

QLS & FLPA FAMILY LAW SYMPOSIUM

2016

“Child support: Updates and tips on navigating the maze”

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This session is to examine “recent updates to legislation” including the practical effect of recent changes for practitioners. It is to provide practical tips to assist clients navigating through the Department of Human Services (Child Support) maze including:

- departure orders – process and procedure
- problems with the formula – disparities between real income and assessed income, income capacity vs income
- approaches to private school fees and other non-periodic payments

I am requested to provide ideas on the advice practitioners should provide to clients about the review process (I intend to do so orally during the presentation of this paper)..

In order to fulfil the brief for my paper, I feel it is necessary to examine the main components of the Child Support legislation to understand how applications are made, how the assessment is created, the alternatives to an assessment – i.e., private arrangements, how to change or challenge an assessment (departures – which will include the issue of school fees and other payments), obtaining credit for non-agency payments, and the process after a decision on a departure application.

The child support legislation is designed to ensure that parents meet their obligations to provide financially for their children.

To that end the legislation starts with clarifying its object, that is, that the parental duty to support has priority over all other commitments of the parent except for the parent’s need to support himself or herself and any other child the parent has a duty to maintain. The duty is NOT affected by any duty of any other person to maintain the child NOR the entitlement of the child or any other person to an income tested pension or allowance.

From a moral point of view it is hard to argue against that object – although, in the real world, when money is taken from clients by an entity they see as akin to the tax office, they see the payments as a tax rather than maintenance for their children.

Child support is probably one of the matters most complained about to politicians. Although it could be seen as a pure financial or mathematical issue, in fact, it is a highly emotive issue and those emotions often cloud what, in the clear light of logical thinking, is a no brainer. If it is your child, you support him or her to the best of your ability.

There are two (2) Acts in the child support legislation which need to be examined – the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1989*. As their names suggest, the first deals with the assessment of child support through the administrative assessment process – with the possibility of departure from the assessment, objections to assessments and departure decisions, and appeals from decisions, as well as private arrangements embodied in child support agreements. The second deals with how the amount which ought to be paid is to be collected and who it is to be paid to.

ELIGIBLE CHILDREN

Section 18 of the *Child Support (Assessment) Act 1989* (“the Assessment Act”) helpfully says it applies to ‘eligible children’. Section 5 is the definitions section and we find the definition says:

“eligible child ” has the meaning given by Part 3 (Children who may be covered by Act).”

An analysis of Part 3 reveals that the Act applies to children who were born on or after 1 October 1989, or a child born before the commencement day (1 October 1989) whose parents separate after 1 October 1989, or has a brother or sister of the same parents born after the commencement day.

Provided that ‘eligible child’ is under 18 years of age and is not a member of a couple AND is either present in Australia on the day the application for child support is made AND/OR is an Australian citizen or is ordinarily resident in Australia on the day the application is made then, with some exceptions set out in section 24(2) an assessment can be made in respect of that child.

APPLICANT FOR ASSESSMENT

A parent can apply for an assessment if:

- the applicant applies for both parents to be assessed in respect of the costs of the child;
- the applicant is not living with the other parent as his or her partner on a genuine domestic basis (whether or not legally married to the other parent); and
- the applicant complies with the joint care requirements, if applicable¹,
- if the child is being cared for under a child welfare law then the carer can apply if he/she is a relative of the child;
- if either parent of the child is not a resident of Australia on the day on

¹ If two or more persons have joint care of the child then only one of those persons can apply.

If the joint carers are one of the parents and another person then the applicant must be the parent.

which the application is made, the Registrar is satisfied child support is reasonably likely to be payable in the case of a non-resident payer and the applicant parent is not a resident of a reciprocating jurisdiction

A non-parent carer can apply for an assessment if the applicant is an eligible carer for the child and

- applies for both parents to be assessed in respect of the costs of the child, or
- if one parent of the child is neither a resident of Australia nor a resident of a reciprocating jurisdiction, the applicant applies for the other parent to be assessed in respect of the costs of the child.
- if the Registrar is satisfied that there are special circumstances and the applicant applies for the other parent to be assessed in respect of the costs of the child, or
- if one parent of the child is dead and the applicant applies for the other parent to be assessed in respect of the costs of the child;

and

- the applicant is not living with either parent as the partner of that parent on a genuine domestic basis (whether or not legally married to that parent); and the applicant complies with the joint care requirements, if applicable,
- if the child is being cared for under a child welfare law then the carer can apply if he/she is a relative of the child;
- if either parent of the child is not a resident of Australia on the day on which the application is made, the Registrar is satisfied child support is reasonably likely to be payable in the case of a non-resident payer and the applicant parent is not a resident of a reciprocating jurisdiction

THE APPLICATION/PARENTAGE

Application is made by completing a form prescribed by the Registrar and application can be made for an assessment for 2 or more children on the one form – even if the children are from different child support case – e.g. if they are of different parents.

