

Sharpen your child support practice

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CHILD SUPPORT

Does it matter?



"18 years, 18 years, she got one of your kids, got you for 18 years. I know somebody payin' child support for one of his kids, his baby mama car and crib is bigger than his..."

Former presidential candidate formally known as Kanye West

- Mr Ye', perhaps the parents should have considered a Binding Child Support Agreement?



TOPICS FOR DISCUSSION

Binding Child Support Agreements – tips to make sure they stick



SECTION 85 & 86

Section 85 & 86 impact and drafting considerations.
Use of Recitals.

Definitions.
Considerations for operative provisions.
Termination considerations.
Advice considerations.

DRAFTING/ADVICE TIPS



Departure Orders by consent
Recent Case Summaries

CASE SUMMARIES



LIMITED CHILD SUPPORT AGREEMENTS

- As the name suggests, these 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.
- It can be terminated after three years (by one party making application).
- It does not require legal advice.

BINDING CHILD SUPPORT AGREEMENTS

- Each party must have legal advice prior to entering into the agreement and the agreement must contain a Certificate of Independent Legal Advice.
- The agreement must be made in writing and signed by both parties.
- There does not generally have to be a child support assessment already in place but it is of no concern if there is an assessment in place. The exception is where an Agreement provides for 'lump sum' child support in which case there must be an assessment in place.
- 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 is where an Agreement that provides for 'lump sum' in which case the lump sum must be more than the annual rate of assessment.
- They can be enforced either via the Child Support Agency (for periodic sums) or the Court (for periodic and/or non-periodic sums).

BEWARE

SECTION 85 & 86

Child Support (Assessment) Act 1989 ('the Act')

- Possible death to Binding Child Support Agreements?
- Prior to July 2018, it was common for Binding Child Support Agreements to refer to both parties as a 'payer' and 'payee' in Binding Child Support Agreements
- Post July 2018, Binding Child Support Agreements can't and shouldn't provide child support to be payable to a carer with whom the children are spending less than 35% of the time.



SECTION 85 & 86 OF THE ACT

(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...

- Section 85 is a problem for many Binding Child Support Agreements.
- Section 86 provides for the Agreement to be suspended and thereafter terminated if a carer is no longer an eligible carer after 28 days.



WHAT DO SECTIONS 85 & 86 OF THE ACT MEAN?

- If the person entitled to child support is no longer an eligible carer (i.e. 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 and terminated if that is not rectified.
- This applies to both periodic and non-periodic child support.
- The suspension period of 28 days can be extended up to 26 weeks if this is provided for within the Agreement.
- If you don't comply with those Sections than a portion or all of your Binding Child Support Agreement won't be binding and/or the Child Support Agency will refuse to register your Agreement.

WHO IS AN ELIGIBLE CARER?

Follow these four sections.

Section 5:

"eligible carer" has the meaning given by section 7B".

Section 7B:

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

Section 5:

"shared care" has the meaning given by subsection (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%.

35% care equates to 5 nights per fortnight or at least 128 nights over the course of a year. This means that we encounter Section 85 & 86 problems on a regular basis.

CASE SCENARIO A

- 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 Section 85 & 86.

This arrangement would be impacted by Section 85 & 86 if it were to provide for the Mother to pay child support (in any form).



Disclaimer – Happier Times

I do not know the parenting or child support arrangements for Ms Kardashian and Mr Ye.

CASE SCENARIO B

- 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. 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.



Disclaimer – Happier Times

I do not know the parenting or child support arrangements for Mr Pitt or Ms Jolie.

HOW DO WE GET AROUND SECTION 85 & 86?

We can't – you cannot contract out of the provisions of the legislation. We can reflect the intentions of the parents in the Agreement.

The best drafting weapon that we have is Recitals. Suggestions to include in your recitals:

- 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 that it has been given consideration in the Agreement, but notwithstanding this it is their 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...."

OTHER OPTIONS FOR DEALING WITH SECTION 85 & 86

- A reduction of the periodic sum within the Agreement if the other parent is not making a contribution to the costs they are to contribute towards as set out in the Recitals.
- Recognition of the option to extend the suspension period up to 26 weeks, even if you don't want to utilise it (see example in the paper) as to proposed drafting of utilising the suspension period or not.
- Consider including 'role swapping' provisions within the Agreement (swapping child support obligations if the care arrangements change).
- Consider (if both have at least 35% care) 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).
- Consider whether a Child Support Departure Order or some other form of documentation of the child support arrangements might be more appropriate.

