia. In supplanting the old

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[1] *Stuckey v Stuckey* Unreported, 21 September 1992, Family Court Napier CS 041/122/92, 12.

[2] The former Liable Parent Contribution scheme.

[3] Section 4(f) Child Support Act 1991.

[4] *Re M* [1992] NZFLR 660, 662 Judge Keane.

[5] Thus the formula inherently penalizes those who are in homosexual relationships.

[6] Taxable income derived from the last relevant income year minus a living allowance, see sections 29 and 30.

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liable parent contribution scheme and that of the Family Proceedings Act with the Australian based legislatively fixed standards, the government has sent a clear message that the test of success is "the extent to which the scheme raises money."[7] The Act assumes that liable parents are not paying enough and can pay a lot more, both towards the states provision of the domestic purposes benefit, and to earning custodial parents. In this sense the reform is motivated by "fiscal exigencies."[8]

Both the transfer of control from the Department of Social Welfare to Inland Revenue, and the imposition of a strict formula based assessment shows the government is serious about collecting a "fair contribution"[9] from liable parents. Inherent in the application of a generalized and fixed standard is that in many situations the parties may feel that the formula assessment has not taken account of their particular circumstances. However, departure from a formula assessment can only be obtained by application to the Family Court and only then if the applicant makes it over three hurdles.[10] The first of these hurdles, and the one to be discussed in detail here, is that in relation to one or more of the grounds for departure in section 105(2), an applicant must show the existence of "special circumstances".

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[7] W R Atkin "Financial Support: The Bureaucratization of Personal Responsibility" in Henaghan and Atkin(eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 213.

[8] Above n7, 213.

[9] Above n3, s4(j).

[10] Various New Zealand child support cases have stated that to be successful in a departure order, the applicant must show cumulatively that a ground per s105 exists with "special circumstances", that an order is "just and equitable" and finally that it is "otherwise proper" to grant such an application. See above n4, 665.

II THE LEGISLATION

The available grounds for departure are set out in section 105(2). In all there are ten grounds broken down into three subgroups. Each subgroup is prefaced by the requirement for the applicant to prove "special circumstances":-

105(2)(a) That, by virtue of special circumstances...

(b) That, in the special circumstances of the case...

(c) That, by virtue of special circumstances...[11]

In addition section 105 provides qualifiers and guidelines for the interpretation of several of the grounds outlined in section 105(2).[12] However, nowhere in the Act is the meaning or interpretation of "special circumstances" expanded or defined. Thus, judges in the Family Court have had to interpret the phrase themselves in the context of the policy and objects of the statute, any relevant case law, and based on their own feelings of fairness and justice.[13]

III POLICY AND OBJECTS OF THE CHILD SUPPORT ACT 1991

An important focus of the Act is the recovery of debt and the government's drive to receive a more significant renumeration for the outlay of the domestic purposes benefit.[14] This is

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[11] The differences in the drafting of subparagraphs (a), (b), and (c) is discussed below at Part VI.

[12] See ss105(3), 105(4), 105(5) and 105(6).

[13] Judge Inglis QC in *G v G and Commissioner of Inland Revenue* Unreported, 29 September 1992, Family Court Napier CS 041/182/92, 5.

[14] The estimated annual cost for the 99,477 people receiving the domestic purposes benefit is just over one billion dollars, see D McLoughlin "Act of Injustice: the Child Support Act" *North*

evident not only from the imposition of the scheme itself but also significantly in the transfer of control of the scheme from the Department of Social Welfare to Inland Revenue.

The "fiscal drive"[15] of the legislation is reflected in several of the stated objectives contained in section 4:

(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 is to be provided by parents for their children should be determined

(j) To ensure that the costs to the State of providing an adequate level of financial support for children and their custodians is offset by the collection of a fair contribution from non custodial parents.

Judge MacCormick in *Cheer v Cheer*[16] felt that the above three objectives were explicit evidence that "in essence the new legislation is a financial statute."[17]

Various Members of Parliament in debating the Child Support Bill claimed it was an affirmation of children's rights and also that it promoted fairness and equity between the parents

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and South, June 1993, 46, 49.

[15] New Zealand Parliamentary Debates No 35, 1991: 5990, Hon Clive Matthewson MP.

[16] Unreported, 7 November 1992, Family Court Gisborne FP 016/183/92, 2-3.

[17] Above n16, 2-3.

of those children.[18] Although several of the objects in section 4 may be cited as supporting this rhetoric, perhaps one thing that is apparent is that the objectives viewed collectively "fail to produce a clear statement of legislative policy."[19] Many of the objects are value laden and range from broad statements about the relationship between parents and children to the underlying mechanics of the Act.

Despite the apparent contradictions in the Act's objectives Parliament did intend a formula based system that would establish the "fundamental principle that parents have a duty to support their children to the best of their ability."[20] In this sense the Act aims to protect the financial interests of the child.[21] The words "to the best of their ability" as reflected in objective 4(j), "a fair contribution", suggests tests of fairness and equity and imply some careful evaluation of each case on its merits. However, this is contradictory to the basic premise of a formula based scheme, namely that the general formula can be applied across the board to all liable parents.[22] For, "while the formula, like the tax system, takes account of basic differences in income, it does not allow for an assessment of an individual's specific needs and outgoings."[23]

Thus, although some of the objects may give a sense that the

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[18] Several important issues such as the rights of children under the Act; parental responsibility; sensitivity to Maori and Pacific Island issues and the position of non-birth parents will not be discussed here. But see Above n7, 217-219.

[19] W R Atkin "Departure Orders - a benefit match for lawyers" (1992) 3 Fam Law Bull 94, 95.

[20] Above n15, No 25 Hon Roger McClay MP, 4385.

[21] *The Dominion*, Wellington, New Zealand, 27 August 1993, 5.

[22] Above n7, 218.

[23] Above n7, 218.

Act is fair and equitable, these broad statements contradict the body of the legislation which is more accurately reflected in object (f), that the Act provides stringent "legislatively fixed standards."

The only time when individual concerns come into consideration, and the only time Parliament intended them to come into consideration, is with the departure order. Departure orders are "designed to be the exception rather than the rule"[24], particularly as object (g) reinforces the principle that custodians should be able to obtain support without the need to resort to Court proceedings.[25] The departure process is a stringent three step one where the applicant is required not only to show a specified ground for departure with "special circumstances", but also that an order would be both "just and equitable" and "otherwise proper". Such a three tiered test indicates that departure orders are not to be granted lightly.

Perhaps some of Parliament's intention behind the use and place of the departure order can be taken from the presentation of the Report of the Social Services Committee to the House by Bill English MP where he said[26]

> The Bill has a basic discretionary element, and that is the departure order that the court may make. That is a safety-valve for situations in which the formula is obviously unjust - it provides some scope for assessments that are regarded as unfair... . We changed the legal requirements in departure orders so that circumstances no longer have

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[24] Above n7, 218.

[25] But see the obiter comments of Judge Inglis QC in *Tapara v Liddall and CIR* Unreported, 10 December 1992, Family Court New Plymouth CS 043/027/91, 6, where His Honour says "s4(g) cannot possibly be interpreted as indicating as a legislative objective that Court proceedings on child support issues are generally to be avoided, so reinforcing the sanctity of the formula assessment, when it is expressly provided that the only means by which a liable parent can attack a formula assessment is by proceedings in Court."

[26] Above n15, 5987.

> to be extraordinary; they only have to be special. That gives the judges some discretion, but does not lock them into not being able to make any decisions at all.

IV "SPECIAL CIRCUMSTANCES" IN OTHER LEGISLATION

The leading case in New Zealand, prior to the introduction of the Child Support legislation, on the interpretation and application of "special circumstances" was the Court of Appeal decision in *Cortez Investments Ltd v Olphert & Collins.*[27] That case dealt with an application for revision of a bill of costs rendered by solicitors who had acted for the company Cortez. The bill was revised and reduced by the Wellington District Law Society but on the same day as being advised of the result, the company instructed its solicitors to give notice of appeal to the High Court. This notice was out of time under section 148 of the Law Practitioners Act 1982. Cortez Investments Ltd then applied to the District Court under section 146 for a further revision. Section 151 of the Law Practitioners Act provides that when a bill of cost had been previously revised, the Court should not make an order referring a bill for revision except in "special circumstances".