In order to be accepted, the Registrar must be satisfied of the following:

1. That the applicant is a parent of the child because the person is or was married to the other party and the child was born (either to the applicant or the other person) during the marriage; or
2. The person's name is recorded on the birth records; or
3. A court has made a finding of parentage or a finding which could not have been made unless the person was a parent – and the finding has not been altered, set aside or reversed.
4. The person has executed an instrument acknowledging he or she is a parent of the child under a Commonwealth, State, Territory or prescribed overseas jurisdiction law and that document has not been annulled or set aside
5. The person is a male and the child was born within 44 weeks after a purported marriage between the parties was annulled

6. If a married but separated couple resume cohabitation for up to three months and then separate again and a child is born within 44 weeks of the separation but after the dissolution of the marriage.
7. The person is a male and the child was born to a woman who cohabited with the man at any time during the period beginning 44 weeks and ending 20 weeks before the birth but no marriage between the man and the woman subsisted during any part of the period of cohabitation
8. The child is a child of the person under either section 60H or section 60HA of the *Family Law Act 1975* (i.e. is a child conceived through the use of artificial conception or is a child of a de facto couple)

A party can apply to the Court under section 107 of the Assessment Act for a declaration that a person should not be assessed in respect of the costs of a child on the grounds the person is not a parent of the child unless the Court has already declared under section 106A that the person should be so assessed because the person is a parent of the child. On occasion the applicant is made after the assessment has been in force for some time – usually because a person finds out they are not the parent – and that can cause some difficulties as a result of payments having been made and the payer seeking repayment²

OVERSEAS APPLICANT/RECIPROCATING JURISDICTIONS

A person living overseas can make an application for an assessment but only if in a reciprocating jurisdiction – in which case the party can give it to the overseas authority which in turn must give the application to the Registrar.; or the overseas authority itself can make the application; or the party can make the application directly. A resident in a reciprocating jurisdiction will not be able to obtain an assessment if the Registrar has not determined under section 29A that child support is reasonably likely to be payable by the parent; or the application is made under section 25A by a non-parent carer and the non-parent carer is a resident of a reciprocating jurisdiction.

If either the liable parent or the carer is a resident of a reciprocating jurisdiction then if there is already an existing registered maintenance liability that relates to the child, the liable parent and the carer, then the Registrar may refuse the application.

ACCEPTANCE

If the Registrar determines to accept an application for an assessment of child support then notice is given to the applicant and any person who is to be assessed in respect of the costs of the child. Then the Registrar must assess:

- both parents' liability if the application is by a parent
 - assess both parents (or one if applicable) when the application is made by a carer
- and
- assess the annual rate of child support payable by a parent for the child support period commencing on the day the application is made – except

² See *Child Support Registrar and Farley* (2011) FamCAFC

if the applicant is resident in a reciprocating jurisdiction in which case the application will commence from when all prior requirements have been completed.

Child support then becomes payable until the day before a child support terminating event occurs in relation to the child, the carer or the liable parent or all three of them.

If new tax figures become available for an earlier child support period then the Registrar is obliged to reassess child support for the earlier period unless the reassessment is not going to affect the amount of child support payable.

THE FORMULA

The Department of Human Services sets out the process of calculating child support as follows:

Basic formula - 8 steps

1. Calculate each parent's income. This is the parent's adjusted taxable income minus a self support amount and any relevant dependent allowance. A parent may estimate their income.
2. Add both parent's incomes together to get a combined child support income
3. Calculate the income percentage for each parent by dividing each parent's income by the combined total income
4. Calculate each parent's percentage of care
5. Work out each parent's cost percentage using the *care and cost table*
6. Subtract the cost percentage from the income percentage for each parent – resulting in the child support percentage. If negative then the parent will be assessed to receive child support. If positive then the parent will be assessed to pay child support.
7. Work out the costs for each child based on the parents' combined total income using the "*Costs of Children*" table
8. Calculate the total child support payable by multiplying the positive child support percentage by the costs of the child.

The above is covered in Part 5, Divisions 2 to 7A of the Assessment Act.

In fact, there are 6 formulas. It is not necessary to examine them but they apply in different situations .

Formula 1: using incomes of both parents in single child support case with no non-parent carer

Formula 2: using incomes of both parents in single child support case with a non-parent carer

Formula 3: using incomes of both parents in multiple child support cases with no non-parent carer

Formula 4: using incomes of both parents in multiple child support cases with a non-parent carer

Formula 5: using income of one parent where other parent not a resident of Australia or in special circumstances

Formula 6: using income of one parent where other parent deceased

Within the formulas is the concept of a parent's "adjusted taxable income" which is established by adding:

- (a) the parent's taxable income for the last relevant year of income in relation to the child support period;
- (b) the parent's reportable fringe benefits total for that year of income;
- (c) the parent's target foreign income for that year of income
- (d) the parent's total net investment loss for that year of income
- (e) the total of the tax free pensions or benefits received by that parent in that year of income;
- (f) the parent's reportable superannuation contributions for that year of income.