DEFINITIONS

- While definitions may seem an obvious way to improve Binding Child Support Agreements, they are essential to assist in reducing the scope for disputes.
- 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 matter or a very specific scope. The matters that are to be defined are not exhaustive but might include as examples:



- ✓ Education costs.
- ✓ Medical expenses.
- ✓ Private Health.
- ✓ Mobile phone costs.
- ✓ Clothing.
- ✓ Tutoring.
- ✓ Extra-curricular and activity costs and equipment.

EDUCATION EXPENSES DEFINITIONS

Broad -

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.

More Narrow -

- All tuition fees, device fees and levies as invoiced by the school;
- All requisite school uniform costs for mandatory/non-elective uniform requirements including, academic uniform, sports uniform, school shoes and school bags;
- All requisite text book and stationery costs for mandatory/non-elective school text book and stationery requirements....

Strict -

- 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....
- 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...

OPERATIVE PROVISIONS

What to include

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 in advance?
- Is there to be an aspect of lump sum child support payable as part of the Agreement? 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?

TERMINATION

WHEN DOES IT END?

A child support terminating event happens pursuant to Section 12 of the Act in a range of circumstances. This includes if:

- The child, dies, ceases to be an eligible child because the child is in the care of a person under a child welfare law, turns 18, is adopted, becomes a member of a couple (and a range of other factors)
- Either parent dies.
- The liable parent ceases to be a resident of Australia (and is not subject to an international maintenance arrangement).
- If the parents reconcile and become a member of the same couple for a period of 6 months or more.
- On the day a Binding Child support Agreement accepted by the Registrar specifies.



OTHER SUGGESTED TERMINATION CONSIDERATIONS



- We should ensure that we deal with the terminating provisions required in Section 12 of the Act in any proposed Binding Child Support Agreement.
- If the care arrangements change – but not to the extent that it is caught by Section 86 of the Act. You may wish to provide for the Agreement to terminate if the current care arrangements were to be varied for period of time.
- If the income of one or both of the parties increases and/or decreases.
- The Agreement should contemplate what evidence needs to be produced to evidence the change of income or change of circumstances. Documents from accountants, payslips, statement from third parties?

BCSA - ADVICE

Section 80C of the Act provides:

Making binding child support agreements

(2) An agreement is a binding child support agreement if:

(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

This creates a high onus on us as practitioners prior to signing Agreements to ensure that we provide the requisite advice, which is similar to that of a Financial Agreement.

BCSA – ADVICE CONTINUED

- 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.
- Set out how child support would be calculated if there was no Binding Child Support Agreement (i.e. pursuant to an assessment).
- 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 online estimator is a useful resource. The link to the estimator is provided within the paper.
- Provide a number of scenarios utilising the child support estimator as a guide to what the child support obligations might be adopting different incomes and care arrangements, whilst noting that it is only a guide, not a comprehensive Assessment.
- Include a summary of the obligations of the parent to the 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.

BCSA – ADVICE CONTINUED

Your advice needs to address:

- The care arrangements for the children.
- The income of each parent.
- The matters considered as part of an Assessment.
- The details of any likely changes to the Assessment if one is already in place.
- 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.
- Estimates of potential child support payable/receivable.
- Whether a Child Support Order, a Limited Child Support Agreement or Parenting Plan setting out Child Support arrangements might be more appropriate.
- A summary of the obligations of each party pursuant to the Agreement.
- The possible terminating provisions of the Agreement and the impact of Sections 85 & 86 of the Act.
- The grounds to set aside a Binding Child Support Agreement- having regard to Section 136 of the Act.

DEPARTURE ORDERS BY CONSENT

- Child Support Departure Orders are still relatively uncommon in Queensland, particularly when sought by consent.
- As a result of Section 85 and 86 of the Act, we as practitioners may now need to give consideration to whether Orders should be sought pursuant to Section 117, Section 118 and/or 124 of the Act when proceedings are already on foot between the parties instead of documenting the arrangements via a Binding Child Support Agreement.
- Advice needs to be provided before signing a Binding Child Support Agreement whether the same or better outcome could be more readily achieved from Orders in relation to child support. Is an Order going to better protect their interest or be a more cost effective way of documenting the settlement agreement reached between them?
- This is 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.
- The provisions of Section 116 (Departure Order) and Section 124 are similar in that a Court needs to be satisfied the Order is appropriate. i.e. it won't simply be approved because it is sought by Consent.

