MAKING CONSENT ARRANGMENTS ABOUT CHILD SUPPORT: HAS IT GOT EASIER OR HARDER

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1. INTRODUCTION

1.1. The ability to 'contract out' by Consent of the administrative assessment of Child Support is crucial to the sustainability of Australia's modern child support scheme. The formulaic approach to assessment that is the cornerstone of that scheme was never meant to be a one size fits all solution. It was a foundation suited to the majority of separating parents; supplemented by the ability to depart from the formula in appropriate circumstances. An important part of that departure regime is the ability of separated parents[2] to make private enforceable arrangements of their own.

1.2. In 2008 the legislation in relation to Consent arrangements for child support was amended substantially[3]. The aim was to provide separated parents with 'more flexible arrangements' and 'better legal protection'[4]. Since then there have been three different means of recording private Agreements: a Binding Child Support Agreement, a Limited Child Support Agreement or a Consent Order made by a Court[5]. Not every one of these means of agreement will be available in every situation, and even if they were the choice between them is not always obvious. There will be competing interests amongst the parties that will need to be carefully weighed before making a choice. A thorough understanding of each option and the inherent advantages and disadvantages is crucial to making an informed choice.

1.3. Across the three options on offer there a number of critical points of distinction. The most striking of which is the ability to subsequently vary the arrangement without the consent of the other party. The amendments put Binding Child Support Agreements at one end of the spectrum and Limited Child Support Agreements at the other end. The difference

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[2] The Child Support scheme is also applicable in certain circumstances to Children who are not cared for by a parent. No attempt is made in this paper to deal with those circumstances.

[3] *Child Support Legislation Amendment (reform of the Child Support Scheme – New Formula and Other Measures) Act 2006* (Cth).

[4] Explanatory Memorandum, *Child Support Legislation Amendment (reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006* (Cth).

[5] There are circumstances where a Consent Order made be made by the SSAT. No attempt is made is this paper to deal with those circumstances.

is stark, too stark. Of all the amendments that were made, whether intended or not, this has been the most profound. When properly considered, rather than promote the ability of parties to enter into consent arrangements, this amendment has discouraged it. Binding Child Support Agreements have become the domain of the very wealthy; difficult to shape to the inevitable future changes to parents lives. While Limited Child Support Agreements have proved a poor substitute, barely worth the paper they are written upon. Rather than improve or support parties' decisions to reach their own arrangements about child support, the amendments have made it more difficult for parties to make consent arrangements. Unsurprisingly, the onus on legal practitioners in terms of advice, drafting and compliance are also much greater than ever before.

2. THE CONSENT OPTIONS

2.1. BACKGROUND

2.1.1. The *Child Support (Assessment) Act 1989* (Cth) ("**the Assessment Act**") and the *Child Support (Registration and Collection) Act 1989* (Cth) ("**the Collection Act**") came into operation on 1 October 1989. The legislation was a substantial law reform. At its core the reform replaced the then discretionary jurisdiction of the Courts to determine the quantum of child support payments with a formula that could be applied administratively. Discretion gave way to rule. There were a range of immediate benefits to society at large. By limiting the recourse to the judiciary and relying instead on an administrative formula the calculation of child support liability was thereafter mostly certain, inexpensive and set at a standard determined by government.

2.1.2. Imposing one administratively actioned formula across every separating family in Australia, no matter how many inherent variables were included in the formula, is not viable. In appropriate circumstances case by case assessment is still necessary. The Assessment Act recognises this through a scheme widely referred to as 'departure'. The need in some cases for departure recognises that the formula will work for the majority of separating parents but not the entirety of them. The level of care one child requires or can expect will not always be capable of direct comparison to another. Neither will references to measures like taxable income be appropriate to every parent's situation. However, rather than throw these special cases back on the Courts, the Assessment Act imposes first an administrative case by case review. If a party is dissatisfied with that outcome then they may have recourse to a Court (or in more recent times a Tribunal).