In the High Court the Judge refused the application, holding that no special circumstances existed for it had not been shown that their was a serious risk of injustice to the Company if the bill was not referred for revision.

The Court of Appeal overruled Ongley J holding that the serious risk of prejudice test was too stringent. This was because the context of the legislation called for a wider construction of "special circumstances" than the serious risk of prejudice test allowed. Rather it was a question of where the interests of

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[27] [1984] 2 NZLR 434.

justice lay in all the circumstances.

In his judgment McMullin J, pointed out the important proviso that:[28]

> What are "special circumstances" must be considered against the statutory background in which they are used... apart from observations of general principle, decisions under one statute are not likely to be of much relevance to another.

All three judges looked at the context, object and policy of the statute holding that it was a "commendable example of legislative consumer protection"[29]which was "directed to the assessment of the fairness and reasonableness of bills of costs in the public interest."[30]

Woodhouse P stated that such a liberal enactment "deserves and is intended to be given an appropriately liberal interpretation"[31] and that it was not wise for the Court to lay down principles or interpretations which could only have the effect of fettering the Court's discretion. The President concluded that one way of looking at the test in the present statutory context was that "special circumstances" may be met "where aspects of the facts seem to indicate a problem with relatively unusual features or reasonably deserving at the same time relief of the kind provided by the provision."[32]

Richardson J held that it was a question of where the interests of justice lay in all the circumstances. He cited *Re Norman*[33] as authority for the proposition that "special circumstances"

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[28] Above n27, 441.

[29] Above n27, 437 per Woodhouse P.

[30] Above n27, 439 per Richardson J.

[31] Above n27, 437.

[32] Above n27, 437.

[33] (1886) 16 QBD 673, 677.

are "wide, comprehensive and flexible words." Richardson J reasoned that synonyms such as "unusual", "out of the ordinary run", "uncommon", "abnormal" and "striking" convey the same flavour but really add nothing to the meaning of "special circumstances" except to emphasise that "'special' is something less than extraordinary or unique."[34] Importantly he concluded that the inquiry into special circumstances never called for "the mechanical application of a rigid set of criteria. The interests of justice must govern."[35]

McMullin J after stating the caution as to the relevance of decisions under other statutes, went on to reason that because the circumstances are special to each case, "a judgment on whether or not they exist will often be a value judgment on the facts."[36] He felt that to be 'special', the circumstances must be "abnormal, uncommon or out of the ordinary."[37]

The appeal was allowed. The Court held that the combination of the Company's clearly stated dissatisfaction with the District Law Society's decision and the mistake on the part of the Company's solicitors amounted to "special circumstances".

The Court of Appeal's interpretations of "special circumstances" are problematic and not entirely consistent. Both Woodhouse P and McMullin J give some indication of how to interpret "special circumstances" in their references respectively to "relatively unusual features" and "abnormal, uncommon or out of the ordinary." But Richardson J sees these synonyms as really adding nothing to the meaning of "special circumstances" except to establish a standard less than extraordinary.

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[34] Above n27, 439.

[35] Above n27, 439.

[36] Above n27, 441.

[37] Above n27, 441.

What was consistent through the three judgments was that the "interests of justice" are the governing criteria. For Woodhouse P referred to features "reasonably deserving of relief"; Richardson J to the "interests of justice" and McMullin J stated that the test was really "a value judgment on the facts."

As a test for "special circumstances" these criteria are not that useful. Firstly this was because the Judges' comments were obviously coloured by the nature of the statute they were dealing with. That is, that the Act inherently embodies concepts of "justice" as the legislation is aimed at an assessment of the fairness and reasonableness of bills of costs. Secondly, that the test offers minimal guidance for subsequent cases as in reality it emphasises little more than that "special circumstances" gives judges a discretion to make a value judgment on the facts.

Other cases have come before the Courts dealing with the interpretation of "special circumstances" (or similar phrases) in the context of various pieces of legislation. In the case of *Anderson v Transport Department*[38] when considering a disqualification for dangerous driving and "special reasons" under section 30 of the Transport Act 1962, Hardie Boys J held that "this was a curious offence of a kind not ordinarily met with",[39] thus justifying a reduction in the statutory disqualification from 12 months to 3 months.

In another case[40] under the Transport Act[41], Adams J in considering whether the reasons advanced amounted to "special

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[38] [1964] NZLR 883.

[39] Above n38, 885.

[40] *Profitt v Police* [1957] NZLR 468.

[41] This time under the Transport Act 1949.

reasons" under section 41, held that it was not necessary that the considerations advanced should be "overwhelming... .The reasons must, of course, be 'special', and not such as are common to the ordinary run of cases."[42] It is a question whether the reasons advanced are of sufficient importance and "sufficiently unusual."[43]

In *MAF v Schofield*[44] where the defendant failed to make the required monthly management reports, Fraser J, in the context of section 107(c)(1) of the Fisheries Act 1983, reasoned that special in this context means "something exceptional not general, not found in the common run of cases."[45]

A similar conclusion was reached as to the meaning of "special circumstances" in section 6 of the Criminal Justice Act 1985. In relation to that Act, Thorp J in *Edwards v Police*[46] said, "before any circumstance can be brought into account it must be a 'special' circumstance, not such as arises in the ordinary case."[47]

These observations as to "special circumstances" can be highlighted by comparison with the Court of Appeal decision in *Martin v Martin*.[48] There the Court had to decide on the division of matrimonial property following a separation. Section 14 of the Matrimonial Property Act 1976 provides an

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[42] Above n40, 470.

[43] Above n40, 470.

[44] [1990] 1 NZLR 210.

[45] Above n44, 221.

[46] [1986] BCL 615.

[47] Above n46, 615.

[48] [1979] 1 NZLR 97.This case has more recently been reaffirmed by the Court of Appeal in *Wilson v Wilson* [1991] 1 NZLR 687; *Hebberd v Hebberd* [1992] 3 NZLR 517 and *Joseph v Johansen* (1993) 10 FRNZ 302.

exception to the general rule that the matrimonial home and chattels should be shared equally. It established that if there were "extraordinary circumstances" that rendered equal sharing "repugnant to justice" then the normal presumption of equal division could be avoided. It is clear that the phrase "repugnant to justice" colours the context but the judges' observations are still useful.

Woodhouse J thought that the phrase "extraordinary circumstances" referred to[49]

> circumstances that must not only be remarkable in degree but also unusual in kind. It is vigorous and powerful language... and I am satisfied that it has been chosen quite deliberately to limit the exceptions to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.

Cooke J said that the test was a stringent one, more so than "special circumstances". Like Richardson J he followed the reasoning of Quilliam J in *Castle v Castle*[50] who saw "extraordinary circumstances" as forcing the Court to say that the particular case is so out of the ordinary that an equal division is something that the Court simply cannot countenance.[51]

With the backdrop of these New Zealand cases the Family Court approached the meaning of "special circumstances" in the Child Support Act. However, it was the Australian Courts that many New Zealand judges have followed.

Judge Keane in one of the first New Zealand Child Support decisions said, "(t)he Act is modelled on the Australian Support (Assessment) Act 1989, and decisions under that

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[49] Above n 48, 102.

[50] [1977] 2 NZLR 97, 102-103.

[51] Above n50, 106.

statute are illuminating."[52]

The leading Australian case is *Gyselman v Gyselman*[53] which has been drawn on heavily by a large body of the judiciary in the New Zealand Family Court. The Australian legislation has similar grounds for departure as the New Zealand Act. However unlike the New Zealand legislation, each of the categories of grounds for departure are prefaced by the words "in the special circumstances of the case" and none mention "by virtue of the special circumstances."[54]

The Full Court of the Family Court of Australia held that "special circumstances" in the context of the Australian Act were as a generality intended to emphasise that the facts of the case must establish[55]

> something which is special or out of the ordinary. That is, the intention of the Legislature is that the Court will not interfere with the administrative formula result in the ordinary run of cases.