SECTION 116

GROUND FOR A DEPARTURE ORDER

Section 116 sets out the grounds for when a party is able to apply to the Court for a Child Support Departure Order:

(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

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).

SECTION 124

ORDER FOR CHILD SUPPORT OTHER THAN PERIODIC SUPPORT

Section 124 sets out the grounds the Court can make an Order for child support other than periodic 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.

DEPARTURE ORDER

The Court will still need to be satisfied that the grounds for a departure Order exist to make such an Order. See Section 117 for those grounds, summarised as follows:

Reason 1. Costs of spending time/communicating with the child(ren) more than 5% of your adjusted taxable income.

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 child care 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.

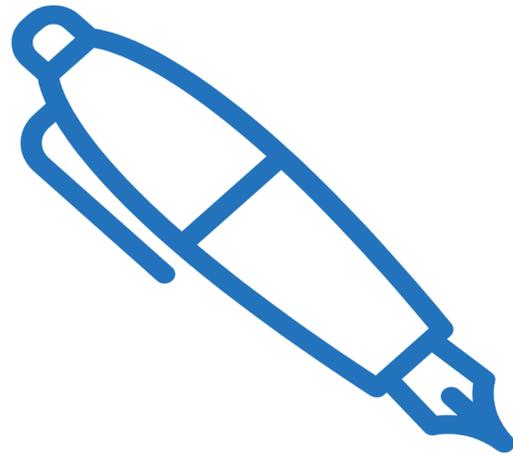
Reason 8B. The Assessment does not correctly reflect one or both parent's earning capacity.

Reason 9. You have a duty to support another person.

Reason 10. You have a responsibility to support a resident child(ren).

REGISTRARS...

Have the power to make your Consent Orders.



Schedule 4 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 confirms that a Senior Judicial Registrar and Judicial Registrar have the power to make Departure Orders/Orders other than in the form of periodic amounts by Consent.

APPLICABLE RULES The old Family Law rules are gone.

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

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;

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.

OBTAINING A CHILD SUPPORT ORDER BY CONSENT

If the Child Support Orders are agreed between the parties, while proceedings are on foot, then it is suggested that the appropriate course of action is for:

- 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 (even though 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 are dealt with under the new rules).
- A copy of the proposed 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 the Section 145 of the Act allows the Registrar to intervene in the proceedings.
- 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.

OBTAINING A CHILD SUPPORT ORDER BY CONSENT

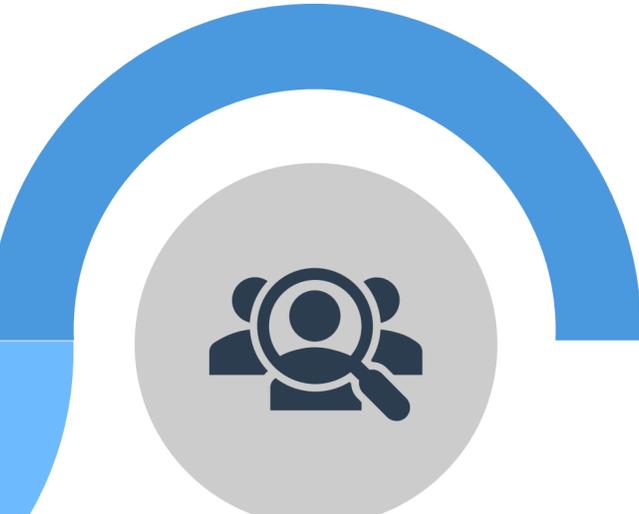
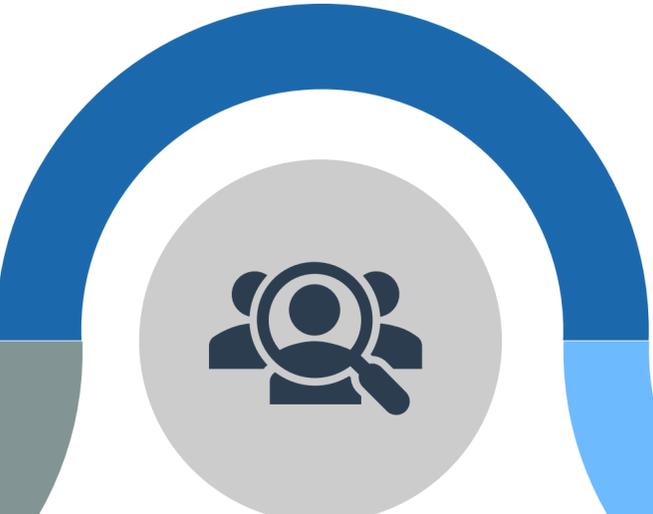
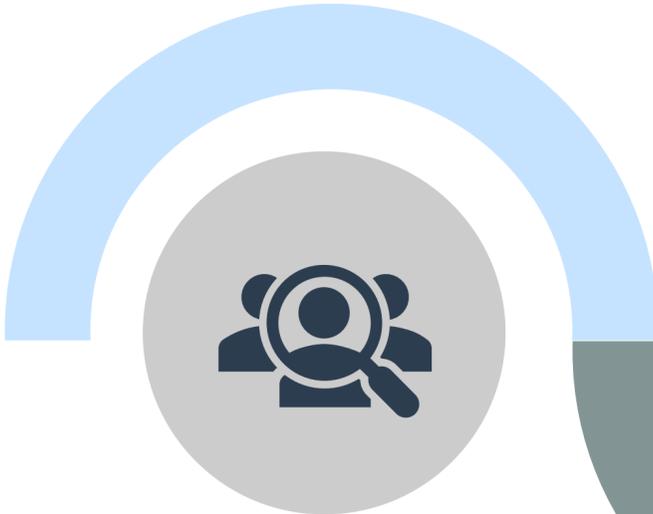
Continued -