2.1.3. There are a variety of reasons parties will desire making a private arrangement in relation to child support rather than rely upon an administrative assessment, administrative review or judicial discretion. Most reasons derive from the limitations of the Child Support formula. Others however are broader and may arise regardless of what the outcome would be under an administrative assessment. Many of these reasons need to be predicted by legal practitioners when they give advice about child support options. Some more common reasons to consider a private arrangement over an assessment include but are by no means limited to the following:

- payments for expenses not included in the costs of children used in the formula like private school fees, child care, private health care, special educational or medical care and supervision, large travel and accommodation costs necessary to spend time with children post separation;
- standards of living and care at a higher level than contemplated by the costs of children used in the formula;
- payments for expenses directly to suppliers of goods or services rather than the other party in a periodic amount;
- payments of lump sum amounts to be credited against ongoing periodic payments to achieve greater security in payment;
- recognition of in kind or balancing contributions intended to offset Child Support commitments;
- variability in income not easily reflected in administrative assessment;
- variability in the time children spend with each party not easily reflected in administrative assessment;
- a desire to avoid interaction with government services; and
- the legitimate arrangement of tax affairs to limit the amount of income tax that would otherwise be due; and
- an intention to 'trade off' child support matters with the resolution of other issues consequent upon the breakdown of a relationship.

2.1.4. Until 2009 parties were able, depending on their circumstances, to enter into a Child Support Agreement or a Consent Order. As is discussed below there

were not insubstantial hurdles to making a Consent Order that made Child Support Agreements by far the most common mechanism that was used. From the writer's anecdotal experience, the legislation, as it was then formulated, in respect of Child Support Agreements worked well. The document provided a degree of certainty and finality without being so rigid an outcome that it could not be interfered with and varied in certain circumstances.

2.1.5. Whether the 2009 amendments were justified or not, they were made and the law changed. Presently, parties have a choice of two types of Child Support Agreements a 'Binding' agreement or a 'Limited' agreement. The law in relation to Consent Orders remained largely the same. Where once there were two options there are now three.

2.2. BINDING CHILD SUPPORT AGREEMENT

2.2.1. OVERVIEW

2.2.1.1 As the name suggests, of the three options discussed, a Binding Child Support Agreement is the most certain and final type of consent arrangement presently available. Unlike a Consent Order or a Limited Child Support Agreement the circumstances in which a Binding Child Support Agreement can be varied without the consent of the other party are deliberately very narrow. The circumstances must be exceptional.

2.2.1.2 The certainty this type of agreement offers parties has its advantages. Particularly where parties are entering into an agreement about child support in the shadow of agreements about final property alteration, spouse maintenance and parenting. For example concessions might more easily be made in relation to property alteration or spouse maintenance in order to achieve an agreement about child support if the conceding party could be confident that child support agreement would hold. But there are certainly also disadvantages. Trying to predict for many years a capacity to meet onerous child support commitments is a difficult task. Locking in arrangements that seem affordable now may be hazardous in the future if financial circumstances change.

2.2.1.3 Given the higher standard of finality, it is not unsurprising that the legislation imposes greater care and consideration before these types of agreements are made. A regime of mandatory independent legal advice is imposed that is similar but not identical to the regime adopted in respect of Financial Agreements. Making these agreements much more

difficult to enter into both for parties and the legal practitioners advising them.

2.2.1.4 Property done a Binding Child Support Agreement once it has been accepted by the Child Support Registrar creates a child support liability[6] from the date of acceptance which can be enforced and avoid or vary as the case may be the administrative assessment of child support that might otherwise be due.

2.2.2. **FORMAL REQUIREMENTS**

2.2.2.1 To qualify for the rarefied status of a Binding Financial Agreement there are two essential elements[7]. Firstly, the agreement must be in the correct form. Secondly, the substance of the agreement must be concerned with one of the prescribed child support matters.

2.2.2.2 An agreement will meet the requirements as to form 'if, and only if' the agreement[8]:

- is in writing;
- signed by the intended payer and payee;
- contains a statement to the effect certain legal advice was given;
- annexes a certificate stating that said legal advice was provided;
- has not been terminated; and
- one party has been given a copy and the other party the original.

2.2.2.3 The requirements in relation to legal advice warrant careful consideration. Section 80C(2) requires:

[6] Section 93

[7] Section 80C(1)

[8] Section 80C(2)

"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; and

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

2.2.2.4 It follows that:

- the legal advice must be independent – each party must obtain their own advice from their own lawyer entirely separate from the other party;

- the legal advice must be provided before the agreement is entered into - best practice would dictate the advice is provided in writing which means it must be prepared and delivered in advance of the execution of the agreement which may require the advice to be refreshed in writing where subsequent amendments are made to the agreement before execution; and

- the body of the agreement must include a statement to the effect contemplated by Section 80C(2)(c) - a reference to the mandatory certificates that are annexed will not suffice.

