'Top Tips to Sharpen Your Child Support Practice'

Matt Hempstead – Barry.Nilsson Lawyers

Introduction

1. One of the most common areas we as practitioners encounter on a regular basis when dealing with Child Support issues, is our involvement in the negotiation and formulation of Binding Child Support Agreements. It is becoming increasingly common for such an Agreement to form part of a suite of settlement documents between separated parents.

2. This paper will not address in detail the specifics of what must be included in a Binding Child Support Agreement, but instead focuses on a range of factors that practitioners need to consider when preparing an Agreement and Letter of Advice.

3. The *Child Support Assessment Act 1989* ("the Act") provides for two types of child support agreement.

   (a) Limited Child Support Agreement – Section 80E of the Act

   As the name suggests, Limited Child Support Agreements are limited in nature and are useful for very simple, non-complicated situations. An administrative assessment must be in place for a Limited Child Support Agreement, the amount specified cannot be less than the assessment, the agreement can be terminated after three years (by one party making application), and the agreement does not require legal advice.

   See chapter 2.7.1 of the Child Support Guide for more information in relation Limited Child Support Agreements.

   (b) Binding Child Support Agreement – Section 80C of the Act.

   The characteristics of a Binding Child Support Agreement, which are the main focus of this paper, are:

   (i) Each party must have legal advice prior to entering into the agreement and the agreement must contain a Certificate of Independent Legal Advice.
   (ii) The agreement must be made in writing and signed by both parties.
   (iii) There does not generally have to be a child support assessment already in place, but it is usually of no concern if there is an assessment in place. The exception to this is an Agreement that provides for 'lump sum' child support in which case there must be an assessment in place.
   (iv) The annual rate of child support payable can be less than, equal to or more than the annual rate of any child support assessment which may be in place or which would otherwise be made. The exception to this is an Agreement that wants to provide for 'lump sum' child support in which case the lump sum must be more than the annual rate of assessment.

(v) They can be enforced either via the Child Support Agency (for periodic sums) or the Court (for periodic and/or non-periodic sums).

See chapter 2.7.1 of the Child Support Guide for more information in relation Binding Child Support Agreements.

Drafting Binding Child Support Agreements –tips to make sure they stick

Tip 1: Beware Sections 85 & 86 of the Child Support (Assessment) Act 1989

4. Prior to July 2018, it was relatively common in a Binding Child Support Agreement for practitioners to label both parents as a carer entitled to child support and a liable parent. This allowed for the Agreement to deal with the payment of child support by both parents. The changes that were brought into the legislation in July 2018 prevent that in some circumstances and the key elements of those changes are set out in Sections 85 and 86 of the Act.

5. The effects of Sections 85 and 86 of the Act have the ability to cause practitioners some headaches when drafting Binding Child Support Agreements if the children are not spending at least 35% of the time with one of the parents.

6. Section 85 of the Act provides:

> *Child support agreement must not provide for person who is not eligible carer to be paid child support*
>
> *(1) An agreement is not a child support agreement in relation to a child if (disregarding section 67A) the agreement provides that a party to the agreement is to pay or provide child support for the child to another party for a period during which the party is not an eligible carer of the child.*
> *(2) Subsection (1) does not affect the operation of the agreement for any other purpose".*

7. Section 86 of the Act provides:

> *Suspension of child support agreements when person is not eligible carer*
>
> *(1) A child support agreement is suspended in relation to a child by force of this section on a day if:*
> *(a) a party (the former carer) to the agreement who is entitled to be paid or provided child support for the child (disregarding section 67A) under the agreement is not an eligible carer of the child on that day; and*
> *(b) the period (including that day) during which the former carer has not been an eligible carer of the child is:*
> *(i) 28 days or less; or*
> *(ii) if subsection (2) applies--26 weeks or less; and*
> *(c) a child support terminating event does not occur under subsection 12(2AA); and*
> *(d) the former carer would (apart from this section) continue to be entitled to be paid or provided child support for the child under the agreement in respect of the day despite ceasing to be an eligible carer.*

Note: The agreement may continue without suspension in relation to other children to whom the agreement relates if the person does not cease to be an eligible carer of those children (see section 87).

(2) The former carer may cease to be an eligible carer of the child for up to 26 weeks under subparagraph (1)(b)(ii) if:

(a) the child support agreement provides that the agreement is to be suspended if a party to the agreement ceases to be an eligible carer of the child for a period of more than 28 days; or

(b) after the former carer ceases to be an eligible carer, each of the parties to the agreement notifies the Registrar, before the end of the 26 week period, that the parties to the agreement want the agreement suspended for more than 28 days; or

(c) the Registrar is satisfied that there are special circumstances in relation to the change in the care of the child.

8. The practical impact of Sections 85 & 86 is that, if the person entitled to child support no longer has the child in their care for at least 35% of the time, then the Binding Child Support Agreement is automatically suspended for 28 days. If that parent is then not caring for the child at least 35% of the time by the end of the 28 day period the Agreement is terminated.

9. The suspension period of 28 days can be extended up to 26 weeks if this is provided for within the Agreement.

10. In terms of who is an eligible carer and the at least 35% of the time requirement, the Act provides:

Section 5:

eligible carer has the meaning given by section 7B.

Section 7B:

(1) In this Act, eligible carer, in relation to a child, means a person who has at least shared care of the child.

(2) Despite subsection (1), if:

(a) a person cares for a child; and

(b) the person is neither a parent nor a legal guardian of the child; and

(c) a parent or legal guardian of the child has indicated that he or she does not consent to the person caring for the child;

then the person is not an eligible carer in relation to the child unless it would be unreasonable in the circumstances for a parent or legal guardian of the child to care for the child.

(3) For the purposes of subsection (2), it is unreasonable for a parent or legal guardian to care for a child if:

(a) the Registrar is satisfied that there has been extreme family breakdown; or

(b) the Registrar is satisfied that there is a serious risk to the child's physical or mental wellbeing from violence or sexual abuse in the home of the parent or legal guardian concerned.

Section 5:

shared care has the meaning given by subsection 5 (3).

Section 5:

Definitions of regular care and shared care

(2) A person has regular care *of a child if the person's percentage of care for the child during a care period is at least 14% but less than 35%.*

(3) A person has shared care *of a child if the person's percentage of care for the child during a care period is at least 35% but not more than 65%.*

11. 35% care is quite substantial - it equates to 5 nights per fortnight or at least 128 nights over the course of a year. See chapter 2.2.1 of the Child Support Guide to further explore how the care arrangements are determined.

12. Practitioners need to be aware of Sections 85 and 86 and give them proper consideration both in terms of contemplating how to draft their Binding Child Support Agreement, but also in providing advice to their client prior to signing the Binding Child Support Agreement.

13. Sections 85 and 86 apply to all aspects of the Binding Child Support Agreement. It does not assist in differentiating between periodic and non-periodic expenses.

14. It was and remains commonly the case for Binding Child Support Agreements to provide for:

(i) One party to pay the other periodic child support in some form.
(ii) Both parties to contribute towards various non-periodic child support items for the child (i.e. to make contributions towards school fees, medical expenses, and other matters).

15. Section 85 means that the non-periodic aspect will not be binding if it relates to a payment by a carer who has less than 35% care of the children. It will also lead to the Child Support Agency likely refusing to register the Binding Child Support Agreement.

Case Scenario examples

A. The parents want to document their agreement via a Binding Child Support Agreement. The relevant facts are as follows:

- *The children live with the Mother and spend time with the Father 1 night per fortnight.*
- *The parties have agreed for the Father to pay a sum $X in periodic child support to the Mother and for the Father to pay the children's private schooling costs and a range of other expenses.*

Provided that the children do not spend less than 35% of the time with the Mother, this arrangement is not impacted by Sections 85 & 86.