The fourth element moves to a calculation of each parent's percentage of care of the child. If a person has a regular pattern of care, ordinarily the percentage of care will be determined to comply with that pattern of care.

If a person does not have a regular pattern of care then the Registrar has to determine the percentage of care.

The Registrar takes into account **the number of nights** the Registrar is satisfied the child is in the care of a person – noting the child cannot be in the care of more than one person at the same time.

If a *family assistance care determination* has been made then that determination sets the responsible person's percentage of care for the child

Cost percentages are set out in the 'Care and Cost' table in section 55C:

Cost percentages		
Item	Column 1 Percentage of care	Column 2 Cost percentage
1	0 to less than 14%	Nil
2	14% to less than 35%	24%
3	35% to less than 48%	25% plus 2% for each percentage point over 35%
4	48% to 52%	50%
5	more than 52% to 65%	51% plus 2% for each percentage point over 53%
6	more than 65% to 86%	76%
7	more than 86% to 100%	100%

The child support percentage is calculated by deducting the parent's cost percentage from the parent's income percentage. If the result is negative then the child support percentage is to be taken as nil.

The 'Costs of Children' is found in a table published annually in the Gazette each year for the next child support year. It is then reproduced in Schedule 1 Clause 1 of the Assessment Act.

Costs of the Children Table						
Parents' combined child support income or parent's child support income						
Fraction of MTAW	0 to 0.5	0.5 to 1	1 to 1.5	1.5 to 2	2 to 2.5	0
Child support children						
Costs of the children						
All children aged 0-12 years						
1 child	17%	15%	12%	10%	7%	
2 children	24%	23%	20%	18%	10%	
3 children	27%	26%	25%	24%	18%	
All children aged 13+ years						
1 child	23%	22%	12%	10%	9%	
2 children	29%	28%	25%	20%	13%	
3 children	32%	31%	30%	29%	20%	
At least one child aged 0-12 years and one child aged 13+ years						
2 children	26.5%	25.5%	22.5%	19%	11.5%	
3 children	29.5%	28.5%	27.5%	26.5%	19%	

The table doesn't give a cost but instead expressed the cost of a child as a percentage of "MTAWE" (Male Total Average Weekly Earnings)- which is an amount set by the Australian statistician and published in a document called 'Average Weekly Earning, States and Australia'. Section 5A of the Assessment Act defines :

- (1) *The **annualised MTAWE figure** for a relevant June quarter means the figure that is 52 times the amount set out for the reference period in the quarter under the headings "Average Weekly Earnings-Trend-Males-All Employees Total Earnings" in a document published by the Australian Statistician entitled "Average Weekly Earnings, Australia".*
- (2) *The **relevant June quarter**, in relation to a child support period, means the quarter ending on 30 June of the last calendar year ending before the child support period begins.*

The Government publications give us the current elements used in the formula:

Child support period starting in	2016
Annualised MTAWE figure	\$71,256
Self-support amount (1/3 MTAWE)	\$23,752
Default income (2/3 MTAWE)	\$47,504
Fixed annual rate of child support	\$1,373
Parenting payment single, maximum basic amount (PPS)	\$19,011
Minimum annual rate of child support	\$414

Child support inflation factor	1.3%
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Source: guides.dss.gov.au

The ages of the children and the number of children give you the percentage to be applied to the MTAW figure which is then multiplied by the child support percentage to give the child support amount.

Child support as assessed is then due on the later of either the 7th of the next month or 30 days after notice of the assessment is given to the payer.

If a person's care percentage is greater than 65% then that person will not be liable to pay child support. If a person's care percentage is nil, then that person will not be eligible to receive child support

There is no longer a 'cap' on the maximum child support payable. There remains a minimum amount of child support payable of \$340 per annum – although in limited cases the Registrar can fix the amount at 'nil'.

CONSENT ARRANGEMENTS – CHILD SUPPORT AGREEMENTS

Parents can enter in to consent arrangements for the payment of child support through either a binding child support agreement or a limited child support agreement.

A binding child support agreement must be:

1. In writing
2. Signed by the parties to the agreement
3. Contain 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
4. the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided;
5. the agreement has not been terminated under section 80D and
6. after the agreement is signed, either the original agreement or a copy of the agreement is given to each party.