- Included in the Case Summaries in the paper are the Cases of Mack & Mack [2017] and Cleaves & Cleaves [2021].
- Those cases re-affirm the position that Court proceedings regarding child support Assessments 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.
- There is always the risk if an application is made for Orders about child support, then it will not be accepted.
- We have seen that judicial officers may be (but are 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.

RECENT CASES

**Porter & Porter and Ors
(No. 2) [2020]**

Mack & Mack [2017]



Martyn & Martyn [2020]

Fenrich & Safor [2021]

Cleaves & Cleaves [2021]

Porter & Porter and Ors (No. 2) [2020] - Setting Aside Binding Child Support Agreement

It was the husband's case that exceptional circumstances had arisen and the Agreement should be set aside. The exceptional circumstances asserted by the husband were his bankruptcy; health issues and disciplinary difficulties he was having with his professional body.

Orders were made setting aside the Binding Child Support Agreement.

When considering whether or not "exceptional circumstances" exist:

- the whole circumstances have to be taken into account;
- 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);
- within a particular context whether something is exceptional is a matter of "fact and degree" (see *Simpson & Hamlin* (1984) FLC 91-576);
- 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);
- 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.

Martyn & Martyn [2020] FamCA 526 – Setting Aside Binding Child Support Agreement

- This was an Application to set aside a Binding Child Support Agreement as a result of the 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.
- The Agreement was set aside, but unlike Porters case the arrears were not discharged.
- 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.

Fenrich & Safor [2021] FamCA 194 – Setting Aside Binding Child Support Agreement

- 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 Father's income reduced below the required sum and there was a dispute about whether or not it should be set aside.
- The Agreement was set aside by the Court.
- 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.

Mack & Mack [2017] FCCA 484 – Departure Orders

This was a Departure Application that was dismissed by the Court.

The Court said 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 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.

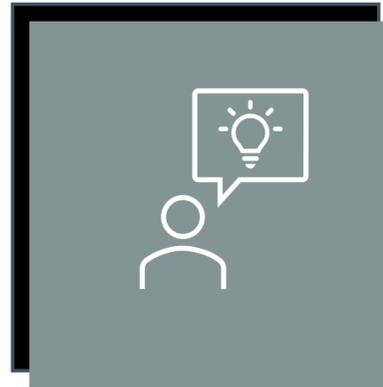
His Honour found that in respect of the departure order sought:

- The Applicant had not taken any steps with the Child Support Agency to have the administrative assessment reviewed or varied;
- 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;
- 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;
- 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
- There was no evidence going to the relevant matters pursuant to s117(5).

Cleaves & Cleaves [2021] FamCA 571 – Departure Orders

- The wife sought final and interim departure orders from the administrative assessment of child support by the Child Support Agency (“the Agency”) for periodic and non-periodic child support.
- The interim child support orders were dismissed.
- 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.
- 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.

RESOURCES



Child Support Legal Helpline :1800 004 351

Child Support guide <https://guides.dss.gov.au/child-support-guide>

Child Support estimator <https://processing.csa.gov.au/estimator/About.aspx>.

THANK YOU