B. The parents want to document their agreement via a Binding Child Support Agreement. The relevant facts are as follows:

- *The children live with the Mother and Father in an equal shared share arrangement.*

The parties have agreed for there to be no periodic payment payable between each of them and for them to equally share the children's private schooling costs and a range of other expenses.

This arrangement is not impacted by Sections 85 & 86. But consideration needs to be given whether the parties want a single Agreement or a dual agreement – particularly having regard to the impact of what will occur in a Section 86 event arising.

C. The parents want to document their agreement via a Binding Child Support Agreement. The relevant facts are as follows:

- *The children live with the Mother and spend time with the Father 2 nights per fortnight.*
- *The parties have agreed for the Father to pay a sum $X in periodic child support to the Mother and for the Mother and Father to equally contribute towards the children's private schooling costs and a range of other expenses.*

This arrangement would be impacted by Sections 85 & 86 if provided for in a Binding Child Support Agreement. The Agreement cannot properly bind the Mother to pay 50% of the costs for the children given they spend less than 35% of the time with the Father.

16. A version of scenario C is an increasingly commonly desired outcome for separated parents and a Binding Child Support Agreement still has a place in resolving those arrangements. Suggestions to assist in cases where scenario C arises, include the following:

(i) The use of Recitals to explain the intention of the parties.

Whilst the inclusion of the Mother paying 50% of the costs and expenses referred to in scenario C should not be included in the operative provision of the Agreement to avoid falling foul of Section 86, it can still be included as a Recital or notation in the Agreement.

You should ensure that in drafting the Binding Child Support Agreement that you utilise the Recitals section of the Agreement to clearly set out, amongst other things:

- What the care arrangements for the child/ren are and whether this is less than 35% for one of the parents. For example, *"the children currently live with the Mother and spend time with the Father 2 nights per fortnight. The time the children spend with the Father is currently less than 35%.*

- That the parties are aware of Section 86 and this has been given consideration in the Agreement, but notwithstanding this it is the parties intention that the Mother will meet certain expenses. For example:

  "The parties acknowledge, having regard to the children spending less than 35% of the time with the Father, that this Agreement cannot provide for child support to be payable by the Mother. The parties wish to reflect as a notation their intentions that:
  - *The Mother will pay 50% of the children's private school fees and 50% and…*

- Whether there is any intention for the care arrangements to change so that the children are spending more than 35% care with both parents and if so whether a different arrangement should come into effect in the operative provisions. Be careful though, this may be 'risky' if the arrangements revert back to being less than 35% of the time.

(ii) There is the option to reduce the periodic sum within the Agreement if the other parent is not making a contribution to the school fees or other expenses set out in the notation.

(iii) Recognition of the option to extend the suspension period up to 26 weeks, even if you don't want to utilise it. For example:

- *If the Mother/Father ceases to be an eligible carer of any of the children for a period of 28 days or more then this Agreement will be suspended for up to 26 weeks in relation to that child/children. If the Mother/Father does not become an eligible carer of the child/children within the 26 week period then this Agreement will cease to have any force and effect and shall come to an end and terminate in relation to that child/children*"; or
- *The parties are aware of Section 86 of the Act and do not wish to seek to extend the suspension period beyond 28 days in the event that the Mother/Father ceases to be an eligible carer of any of the children*.

(iv) There is an option to include 'role swapping' provisions within the Agreement (swapping child support obligations if the care arrangements change, or if both parties have 35% care then having a dual role agreement where two parties are to pay certain costs so that it is not treated as one agreement (and may terminate if just one ceases to be an eligible carer).

(v) Ensuring that in your letter of advice to your client and in negotiating the Binding Child Support Agreement that parties are aware of the impact of Sections 85 and 86.

(vi) If there are already proceedings on foot, consideration might be given to a Child Support Departure Order, having regard to the circumstances of the case. This is something that is addressed further below.

<u>Tip 2: Define, Define, Define</u>

17. While this is a more obvious aspect of improving Binding Child Support Agreements, it remains true that definitions about what is actually to be incurred by the parties remains essential to assist in reducing the scope for disputes.

18. Practitioners should take great care in setting out what is to be met by each of the parties pursuant to the Binding Child Support Agreement. This will be specific to each particular client's circumstances as to whether the definitions ought to include a broad range of matters or a very specific scope. By way of example, here's a non-exhaustive list of costs and expenses that you would consider defining carefully:
    - Education costs (is this just tuition costs or are the range of other expenses associated with schooling to be included?)
    - Medical expenses (is there to be a contribution to medical expenses, if so what does this mean, i.e dental, orthodontics, surgical, chiropractic, massage?);
    - Private Health insurance costs (what level of cover, what happens to the rebate who is the card holder?);
    - Mobile phone costs (is the child to be provided with a phone? If so who is to pay for it?);
    - Clothing (haven't seen this one as yet but I'm sure it is out there);
    - Tutoring (what private tutoring if any is required and who is to pay for it?);
    - Extra-curricular and activity costs and equipment (how will these costs be met and what is to be included?).

19. The most disputed area in relation to definitions is regarding education costs. Example definitions include:

Broad	**Narrow**	**Strict**
Education expenses means all costs associated with the child attending at SCHOOL NAME or such other school as may be agreed between the parties in writing or Ordered by the Court".	*Education expenses means the following costs only for the child with respect that child attending at SCHOOL NAME or such other school as may be agreed between the parties in writing or Ordered by the Court until the completion of that child's high schooling education:* *(a) All tuition fees, device fees and levies as invoiced by the school;* *(b) All requisite school uniform costs for mandatory/non-elective uniform requirements including, academic uniform, sports uniform, school shoes and school bags;* *(c) All requisite text book and stationery costs for mandatory/non-elective school text book and stationery requirements;* *(d) All costs associated with mandatory/non-elective excursions including school based travel associated with those excursions* *(e) All costs associated with any mandatory/non-elective expenses relating to non-optional school-based sports and non-optional extra-curricular activities.*	*Education expenses means the following costs only for the child with respect that child attending at SCHOOL NAME or such other school as may be agreed between the parties in writing or Ordered by the Court until the completion of that child's high schooling education:* *(a) All tuition fees, device fees and levies as invoiced by the school;* *(b) 1 set of academic uniforms per year consisting of 3 shirts, 1 blazer, 2 shorts, 2 pants, 1 tie, 1 pair of shoes and 1 hat….* *(c) 1 set of sports uniforms per year consisting of 1 sports shirt, 1 sports shorts, 1 tracksuit (jumper and pants), 1 pair of runners, 1 sports hat…*

20. The decision about whether or not the definitions included in the Binding Child Support Agreement are broad or narrow will ultimately be one for the parties. You should ensure that the letter of advice you provide to your client sets out the option for more broad and/or more narrow definitions so that they are informed prior to entering into the Binding Child Support Agreement.

Tip 3: Operative provisions

21. This paper doesn't focus in detail on what is to be included in the operative provisions of the Binding Child Support Agreement. However, some matters to think about in terms of the operative provisions of the Agreement are:

- Periodic child support:
  - Will it be as Assessed?
  - If it is to be a set sum, then will this sum change with variations to the care arrangements or increase with CPI? How regular will the payments be, can payments be made in advance?

- Is there to be an aspect of lump sum child support payable as part of the Agreement? If there is, ensure that there is an administrative assessment in force and that the lump sum is more than or equal to the annual rate of child support and be clear about what the lump sum is being applied towards (i.e. is it to bring an end to the child support obligation, or will periodic child support continue to be paid once the lump sum has been applied towards the assessment).