2.2.2.5 Many legal practitioners will be familiar with the requirement given their similarity to the strict requirements required for Financial Agreements under the *Family Law Act*. Indeed the Explanatory Memorandum to the legislation which introduced Binding Child Support Agreements records that the new requirement for independent legal advice brings 'arrangements in relation to Binding Child Support Agreements into harmony with financial Agreements concerning property division and spouse maintenance under the Family Law Act'[9]. However, the requirements are not the same. The strict requirements for Financial

[9] Page 150

Agreements have been the subject of revision since the child support reforms were made. The child support legislation has not kept pace with the changes made in respect of Financial Agreements. Moreover, there is a complete absence in the child support legislation of any remedial legislation to mitigate against non-compliance with the legal advice requirements like exists in Section 90G(1A) of the *Family Law Act*.

2.2.2.6 An agreement will meet the requirements as to substance if[10]:

- an administrative assessment was otherwise capable of being made for child support between the parties[11] in respect of the child who is the subject of the agreement[12]; and
- makes provision for child support in one of the prescribed manners[13].

2.2.2.7 This means that in respect of the child, he or she must:

- be born after 1 October 1989[14];
- be under 18 years of age[15];
- not a member of a couple[16]; and
- either be present in Australia or an Australian Citizen or Permanent Resident on the day the Child Support Agreement is entered into[17].

2.2.2.8 This means in respect of the parties:

- the person who will be liable to pay child support pursuant to the agreement is a parent of the child[18];

[10] Section 81

[11] Section 82

[12] Section 83

[13] Section 84

[14] Section 19, 24(1)(a)(i)

[15] Section 24(1)(a)(ii);

[16] Section 24(1)(a)(iii);

[17] Section 24(1)(b)

[18] Section 25(a)

- the parties are not living together as partners on a genuine domestic basis[19]; and

- the party who is liable to pay child support pursuant to the agreement (or if both parties to the agreement are parents, at least one of them) is a resident of Australia on the day the Child Support Agreement is entered into or there is a determination having regard to Australia's treaty obligations that child support is likely to be recoverable notwithstanding the lack of residence[20].

2.2.2.9 The prescribed matters which the agreement can provide for are[21]:

- periodic payment from one party to another;

- variation of the rate at which a party is already liable to make periodic payment from one party to another;

- variation of one of the elements of an administrative assessment of child support[22];

- non-periodic payments from one party to another;

- lump sum payments from one party to another mandated to be credited against an administrative assessment; and

- a day upon which liability of one party to the other for child support comes to an end.

2.2.2.10 Any other obligation purported to be created that is outside those prescribed matters set out above, will have no effect for the purposes of the child support legislation[23]. Provision about non-periodic payments must state their relationship with the administrative assessment of child

[19] Section 25(b)

[20] Section 29A and 29B

[21] Section 84

[22] Section 84(c), 118

[23] Section 84(3)

support[24]. Provision about lump sum payments will only be effective if there is a child support assessment in place immediately prior to the acceptance of the agreement by the Child Support Registrar and is for an amount that equals or exceeds the annual rate of child support administratively assessed[25].

2.2.2.11 These dual requirements as to form and substance are a significant obstacle to perfecting a Binding Child Support Agreement. Failure can have a number of consequences that are far wider than might be obvious at first glance if the agreement is part of a suite of agreements across a broad range of family law issues like property alteration, spouse maintenance and parenting.

2.2.3. **TERMINATION**

2.2.3.1 A Binding Child Support Agreement is usually intended to operate until a child is 18 years of age. However, that need not necessarily be the case. A Binding Child Support Agreement may terminate or cease to be enforceable in respect of a child prior to that child attaining the age of 18 years in the following circumstances:

- at a date or upon the happening of an event stipulated within the terms of the agreement[26];
- with the parties consent as part of a termination agreement that complies with the strict requirement of Section 90D;
- upon the happening of a child support terminating event[27]; and
- by a Court Order made pursuant to Section 136.