All Child Support agreements must be

1. in writing;
2. be signed by the parties to the agreement;
3. be made in relation to a child in relation to whom an application for administrative assessment is entitled to be made on the day the agreement is entered into.
4. Be made between either

- a. 2 parents of a child or
 - b. one or both parents of a child, and a non-parent carer of the child (who would be able to properly make an application for administrative assessment of child support for the child on the day it is entered into);
5. Includes one or more of the following kinds of provisions:
- (a) provisions under which a party is to pay child support for a child to another party in the form of periodic amounts paid to the other party;
 - (b) provisions under which the rate at which a party is already liable to pay child support for a child to another party in the form of periodic amounts paid to the other party is varied;
 - (c) provisions agreeing between parties any other matter that may be included in an order made by a court under a departure orders;
 - (d) provisions for the payment and treatment of non-periodic payments
 - (e) provisions dealing with lump sum payments
 - (f) provisions under which a party is to provide child support for a child to another party other than as periodic amounts or non-periodic payment provisions or lump sum payment;
 - (g) provisions under which the liability of a party to pay or provide child support for a child to another party is to end from a specified day.
6. Either:
- (i) it meets the conditions in section 80E subsection (2), (3) or (4), as the case requires, (assuming the agreement is accepted by the Registrar); or
 - (ii) it has been accepted by the Registrar under section 98U.

A limited child support agreement comply with 1 – 6 above and there must be an administrative assessment in force in relation to the child in respect of whom the agreement is made (otherwise the Registrar is obliged to refuse to accept the agreement). It must comply with the provisions of section 80E (2) , (3) or (4) or it must have been accepted by the Registrar under section 98U.

The requirements of section 80E(2) are that there must be child support payable under the agreement by one party to the other/s on the day the application is made to the Registrar for acceptance and the annual rate of child support is at least equivalent to that which would otherwise be payable under the Act.

Section 80E(3) provides that if the agreement does not provides for payment to be made to the other/s on the day the agreement is presented for acceptance but the amount payable annually is at least the annual rate payable under the Act then it complies.

Section 80E(4) allows for a provision to be included that requires payments for a period before the date the agreement is presented for acceptance and, again, if the annual rate is at least equivalent to that payable under the Act then it complies.

An application for acceptance must be made to the Registrar under section 98U. If the Registrar is satisfied that it is a child support agreement then the Registrar must accept the agreement. However, for an agreement other than a binding child support agreement, the Registrar must also be satisfied the agreement is just and equitable as regards the child, the liable parent and the carer entitled to child support.

Neither limited nor binding child support agreements can be varied. Binding Child Support agreements and Limited Child Support Agreements can be set aside on grounds of fraud, undue influence etc, under section 136 and

1. in the case of a limited child support agreement on the additional grounds that there has been a significant change in circumstances or that the annual rate of child support is not proper or adequate
- but,
2. in the case of a binding child support agreement only if there are 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, such that the applicant or the child will suffer hardship if the agreement is not set aside.³

DEPARTURE/CHANGE OF ASSESSMENT

Part 6A of the Assessment Act provides for applications to be made to change assessments - commonly called 'departure applications'.

Except in limited circumstances an application for a change of assessment must be made to the Registrar. The Registrar will not make a change to the assessment unless the Registrar is satisfied that one of the grounds for departure set out in section 117(2) is made out AND that it would be just and equitable (as regards the child, the liable parent and the carer) AND it is otherwise proper, in the particular circumstances of the case, to make a determination which might change the assessment.

IF the liable parent or carer entitled to child support:

1. is a party to an application pending in a court having jurisdiction under this Act AND
2. the court is satisfied that it would be in the interests of the liable parent and the carer entitled to child support for the court to consider whether an order (for departure) should be made OR,
3. 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) - that is when the parent does not have at least regular care of at least one of the children in the child support case and the total payable by the parent for all the children in the child support case would be assessed as less than the minimum annual rate of child support for the child support period

.. THEN application can be made to a Court for a departure order. The court may make an order in respect of a day that is **more than 18 months earlier** than the day on which the relevant application was made only if leave is granted.

³ *Balzano & Balzano* [2010] FamCAFC 11; *Garde & Homer* [2013] FMCAfam 167; *Kennedy & Kennedy* [2013] FamCA 332; *H & R* [2016] FCCA 1781

Leave to amend an assessment **more than 18 months old (but not more than 7 years old)** is made under section 111 of the Assessment Act.

if the court sets aside a child support agreement under section 136 then the court may also make a departure order

GROUNDS FOR DEPARTURE

Three elements are required in order to be eligible for a departure order. The three necessary elements are:

- one of the grounds for departure must be made out
- it must be just and equitable as regards the child, the carer and the liable parent and
- it must be otherwise proper.

The grounds upon which an administrative assessment may be changed are set out in section 117(2). In each instance the ground is prefaced by the words “in the special circumstances of the case”. Those words have meaning and signify that there are facts and circumstances that set the case apart from others⁴. There are in reality 12 specific grounds are grouped in three (3) categories.