- Adopt the use of definitions referred to earlier in the Agreement in setting out who is to pay what in relation to non-periodic child support.

- Include provision about how non-periodic child support is to be paid. Is it directly to the service provider? Is there a reimbursement provision if one party pays at first instance?

Tip 4: Termination

22. A child support terminating event happens pursuant to Section 12 of the Act (for further information see chapter 2.10.3 of the Child Support Guide), if:

(i) The child:
- dies;
- ceases to be an eligible child because the child is in the care of a person under a child welfare law (Section 22 of the Act and Regulation 6 of the Child Support (Assessment) Regulations 2018);
- turns 18 (unless the Registrar has accepted an application for the assessment to continue beyond a child's 18th birthday (chapter 2.5.5 of the Child Support Guide));
- is adopted;
- becomes a member of a couple (chapter 2.1.2 of the Child Support Guide);
- is no longer present in Australia, is not an Australian citizen, and is not ordinarily resident in Australia (chapter 1.6.2 of the Child Support Guide) (and is not subject to an international maintenance arrangement), or

- a second liability is registered for the same parents and child/ren (Section 30AA(1) of *the Child Support (Registration and Collection) Act 1988*).

(ii) Either parent dies.

(iii) The liable parent ceases to be a resident of Australia (and is not subject to an international maintenance arrangement).

(iv) If the parents reconcile and become a member of the same couple for a period of 6 months or more.

(v) On the day a Binding Child support Agreement accepted by the Registrar specifies.

23. There are many Binding Child Support Agreements prepared that do not deal with the matters that are set out in Section 12 of the Act. The jury is out on whether it is even possible to contract out of Section 12, and it is suspected that this is not possible. It is suggested that practitioners should take steps to specifically include the provisions of Section 12 as terminating provisions in their Binding Child Support Agreement and explain each of those provisions to their client's when providing advice prior to signing.

24. There may be other circumstances that the parties want to include that provide for the termination of the Binding Child Support Agreement, for example:

(i) If the care arrangements change – but not to the extent that it is caught by Section 86 of the Act. The Agreement may terminate if the current care arrangements were to be varied for a period of time.

(ii) If the income of one or both of the parties increases and/or decreases. Examples of these types of provisions include:

- *The Mother and Father agree that this Agreement will cease to have any force and effect and shall come to an end and terminate in relation to each of the children in the event that*
    - *the Father/Mother's total annual income decreases to below $### gross per annum (including superannuation and any other fringe benefits) for a period exceeding ## months in duration assessed on a pro-rata basis and upon the Father/Mother making an election in writing to the Mother/Father of his/her desire to terminate this Agreement as a result of the decrease of his/her income.*
    - *the Father/Mother's total annual income increase to above $### gross per annum (including superannuation and any other fringe benefits) for a period exceeding ## months in duration assessed on a pro-rata basis and upon the Father/Mother making an election in writing to the Mother/Father of his/her desire to terminate this Agreement as a result of the increase of the other party's income.*

- *This Agreement will cease to have any force and effect and shall come to an end and terminate in relation to each child in the event that:*
    - *the Father/Mother is receiving a Government Pension or Unemployment Benefit including due to prolonged illness, injury or incapacity ; or*
    - *in the event that the Father/Mother is not eligible to receive a Centrelink Pension or Unemployment Benefit, then in the event that the Father/Mother is unemployed for a period of at least 12 months.*

and upon the Father/Mother making an election in writing to the Mother/Father of his/her desire to terminate this Agreement as a result of either of the above.

- The Agreement should contemplate what evidence needs to be produced to evidence the change of income, for example. documents from accountants, payslips etc.

Tip 5: Preparing advice for a Binding Child Support Agreement – what is required?

25. Section 80C of the Act provides:

Making binding child support agreements

(1) An agreement is a binding child support agreement if:
(a) the agreement is binding on the parties to the agreement in accordance with (2); and
(b) the agreement complies with subsection 81(2).
(2) For the purposes of subsection (1), an agreement is binding on the parties to the agreement if, and only if:
(a) the agreement is in writing; and
(b) the agreement is signed by the parties to the agreement; and
(c) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
(i) the effect of the agreement on the rights of that party;
(ii))the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
(d) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
(e) the agreement has not been terminated under section 80D; and
(f) after the agreement is signed, either the original agreement or a copy of the agreement is given to each party.

26. Section 80C of the Act creates a similar onus on us as practitioners as the provisions of Sections 90G/90UJ of the *Family Law Act 1975* in relation to Financial Agreements. We are required to provide advices on the effect of the Agreement on the rights of that party and the advantages and disadvantages to the party in making the Agreement.

27. To ensure that you are providing advice that it is consistent with the standard required, it is important that you are made aware of each party's income, resources, and the care arrangements for the children.

28. Your advice should set out how child support would be calculated if there was no Binding Child Support Agreement, for example pursuant to an Assessment taking into account a range of factors such as:

(i) The adjusted income of both the resident and non-resident parent, after a self support amount has been deducted;
(ii) The amount each parent requires to support themselves;
(iii) The percentage of care that both the resident and non-resident parent give the child (calculated in the number of nights in each party's care);
(iv) The costs of the child, relevant to the child's age.

(v) Any potential change to the Assessment based on 'Special Circumstances'.

29. Your advice should also set out what the child support obligations might look like, as can be best estimated from the information available. This is likely to be more straight forward in circumstances where there is already an Assessment in place. If there is no Assessment, then the Child Support Estimator provided by the Department of Human Services is a useful resource.

30. It is good practice to provide your client with a number of scenarios utilising the Child Support Estimator as a guide as to what the child support obligations might look like adopting different incomes and care arrangements, whilst noting that it is only a guide, not a comprehensive Assessment.

31. Once the practitioner has an understanding of what the party's child support obligations might be without the Binding Child Support Agreement then they are in a better position to provide informed advices about the advantages and disadvantages of the Agreement.

32. The advice should include a summary of the obligations of the parent to the Binding Child Support Agreement. For example, if there is an obligation on a parent to pay private school fees for the child then the advice should set out that this cost is likely to exceed $X until the child reaches 18 (or completes school) and the potential impact on that person's income/resources.

33. It is recommended that practitioners provide their advice in writing and that this covers off on but is not limited to the following:

(i) The care arrangements for the children.
(ii) The income of each parent.
(iii) The matters considered as part of an Assessment.
(iv) The details of any likely changes to the Assessment if one is already in place.
(v) The potential impact on Family Tax Benefits as a result of the Agreement. If this isn't known your client should be advised to make their own enquiries about it prior to entering into the Agreement. It is often difficult to estimate.
(vi) Estimates of potential child support payable/receivable.
(vii) Whether an order for Child Support, a Limited Child Support Agreement or Parenting Plan setting out Child Support arrangements might be more appropriate.
(viii) Whether the draft Agreement was provided to the Child Support Agency, and any comments that they made. A draft Agreement should be provided to the Agency where possible.
(ix) A summary of the obligations of each party pursuant to the Agreement.
(x) The possible terminating provisions of the Agreement and the impact of Sections 85 & 86 of the Act.
(xi) The grounds to set aside a Binding Child Support Agreement- having regard to Section 136 of the Act. We will discuss those further below having regard to the recent cases.

Tip 6: Departure/Child Support Orders by Consent May be an Option

34. Child Support Departure Orders are still relatively uncommon in Queensland, particularly when sought by consent. As a result of Sections 85 and 86 of the Act, we may now need to give consideration to whether a Child Support Orders

should be sought pursuant to Section 117, Section 118 and/or Section 124 of the Act when proceedings are already on foot between the parties.