2.2.3.2 In relation a Binding Child Support Agreement a Court will only set aside an agreement if one of the following five grounds are satisfied:

- a party's agreement was obtained by fraud[28];

[24] Section 84(6)

[25] Section 84(7)

[26] Section 84(1)(g)

[27] Sections 12, 93(1)(h)(i)

[28] Section 136(a)

- a party's agreement was obtained by a failure to disclose information[29];

- that another party to the agreement or someone acting for another party exerted undue influence or duress in obtaining that agreement to such an extent it would be unjust not set aside the agreement [30];

- that another party to the agreement or someone acting for another party engaged in unconscionable or other conduct to such an extent it would be unjust not to set aside the agreement [31]; or

- that because of the exceptional circumstances relating to a party or a child the subject of the agreement that have arisen subsequent to the making of the agreement the applicant or the child will suffer hardship[32].

2.2.3.3 The first four of those five grounds are largely uncontroversial. They sit appropriately in any jurisprudence about the making of private agreements at law. The final ground has however proved controversial. The standard is much higher and necessarily much more restrictive than had been the case prior to the 2009 amendments. The Explanatory Memorandum foreshadowed the change in these words:

> "As currently drafted, courts could set aside Binding Child Support Agreements (made with legal advice) in a range of circumstances, including circumstances that may have been contemplated and dealt with in the agreement. It is not intended that Binding Agreements should be set aside lightly. This amendment restricts the scope for the setting aside of Binding Child Support Agreements, by specifying that exceptional circumstances relating to one of the children or parties to the agreement must have arisen since the making of the agreement, and that the child or party would suffer hardship if the agreement were not altered or set aside."

[29] Section 136(a)

[30] Section 136(b)(i)

[31] Section 136(b)(i)

[32] Section 136(d)

2.2.3.4 The term 'exceptional' is necessarily vague like many standards imposed by legislation and as is often the case Courts have been careful to avoid restrictive lists of types of matters that may be persuasive in any given situation. A curious quirk of the 2009 reforms was to transition existing Child Support Agreements made under the prior law to the status of Binding Child Support Agreement. Where before those agreements might be capable of being set aside for the same types of considerations that would inform a Departure Order, they were instead held to the new higher test. This proved disconcerting for a number of Child Support payers and produced a number of single instance judgments that have given some limited assistance.

2.2.3.5 There has been no consideration of the word 'exceptional' by a full bench of the Full Court of the Family Court of Australia in relation to Section 136(d). In *Balzano & Balzano*[33] a single Judge of the Full Court sitting on appeal from a decision of the then Federal Magistrates Court of Australia did consider the term 'exceptional'. There is limited analysis in the judgment but there is a useful reference to an earlier consideration of the term in a different legislative context in *Sandrk and Sandrk*[34] where Gee J said:

> "What amounts to exceptional circumstances is very much a question of fact and degree and the question in this case, as in that case, is whether what occurred subsequent to my Orders of 22 May 1989 were such as to take it out of and beyond the ordinary circumstances in which such a change might be reasonably expected to occur.
>
> A feature in Simpson and Hamlin (supra) which Lambert J, saw as significant, and indeed as did the Full Court in agreeing with his Honour in this respect, was whether or not the change occurred unexpectedly and quickly after the making of the property Order so that it could not have been regarded within the reasonable contemplate or expectation of the parties. It seems to me that that is the situation in this case."

2.2.3.6 The most comprehensive treatment of word 'exceptional;' in Section 136(d) to date appears in *Keane & Keane and Others*[35] where Watts J.

[33] [2010] Fam CAFC 11 (2 February 2010)

[34] (1991) FLC 92-260 at 78,750

[35] [2013] FamCA 332

conveniently draws comparisons to the use of the word in other family law legislation and summaries the judicial consideration of the same to date.