1. **The capacity of the parents**
2. **There are high cost of maintaining the child(ren)**
3. **The child, or the liable parent, or the carer parent has income property, earning capacity or financial resources not reflected through the formula or a payment or transfer of property was made or is to be made for the benefit of the child**

The first series of four grounds are contained in section 117(2)(a) and (aa):

“(a) the capacity of **either parent** to provide financial support for the child is **significantly reduced because of:**

- (i) **the duty of the parent to maintain any other child or another person⁵; or**
- (ii) **special needs of any other child or another person that the parent has a duty to maintain; or**
- (iii) **commitments of the parent necessary⁶ to enable the parent to**

⁴ See *Morrison & Morrison* (1990) F.L.C. 92-136; *Gyselman and Gyselman* (1992) F.L.C. 92-279; *Sheehan and Sheehan* (1993) F.L.C. 92-75; *Savery and Savery* (1990) F.L.C. 92-375

⁵ The duty must be a legal duty: *Vick & Hartcher* (1991) F.L.C. 92-262

⁶ “Necessary” was discussed in *Gyselman and Gyselman* (1992) F.L.C. 92-279. It is not intended to produce an unrealistically low standard of living for the liable parent. It refers to the commitments which are reasonably needed for that purpose.

support:

(A) himself or herself; or

(B) any other child or another person that the parent has a duty to maintain⁷; or

- (iv) high costs involved in enabling a parent to spend time with, or communicate with, any other child or another person that the parent has a duty to maintain⁸⁹;**

(aa) the capacity of either parent to provide financial support for the child is significantly reduced because of the responsibility of the parent to maintain a resident child of the parent (see subsection (10));

2. High costs of maintaining the child(ren)

(b) the costs of maintaining the child are significantly affected:

(i) because of high costs involved in enabling a parent to spend time with, or communicate with, the child¹⁰; or

(ia) because of special needs of the child; or

(ib) because of high child care costs in relation to the child¹¹; or

(ii) because the child is being cared for, educated¹² or trained in the manner that was expected by his or her parents¹³;

3.

The child, or the liable parent, or the carer parent has income property, earning capacity or financial resources not reflected through the formula

⁷ Discussed in *Morrison and Morrison* (1990) F.L.C. 92-136; *Berry and Berry* (1990) F.L.C. 92-155; *Gerges and Gerges* (1991) F.L.C. 92-203

⁸ See the definition of high costs of care in section 117(2B) set out below in the text of this paper.

⁹ There is a distinction between ‘enabling a parent to spend time with or communicate with a child’ and actually spending time with or communicating with a child – see *Gyselman and Gyselman* (1992) F.L.C. 92-279 at 79-068. Section 117(2C) now enables **only** travel costs to be taken into account if the person has at least “regular care” (see footnote 18)

¹⁰ See the definition of high costs of care set out in section 117(2B)

¹¹ “High child care costs” is defined by section 117(3A) & (3C)

¹² If it is established a child is attending private school, for example, and the costs of maintaining the child are significantly affected as a result, then on an application to the Registrar for a departure, the Registrar cannot order the payment of school fees but can order an increase in the child support payable to compensate for the fees. If a party seeks an order for payment direct to the school then the Court has power to make such an order under section 141 on an application under section 122.

¹³ It needs to be established is that the costs of maintaining the child are **significantly affected** because of the cost of the activities. It will need to be determined if the activities are usual or common and of a nature that would normally be met by child support payments or whether the amount being expended is high, relative to the ‘norm’.

or a payment or transfer of property was made or is to be made for the benefit of the child

(c) that the application in relation to the child of the provisions relating to administrative assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child:

- (i) because of the income, earning capacity, property and financial resources of the child¹⁴; or
- (ia) because of the income, property and financial resources of either parent¹⁵; or
- (ib) because of the earning capacity of either parent¹⁶; or
- (ii) because of any payments, and any transfer or settlement of property, made or to be made (whether under this Act, the *Family Law Act 1975* or otherwise) by the liable parent to the child, to the carer entitled to child support or to any other person for the benefit of the child¹⁷.

Definition - High costs involved in enabling parent to care for a child

(2B) A parent's costs involved in enabling the parent to care for a child can only be high for the purposes of subparagraph (2)(a)(iv) or (2)(b)(i) if the costs that have been or will be incurred, during a child support period, total more than 5% of the amount worked out by:

- (a) dividing the parent's adjusted taxable income for the period by 365; and
- (b) multiplying the quotient by the number of days in the period.

(2C) If a parent has at least regular care of a child¹⁸, then the only costs that can be taken into account for the purposes of subsection (2B) are costs related to travel to enable the parent to spend time with, or communicate with, the child.