The Full Court then went on to approve the approach of Kay J in *Savery v Savery*[56] that "special circumstances" were "facts peculiar to the particular case which set it apart from other cases."[57]

In essence then the conclusions as to "special circumstances" in the Australian Family Court are very similar to those of the New Zealand judiciary in a variety of legislation.

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[52] Above n4, 662.

[53] (1992) FLC 79,065.

[54] See below Part VI.

[55] Above n53, 79,065.

[56] (1990) FLC 77,897.

[57] Above n56, 77,897.

V "SPECIAL CIRCUMSTANCES" BEFORE THE HIGH COURT DECISION OF *RE M*

The Family Court in approaching the interpretation of "special circumstances" looked to the body of case law (particularly in Australia) which illuminated the meaning of the phrase and also to the objects, and the policy behind those objects, as expressed in the Act. Two principal interpretations emerged.

The dominant line, and that accepted by the large majority of Family Court judges,[58] was that expressed by Judge Keane in Re M. His Honour looked closely at the philosophy and the objects of the Act stating that "what sets this Act apart is object (f)"[59] (legislatively fixed standards). In the context of this observation, his Honour concluded that:[60]

> The legislature has allowed for the possibility of departure from the formula answer, but only by a *narrow gate*. The formula answer... is clearly intended to be definitive in all but a few cases.(emphasis added)

Judge Keane agreed with counsel for the Commissioner of Inland Revenue that "special circumstances" must be something other than the grounds specified in section 105. For otherwise the reference to "special circumstances" would be redundant in the Act.[61] His Honour stated that the Child Support Act 1991 was

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[58] See for example, the Principal Family Court Judge in *DvD* [1992] NZFLR 762; His Honour Judge Strettell in *Flynn v Flynn* Unreported, 10 August 1992, Family Court Christchurch FP 009/692/92; His Honour Judge Carruthers in *Richards v Richards* Unreported, 28 October 1992, Family Court Lower Hutt FP 280/92.

[59] Above n4, 662.

[60] Above n4, 663.

[61] Above n4, 666.

modelled on the Australian system and thus the Australian case law was illuminating. In particular he looked at the *Philippe*,[62] *Savery*[63] and *Gyselman*[64] approach which he adopted and followed.[65] Essentially this was the line that to be "special", the circumstances must show something out of the ordinary which set it apart from other cases.

However, in his discussion of the meaning of "special circumstances", Judge Keane made some observations which could be regarded as imposing an even more stringent test than that in *Gyselman*. For he stated that[66]

> There must be something *remarkable* about the circumstances of the applicant... to be relevant the 'special circumstances' must take those consequences beyond the usual and make the applicants predicament more *extreme* than is common.(emphasis added)

It was the stringency of the test as postulated in *Re M* and the close identification with the Australian legislation and case law that the second principal interpretation of "special circumstances" disagreed with. Judge Inglis QC was the chief advocate of this alternative reasoning and his position is best postulated in the decision of *H v G and CIR.*[67]

Unlike Judge Keane, Judge Inglis QC saw significant differences between the New Zealand and Australian legislation and believed it was "unsafe to assume that Australian cases will necessarily assist in interpreting the New Zealand Act."[68] Judge Inglis

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[62] (1978) FLC 90-433, 77202.

[63] Above n56, 77,897.

[64] Above n53, 79,065.

[65] In particular His Honour Judge Keane relied on the passages quoted from *Gyselman* see above Part IV.

[66] Above n4, 666 and 667.

[67] [1992] NZFLR 861.

[68] Above n67, 865.

QC's central premise for distinguishing the Australian line of interpretation focused on the nature of the formula itself. He reasoned that "the Australian statute bases the formula assessment on the income of *both* parents and because of that the interpretation of 'special circumstances' in *Gyselman* cannot be applied safely to the New Zealand statute."[69] The New Zealand formula assessment used as its exclusive basis the income of the *non-custodial parent*. Thus, argued Judge Inglis QC, the formula assessment was intended as a benchmark only for cases in which the non-custodial parent is the sole income earner. "For other cases it can provide no more than a starting point."[70]

His Honour continued that it is not rational to apply slavishly a formula based on only one parent's financial situation to a case where the formula does not represent reality. Further, the situations where both parents are earning are by no means exceptional or uncommon. For these reasons Judge Inglis QC rejected the approach of Judge Keane which would allow departure orders only through a "narrow gate." He concluded that Parliament cannot have intended that "the departure provisions of section 105 should be approached narrowly or grudgingly"[71] and what Parliament did intend was that the formula assessment should be departed from "not in limited, but appropriate instances."[72]

The next step in the reasoning of Judge Inglis QC was as to the meaning of the phrase "special circumstances" itself. It was important, he argued, that in assessing whether "special circumstances" exist, "to recognize that the norm is established by the formula assessment provisions

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[69] *T v T* Unreported Minute of Judge Inglis QC, 14 December 1992, Family Court Hawera CS 021/141/92, 3.

[70] Above n67, 867.

[71] Above n67, 868.

[72] Above n 67, 868.

themselves."[73] But that the norm as established by the New Zealand formula is of a more limited application than that in Australia because of the distinguishable statutory context. It is this distinction which Judge Inglis QC reasoned was not brought to the attention of Judge Keane or other Judges in the Family Court. Thus, he concluded that *Re M* is distinguishable and that "special", in light of its primary dictionary meaning, was to be read as meaning "merely individual circumstances or particular circumstances"[74]

Although the distinction that Judge Inglis QC made was a valid one, the blindness of the New Zealand formula to the income of the custodial parent is in practice not a substantial ground for distinguishing the Australian statute. The Consultative group on the Child Support legislation in Australia recommended the inclusion of both parents income in the formula because it was concerned to avoid the situation where non-custodial parents were required to pay a significant proportion of their income in child support to a high income custodial parent.[75] This was a valid concern at the time. However, the years since the Child Support (Assessment) Act 1989 came into force have shown that the proportion of cases registered with the Australian Child Support agency where the custodians income has in fact affected the level of liability, is less than two percent.[76] There is no evidence to suggest that the situation in New Zealand would be any different. Thus, Judge Inglis QC's argument may only be applicable in the very small proportion of cases where the custodial parent's income does affect the formula. Even here his argument is limited as the Act

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[73] *G v G* Unreported, 29 September 1992, Family Court Napier CS 041/182/92, 5.

[74] Above n 67, 873.

[75] Child Support Evaluation Advisory Group *Child Support in Australia: Final Report of the Evaluation of the Child Support Scheme* (Commonwealth of Australia 1992) Vol 1, 225.

[76] Above n75, 225.

specifically provides for the affect of the custodial parent's income to be a ground for departure.[77]

Judge Inglis QC and Judge Keane form the two principal poles of interpretation in the Family Court. Various judges expressed views which, either whole heartedly or in shades, followed the meaning of "special circumstances" postulated by these two judges.[78]

However, a third approach to the phrase "special circumstances" in the Child Support Act emerged just a month before the High Court appeal of *Re M.* The line of Judge Ellis in *Bradey v Bradey and CIR*[79] does not go as far as Judge Inglis QC in undermining the decision in *Re M,* but places a different and important focus on "special circumstances" in the Child Support legislation.

Judge Ellis's discussion of "special circumstances" was in the context of an application for departure under section 105(2)(c)(iii).[80] His Honour began by stating that such an occupation of the former matrimonial home by a separated spouse and children is not of itself unusual.[81] In looking at a series of New Zealand cases where this ground had and had not

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[77] See above n3, s105(2)(c)(i).