2.2.3.7 The single instance judgements that have arisen in relation to Section 136(d) have all unsurprisingly turned on their own unique factual circumstance. Caution should be exercised in drawing principle from these decisions but they are still instructive. Circumstances that have been found to be 'exceptional' include:

- incarceration by a payer[36];
- child support being paid at 30% what would otherwise be paid pursuant to an administrative assessment that arose though a change from self-employment to salaried employment[37];
- a confluence of a new de-facto partner and a child of a new relationship whom are financially dependent, a decrease in income, a liquidation of income earning assets in part to pay child support and difficulty finding work while faced with depression and misuse of alcohol[38].
- bankruptcy of payer[39]
- change in parenting arrangements such that child does not spend any nights with one parent[40]
- payer can't afford commitment and has borrowed to pay for a period of time[41]
- substantial change in care arrangements to an equal care situation where payer's liability is $100,000 more than assessment[42]

[36] *Balzano & Balzano* (above)

[37] *Daley & Daley* [2009] FMCAfam 398

[38] *Gallup & Gallup* [2009] FMCAfam 839 and Lincoln & Ryan [2011] FMCAfam841

[39] Ackers & Ducley [2010] FMCAfam 809

[40] Curran & Roper [2011] FMCAfam 859 and Cheyne & Masters & Anor (SSAT Appeal) [2014] FCCA 856 and Cheerer & Barrie [2012] FMCAfam 869

[41] Lincoln & Lincoln [2015] FCCA 18

[42] Leonard & Leonard [2010] FMCAfam 390

2.2.3.8 It is useful to compare those decisions above with cases where an 'exceptional' circumstance was not proved:

- a significant but likely temporary reduction in income and capital as a consequence of the global financial crisis[43];
- a retrenchment, period of unemployment, reduction in income and birth of a child of a new relationship[44]; and
- a new de-facto partner and a child of a new relationship whom are financially dependent and redundancy[45].
- A new de facto partner's unemployment and new child[46]

2.2.3.9 What is clear from the amalgamation of these decisions is that a change in financial circumstances by a payer will not in itself be 'exceptional'. Redundancy, unemployment and reductions in income because of external financial circumstances are all foreseeable possibilities even if they cannot necessarily be predicted.

2.3. LIMITED CHILD SUPPORT AGREEMENTS

2.3.1. OVERVIEW

2.3.1.1 Limited Child Support Agreement are designed to be easy to enter into in comparison to the onerous requirements of a Binding Financial Agreement set out above. The poorer cousin by comparison. They are cheaper, shorter in duration and easier to set aside. Notwithstanding these differences, properly entered into a Limited Child Support Agreement like a Binding Child Support Agreement creates a liability and is enforceable.

2.3.1.2 The most dominant feature of a Limited Child Support Agreement is either parties' right to unilaterally terminate the agreement after a period of 3 years. Attractive, in the short term it necessarily provides only a stop

[43] *Appleton & Appleton* [2011] FamCA 70

[44] *Jessup & Jessup* [2010] FMCAfam124

[45] Keane & Keane and Others [2013] FamCa 332

[46] Ramsey & Ramsey [2012] FMCAfa739

gap solution in many instances where child support remains a matter of issue for many more than 3 years. Given, that unavoidable reality in many family law situations, the utility of Limited Child Support Agreements must be questionable.

2.3.1.3 The anecdotal evidence of the writer is that Limited Child Support Agreements are rarely used as part of an entire settlement of family law issues. Their relevance is most likely reserved for the resolution of short terms disputes often within the scope of pending administrative or tribunal reviews of administrative assessment.

2.3.2. **FORMAL REQURIEMENTS**

2.3.2.1 The formal requirements to enter into a Limited Child Support Agreement like a Binding Financial Agreement are readily categorised into matters of form[47] and matters of substance[48]. The matters of substance are entirely the same as for a Binding Child Support Agreement. The matters of form are different.

2.3.2.2 The foremost difference in terms of form is the absence of any requirement for independent legal advice. This is an agreement that can be drawn an entered into without the need to engage a lawyer.

2.3.2.3 The second point of difference is the requirement for the quantum of the child support payable pursuant to the agreement to be equal to or greater than what would be paid but for the agreement pursuant to an administrative assessment of child support[49]. This is not an agreement that can be used to reduce a parties child support commitment below what might otherwise be the case. There is an exception to this rule however where the agreement was approved by the child support Registrar as a resolution of a pending administrative review pursuant to Part 6A of the Assessment Act[50].

2.3.2.4 There is a potential additional formal requirement to the effect that there be an administrative assessment in place on the day immediately prior to the application for acceptance being made by to the Child Support Registrar[51]. The Registrar has a discretion but there is no guidance on

[47] Section 80E

[48] Section 81(2)

[49] Section 80E(1)(d)(i), 80E(2), 80E(3), 80E(4)

[50] Section 80E(1)(d)(ii), 98T, 98U

[51] Section 92(3)

how that discretion ought to be exercised. In practice this requirement can be met after the agreement has been made and prior to the lodgement of the same for acceptance.