Definition - High child care costs

¹⁴ See section 117(7)

¹⁵ See section 117(7A)

¹⁶ See section 117(7B)

¹⁷ It is not sufficient to show the other party received more in the property settlement or that the property settlement benefits the children. The payer must show that some part of the property settlement was made for the benefit of the children and not for some other reason. If it can be shown that part of the settlement is 'a transfer or settlement of property made by the liable parent to the carer parent entitled to child support and for the benefit of the child, then the applicant may succeed on this ground: *King & King* (Unreported) Kay J. Payments of the mortgage, health insurance premiums and other pre-separation debts were recognized in *Cleary and Cleary* (Nicholson C.J.). Health insurance premiums were recognized in *Berry* (per Kay J.) School fees paid were taken into account under this ground in *Szeptietowski* as well as rates payments on the former matrimonial home, mortgage payments in relation to an investment property and claims by the liable parent that he had made payments for the wife's car registration, shopping and clearing outstanding accounts.

¹⁸ Section 5(2) – the person's percentage of care for the child during a care period is at least 14% but less than 35%

(3A) The ground for departure mentioned in subparagraph (2)(b)(ib) is taken not to exist unless:

- (a) the costs are incurred by a parent or a non-parent carer¹⁹; and
- (b) the child is younger than 12 at the start of the child support period.

(3B) Child care costs for a parent can only be high for the purposes of subparagraph (2)(b)(ib) if, during a child support period, they total more than 5% of the amount worked out by:

- (a) dividing the parent's adjusted taxable income for the period by 365; and
- (b) multiplying the quotient by the number of days in the period.

(3C) Child care costs for a non-parent carer can only be high for the purposes of subparagraph (2)(b)(ib) if, during a child support period, they total at least 25% of the costs of the child for that period.

Matters to consider for purposes of subparagraph (1)(b)(ii)

(4) 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 a particular order under this Division, the court must have regard to:

- (a) the nature of the duty of a parent to maintain a child (as stated in [section 3](#)); and
- (b) the proper needs of the child; and
- (c) the income, earning capacity, property and financial resources of the child; and
- (d) the income, property and financial resources of each parent who is a party to the proceeding; and
- (da) the earning capacity of each parent who is a party to the proceeding; and
- (e) the commitments of each parent who is a party to the proceeding that are necessary to enable the parent to support:
 - (i) himself or herself; or
 - (ii) any other child or another person that the person has a duty to maintain; and
- (f) the direct and indirect costs incurred by the carer entitled to child support in providing care for the child; and
- (g) any hardship that would be caused:
 - (i) to:
 - (A) the child; or
 - (B) the carer entitled to child support;
 - by the making of, or the refusal to make, the order; and
 - (ii) to:
 - (A) the liable parent; or
 - (B) any other child or another person that the liable parent has a duty to support;
 - by the making of, or the refusal to make, the order; and
 - (iii) to any resident child of the parent (see subsection (10)) by the making of, or the refusal to make, the order.²⁰

¹⁹ Payments by grandparents or nonparents will not qualify.

²⁰ The reviewer needs to examine each of the matters set out in section 117(4) but does not need to do so slavishly in order to determine whether it is just and

(5) In determining whether it would be otherwise proper to make a particular order under this Division, the court must have regard to:

- (a) the nature of the duty of a parent to maintain a child (as stated in [section 3](#)) and, in particular, the fact that it is the parents of a child themselves who have the primary duty to maintain the child; and
- (b) the effect that the making of the order would have on
 - (i) any entitlement of the child, or the carer entitled to child support, to an income tested pension, allowance or benefit; or
 - (ii) the rate of any income tested pension, allowance or benefit payable to the child or the carer entitled to child support.

Proper needs of the child

(6) In having regard to the proper needs of the child, the court must have regard to:

- (a) the manner in which the child is being, and in which the parents expected the child to be, cared for, educated or trained; and
- (b) any special needs of the child.²¹

Income, earning capacity, property and financial resources

(7) In having regard to the income, earning capacity, property and financial resources of the child, the court must:

- (a) have regard to the capacity of the child to earn or derive income, including any assets of, under the control of, or held for the benefit of, the child that do not produce, but are capable of producing, income; and
- (b) disregard:
 - (i) the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child, or who has such a duty but is not a party to the proceeding, unless, in the special circumstances of the case, the court considers that it is appropriate to have regard to them; and
 - (ii) any entitlement of the child or the carer entitled to child support to an income tested pension, allowance or benefit

(7A) In having regard to the income, property and financial resources of a parent of the child, the court must:

- (a) have regard to the capacity of the parent to derive income, including any assets of, under the control of, or held for the benefit of, the parent that do not produce, but are capable of producing, income; and

equitable to make a particular order in the particular circumstances of the case: *Hides v. Hatton* (1998) FL.C. 92-759 at 84,352 - 353

²¹ "Otherwise proper" was considered in *Gyselman and Gyselman* (1992) F.L.C. 92-279 at 77,077 et seq. The reviewer must have regard to the nature of the duty of a parent to maintain the child and that it is the primary duty of the parents to support the child. The reviewer should consider the effect that making an order will have on any entitlement of the child or the carer to an income tested pension, allowance or benefit or the rate thereof.