[78] See above n, 58 for a cross-section of judges who support the *Re M* interpretation. Support for Judge Inglis QC' line of interpretation is significantly less but various judges including His Honour Judge Whitehead in *Dingle v Dingle and CIR* [1993] NZFLR 184, have applied both the 'lesser standard' of Judge Inglis QC and the *Re M* approach.

[79] Unreported, 6 November 1992, Family Court Dannevirke FP 010/26/92.

[80] That is , because of the respondent's entitlement to occupy the home in which the applicant had a financial interest, the application of the formula assessment would result in an unjust and inequitable determination.

[81] Above n79, 9.

been established, Judge Ellis said that:[82]

> What these, and other, cases illustrate is that each case must be determined on its own circumstances, but that relief cannot be provided unless there is something "special" about those circumstances.

In stating this Judge Ellis agreed with Judge Carruthers in *Simpson v Simpson*[83] and *Lewis v Lewis and CIR*[84] that the phrase "special circumstances" must be applied disjunctively to the financial consequences of the grounds and that the grounds themselves cannot constitute the special circumstances.[85]

Judge Ellis also considered closely the approach to "special circumstances" in other legislation by the courts. In particular he drew on the Court of Appeal decision in *Cortez Investments Ltd.*[86] He reasoned that the meaning of "special circumstances" is to be derived from the particular context and objects of the statute.[87] Importantly, Judge Ellis stressed that "over emphasis of the facts themselves may be to miss the point."[88] It was here that he disagreed with Judge Inglis QC, stating that the "special circumstances" "must be more than the

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[82] Above n79, 10.

[83] Unreported, September 1992, Family Court Masterton.

[84] Unreported, 1 October 1992, Family Court Blenheim FP 006/202/89.

[85] Compare this with the early view of His Honour Judge MacCormick in *Carey v Carey and CIR* Unreported, 28 August 1992, Family Court Auckland FP 004/1930/ 87, where he said at p7 that the three instances in s105(2)(c)(i), (ii) and (iii) are "specific instances that might be considered special" that is, they establish "special circumstances" in themselves in terms of the Act.

[86] See above n27.

[87] Above n79, 17.

[88] Above n79, 18.

particular facts of an individual case."[89] For if Judge Inglis QC's standard was applied, then that did no more than judge each case on its merits without applying any qualifying threshold. Judge Ellis stated that every case in the Court was entitled to consideration on its merits but that "cannot discount the requirement that... there must be something special about those particular circumstances or their consequences before relief can be provided."[90]

His Honour returned to the "Pierian Spring of *Gyselman*"[91] and to *Re M* but placed a different focus to that previously applied in the Family Court. He reasoned that it was not the facts themselves which have to be "special" rather it was "the *consequences* and the *predicament* which must be examined"[92]

Judge Ellis stated that[93]

> unusual consequences, or a predicament out of the ordinary, or a problem having relatively unusual features, may be created by a combination of factors in themselves not unusual.... It cannot be right to subject the facts in isolation to the test of "speciality" as if that were a separate step in the proceeding. The exercise... is surely an integral one in which the particular circumstances are elements of a 'whole' which may, or may not, demand attention.

Judge Ellis's approach to "special circumstances" purports to come within the *Re M* and *Gyselman* reasoning. Judge Keane had referred to the "consequences" and the "predicament" as having to be beyond the usual.[94] In interpreting *Gyselman* Judge Ellis

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[89] Above n79, 17.

[90] Above n79, 17.

[91] Above n79, 18.

[92] Above n79, 18.

[93] Above n79, 18-19.

[94] Above n4, 666-667.

saw the Court as not finding it necessary that the facts themselves be special but that the facts must establish something which is special or out of the ordinary.[95] Judge Ellis is not then inconsistent with the letter of the *Re M* decision. Rather he moved the focus away from what could have become an overly narrow approach concentrating on the facts themselves, to an analysis which looked at the applicant's situation as a whole and recognized that a combination of quite ordinary factors could produce a result which was "special".

The family court thus showed a division of opinion. Judge Keane in the *Re M* decision represented the "narrow gate" approach where the formula assessment is all but definitive. Judge Inglis QC pushed a much wider individualized line which focused on the particular facts of a specific case. Judge Ellis in *Bradey* came in between these two interpretations emphasising a holistic approach which looked at the predicament and consequences that the group of factors involved placed on an applicant.[96] It was this division which faced the Full Court of the High Court in hearing the appeal of *Re M*.

VI SPECIAL CIRCUMSTANCES IN THE HIGH COURT - THE APPEAL OF *RE M*

The appeal from the Family Court decision of *Re M* to the Full Court of the High Court was the first in relation to a departure order under the new Child Support legislation. The appeal was brought by the mother of a girl who was living with her father, a social welfare beneficiary. Judge Keane in the Family Court had refused to allow the application for a departure order[97] and ultimately the High Court upheld that

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[95] Above n79, 18.

[96] See also the approach of Judge O'Donovan in *Cozens v Cozens* Unreported, 17 September 1992, Family Court Auckland FP 004/337/92, below Part VI.

[97] See above part V.

decision on appeal. The decision is of importance not only because it was the first of its type heard on appeal but principally because it purports to settle the interpretation of the phrase "special circumstances."

Four essential points of law emerge in relation to the words "special circumstances."

Firstly, the Full Court held that in emphasising paragraph (f) of section 4 (to provide legislatively fixed standards) His Honour Judge Keane had not overstated the position in saying that it was this object which set the Act apart. Rather it was a central feature of the legislation that child support liability was to be determined administratively by application of a legislative formula. The High Court accepted that the new Act was a "radical departure from previous philosophy"[98] and importantly endorsed Judge Keane's description of the departure process as a "narrow gate."[99]

Secondly, the "interpretation and place of special circumstances"[100] was considered. The Full Court looked at the decisions of *Profitt v Police*, *Cortez Investments Ltd* and *Gyselman*. Eichelbaum CJ and Heron J accepted that the Judge in the Family Court was correct to adopt the *Gyselman* approach. Further that "special circumstances" must be more than merely the set of facts pertaining to the case in hand. The facts must set the particular case apart from other cases.[101] This view, they held, followed logically from and was completely

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[98] *Re M* [1993] NZFLR 74, 81 (HC).

[99] Above n98, 81. In doing so the High Court impliedly rejected the reasoning of Judge Inglis Qc that the formula assessment should be departed from "not in limited but appropriate instances" see above n68.

[100] Above n98, 82.

[101] Above n98, 82.

consistent with the objectives of the legislation.[102]

Further, the Full court supported the proposition of Judge Keane that the "all to usual situation... where income is just sufficient to meet outgoings, or does not quite suffice, cannot without more be regarded as special."[103]

In considering *Cortez Investments Ltd* it was held that the above approach was consistent with the view adopted by the Court of Appeal both that the phrase "special circumstances" is "wide comprehensive and flexible" and that the Court ought not lay down any exhaustive definitions. The caveat that "special" is less than "extraordinary or unique"[104] should also be kept in mind.

Significantly, the High Court rejected the approach of his Honour Judge Inglis QC in *H v G* as reading down the statutory requirement to simply "circumstances", giving no weight to the presence of the adjective "special".[105] Further, the Court rejected counsel's criticism that Judge Keane's use of expressions such as "remarkable" or "extreme" imposed a greater burden than was required. They accepted that the words taken by themselves could be regarded as setting a higher standard but having regard to the context of the Judge's remarks as a whole and the tests he postulated, the Court was satisfied Judge Keane did not pitch the search too high.

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[102] The Full Court in looking at the objectives and philosophy of the legislation emphasised both the fixed and stringent nature of the formula and that in effect the statute was largely fiscal. See for example at page 85 where it is said "...it is a matter of giving effect to the philosophy of the legislation that a more distinct proportion of the income of non-custodial parents should be devoted to the maintenance of their children than previously, and a lesser proportion of the responsibility should fall on the general body of taxpayers."

[103] Above n98, 82.

[104] Above n98, 82.

[105] Above n98, 82.