35. This is something that practitioners should be aware of and should give consideration to in contemplation of whether it is going to better protect their client's interest and/or be a more cost effective way of documenting the settlement agreement reached between the parties. This is relatively untested ground and may be likely to be more useful particularly in relation to Section 124 when addressing payment of non-periodic expenses such as school fees when one party does not have at least 35% care of the child, but it is worth giving consideration.

36. Section 116 of the Act sets out the grounds for when a party is able to apply to the Court for a Child Support Departure Order, as follows:

> *(1) A liable parent or a carer entitled to child support may, in respect of an administrative assessment of child support for a child, apply to a court having jurisdiction under this Act for an order under this Division in relation to the child in the special circumstances of the case if:*
> *(b) both of the following apply:*
> *(i) the liable parent or carer entitled to child support is a party to an application pending in a court having jurisdiction under this Act;*
> *(ii) the court is satisfied that it would be in the interest of the liable parent and the carer entitled to child support for the court to consider whether an order should be made under this Division in relation to the child in the special circumstances of the case; or*
> *(c) in the case of a liable parent—the administrative assessment of child support payable by the liable parent for the child is made under subsection 66(1).*
> *Note 1: For the orders that a court may make under this Division see section118.*
> *Note 2: With a court's leave, a court may make an order under this Division in respect of a day that is more than 18 months earlier than the day on which the relevant application was made (see subsection 118(2B)). A person is taken to have applied under this section if leave is granted.*
> *Note 3: A court may make an order under this Division if the court sets aside a child support agreement under section 136.*
> *(2) An application may be made by the carer entitled to child support, or the liable parent, in relation to the child.*
> *(3) Subject to section 145 (Registrar may intervene in proceedings), the parties to the application are the liable parent and the carer entitled to child support.*

37. The wording of Section 116 in obtaining a Departure Order is similar to the wording of Section 123 (applicable to an Order sought under Section 124) of the Act in seeking and Order for child support in the form otherwise than periodic sums. The main difference being 'special circumstances' and 'just and equitable/otherwise proper'.

38. Section 124 of the Act provides:

> *Orders for provision of child support otherwise than in form of periodic amounts paid to carer entitled to child support*

(1) Where:

(a) a carer entitled to child support or a liable parent makes an application under paragraph 123(1)(a); and

(b) the court is satisfied that it would be:

(i) just and equitable as regards the child, the carer entitled to child support and the liable parent; and

(ii) otherwise proper;

to make an order that the liable parent provide child support for the child otherwise than in the form of periodic amounts paid to the carer entitled to child support;

the court may make the order.

(2) In determining the application, the court must have regard to:

(a) the administrative assessment in force in relation to the child, the carer entitled to child support and the liable parent; and

(aa) any determination in force under Part 6A (departure determinations) in relation to the child, the carer entitled to child support and the liable parent; and

(b) any order in force under Division 4 (departure orders) in relation to the child, the carer entitled to child support and the liable parent; and

(c) whether the carer entitled to child support is in receipt of an income tested pension, allowance or benefit or, if the carer entitled to child support is not in receipt of such a pension, allowance or benefit, whether the circumstances of the carer are such that, taking into account the effect of the order proposed to be made by the court, the carer would be unable to support himself or herself without an income tested pension, allowance or benefit.

(3) In determining whether it would be just and equitable as regards the child, the carer entitled to child support and the liable parent to make an order under subsection (1), the court must have regard to the matters mentioned in subsections 117(4), (6), (7), (7A) and (8).

(3A) In having regard to the earning capacity of a parent of the child under paragraph 117(4)(da), the court may determine that the parent's earning capacity is greater than is reflected in his or her income for the purposes of this Act only if the court is satisfied as mentioned in subsection 117(7B).

(4) In determining whether it would be otherwise proper to make an order under subsection(1), the court must have regard to the matters mentioned in subsection 117(5).

(5) Subsections (2), (3), (3A) and (4) do not limit the matters to which the court may have regard.

39. In summary, the grounds for a Departure Order pursuant to section 117 of the Act are as follows (noting they are essentially the same as the grounds for an Application to change an Assessment – Special Circumstances albeit in a different Order) (see Child Support – Special Circumstances Form CS1970):

- Reason 1. The costs of spending time with or communicating with the child(ren) are more than 5% of your adjusted taxable income amount.
- Reason 2. The child(ren) has special needs.
- Reason 3. There are extra costs in caring for, educating or training the child(ren) in the way that both parents intended.

- Reason 4. The child(ren) has income, an earning capacity, property and/or financial resources.
- Reason 5. You have provided money, goods or property for the benefit of the child(ren).
- Reason 6. The costs of childcare for the child(ren) under 12 years of age has changed.
- Reason 7. You have out of the ordinary, necessary expenses to support yourself.
- Reason 8A. The Assessment does not correctly reflect one or both parent's income, property and/or financial resources.
- Reason 8B. The Assessment does not correctly reflect one or both parent's earning capacity.
- Reason 9. You have a duty to support another person.
- Reason 10. You have a responsibility to support a resident child(ren).

40. It is beyond the scope of this paper to go into specifics of each of the grounds for a child support departure (either via the Agency or via the Court). Practitioners should however be aware of the grounds for departure and, if proceedings are on foot, being sure to consider whether a Departure Order should be sought by consent.

41. If the Departure/Child Support Order is sought by consent the Court will still need to be satisfied that:
    (i) A ground for departure exists (in the special circumstance of the case);
    (ii) The order/s sought are just and equitable and otherwise proper; and
    (iii) It is in the interest of the parent for the departure order to be made (in the case of Section 116).

42. Schedule 4 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Clause 37 and Clause 2) confirms that a Senior Judicial Registrar and Judicial Registrar have the power to make such Departure Orders/Orders other than in the form of periodic amounts. In the case of a Judicial Registrar that power is only if the Order is made:
    (i) In undefended proceedings; or
    (ii) With the consent of all the parties to the proceedings.

43. The cases of *Mack & Mack [2017]* and *Cleaves & Cleaves [2021]* re-affirm the position of the Court that proceedings regarding child support Orders should be the exception rather than the rule, given the role of the Child Support Agency and the framework within it, and that Court proceedings about child support are appropriate in limited circumstances. We have, however, seen that judicial officers may be (but not always) prepared to make Orders by Consent in relation to Child Support that may not otherwise be made if it were contested as in those cases.

46. A summary of recent child support cases is provided at **Appendix A** to this paper.

Tip 7: Other matters to be aware of if Child Support Orders are to be sought by consent

44. If Child Support Order/s are agreed between the parties then it is suggested that the appropriate course of action is for:

(i) One party to amend their Application/Response seeking the Child Support Departure Orders. You should ensure that you file an Affidavit annexing the current child support Assessment as part of this Application (It appears that the old Family Law Rules 4.18 requiring this, and other things, has been omitted from the new rules, this is likely to remain good practice, particularly until we see how these issues are dealt with under the new rules).

(ii) A copy of the proposed Child Support Orders to be served on the Child Support Registrar (and the other parties and parent/s eligible carer) to allow them the opportunity to be heard. See Rule 1.13 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*. Note that Section 145 of the Act allows the Registrar to intervene in the proceedings.

(iii) A letter to the Court addressing the basis for the Orders being sought and why they should be made having regard to the specific circumstances of your client/s.

45. If Court Orders are made about Child Support, chapter 4.3.3 of the Child Support Guide sets out what is to be done in terms of implementing the Orders, relevantly practitioners should be aware of the following considerations of the Registrar:

- *Implementation of court orders*

  When a court's decision under the child support legislation becomes final, the Registrar must take action that is necessary to amend the child support assessment to give effect to the order. However, the Registrar may, and generally will, give effect to a court order as soon as possible after being notified of the provisions of the court order, without waiting for the order to become final. If the order is changed following an appeal, the Registrar will amend the child support assessment again to reflect the terms of the later order.