2.3.3. **TERMINATION**

2.3.3.1 Like a Binding Child Support Agreement, a Limited Child Support Agreement may be terminated:

- at a date or upon the happening of an event stipulated within the terms of the agreement[52];
- by a subsequent Binding Child Support Agreement including a provision terminating the same[53];
- upon the happening of a child support Terminating Event[54]; and
- by a Court Order made pursuant to Section 136[55].

2.3.3.2 In addition a Limited Child Support Agreement will be terminated:

- by a new Limited Child Support Agreement including a provision terminating the same[56]
- if a notional assessment of child support issues (an administrative assessment of what the Child Support would have been but for the Child Support agreement) which contains a variation of more than 15% since the last notional assessment – by a written notice of termination being provided by either party to the Child Support Registrar within 60 days of receipt of the latest notional assessment[57]; and

[52] Section 84(1)(g)

[53] Section 80G(1)(a)(ii)

[54] Sections 12, 93(1)(h)(i)

[55] Section 80G(1)(c)

[56] Section 80G(1)(a)(i)

[57] Section 80G(1)(e)

- if the agreement is 3 years or more old – by written notice of termination being provided by either party to the Child Support Registrar[58].

2.3.3.3 If these additional exit options were not enough, the matters about which a Court must be satisfied to ground an application to set aside a Limited Child Support Agreement because of a change in circumstance are far easier to meet than those stipulated in the case of a Binding Child Support Agreement. In respect of Limited Child Support Agreements Section 136(c) provides:

"in the case of a Limited Child Support agreement:

(i) that because of a significant change in the circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, it would be unjust not to set aside the agreement; or

(ii) that the agreement provides for an annual rate of child support that is not proper or adequate, taking into account all the circumstances of the case (including the financial circumstances of the parties to the agreement);"

2.3.3.4 Where a Binding Child Support Agreement is difficult to set aside a Limited Child Support Agreement is difficult to retain. Multiple triggers exist to set aside a Limited Child Support Agreement such that legal practitioners need be comprehensive in their advice about the myriad of circumstances that could readily give rise the Limited Child Support Agreement becoming redundant.

2.4. CONSENT ORDERS

2.4.1. OVERVIEW

2.4.1.1 A consistent and overarching feature of the Assessment Act and its reforms from time to time since 1989 has been to avoid wherever possible the judicial determination of child support issues and in particular the quantification of child support liability. The initial introduction of the internal review process followed later by the transfer

[58] Section 80G(1)(e)

of secondary judicial review process from the family law courts to the SSAT have significantly limited child support litigation.

2.4.1.2 An exception to the mandated internal and external review process has always existed at the discretion of the Court where there are other family law issues before the Court. The present relevance of these type of applications deserve serious consideration where final family law hearings are taking three or more years to be set down. However, while such an application is on foot there is power under the Assessment Act for a Court to make a Consent Order that departs from administrative assessment.

2.4.1.3 Given the failings, albeit for entirely different reasons, of Binding Child Support Agreements and Limited Child Support Agreements, a Consent Order will sometimes be a more attractive option.

2.4.2. **FORMAL REQUIREMENTS**

2.4.2.1 There are a number of requirements that ought to be considered before setting upon the path to a Consent Order departing from administrative assessment of child support. First and foremost will be the ability to ground the application whether defended or by consent. Section 116 sets out the limited circumstances in which such an application can be made to a Court. Save for the limited circumstances where a liable parent disputes an assessment on the minimum amount[59] it will be necessary to rely upon Section 116(1)(b) in the following terms:

"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;"

2.4.2.2 There are other basis to bring applications before the Court pursuant to the Assessment Act for lump sum payments and non-periodic payments.

[59] Section 116(c)

These may constitute a pending proceeding as contemplated by Section 116(1)(b) as might spouse maintenance or property alteration claims. Parenting proceedings are less likely to enliven the direction but in case like relocation arguments might be advanced for why the Court should determine all matters at once.

2.4.2.3 Like with provisions in Agreements about non-periodic payments the relationship between that relief and the administrative assessment of child support must be stated[60]. In addition, if the carer entitled to Child Support is in receipt of an income tested pension the Court must give reasons[61].