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The third essential point that the High Court makes is that "unless the 'special circumstances' were something other than the possible consequences specified, the reference to special circumstances would be obtuse... more than the fact itself needs to be proved."[106] This simply endorses what Judge Keane said in the Family Court.

Finally, the Full Court looked at the different ways "special circumstances" was expressed throughout section 105(2). Where paragraphs (a) and (c) open with the expression " by virtue of the special circumstances", while in (b) the reference is to "in the special circumstances of the case." However, Eichelbaum CJ and Heron J concluded that they were unable to see any difference of consequence and that it is "no more than a vagary of draughtsmanship."[107]

In essence the writer does not disagree with the general approach of the Full Court to "special circumstances". However, with respect the judgment is disappointing, and not completely conclusive, on several important issues relating to the meaning and application of "special circumstances".

In endorsing Judge Keane's "narrow gate" approach the Court on appeal is consistent with the general nature of the Act's objectives and more specifically Parliament's intentions behind those objectives. Particularly that, as was discussed earlier,[108] object 4(f) does seem more accurately than many of the more rights/obligations based objects to reflect the body of the legislation it prefaces. The Child Support Act 1991 despite much of the rhetoric in section 4 is largely a fiscal statute. The Act does clearly enforce the financial duty that parents owe to their children. But importantly it also attempts

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[106] Above n98, 83.

[107] Above n98, 83.

[108] See above Part III.

to alleviate some of the burden of this duty off the general taxpayer.

However, in supporting Judge Keane's approach that objective (f) set the Act apart, the High Court over looked several of the other relevant objects in section 4.

In particular, as the nature of the application related to the applicant's income and commitments, the Court could have considered objects (d) (parents capacity to provide financial support) and (h) (equity between custodial and non-custodial parents regarding the costs of supporting the children). Clearly, despite the aptness of 4(f) as a description of the statute, these other objectives are of importance in such a consideration on the facts of "special circumstances". The High Court also overstated the position in accepting that the new Act was a "radical departure from previous philosophy" given that the old Liable Parents Contribution Scheme was also calculated by the Director General of Social Welfare on the basis of the liable parent's taxable income and a formula.

The comments of Bill English MP on the presentation of the Report of the Social Services Committee on the Child Support Bill that the departure order is a "safety valve" and applies where it is "obviously unjust",[109] reinforce the words of Judge Keane that the "formula answer... is clearly intended to be definitive in all but a few cases."[110] Thus, the general tenor of both decisions in *Re M* that departure orders will not be granted easily must be supported in light of the policy behind the statute.[111]

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[109] Above n15, 5987. Although 'injustice' is clearly not the test.

[110] Above n4, 663.

[111] Despite the appearance that the statute is largely fiscal in nature, Revenue Minister Wyatt Creech has stated that it is not a "revenue grabber". He has also said that the judges have been interpreting the Act much stricter than Parliament

Despite this conclusion, the reasoning of Judge Inglis QC in *H v G* which favoured a wider approach is very persuasive and respectfully should at least have been considered. Rather, the High Court justices did not even mention the obvious distinctions between the Australian and New Zealand formulae, that the former is based on both parent's income, and the latter on only that of the non-custodial parent. Potentially, this could have been a valid ground for distinguishing the Australian cases.[112]

The High Court interpretation of "special circumstances" as "facts peculiar to the particular case which set it apart from other cases" and "something out of the ordinary", is consistent with the approaches of Woodhouse P and McMullin J in *Cortez*. However, if the comment of Richardson J that such phrases are simply synonyms which add little to the meaning of "special circumstances" is accepted, then what is left is the "interests of justice line" of the three Court of Appeal judges. With respect the *Cortez* case may have very little practical application given the totally different statutory contexts of the Law Practitioners Act and the Child Support Act.[113]

The Child Support legislation cannot fairly be described as a "liberal enactment"[114] designed for "consumer protection".[115]

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intended. This is true to an extent but the comment of the Minister may be interpreted as political back-peddling in the light of rising dissatisfaction with the Act and an attempt to shift the focus of the blame onto judges. See Above n14, 54.

[112] A review of the Child Support Act undertaken in may of this year suggested that as a ground for distinction this difference between the formulas on either side of the Tasman may become obsolete. The Government indicated that part of the Child Support reforms (now after the election) will take account of the custodial parents income. See *The Dominion*, Wellington, New Zealand, 2 August 1993, 1 and 4 August 1993, 4.

[113] This in fact what McMullin J warned in *Cortez*, see above Part IV.

[114] Above n27, 441.

Rather the Child Support Act attempts to enforce parental financial obligations to their children, in effect inducing "parents to alter their priorities".[116] Further, the "interests of justice" test is precluded by the nature of the Child Support Act. This is firstly because the Act provides specific grounds for departure. Secondly this is because the Child Support legislation has a three step test where considerations of whether the order is "just and equitable" and "otherwise proper" capture the "interests of justice" element. This must mean that "special circumstances" is a consideration separate from this.

It is important that the Courts must pay more than lip service to the High Court caveat (taken from *Cortez*) that "special" is something less than "extraordinary or unique".[117] For there may be a temptation that in applying the formula assessment in "all but a few cases"[118], that the Courts may tend towards the "extraordinary" or "remarkable" tests. Clearly this is not the interpretation that the High Court endorses or indeed what Parliament intended; for the requirements for a departure order were expressly reduced from "extraordinary" to "special" in the select committee process.[119]

What was disappointing in the High Court's acceptance of the *Gyselman* approach is that the decision of Judge Ellis in *Bradey* was not discussed by the Court. For the observations of Judge Ellis can provide a "helpful corrective to an approach that would assess 'special circumstances' by comparison with

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[115] Above n27, 439 Richardson J.

[116] Above n98, 85,

[117] Above n98, 83.

[118] Above n4, 663.

[119] Above n15, 5987.

stereotypical situations or classes of case".[120] Judge Ellis emphasised the *consequences* and the *predicament* created by the circumstances and that the exercise in testing for speciality should be an integral one.[121] These are useful provisos which may allow issues of overall justice to come into the test of speciality without derogating from the High Court interpretation. For *Bradey* is not essentially inconsistent with *Re M.* It just concentrated on different aspects of the *Gyselman* approach to justify the conclusion that the test should look at all the facts and the affects those facts produce, rather than to see if a particular fact was or was not "special".

Also problematic is the Full Court's decision that "special circumstances" must be something *other* than the grounds for departure themselves. If in stating this, the Court means that a departure order will not be granted merely if the specified ground is satisfied, then this seems consistent with Parliament's intention in imposing the standard of "special circumstances". However, if (as it looks like is the case) something extra is required, that the circumstances need to be independent of the ground to satisfy the requirement of "special", then the Court was imposing an unnecessarily harsh hurdle and one which was not inevitably indicated by the wording of the statute. It appears completely consistent with the terms and context of section 105(2) that the grounds for departure themselves can constitute "special circumstances" as long as the facts (or the consequences /predicament) are "special" or "out of the ordinary run". For example, if under section 105(2)(c)(ii), a non-custodial parent has made a previous contribution which is out of the ordinary (in that it is very large) in favour of the custodial parent which creates an inequity between the two, the question remains why in terms

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[120] *Wood v Wood* Unreported, 7 December 1992, Family Court Levin CS 031/147/92, Judge Inglis QC, 16.

[121] Above n79, 18-19.

of the High Court judgment, can this situation not be regarded as "special"?[122] Similar arguments can be made in relation to departure applications for high costs of access (and various of the other grounds).[123]

The final point is really one of statutory interpretation. It relates to the High Court's over abrupt dismissal of the differences between paragraphs (a),(b) and (c) as simply a vagary of draughtsmanship. Illuminating is the discussion of the differences in drafting by Judge O'Donovan in the unreported decision of *Cozens v Cozens and CIR.*[124] In that case his Honour compared the New Zealand statute to the Australian equivalent. The Australian Act refers only to "in the special circumstances of the case" and not to the phrase "by virtue of the special circumstances". The New Zealand legislation is not the same as the Australian "unless of course one is able to say that, despite their apparent differences, the words used in each subparagraph really amount to the same thing".[125] This is a proposition which Judge O'Donovan could not accept. In *Cozens* his Honour posed a crucial question which the High Court left unanswered. At page 5 he asked[126]

> Why else would parliament go to the trouble of expressing itself in different ways unless it intended the test to be different, particularly when Parliament must have had before it the equivalent Australian legislation? It seems indeed that a deliberate attempt has been made to alter the position in New Zealand from that in Australia.