  Note: An order made by consent of the parties is an order of a court, and not a child support agreement.

- *Orders reducing the assessment to nil*

  The Registrar cannot make a change of assessment decision that has the effect of reducing the annual rate of child support below the minimum annual rate of child support if the liable parent has less than regular care of the children (CSA Act section 98SA). However, a court may make such orders and the Registrar will give effect to them (CSA Act sections 118, 119, 66(8)(a)).

- *An order to reduce arrears under the CSA Act*

  A departure order or agreement may purport to discharge arrears where an assessment has been made under the CSA Act. The child support legislation does not expressly provide for arrears to be discharged, but the Registrar will give effect to these orders and agreements where possible by varying the rate of child support for a specified period. To avoid any uncertainty a departure order or agreement that seeks to discharge arrears should set the rate of child support for the period equal to the amount which has already been paid for that period. This will have the effect of removing the accrued child support arrears.

- *Orders the registrar cannot implement*

If the Registrar cannot give effect to an order, the parents, and if appropriate, their legal representatives, must be advised. They must also be advised that they have the right to object (4.1) under Part VII of the CSRC Act if they consider that the particulars of their assessment are incorrect because the Registrar did not give effect to the order.

- *End dates of orders to change the assessment*

  An order changing the assessment has effect until:
  - *a terminating event (2.10.3) occurs (CSA Act section 142) occurs*
  - *a further departure order is made, or*
  - *the end date or occurrence of an event specified in the order has occurred.*

- *Orders & notations*

  A court order made by consent under Part 7 of the CSA Act for a departure from an assessment can sometimes contain notations, notes or annotations to draw attention to actions the parents have taken or will take in the future. While a notation can indicate the parents' intentions, they are not orders and cannot be registered or vary an assessment. Such notations, however, may refer to the payment of expenses and support a proposition that a parent has agreed that they are separately or jointly responsible for certain payments. Therefore, they may form part of the evidence the Registrar considers in determining the parents' intentions for purposes such as non-agency payments or change of assessment matters.

Tip 8: It is still unclear how the new rules impact on Child Support matters

46. The old division 4.2.5 of the *Family Law Rules 2004* in relation to Child Support appear to have been removed in the new rules. The old rules made specific provision for the filing of a number of documents with applications relating to child support and the evidence to be produced.

47. The *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* appear to have a much lower standard of requirements in relation to service and evidentiary matters in relation to Child Support Matters. The relevant provision is Rule 1.13(4)(c):

> *(4) Each of the following persons is to be served with an application or appeal to which this rule applies:*
> *(a) each respondent;*
> *(b) a parent or eligible carer of the child in relation to whom the application is made;*
> *(c) the Child Support Registrar;*
> *(d) for appeals from the Administrative Appeals Tribunal to which this rule applies:*
> *(i) the Registrar of the Tribunal; and*
> *(ii) any other parties to the appeal".*

48. It is recommended that practitioners continue to meet the standards set out in the Family Law Rules (Rules 4.16 to 4.26) when making applications in relation to child support matters.

APPENDIX A

CHILD SUPPORT CASE SUMMARIES

Setting aside Binding Child Support Agreements

Porter & Porter and Ors (No. 2) [2020] FamCA 554
Date of Judgment: 25 June 2020
Facts:

In May 2011 the husband and wife separated.

In 2014 the husband was a professional and entrepreneur. The wife, who had a law degree, was not in paid employment and cared full time for three children, the eldest of which has special needs.

The parties entered into a binding child support agreement in 2014. The binding child support agreement obliged the husband to pay to the wife $700 per week for each of the three children (a total of $2,100 per week). Subject to a child not commencing full time employment or no longer living with the wife, this obligation continues until the child is 18 or completes high school (whichever last occurs). This weekly amount is not indexed. The binding child support agreement also required the husband to pay 100 per cent of private school fees for the children's schooling and preschool costs; 100 per cent of all costs of the children's school uniforms, compulsory school equipment, stationery and text books including but not limited to laptops and iPads; 100 per cent of school excursions, camps and school related events and 100 per cent of all costs related to the children's medical and dental treatment, including private health treatment and health insurance.

The husband relied upon the provisions of s 136(2)(d) of the Assessment Act which is in the following terms:

> The court may set aside the agreement in accordance with the application if the court is satisfied:
> ….
> in the case of a binding support agreement – that because of **exceptional circumstances,** relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made, the applicant or the child will suffer hardship if the agreement is not set aside.

It was the husband's case that exceptional circumstances relating to himself have arisen since the agreement was made and because of those exceptional circumstances, he will suffer hardship if the agreement is not set aside. The exceptional circumstances asserted by the husband were his bankruptcy; health issues and disciplinary difficulties he was having with his professional body.

From about April 2017 the husband commenced to default in his obligations under the orders and the binding child support agreement. The wife and the Child Support Agency brought enforcement action and intercepted income payable to the husband from Organisation DF in order to satisfy arrears. The husband then sought to set aside 2014 consent orders on the basis that they were made without jurisdiction, asserting that property did not exist at the date of the orders.

A final hearing was set to commence on 31 January 2018. From mid to late November 2017 an agreement was made that the husband would transfer all ownership and

control of the business operations conducted by various companies and trusts to Ms O and for the husband to become bankrupt on his own petition. On the first day of the scheduled final hearing, the husband somewhat dramatically, announced he had been made bankrupt on his own petition that morning.

The final hearing was about whether all orders and agreements should be set aside, and if so what, new orders should be made.

Orders: (amongst others, however relevant Order is below)

Pursuant to s 136(1) Child Support (Assessment) Act, the binding financial support agreement made 23 June 2014 be set aside.

All arrears under prior orders, agreements and third party debt notices are discharged to the date to which they stand paid.

Judgment:

When considering whether or not "exceptional circumstances" exist:

1. the whole circumstances have to be taken into account;'
2. it may be that one circumstance alone cannot be described as exceptional but the whole of the circumstances, when looked at cumulatively, might be described as exceptional (see Gallup & Gallup [2009] FMCAfam 839);
3. within a particular context whether something is exceptional is a matter of "fact and degree" (see Simpson & Hamlin (1984) FLC 91-576);
4. care must be taken to avoid placing any "gloss" on the word "exceptional" as used in legislation (see Garning & Director-General, Department of Communities, Child Safety and Disability Services & Anor [2013] FamCAFC 28);
5. the words "that have arisen since the agreement was made" in s 136(2)(d) of the Assessment Act, direct the court's attention to the circumstances that existed at the date the agreement was made and towards an inquiry as to what exceptional circumstances have arisen since the date of the agreement which would result in the applicant or the child suffering hardship if the agreement was not set aside.

The legislative intent of s 136(2)(d) of the Assessment Act has to be judged in the context of the whole of the Assessment Act. The Objects of the Assessment Act (section 4) provide, inter alia:

> (2) Particular objects of this Act include ensuring:
>
> > (a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support;
>
> …
>
> (3) It is the intention of the Parliament that this Act should be construed, to the greatest extent consistent with the attainment of its objects:
>
> > (a) to permit parents to make private arrangements for the financial support of their children…

His Honour concluded that the bar that the husband must satisfy is high.

His Honour noted that the debt which the husband incurs under the binding child support agreement which he was unable to pay during his bankruptcy, does not merge

in the bankruptcy but His Honour discharged it as part of the adjustment of financial obligations under the property settlement order.