2.4.3. **TERMINATION**

2.4.3.1 A Consent Order will end in the following circumstances:

- at a date or upon the happening of an event stipulated within the terms of the Order;
- with the parties consent as part of either a Binding Child Support Agreement or a Limited Child Support Agreement if accepted by the Child Support Registrar[62];
- upon the happening of a child support Terminating Event[63]; and
- by a Court on an subsequent application to vary the Order[64].

2.4.3.2 If there is a change in circumstances a Court may be persuaded to vary and/or discharge an existing Order. The success of the Application will depend upon the same factors which informed the decision sought to be interfered with. In relation to variations to periodical payments regard will be had to Section 117 of the Act and the concept of the 'special circumstances' of the case. A lower standard than 'exceptional circumstances' as is required to set aside a Binding Financial Agreement.

[60] Section 125

[61] Section 118,126

[62] Section 95(5)

[63] Sections 12, 93(1)(h)(i)

[64] Section 141(j) with the caveats in Section 129 in respect of variations to lump sum and non-periodic Orders.

3. ADVANTAGES AND DISADVANTAGES

3.1. POINTS OF DISTINCTION

3.1.1. Two principle points of distinction emerge between Binding Child Support Agreements, Limited Child Support Agreements and Consent Orders when they are weighed in terms of their formal requirements and the means by which they can be set aside

3.1.2. The first distinction is the period for which the consent arrangement will operate. That arises because of the unusual provisions in relation to a Limited Child Support Agreement that can trigger its termination on the unilateral request of either party after 3 years or where there has been a 15% variation in the notional administrative assessment. Given that notional administrative assessments are made from year to year, it is therefore possible that a basis to set aside will arise in only 12 months of the Agreement's execution. This is a point of distinction that cannot be contracted out of through carful drafting. With all due respect to the drafters of this legislation it renders the utility of Limited Child Support Agreements to almost worthless and makes them largely redundant to the majority of situations where legal practitioners are advising on child support arrangements. In all but the rarest of circumstances, a Binding Child Support Agreement or a Consent Order would be preferred to a Limited Child Support Agreement by payees.

3.1.3. The second point of distinction turns on the various merits based requirements to terminate an agreement on the unilateral application of one of the parties. In respect of this distinction, Binding Child Support Agreements set themselves very much apart from Limited Child Support Agreements and Consent Orders because of the very high threshold the legislation creates to successfully bring an application to set them aside. Parties who enter into Binding Child Support Agreements need to contemplate the likely reality that whatever that agreement provides for will be in place until a child is 18 years of age. Many of the vicissitudes of life will not in themselves create a trigger that could justify the setting aside of those arrangements. If income is exhausted payers may need to have recourse to capital. If capital is exhausted then it is possible that the agreement might give rise to a financial catastrophe leading to bankruptcy.

3.1.4. However, where drafting could not resolve difficulties attaching to a Limited Child Support Agreement, careful considered drafting can mitigate the deficiencies identified above in relation to a Binding Child Support Agreement. Relying upon drafting alone has its pitfalls and places significant onus upon legal practitioners engaged in these types of matters. Attempting to crystal ball

gaze into the future of separated parents' lives and anticipate and allow for the multitude of potential variations of circumstances is a heavy task.

3.1.5. It is suggested that more often than not, if circumstances permit, a Consent Order made under the Assessment Act will be the most balanced and appropriate means to resolves child support consent arrangements. Surprisingly this is not a common path. In most contested proceedings in the Family Court of Australia that involve parenting, property, spouse maintenance and child support to be resolved by a suite of consent documents include a Child Support Agreement rather than a Departure Consent Order. There is no doubt that trying to convince a Registrar or a Judge to make a Child Support Order even by consent, is no easy task.

3.2. DRAFTING CONSIDERATIONS

3.2.1. If for all of the reasons set out above the considered view is that the most viable option is a Binding Child Support Agreement, as it very often will be, then the onus will fall to adequate drafting to try to mitigate the risk of being tied into a consent arrangement that might not be sustainable in the future. This type of drafting is not easy. Reliance on precedents or agreements drafted in unrelated matters is prone to risk and no attempt will be made in this paper to formulate any type of coverall clause that would work as a global panacea to those occasions where an early release from a Binding Child Support Agreements would be fair. Instead an attempt is made to identify the types of matters that should be considered when moving to draft these types of clauses in individual cases.