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[122] See below Part VII.

[123] See below part VII.

[124] Unreported, 17 September 1992, Family Court Auckland FP 004/337/92, 3-6.

[125] Above n124, 5.

[126] Above n124, 5.

Was it intended that different tests be applied to subparagraphs (a), (c) and (b)? The High Court decision makes it clear that a universal standard is to be applied to all of the three groups.

With respect the High Court took the easy way out in putting the differences down to the vagaries of drafting and side-stepped the true application that Parliament intended for the respective categories of grounds.

Judge O'Donovan suggested that the phrase "in the special circumstances of the case" meant no more than the grounds contained in subparagraph (b) are to be viewed in light of the facts of the particular case. This is similar to the Judge Inglis interpretation of "special circumstances" in *H v G*. His Honour Judge O'Donovan viewed the other phrase ("by virtue... ") used in (a) and (c) as meaning that circumstances which are special, in the sense of being out of the ordinary, need to be demonstrated.[127] This approach is problematic because the Australian Courts have interpreted the former phrase "in the special circumstances of the case" as meaning out of the ordinary. This suggests Judge O'Donovan may have got the tests around the wrong way but at least he was not simply ignoring the differences in drafting.

VII THE FAMILY COURTS AFTER *RE M* - THE APPLICATION OF THE HIGH COURT DECISION

Essentially there is no noticeable difference in departure orders before and after the High Court decision in *Re M*. This is not surprising as many Family Court judges in New Zealand were following Judge Keane's interpretation anyway.

One key area of departure orders that has continued to operate outside the ambit of how the High Court interpreted "special

[127] Above n124, 4.

circumstances" is in relation to applications under section 105(2)(b)(i) - high costs of access; and under section 105(2)(c)(ii) - previous matrimonial property (and other) settlements.
The Courts here have often granted orders despite the fact that in essence it is only the ground itself that has been established and nothing extra.

In departure orders purporting to establish high costs of access, the applicant must show that in terms of section 105(3), the costs of access enabling access reach a 5% threshold. As with all the grounds, an applicant is required to show "special circumstances". If the High Court interpretation is accepted these circumstances must be something other than the ground itself. However, what was happening before *Re M*(HC) and what to a large extent is still happening, is that if an applicant shows they can meet the 5% threshold then that in itself will often be enough to satisfy the requirements of "special circumstances".

In *Adams v Adams and CIR*[128] the applicant satisfied the 5% threshold. Judge Frater said "special circumstances" existed because one parent lived in Wainuiomata and the other, with the children, lived in Christchurch. The order was unsuccessful but only because Her Honour Judge Frater held it was not "otherwise proper" to grant a departure. This case and a long list of others like it (often with significantly less distance to travel)[129] show the Courts willingness to find "special circumstances" if the 5% level is reached.

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[128] Unreported, Heard 14 October 1992 (decided after *Re M* in the High Court), Family Court Lower Hutt FP 226/92, Judge Frater.

[129] For example see *Kenning v Reynard* [1993] NZFLR 402, where the distance was from Tauranga to Auckland; *Webby v Webby* Unreported, 2 January 1993, Family Court FP 016/182/92, Judge Evans, where the applicant had to travel from Gisborne to Rotorua; *White v White* Unreported, 10 December 1992, Family Court North Shore FP 196/86, where access was exercised between Auckland and Ngaruawahia.

Arguably, the very nature of high costs of access being 5% or more of your child support income means the applicant must either travel often to visit or travel over long distances (or both). Surely, if either of these two requisites are inherently necessary in establishing high access, then they only go towards creating the ground and cannot without more be regarded as "special" if the analysis is to stay within the High Court's decision. Thus, when Judge Frater held that the travel between Christchurch and Wainuiomata was a "special circumstance", she was at odds with the High Court decision. In effect these facts only went to establish the ground itself.

The anomaly is highlighted when the case of *Grant v Ulph*[130] is compared with that of *Adams* and others like it. In *Grant*, His Honour Judge Carruthers correctly followed the High Court decision finding that the ground for high access was established (with the 5% threshold) and that in addition there was a "special circumstance" as to that ground. That "special circumstance" was the mental and developmental problems of the child which meant that he "has a very special interest beyond what is ordinary in maintaining a sensitive and healthy contact with his father".[131]

Judge Carruthers disjunctive approach is arguably how the High Court intended the test for speciality to be applied. Even though the approach of Judge Frater may be fairer to the applicant, it is not strictly within the meaning of "special circumstances" as interpreted in the High Court.

Similar arguments can be made in relation to matrimonial settlements before the Act came into force. In these situations many judges are finding "special circumstances" simply because of "the significant size of the imbalance (in settlement) seen

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[130] Unreported, 7 April 1993, Family Court Wellington CS 4/93, Judge Carruthers.

[131] Above n130, 6.

against a right to equity of division... expressed in the Matrimonial Property Act".[132] Again this approach is fairer but in basic terms the applicant has satisfied the ground only by showing an inequity in division of property. Even if that division is significant, it is still not a "special circumstance" in the sense of something extra.

A recent decision in the Family Court by His Honour Judge Inglis QC gives an interesting insight into the High Court decision. In effect *Ruru v Waddell and CIR*[133] comes to similar conclusions as the line of matrimonial property cases. That is, if there is a significant imbalance then this may be sufficient to satisfy "special circumstances". However, the reasoning of Judge Inglis QC articulated the steps which led to these conclusions and provides both a fairer and less orthodox interpretation of the High Court decision.

The applicant sought a departure order under section 105(2)(c)(iii). The applicant's former de facto and two children retained the sole occupation of his home at a nominal rent of twenty dollars a week. The home was on Maori land and the applicant wanted the children to retain strong ties with the whanau. In addition, the applicant was paying the major outgoings on that home.

Judge Inglis QC began from the proposition that the formula assessment model was limited to an income earning liable parent and a custodial parent whose income is irrelevant.[134] The model does not include provision by the liable parent of a home for the custodial parent and the children. To that extent the applicant does not match the formula model. This anomaly,

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[132] *Scrivener v Scrivener* Unreported, 8 September 1992, Family Court Christchurch CS 009/661/92, Judge Strettell, 11.

[133] Unreported, 2 April 1993, Family Court Levin CS 031/160/92.

[134] Above n133, 4.

reasoned Judge Inglis QC, is recognized as a ground for departure.

The essence of counsel for the Commissioner's submission was that the existence of the anomaly cannot in itself be "special circumstances". This was because the nature of the anomaly was recognized by the specified ground for departure . Thus, the "special circumstances" must be circumstances independent of that substantive ground for a departure order application.[135] This is a standard interpretation of the High Court decision that "special circumstances" must be something other than the possible consequences specified in section 105(2).
However, Judge Inglis QC rejected this argument. He held that[136]

> it may remain possible to argue that the phrase 'special circumstances' was intended to do no more than to emphasize that the degree of anomaly revealed by comparing relevant features of the applicant's situation with the formula assessment model has to be a truly significant degree of anomaly in order to justify departure.

His Honour saw nothing in *Re M* or the objectives of the Act inconsistent with the above view.[137]

Judge Inglis QC rejected counsel's submission that the comparison involved in analysing "special circumstances" lay not with the formula model generally but with those cases where the liable parent has left the custodial parent in sole occupation of the matrimonial home. He held it was illogical and restrictive to argue that the circumstances must be outside the ordinary run of cases where the custodial parent retained

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[135] Above n133, 5.