(b) disregard:

- (i) the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child, or who has such a duty but is not a party to the proceeding, unless, in the special circumstances of the case, the court considers that it is appropriate to have regard to them; and
- (ii) any entitlement of the child or the carer entitled to child support to an income tested pension, allowance or benefit.

(7B) In having regard to the **earning capacity of a parent** of the child, 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 that:

(a) one or more of the following applies:

- (i) the parent does not work despite ample opportunity to do so;
- (ii) the parent has reduced the number of hours per week of his or her employment or other work below the normal number of hours per week that constitutes full-time work for the occupation or industry in which the parent is employed or otherwise engaged;
- (iii) the parent has changed his or her occupation, industry or working pattern; and

(b) the parent's decision not to work, to reduce the number of hours, or to change his or her occupation, industry or working pattern, is not justified on the basis of:

- (i) the parent's caring responsibilities; or
- (ii) the parent's state of health; and

(c) the parent has not demonstrated that it was not a major purpose of that decision to affect the administrative assessment of child support in relation to the child.

Direct and indirect costs in providing care

(8) In having regard to the direct and indirect costs incurred by the carer entitled to child support in providing care for the child, the court must have regard to the income and earning capacity foregone by the carer entitled to child support in providing that care.

Subsections not to limit consideration of other matters

(9) Subsections (4) to (8) (inclusive) do not limit other matters to which the court may have regard.

Definition – Resident Child

“10. ... a child is a **resident child** of a person only if:

- (a) the child normally lives with the person, but is not a child of the person; and
- (b) the person is, or was, for 2 continuous years, a member of a couple; and
- (c) the other member of the couple is, or was, a parent of the child; and
- (d) the child is aged under 18; and
- (e) the child is not a member of a couple; and
- (f) one or more of the following applies in respect of each parent of the child:
 - (i) the parent has died;
 - (ii) the parent is unable to support the child due to the ill-health of the

- parent;
 (iii) the parent is unable to support the child due to the caring responsibilities of the parent; and
 (g) the court is satisfied that the resident child requires financial assistance.”

OBJECTIONS TO/APPEALS AGAINST DECISIONS

Section 80 of the *Child Support (Registration and Collection) Act 1989* (“the R & C Act”) sets out the decisions or determinations made by the Registrar in relation to which parties can object. In the table to that section it sets out who is entitled to object to particular decisions.

By way of example, if a party is dissatisfied with a decision made on an application to change an assessment (a departure application under Part 6A of the Collection Act) then a liable parent or the carer entitled to child support must object to the determination under the provisions of the.

An objection must be made within 28 days of notice of a decision being served on the person. It is possible to apply for an extension of time under section 81. An objection must fully state the objection and the grounds relied upon. The Registrar will serve the objection on the other party to allow time to respond and then consider the objection, In reality a further hearing is usually conducted.

Either party can thereafter apply for a review of the decision to the Administrative Appeals Tribunal (AAT). Thereafter any further attempt to change the assessment must be by way of appeal to the Federal Circuit Court under section 44AAA of the *Administrative Appeals Tribunal Act 1975* – limited to questions of law.

NON-AGENCY PAYMENTS

Certain payments made by a person liable to pay child support to a carer entitled to child support, but made to a third party, may be credited against the liable party’s account.

If the payer and the payee intended that a payment to a third party was in payment in complete or partial satisfaction of an amount payable under an enforceable maintenance liability then the Registrar will credit the amount against the payer’s account.²² A payment not in money or a transfer of property, if intended by both to be in complete or partial satisfaction of a liability can be credited²³.

If there is a dispute about whether or not there was an ‘intention’ that the payment was either partly or wholly to satisfy a child support liability then it is likely the application will be rejected and the payer will be left to see if the payment fits under section 71C – which does not require agreement or intention – or to make an application for a departure.

²² Section 71A of the R & C Act

²³ Section 71B of the R & C Act

Other payments (specified in the Regulations) can be credited under section 71C of the R & C Act if they are payments of the following kind:

- (a) child care costs for the child who is the subject of the enforceable maintenance liability;
- (b) fees charged by a school or pre-school for that child;
- (ba) amounts payable for uniforms and books prescribed by a school or pre-school for that child;
- (c) fees for essential medical and dental services for that child;
- (d) the payee's share of amounts payable for rent or a security bond for the payee's home;
- (e) the payee's share of amounts payable for utilities, rates or body corporate charges for the payee's home;
- (f) the payee's share of repayments on a loan that financed the payee's home
- (g) costs to the payee of obtaining and running a motor vehicle, including repairs and standing costs.

ENFORCEMENT

Child support payable during a period is due and payable on the 7th day of the month following. Penalties apply for late payment.

Unpaid child support is a debt due to the Commonwealth.