His Honour was satisfied that at the current time the husband does not have the capacity to meet all his obligations under the binding child support agreement. His Honour concluded that during the period of the husband's bankruptcy, exceptional circumstances exist such that hardship will be occasioned to the husband if the agreement was not set aside during the period where his earning capacity is constrained by his current employment contract and the potential call on his earnings by the trustees. Accordingly, the binding child support agreement was set aside.

His Honour found that once the husband has been discharged from his bankruptcy, it is just and equitable that payment of child support should be returned to the levels that were previously required under the binding child support agreement which has been set aside, including payment of private school fees.

Martyn & Martyn [2020] FamCA 526
Date of Judgment: 1 July 2020
Facts:

The issue in respect to child support arises from the father's Initiating Application filed 13 January 2020, in which the father sought an order setting aside the binding child support agreement between the parties, dated 16 April 2012, under s 136 of the Child Support (Assessment) Act 1989 (Cth) ("the CSA Act").

On 1 August 2017, Judge Henderson, made the following Order:

> 4.Pending further order, the collection of Child Support pursuant to the Child Support Agreement entered into by the parties on 16 August 2012 is stayed on the basis the [father] pays to the [mother] $580.00 per month by way of Child Support.

The Application was made in circumstances where the father owns and operates a business that supplies products to international businesses that was impacted by the COVID-19 pandemic.

The father's Application was made in circumstances where his business and, consequently, his financial circumstances have been made significantly worse by the limitations on international commerce during the pandemic. '

In April 2020, the father informed the mother of his current circumstances. The father attested to being incapable of affording the child support payments in the sum of $580 per month, being the payments made in accordance with the Orders of Judge Henderson, and stated that he was only able to make payments of $120 per month.

Although the father has been making payments of $580 per month in accordance with the Orders of Judge Henderson made on 1 August 2017, the father's child support liability, assessed in accordance with the Agreement, remained at $1,550.75 per month (being the original amount of $1,350 as indexed in accordance with the agreement). This resulted in arrears accruing in the sum of $31,928.22 as of May 2020.

The father sought the following order in accordance with his Amended Initiating Application filed 13 January 2020:

1. That pursuant to s136 of the Child Support (Assessment) Act 1989, the Binding Child Support Agreement dated 16 April 2012 be set aside.

2. In his case outline document, the father also sought an order that "the outstanding liability in respect to the Binding Child Support Agreement be extinguished".

Orders:

That, pursuant to s 136(2)(d) of the Child Support (Assessment) Act 1989 (Cth), the binding child support agreement between Mr Martyn ("the father") and Ms Martyn ("the mother") dated 16 August 2012 be set aside as of the date of these Orders.

Judgment:

The power for this Court to set aside a binding child support agreement is conferred by s 136(2)(d) of the CSA Act.
The CSA Act sets out three limbs that the applicant, seeking an order providing for a binding child support agreement to be set aside, must satisfy:

1. That there are exceptional circumstances which relate to a party to the agreement or a child in respect of whom the agreement is made;
2. That those exceptional circumstances arose after the agreement was made; and
3. That the applicant or the child will suffer hardship if the agreement is not set aside.

The Meaning of "Exceptional Circumstances" And "Hardship"

The expression "exceptional circumstances" has frequently been interpreted in a number of different contexts. In ordinary usage the expression "exceptional" means "unusual or out of the ordinary" or "unusual or extraordinary". It has been said that:

> *We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that it is regularly, or routinely, or normally encountered.*

As Watts J has pointed out, the Full Court has applied that statement.

> 43. The expression "hardship" has also been frequently interpreted in *different contexts, primarily by reference to s 44(3) of the Family Law Act 1975 (Cth). The concept involves a "hardness of fate or circumstances; severe suffering or privation" or "a condition that bears hard upon one; severe toil, trial, oppression or need; to cause to suffer privations".*
> *(Citations omitted)*

His Honour concluded that had it not been for the outbreak of the COVID-19 pandemic, the Court would not have been satisfied, on the basis of the evidence presented, that the father's business was in such dire financial circumstances that it established the existence of exceptional circumstances for the purpose of s 136(2)(d) of the CSA Act. However, the father was not challenged that, as a result of the impact of the COVID-19 pandemic, the business activity of F Pty Ltd has reduced by approximately 90%. It can reasonably be inferred that, consequently, the income derived by the father from the business will be significantly reduced below the amount which he received in the last financial year, being the sum of $41,460. It is clear that the reduction of the father's income below that level will not enable him to pay child support in the sum of $1,550 per month as required by the Agreement.
His Honour was therefore satisfied that the outbreak of the COVID-19 pandemic is an exceptional circumstance and, further, His Honour was satisfied that the father would suffer hardship if the Agreement is not set aside.

The question becomes whether, in accordance with the decision of Austin J in Venson (No 2), rather than setting aside the Agreement, the Court should suspend the Agreement for a closed period of time.

His Honour declined to exercise a discretion to suspend rather than set aside the Agreement because there is an understandable absence of evidence as to the likely duration and impact of the COVID-19 pandemic on international commerce. In other words, it not possible to determine, on the basis of the evidence before the Court, whether it is likely that the father's business would recover to the extent that he is capable of satisfying the obligation imposed upon him pursuant to the Agreement after any period of suspension.

His Honour disagreed with the submission of learned counsel for the father that s 141 of the CSA Act empowers the Court to make an order extinguishing "the outstanding liability in respect to the Binding Child Support Agreement". The making of such an order would be to, effectively, retrospectively vary the Agreement to reduce it from the amount of $1,550.75 per month, which is currently payable to the sum of $580 specified in the Order of Judge Henderson, as she then was, made on 1 August 2017. That course of action is specifically precluded by s 80CA of the CSA Act which specifically provides that "a binding child support agreement must not be varied".

In the alternative, it was argued that s 141(1)(h) of the CSA Act empowers the Court to retrospectively set aside the Agreement. His Honour accepted that this power existed. However, on the facts of this case, to relieve the father of his obligation to pay arrears of child support pursuant to the Agreement would require the Court to make an order terminating the Agreement as of the date of the Orders made by Judge Henderson in respect of the Agreement. That date is a date considerably earlier than the date that the Court has determined that exceptional circumstances exist justifying the termination of the Agreement. Those circumstances, as explained, are as a result of the outbreak of the COVID-19 pandemic. In those circumstances, His Honour would be acting contrary to the direction of Parliament as set out in s 136(2)(d) of the CSA Act which provides that the precondition to making such an order setting aside a binding child support agreement is a finding that exceptional circumstances exist.

Accordingly, His Honour declined to make the second order sought by the father extinguishing his liability to pay the arrears of child support, pursuant to the Agreement, in the period prior to the date of these orders.

Fenrich & Safor [2021] FamCA 194
Date of Judgment: 4 February 2021
Facts:

The parents in this matter come to the Court with a dispute over child support arising from a child support agreement entered into on 27 November 2019.

The agreement provided at paragraph 3(1), that the agreement shall cease to operate in relation to the children:

> *In the event the Liable Parent's earning capacity, through no election, decision, conduct or misconduct whether by him or his agent causes his said earning capacity (excluding application of any taxation deduction, rental property or other offsetting losses or expenses), in the opinion of a Court has reduced below $179,000 per annum.*

The agreement provided, at paragraph 7 for periodic support to be paid by the father to the eligible parent, being the mother, at a rate of $1,400 per fortnight if a school fee discount had been obtained or $1,500 per fortnight if no school fee discount had been obtained. The payments are to be indexed annually by CPI.

Clause 10 of the agreement further provided that non-periodic support would be payable by the father to the mother, being 50% of extra-curricular expenses, music and the like; 100% of the private health insurance for the children and 50% of medical gap fees

Orders:

That the Binding Child Support Agreement entered into between the parties dated 27 November 2019 be set aside effective 1 July 2020.