[136] Above n133, 5.

[137] Above n133, 5-6.

that sole occupation.[138]

His Honour followed the approach of Judge Ellis in *Bradey v Bradey and CIR*. He stated that the correct approach to "special circumstances" requires an "assessment of the *degree* to which the parties' circumstances deviate from the formula assessment model and, detailed assessment of the particular *predicament* of the particular parties and the particular *consequences* for them if the formula assessment is or is not upheld".[139] (emphasis added)

In rejecting the argument that the anomaly in itself cannot be "special circumstances", Judge Inglis QC was taking a wider view of the High Court decision *in Re M*. He accepted that it must logically follow that "special circumstances" should be something other than the possible consequences specified in the ground. But he stated that it did not follow that, in assessing whether there are "special circumstances", the circumstances relied on must be entirely disregarded.[140]

In relation to an application under section 105(2)(c)(iii) Judge Inglis QC agreed that the ground is only established if it is shown that the respondent's and the children's occupation of the home results in application of the formula assessment being "unjust and inequitable" as a determination of the level of financial support required by the applicant.[141] However, he went on to hold that "the demonstrated *degree* of injustice and inequity must... be an important element in determining whether the circumstances are indeed special".[142]

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[138] Above n133, 6.

[139] Above n133, 13.

[140] Above n133, 13.

[141] Above n133, 14.

[142] Above n133, 14.

The conclusion that a significant degree of anomaly in comparison to the formula model can satisfy "special circumstances", is a fairer approach for the applicant. It ameliorates the harshness of the interpretation which would require something extra for the circumstances to be special. Further the reasoning of Judge Inglis QC provides a justification for the "significant size of the imbalance" line in the matrimonial settlement cases.

Despite being potentially fairer to future applicants and showing one way to apply the *Bradey* "predicament" and "consequences" test, *Ruru* is not completely consistent with *Re M*. Judge Inglis QC is undoubtedly correct in stating that the words "the special circumstances must be something *other than* the possible consequence specified in the ground for departure"[143] do not by necessity mean that "the circumstances relied upon to bring the case within a particular ground for departure must be *entirely* disregarded".[144] (emphasis added)

But he goes beyond the interpretation in *Re M* in suggesting that the phrase "special circumstances" was intended to do no more than emphasise that the degree of anomaly has to be a truly significant degree to justify a departure.[145] The "degree of anomaly" is a relevant consideration in the assessment of "special circumstances". It is probably one Parliament intended although it does not come wholly within the *Re M* approach.

In *Re M* the High Court used as an example the first ground for departure. The Full Court stated that an applicant relying on it must show more than that their capacity to provide financial

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[143] Above n98, 83.

[144] Above n133, 14.

[145] Above n133, 5.

support is *significantly* reduced because of their duty to maintain another child.[146] For this could be said in the majority of situations where a parent had more than one child to support. The circumstances must be special and more than the fact itself needs to be proved.[147] Surely what the High Court is saying here is exactly what counsel for the Commissioner argued in *Ruru*, namely that the existence of the anomaly cannot in itself be special. Even in the High Court example a "significant degree of anomaly" would not suffice because the ground itself states that an applicant's financial capacity must be "*significantly*" affected. On the High Court's reasoning more than a significant reduction was required.

Judge Inglis QC's analysis that the applicant is relying on injustice and inequity to establish the ground and the degree of the injustice and inequity as an element of "special circumstances" is persuasive and follows logically from the objects of the Act.[148] The notion that the degree of injustice and inequity is to be measured in all the surrounding circumstances and against the degree to which the parties situation deviates from the formula model may be a test which comes within the words "something other than the possible consequences specified".[149] However, if these words are considered in the context of the rest of the High Court judgment and in particular the example cited above, the "significant degree of anomaly" test seems to go beyond the High Court interpretation.

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[146] Above n98, 83.

[147] Above n98, 83.

[148] Above n133, 15.

[149] Above n98, 83.

VIII THE HIGH COURT REVISITED: *PATRICK V BOXEN* AND *WILCOX V LYON*

Subsequent to *Re M,* two more appeals have been heard in the High Court. *Patrick v Boxen*[150] and *Wilcox v Lyon*[151] are the most recent pronouncements on "special circumstances being decided in July and August of this year. Neither case rejected the basic approach in *Re M* but both decisions came to different conclusions as to the nature of the Full Court's test.

In *Patrick v Boxen,* Temm J rejected the appeal of a custodial parent whose maintenance was reduced from six hundred dollars every four weeks to three hundred and thirty eight dollars a month by the child support formula. Prior to the Child Support Act, the parents had come to a mutual agreement that the father would pay one hundred and fifty dollars a week for the two children. With the father using the child support formula, the mother claimed a deficit of about eighty four dollars a week. The judge ignored the fact that the combined income of the liable parent and his new wife was seventy one thousand five hundred dollars.

Temm J approved of *Re M.* In doing so he stated that the important point about the Full Court's interpretation which needed emphasis was that those who object to an assessment and seek relief, must take their case "to the point where it is *quite* out of the ordinary and where the case can properly be described as being set apart from other cases."[152] (emphasis added) This imposed a higher standard than the Court in *Re M* intended. The test of the Full Court was whether the facts established something which was special or out of the ordinary, not "quite" out of the ordinary, as Temm J said.

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[150] Unreported, 6 July 1993, High Court Auckland HC 4/93.

[151] Unreported, 3 August 1993, High Court Christchurch AP 164/93.

[152] Above n150, 7.

In support of the above statement, the judge cited the passage from *Re M* where the Court held that the expressions such as "remarkable" or "extreme" used by Keane J may have seemed to impose a greater burden than was required but in the context of the Judge's remarks as a whole, the test was not too high.

However, the context of Temm J's judgment did impose a greater burden than was required. In particular, the Judge cited with approval an observation from the Family Court which did pose the test too high. Temm J saw the Family Court Judge as perfectly correct in stating "(w)hat I think she would be required to shoe is that there existed some liability or obligation which committed her to a *quite extraordinary extent*...."[153] (emphasis added) With respect this statement takes no regard of the Full Court's caveat that "special" is something less than "extraordinary" or "unique".[154]

Temm J's approach was coloured by the way he viewed the Act itself. He saw the Child Support Act as having the hallmarks of revenue and taxation legislation.[155] Further, of the Act's eleven objects the Judge only mentioned one, object 4(f) "legislatively fixed standards". Although Temm J is correct in identifying the fiscal nature of the statute, he completely ignored one fundamental purpose of the Act, to protect the financial interests of the child.[156] Like the Justices in the Full Court, Temm J did not give adequate consideration to any of the Act's other objectives.[157] This point is highlighted by another passage from the Family Court judgment which Temm J believed was appropriate and right. Namely, that it is not

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[153] Above n150, 9.

[154] See above Part VI

[155] Above n150, 1.

[156] See above Part III.

[157] See above Part VI.

enough to say that:[158]

> the objects of the Act require a liable parent to maintain a child as much as they can. The Act does not say that. It says that the obligation is to maintain up to a statutory level and only beyond where there are special circumstances pertaining to any of the matters set out in section 105 which justify departure.

This statement is correct to an extent but it was blind to object 4(j) which does say clearly say that a "fair contribution" is required. Before the Child Support Act the parties had agreed that six hundred dollars every four weeks was a fair contribution. Since the passing of the Act the non-custodial parent had obviously used the formula to reduce his liability which was patently unfair to the mother and the children she cared for.

The final point of interest from the somewhat brief judgment of Temm J is that the judge has serious reservations about Judge Inglis QC's approach in *Ruru v Waddell*. However, he does not indicate why he doubts this case.

A much fuller judgment from Tipping J in *Wilcox v Lyon* revealed a greater underlying sympathy for departure order applicants. The mother and child lived in Scotland with the mother's partner. The father lived in New Zealand, although he was originally from the United States. The non-custodial parent was a biological father only as the child had been born from a brief relationship and father and son had had no contact whatsoever. Plans to adopt the child had not been pursued by the mother. The father's level of payments rose under a formula assessment from ten dollars a week to one hundred and fifty six dollars a week. In addition, at the age of fifty, he and his wife had just acquired their first home with a substantial mortgage. The appeal by the father was allowed.