The Registrar can

- Collect child support related debts from a third person
- Seek periodic deductions from social security pensions and benefits
- Seek periodic deductions from family tax benefit
- Seek periodic deductions from veterans' pensions and allowances
- Seek periodic deductions from parental leave pay
- "Garnishee" moneys in the hands of a person receiving or controlling money of a debtor who is outside Australia
- Apply to the Court to set aside transaction to defeat maintenance liability
- Make a departure prohibition order if the Registrar believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does not depart from Australia for a foreign country without: (i) wholly discharging the child support liability; or (ii) making arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.
- As well as the 'usual' raft of enforcement options available through the Court²⁴

However, a payee can also enforce a child support debt provided the payee gives the Registrar at least 14 days notice of his or her intention to institute a proceeding to recover the debt²⁵.

CHILD SUPPORT TERMINATING EVENTS

²⁴ R & C Act section 113

²⁵ R & C Act section 113A.

Section 12 defines the happening of a child support terminating event, namely:

- (1)** A child support terminating event happens in relation to a child if:
- (a) the child dies; or
 - (b) the child ceases to be an eligible child under regulations made under subsection 22(1); or
 - (c) the child turns 18; or
 - (d) the child is adopted; or
 - (e) the child becomes a member of a couple; or
 - (f) none of the following subparagraphs applies any longer in relation to the child:
 - (i) the child is present in Australia;
 - (ii) the child is an Australian citizen;
 - (iii) the child is ordinarily resident in Australia; or
 - (g) the circumstances described in subsection 30AA(1) of the Registration and Collection Act apply in relation to the child²⁶.
- (2)** A child support terminating event happens in relation to a person who is a carer entitled to child support in relation to a child if the person dies.
- (2AA)** A child support terminating event happens in relation to a child if:
- (a) both of the parents of the child are not eligible carers of the child; and
 - (b) there are no non-parent carers entitled to be paid child support in relation to the child.
- (2A)** A child support terminating event happens in relation to a person who is a carer entitled to child support in relation to a child if:
- (a) an international maintenance arrangement applies in respect of the person and the child; and
 - (b) the person is a resident of a reciprocating jurisdiction; and
 - (c) the person ceases to be a resident of the reciprocating jurisdiction; and
 - (d) the person does not, immediately after so ceasing, become a resident of another reciprocating jurisdiction or of Australia.
- (3)** A child support terminating event happens in relation to a person who is a liable parent in relation to a child if:
- (a) the person dies; or
 - (b) the person ceases to be a resident of Australia.
- (3A)** A child support terminating event happens in relation to a person who is a liable parent in relation to a child if:
- (a) an international maintenance arrangement applies in respect of the person and the child; and
 - (b) the person is a resident of a reciprocating jurisdiction; and
 - (c) the person ceases to be a resident of the reciprocating jurisdiction; and
 - (d) the person does not, immediately after so ceasing, become a resident of another reciprocating jurisdiction or of Australia.

²⁶ A rule to avoid dual liabilities

(3B) A child support terminating event happens in relation to a person who is a liable parent in relation to a child if:

- (a) an international maintenance arrangement applies in respect of the person and the child; and**
- (b) the person is a resident of a reciprocating jurisdiction; and**
- (c) the reciprocating jurisdiction becomes specified in regulations made for the purposes of section 30A as a reciprocating jurisdiction for a resident of which an application for:**
 - (i) an administrative assessment of child support for a child; or**
 - (ii) acceptance of a child support agreement;****may not be accepted.**

(4) A child support terminating event happens in relation to a child and the persons who are respectively a carer entitled to child support and a liable parent in relation to the child if:

- (a) either of the following subparagraphs applies in relation to the child and those persons:**
 - (i) the carer entitled to child support elects by a notice that complies with section 151 (Election by carer entitled to child support to end administrative assessment) that the liability of the liable parent to pay or provide child support for the child to the carer entitled to child support is to end from a specified day;**
 - (ii) the Registrar accepts a child support agreement made in relation to the child between the carer entitled to child support and the liable parent, and the agreement includes provisions under which the liability of the liable parent to pay or provide child support for the child to the carer entitled to child support is to end from a specified day; and**
- (b) the specified day arrives.**

(4A) Subject to subsection (4B):

- (a) if an international maintenance arrangement applies in respect of a child—a circumstance set out in paragraph (1)(f) is not a child support terminating event in relation to the child; and**
- (b) if an international maintenance arrangement applies in respect of a person who is a liable parent in respect of a child—a circumstance set out in paragraph (3)(b) is not a child support terminating event in relation to the person.**

(4B) Subsection (4A) does not apply if:

- (a) where one only of the carer entitled to child support in relation to a child and the liable parent in relation to the child is a resident of Australia—that carer or that liable parent ceases to be a resident of Australia; or**
- (b) where both the carer entitled to child support in relation to a child and the liable parent in relation to the child are residents of Australia—that carer and that liable parent both cease to be residents of Australia.**

(5) A child support terminating event happens in relation to a child and the child's parents if the parents become members of the same couple for a period

of 6 months or more.