Judgment:

His Honour was satisfied on the evidence, that when the parties genuinely and faithfully entered into the binding child support agreement on 27 November 2019 they did so with the intention of, again, removing themselves from the administrative processes under the Child Support (Assessment) Act 1989 (Cth) ("the Act").

His Honour acknowledged that the lack of child support that the father has been paying, which the mother says now is at a rate of $375 per fortnight whilst the father says is at $475 per fortnight, since, the mother says, March 2020, has created significant financial pressures upon the mother's household.

His Honour found that a global pandemic had affected the father's employment in Australia since sometime in March 2020 and that the father, as a longstanding K Company employee, has, to put it simply, had less work to do because there have been less demand for his skills.

The Father produced in the proceedings, copies of his payslips and his summary. His Honour accepted this evidence. His Honour acknowledged that there was no real way for the mother to challenge this evidence.

His Honour found that the basis for the agreement ceasing to have effect, set out in clause 3 of the agreement between the parties, has been satisfied.

Departure Orders

Mack & Mack [2017] FCCA 484
Date of Judgment: 27 March 2017
Facts:

The parties are the parents of two children, X, born on (omitted) 2007 and Y, born on (omitted) 2011.

The parents were married on (omitted) 2007, but they lived together from 2004 until separation in January 2016. Since separation, the children have been living with the mother. Between the date of separation and 4 July 2016, the children had been spending some time with the father.
This was an application for a departure order pursuant to s117 Child Support (Assessment) Act 1989 ("CSA Act"). It was said to be an application pursuant to s117(2)(c) of the CSA Act.

Orders: (amongst others)

> Dismiss the interim application for child support on the basis that the Court is not satisfied pursuant to section 116 of the *Child Support (Assessment) Act* that leave ought to be granted or a departure to be made.

Judgment:

His Honour noted that the jurisdiction to make an order under s117 departing from an administrative assessment of child support is a discretionary jurisdiction: *Hides & Hatton (1997) FLC 92-759.*

The requirement in s117 of the CSA Act is that where an application is made for a departure order, the Court must be satisfied that a ground for departure exists (s117(2)), that it is just and equitable (s117(4)) and otherwise proper (s117(5)) to make the departure order: *Gyselman & Gyselman (1992) FLC 92-279 at 79,064.* All three elements must be addressed and in that sense, the Court's discretion is highly structured.

Each of the grounds in s117(2) is prefaced by the words "*in the special circumstances of the case*". As such, the facts of the case must establish something which is special or out of the ordinary. His Honour noted that the intention of the legislature was that the Court will not interfere with the administrative formula in the ordinary run of cases: *Gyselman.*

It was submitted on behalf of the Applicant that the threshold set out in s117(2)(c) was met by the following:

1. That it was going to be an arduous task going through the agency and through the Court to settle matters when they could both be dealt with in the one forum;
2. That the income of the father is not reflected in the administrative assessment;
3. That the mother has the sole care of the children;
4. That it was in the interests of both parents for the children to be adequately maintained; and
5. That the children were not adequately maintained because the income which the Respondent's father's liability for child support was assessed upon is significantly lower than the income he has declared in his Financial Statement filed on 7 October 2016.

The evidence in the mother's case in support of her application for a departure order was extremely limited. It was submitted on behalf of the mother that she had not applied to the Child support agency to have that assessment reviewed or varied; that is she has not lodged any objection to the assessment, but rather she applied to the Court for a departure order because there were proceedings already on foot.

His Honour found that in respect of the departure order sought:

1. The Applicant had not taken any steps with the Child Support Agency to have the administrative assessment reviewed or varied;
2. The fact of proceedings being on foot does not take this matter into the '*special circumstances*' category, it might simply make it more convenient to the Applicant, this not being a relevant test;
3. The fact that the Respondent estimates his income at a different rate to the income on which he was assessed to pay child support does not ipso facto

mean that the administrative assessment resulted in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child;

4. Except for the matters contained in the parties' financial statements there was no other evidence going to the relevant matters pursuant to s117(4); and
5. There was no evidence going to the relevant matters pursuant to s117(5).

His Honour was not persuaded by the submissions made on behalf of the Applicant that any special circumstance had been established and that the Court ought to, in the exercise of its discretion, make an order departing from the administrative child support assessment. As such, the application for a departure order was dismissed.

Cleaves & Cleaves [2021] FamCA 571
Date of Judgment: 5 August 2021
Facts:

The Applicant Wife ('the wife") commenced these proceedings by filing an Initiating Application and an Amended Initiating Application on 15 April 2021, seeking both final and interim orders.

The wife sought final departure orders from the administrative assessment of child support by the Child Support Agency ("the Agency") for periodic and non-periodic child support payable by the Respondent Husband ("the husband") in respect of the parties' two children: X, born … 2012 aged 9 and Y, born … 2015 and aged 5 (together referred to as "the children"). She also sought interim orders for litigation funding and orders for child support departure orders, identical to those sought on a final basis.

The husband sought that the wife's interim orders for child support be dismissed.

There was a dispute about whether the Wife had complied with the Rules for Service and Notice on the Child Support Registrar, which were ultimately not an issue.

Orders: (amongst others, however relevant Order is below)
Paragraphs 5, 6 and 7 of the wife's Amended Initiating Application filed on 15 April 2021, and claims regarding child support sought therein, be dismissed.

Judgment:

His Honour noted that numerous decisions under the Assessment Act have held court proceedings regarding child support assessments should be the exception rather than the rule because the Assessment Act establishes a detailed administrative framework to deal with child support applications; the circumstances in which departure applications are to be heard by the Court are limited, given the desirability of such issues being determined in a manner characterised as being less adversarial, whilst, at the same time, remaining fair: *Yewen & Child Support Registrar (2014) 290 FLR 366; [2014] FCCA 2399 at [79].*

His Honour referred to the case of *Warwick & Cutler [2016] FamCA 934 [59]* McClelland J (as he then was) in this Court observed that since the enactment of the Tribunals Amalgamation Act 2015 (Cth), this Court no longer has jurisdiction to hear appeals on questions of law in respect to child support and this is a fact which supports the conclusion that court proceedings are appropriate in limited circumstances.

The husband argued that the wife had failed to establish jurisdiction under Division 4. He contended that the wife could not satisfy s 116(1)(b)(i) and (ii) of the Assessment Act.

The wife argued sub-paragraph s 116(1)(b)(i) is satisfied because the wife is a party to an application pending before this Court. The husband denied this. He argued that there is now no pending application in this Court because the wife's interim application for financial orders has been dealt with.

His Honour referred to the case of Saberton & Saberton [2013] FamCAFC 89at [16] and [18], where the Full Court held that the Court assumes jurisdiction pursuant to s 116(1)(b) of the Assessment Act at a time when there was a relevant application pending, until final orders are made in the child support proceedings, jurisdiction is not lost merely because the pending application has been finalised. By parity of reasoning where a pending interim application is finalised, jurisdiction is not automatically lost for that reason. His Honour found that the wife remained a party to her own existing and undetermined application for final relief, which includes relief both under s 79 and the Assessment Act.

Sub-paragraph s 116(1)(b)(ii) requires the court to be satisfied *"it would be in the interest of the liable parent and the carer entitled to child support for the court to consider whether an order should be made under this Division in relation to the child in the special circumstances of the case".*

His Honour noted that the expression "*in the special circumstances of the case"* is also found in s 117 of the Assessment Act.