The Judge agreed with *Re M* that the expressions "by virtue of

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[158] Above n150, 9.

special circumstances" and " in the special circumstances of the case" convey the same idea. even if Tipping J and the Full Court are correct, it was still disappointing that the High Court had still not given any reasons to support the conclusion that subparagraphs (a), (c) and (b) were not intended to denote any different interpretations.[159]

However, Tipping J did go along way towards clarifying a troubling point in *Re M*. The Full Court had held that "special circumstances" must be something other than the possible consequences specified in the ground for departure.[160] This had led to problems in the Family Courts as can be seen by Judge Inglis QC'S "significant degree of anomaly" test in *Ruru* and the line of high access and settlement cases discussed above.[161]

Tipping J made it clear that "special circumstances" do not have to be extraneous to the grounds for departure. He stated that:[162]

> when the Full Court spoke of 'something other' than the possible consequences specified I do not consider they meant something quite separate and apart from those consequences... . They can be extraneous... but they do not have to be. They can equally relate to the ground so as to make it a special case of its kind.
>
> Put at its simplest level, it is enough for the applicant to show something in the ground alleged which is a special rather than an ordinary manifestation of the ground.

This was very similar to what Judge Inglis QC said in *Ruru* and

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159 See above Part VI.

160 Above n98, 83.

161 See above Part VII.

162 Above n151, 6.

what Judge Ellis said in *Bradey*. In *Ruru* the Judge had said that it did not follow that just because "special circumstances" must be something other than the ground for departure that the circumstances relied upon to bring the case within a particular ground should be entirely disregarded.[163] In *Bradey* Judge Ellis had emphasised that the approach to departure order applications was an integral one in which the particular circumstances are elements of a whole.[164] Tipping J's judgment favours this holistic analysis and should put an end to the idea that something extra is required before "special circumstances" are satisfied. In addition it will give some certainty to those cases where there is a significant degree of anomaly (in comparison with the formula assessment model) as these cases could be classified as "special case(s) of (their) kind."

Despite being more sympathetic to the applicant in his approach to "special circumstances", Tipping J made some telling, yet accurate, observations about the nature of departure orders. The Judge agreed with the Full Court's description of the criteria for a departure application as a "narrow gate". His Honour stated that Parliament had deliberately made the gate narrow.[165] That the policy of the Act was to ensure that the formula assessment applied unless "special circumstances" could be shown. Further, the fact that Parliament placed a series of "cumulative hurdles"[166] in an applicants path, namely the need to show an order was "just and equitable", "otherwise proper' and that "special circumstances" existed, made it clear that departure orders were not to be lightly granted. Importantly though Tipping J added to this the Full Court's warning that there is no need to impose on the applicant the requirement to

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[163] Above n133, 14 and see above Part VII.

[164] Above n79, 18-19.

[165] Above n151, 7.

[166] Above n151, 7.

demonstrate that the case was unique or extraordinary.

IX CONCLUSION

The old Liable Parent Contribution scheme administered by the Department of Social Welfare was regarded by many as toothless. It was estimated that only a third of liable parents were paying their full share.[167] Thus, it was not surprising that a more stringent system with a rigid formula assessment was introduced under the control of the Inland Revenue Department.

It is part and parcel of legislation of this kind that it has affected some people more harshly than others and that in some cases it has caused hardship. The departure order is supposed to be the "safety valve" of the system. It is Parliament's recognition that the formula assessment model, no matter how all-encompassing, simply will not be applicable in all cases. However, hardship and injustice are not grounds for departure and Bill English MP was patently incorrect when he stated to the House that the departure order was the court's discretionary tool for situations where the formula is "obviously unjust".[168] The departure application system is much narrower than a discretionary test of justice and the High Court was correct to categorize it as a "narrow gate". Parliament had deliberately made the gate narrow by placing the three "cumulative hurdles"[169] ("special circumstances" with the specified ground; evidence that an order would be "just and equitable" and "otherwise proper") in an applicants path.
The very nature of the departure process suggested that deviations from the formula assessment were not to be granted lightly. The three tier test reinforced Parliament's message to non-custodial parents that it was serious about obtaining

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[167] W Barton "Getting parents to pay for their kids" *Dominion*, Wellington, New Zealand, June 30 1993, 9.

[168] Above n15, 5987.

[169] Above n151, 7.

a "fair contribution" towards offsetting the cost of the Domestic Purposes Benefit on the tax payer.

The other central message of the Child Support Act was accurately summarized by Principle Family Court Judge Mahony in *Andrews v Andrews*[170] where he said:

> Parliament is giving a clear indication to liable parents that their obligation to support their children must be very high on their list of priorities when they are ordering their financial affairs... .

Of the three hurdles "special circumstances had proved to be the highest and hardest to get over in the courts.
The context of the Child Support Act precluded the Court of Appeal's observation in *Cortez* that in considering "special circumstances" the interests of justice must govern. This test may have been appropriate to the liberal and protective Law Practitioners Act but under the child support legislation issues of overall justice do not come into consideration until the second hurdle.

Although it was relatively easy for the courts to conclude that "special circumstances" meant that something out of the ordinary run had to be shown, beyond that there was a division of opinion. Despite the observations of the Court of Appeal that "special circumstances" are wide comprehensive and flexible words, the majority of the Family Court applied the phrase narrowly. The Full Court of the High Court's endorsement of the narrow approach potentially lifted the hurdle Parliament had set and placed it higher.

Despite the prominence of the narrow approach and the High Court's support of it, various judges showed an underlying sympathy for those seeking departure orders. There was still a division of opinion as to how "special circumstances" should

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[170] Unreported, 11 August 1992, Family Court Nelson CS 042/196/92, 3.

be applied. Several judges showed that if the ground were established and there was a sufficient imbalance or a "significant degree of anomaly" in comparison with the formula assessment model then this was sufficient to satisfy the test. Most notable of these was the decision of Judge Inglis QC in *Ruru v Waddell*.

The fact that "special circumstances" in the context of the Child Support Act was problematic was highlighted by the two recent High Court decisions. One of which, *Patrick*, in a case which cried out for justice and equity, appeared to push the test of speciality closer to that of "extraordinary". The other, *Wilcox*, revealed a sensible and sympathetic approach. Tipping J recognized the stringent limitations imposed by Parliament. But he clarified what had developed into an unnecessarily harsh application of Re M *by concluding that "special circumstances" did not have to be extraneous to the ground, they could simply show a special case of its kind.*

Although Tipping J's analysis makes good sense and together with Ellis J's and Judge Inglis QC's approaches may ameliorate some of the harshness of the departure application process, the system for relief is still overly complicated and restrictive. Indeed there is a serious difficulty with "special circumstances" as an initial hurdle in the context of this Act. The requirement to show something "special", even just "a special case of its kind", unnecessarily eliminates some applicants who may be worthy of relief. Pamela Patrick was a prime example where "special circumstances" got in the way of a deserved departure order.

The grounds for departure are limited enough themselves. If Parliament intended to give the courts discretion in this area so as to alleviate some of the harshness of the formula then it would have been more useful to exclude "special circumstances" all together. Tipping J in *Wilcox* showed that the question of whether an order is "just and equitable" is a

comprehensive test which embodies an extensive list of considerations.[171] It includes the objects of the Act, the proper needs of the child, relevant financial resources and commitments of all parties as well as issues of hardship. The second and third hurdles are holistic considerations which call for the balance of the needs of the children, parents and the state. It is these tests of justice and equity and what is otherwise proper that are more appropriate in the context of the child support legislation than the need to show "special circumstances". For although the Act is largely fiscal, the financial interests of the child must be a paramount consideration and the nature of the test of speciality in the Act does not always allow this to be the case.

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[171] See s105(4).

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