3.2.2. Matters for consideration when drafting include the following:

3.2.2.1 in respect of changes in the care arrangements for Children:

- the quantification of the change before it warrants a variation to the child support liability; for example should the number of nights of care need to change by more than two nights per week before a variation is justified;

- the period in which the justification for change needs to arise; for example it would be impractical to require a variation to the child support liability simply because in any given week a child spends more unintended nights with one parent than the other - should the change be for a period of more than 3 months or an average over a period of even 12 months - should the test then be

different in the last 12 months before a child support Terminating Event would otherwise occur; and

- will an agreement that varies if the number of nights change, operate as a hand brake to a party who would otherwise be seeking more time with a child.

3.2.2.2 in respect of changes in income:

- the quantification of the change that would justify the variation, for example should it be a change in percentage of a base income on the day a Child Support Agreement was entered into or a change in percentage in income from one year to the next.

- how is income to be defined, for example would it be by reference to taxable income reported in an income tax return, a base salary or also a deferred bonus - how would that income measure be determined in an objective sense (legal practitioners should be weary of clauses in Child Support Agreements which support to compel the productions of documents and/or information on a contractual basis that would inevitably need to rely upon some enforcement, the power of which may not necessarily exist in the hands of a Judge);

- how should redundancies be treated, for example at what point would you cease to pro rata a lump sum redundancy payment out over time and permit a variation down in the quantum of child support liability – in many industries large redundancy payments are the norm and recognise a period of unemployment and provide compensation to an employee for that period;

- how should voluntary terminations of employment to avoid child support be dealt with and if there is a need to provide an expansive definition of what will and will not justify a reduction of child support because of changes of employment status then how would those types of changes be objectively measured;

- for those payers who are self-employed the drafting bar is even higher in terms of trying to properly define their income and avoid mechanisms to move that income in legitimate ways that

don't offend the income tax legislation but might fall foul of the narrow definition of income in a Child Support Agreement.

3.2.2.3 Once a variation event has been achieved specific provision must be made as to what then should next occur.

- should the variation be temporary and if so for what period - should the period be set or variable and if variable what are the objective measures that define that variable period;

- should the agreement be set aside in its entirety and if so specific provision making it clear that the parties would then revert to the administrative assessment of child support needs to be made (practitioners should be very careful to avoid a situation where accidently the liability for child support might end pursuant to a Binding Child Support Agreement but the agreement itself might continue such that an administrative assessment of child support would not then be available).

3.2.2.4 The following additional observations are also offered:

- don't underestimate the benefits of using a Binding Child Support Agreement to vary one or more elements in a Child Support formula and otherwise permitting the remainder of the administrative child support assessment to occur in the ordinary course; for example a Binding Child Support Agreement which provides for a child support income amount for a carer to always be set to nil;

- if an agreement seeks to adopt definitions that appear in the Assessment Act then a specific clause to that effect ought to be included within at least the recitals to the Child Support Agreement to avoid any doubts.

3.3 At every stage legal practitioners should make clients aware that there is always likely to be a situation in which the drafting will fail. No clause will mitigate against every eventuality even if they could all be foreseen.

4. CONCLUSION

4.1 It will often be the case that a payer entering into a Binding Child Support Agreement will need to expect that in the worst case scenario they could be required to eat into capital to fund their child support commitments. If they are not in a position to do that then there

is a serious question to be asked about the viability of a Binding Child Support Agreement. In circumstances where Limited Child Support Agreements are of almost no use unless a party can prevail themselves of a Consent Order there is presently a significant deficiency in the consent options offered by the Assessment Act. There is an urgent need to recraft either the requirements to set aside a Binding Child Support Agreement or the "term limited" relevance of the Limited Child Support Agreement.

4.2 The desire to bring uniformity to a Binding Child Support Agreement and a Binding Financial Agreement is misguided. An attempt to treat spouse maintenance in the same manner as child support fundamentally misunderstands the great longevity of most child support arrangements and a lack of connection that child support has with property alteration as opposed to the connection that spouse maintenance has with property alteration. Whether the present situation is exactly what the crafters of the 2009 amendments sought to achieve or not, the reality is that the obligations upon legal practitioners advising on these matters are onerous.