His Honour noted that the usual authority cited for this expression is from the case of *In the marriage of Gyselman (1992) FLC 92- 279; (1991) 103 FLR 156; [1991] FamCA 93 at 79,064-5:*

> *"Whilst it is not possible to define with precision the meaning of that term, as a generality, it is intended to emphasize that the facts of the case must establish 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. In Savery's case (p 77,897), Kay J, adopting the view in Philippe and Philippe (1978) FLC 90-433 at p 77,202 in a different context, said that "special circumstances" were "facts peculiar to the particular case which set it apart from other cases".*

His Honour found that for the wife to establish jurisdiction, the Court must find at this interim stage the circumstances of the case are relevantly "special". In other words, the question of whether consideration by the Court is in the interest of both parents is informed by what elements are said to render the circumstances of the case special, or exceptional so as to take them outside the "ordinary run of cases" and the "rule" that child support should generally be dealt with by the administrative procedure to avoid injustice or hardship.

The wife made oral and written submissions as to why it would be in the interest of both the wife and the husband.

1. She submitted that the husband is currently assessed to pay and pays child support for the two children in total monthly sum of $901.17 (which equates to $207.96 per week or a little over $100 per child).
2. She argued that this existing child support assessment is patently inadequate in light of her recurrent expenses and limited access to financial resources.
3. She argued the evidence showed the husband on the other hand has access to vast financial resources, including funds in his own and family trust accounts amounting to some millions of dollars.
4. She acknowledged the husband pays the children's school fees and health insurance.

5. The wife argued she should not be required to embark on the process of objection within the administrative processes of the Agency, which would not see the issue of child support resolved for many weeks and put her financial capacity for the children at risk. She also submitted in writing that it is in the interests of both, for the Court to consider the wife's application because they have both put on evidence on the application and it is preferable for the Court to determine the application rather than the parties be deferred to an administrative determination and likely lengthy delay.

The husband argued that it was contrary to his interests for the Court to consider whether a departure order should be made for the following reasons

1. The wife, with the benefit of legal advice, has chosen not to make any application within the administrative procedure for review or objection concerning child support.
2. He argued a fresh assessment would be issued in August 2021.
3. The husband submitted, which His Honour accepted, that the wife gave no evidence as to why she has chosen not to follow the administrative processes, which, according to the authorities, are preferred.
4. In oral argument, the husband pointed out that the wife sought on a final basis the same relief for child as she seeks on an interim basis.
5. He argued the Court processes should not be prosecuted at an interim stage where the administrative process remains available.
6. Secondly, there is no evidence the Child Support Registrar has refused a review under Part 6A of the Assessment Act because the circumstances are too complex: ss 98E & 98R.
7. Thirdly, without the basis for the existing assessment in evidence, it is not possible for the Court to take account of the factual elements of the administrative assessment in forming a view as to whether it is in the interests of both parents for the Court to consider making a departure order.
8. Fourthly, the husband has made his opposition to the Court process unequivocally clear on the basis the administrative process should be followed.
9. Fifthly, part of the departure order seeks a non-periodic order in respect of private school fees, but these are not in arrears, and the husband states he will continue to pay these fees from earnings or capital.

<u>Conclusion:</u>

His Honour preferred the arguments of the husband. His Honour found that the wife's contention concerning the interest of both parties seemed in truth to go no further than submitting that because the administrative processes for objection within the Agency would take time and because both parties had prepared evidence and arguments in relation to her application for a Court ordered departure, it was in the interest of both for the Court to consider whether a departure order should be made. His Honour noted that the fact that the administrative process may take time is inherent in those processes. His Honour stated that delay in those processes of itself does not demonstrate that it is in the interest of both parties for the Court to consider making a departure order.

His Honour established that parties should not, and should not be encouraged to, make Court applications because they want to escape the administrative process and achieve what they perceive may be a quicker outcome in Court.

His Honour held that there was nothing in the evidence which convinced him for the purposes of an interim hearing that the circumstances of this case were relevantly special. The factors relied upon by the husband to argue it was not in his interest to

consider making a departure order also demonstrate why the case falls within the ordinary run of cases. His Honour noted that disparity of wealth or access to financial resources does not of itself amount to a special circumstance: *Seymour* at [119].

His Honour found that there were no special circumstances in the matter that give rise to the Court being satisfied that it is in the interests of both the husband and wife for the Court to entertain the present departure application nor would they suffer undue hardship or injustice if they were left to pursue the administrative review process.

His Honour was unable to make a finding that it would be just and equitable or otherwise proper to make a departure order under Division 4, especially in light of the likely fresh assessment in August 2021. In all of the circumstances and concomitant with the objects of the Assessment Act, it was appropriate that the administrative procedure follow its statutory pathway, in particular, in the context of this interim application where the evidence of the parties and their respective financial circumstances cannot be tested by cross examination.

His Honour advised that his conclusions in this judgment should not be taken as denying there is any merit in the wife's claims to child support. However, His Honour held that insufficient reason has been put forward by the wife at present and at this early stage of the proceedings to persuade me why the administrative process, including reviews, should not determine what child support is appropriate. If this takes time, or more time than the wife or husband would like, that of itself does not justify using the Court for essentially the same purpose. Moreover, a fresh assessment is due to issue within a short time in any event. His Honour dismissed the wife's Application in a case.

BFA a Binding Child Support Agreement?

Piper & Talbot & Anor [2021] FCCA 511
Date of Judgment: 18 March 2021
Facts:

The parties made the financial agreement in April 2015 following the breakdown of their relationship, which the mother registered with the Child Support Registrar in May 2018.

Order:

The section 90UD Financial Agreement entered into between the Appellant and the First Respondent dated 14 April 2016 does not constitute a Binding Child Support Agreement pursuant to the *Child Support (Assessment) Act 1989 (Cth).*

Judgment:

The court said (from [53]):

> "…s84(5) of the [Child Support] *Assessment Act* states that the same document can be both a Child Support Agreement and a parenting plan, a Child Support Agreement and a Maintenance Agreement or Financial Agreement under the *Family Law Act* or a Child Support Agreement and a Part VIII AB Financial Agreement. Given my finding that the principles of law and equity are applicable to Binding Child Support Agreements, it will be necessary for the parties to have intended that the component of their joint document which relates to child support be a Binding Child Support Agreement… (…)
> [165] … [I]t was incumbent upon the Tribunal … to look at the agreement as a whole, including the recitals, to satisfy itself that the legal advice given not only related to … Part VIII AB of the *Family Law Act*, but also related to … Part 6 of the Assessment Act as the parties' rights and the advantages and disadvantages of the agreement are clearly very different depending upon which agreement the advice is being given for.
> [166] Whilst there is no statutory requirement … that a binding child support agreement specifically state that it is made pursuant to Part 6 of the *Assessment Act* … the Tribunal had an obligation … to read the agreement as a whole to determine if on its face the Tribunal could be satisfied the advice given was the effects of the document as both a financial agreement under the Family Law Act and a binding child support agreement under the *Assessment Act*."

Bankruptcy

Barre & Barre [2021] FamCA 101
Date of Judgment: 8 March 2021
Facts:

The parties were the Applicant Wife, Ms Barre, born in 1974 ("the wife"), and the Respondent Husband, Mr Barre, born in 1972 ("the husband").

The parties have two children together, X born in 2007, years of age ("X") and Y born in 2012, nine years of age ("Y") ("the children"). The husband became bankrupt at some time.

This case involved the interpretation of a Binding Financial Agreement. One of the many issues in dispute in this case was whether any type of Child Support Departure

order should be made against the husband while he is bankrupt and payment of arrears.

The Court ultimately dismissed the application for child support departure orders and did not deal with the arrears which the Court ultimately finding the arrears where a matter for the Child Support Agency and that a departure was an exceptions rather than the rule and there was no evidence about why a departure would be in the best interest of the bankrupted husband and therefore jurisdiction had not been established.