

CHILD SUPPORT DEPARTURE ORDERS

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What are we talking about?

- **Part 7, Division 4 of the *Child Support (Assessment) Act 1989 (Cth)* (“the Act”) - Orders for departure from administrative assessment in special circumstances (departure orders)**
 - Why would a party apply for orders under this Division?
 - Which Courts have jurisdiction?
 - When is a party at liberty to able to apply to a Court for departure orders?
 - What does the Court need to be satisfied of prior to exercising their power to make departure orders?
 - What types of departure orders can be made?

What is not being dealt with today

Child Support Agency outcomes

- Parts 4, 4A or 5 of the Act – Administrative assessment application process and formulas
- Part 6A of the Act - Departure from administrative assessment of child support (departure determinations)

Other Court based outcomes

- Part 7, Division 3 of the Act - Application for amendment of administrative assessment that is more than 18 months old
- Part 7, Division 5 of the Act - Orders for provision of child support otherwise than in form of periodic amounts paid to carer
- Part VIII, Division 3 of the *Child Support (Registration and Collection) Act 1988* (Cth) - Appeals and references of questions of law from SSAT to courts

Jurisdiction

- Section 99 confers jurisdiction in relation to matters arising under the Act on:
 - the Family Court
 - the Federal Circuit Court
 - certain State and Territory courts
- Section 100 outlines the application of:
 - *Family Law Act 1975 (Cth)*
 - *Family Law Rules*
 - *Federal Circuit Court Rules*

to proceedings under the Act, *subject to the Act*, as if they were proceedings under section Part VII of the *Family Law Act 1975 (Cth)*

When can a party apply?

- Section 116 lists five alternative scenarios when a liable parent or carer “*may, in respect of an administrative assessment of child support for a child, apply... for an order [under Division 4]... in relation to the child in the special circumstances of the case*”
 - Firstly, must have an administrative assessment
 - Secondly, must be able to demonstrate some “special circumstances”
 - Thirdly, must fall into one of the five scenarios

The five scenarios under section 116

(a) Child Support Registrar has refused to make determination under Part 6A because the issues are too complex (s 98E or 98R) in respect of administrative assessment, and a lodged objection to that refusal has been disallowed

(aa) Child Support Registrar has refused to make determination under Part 6A because the issues are too complex (s 98E or 98R) in respect of an objection to administrative assessment

(ab) the SSAT has refused to make determination under Part 6A because the issues are too complex (s 98E or 98R) in respect of the administrative assessment

(b) per next slide

(c) the administrative assessment payable is assessed as the minimum annual rate of child support due to criteria under s 66(1) being met (n.b. liable parent, only eligible applicant)

Section 116(1)(b)

(b) both of the following apply:

- (i) **the liable parent** or carer entitled to child support is **a party to an application pending in a court** having jurisdiction under this Act;
- (ii) the court is satisfied that **it would be in the interest of the liable parent and the carer entitled to child support for the court to consider whether an order should be made** under this Division in relation to the child **in the special circumstances of the case**;

Power to make departure order: section 117(1)

(1) Where:

(a) **application is made** to a court... for an order... in relation to a child in the special circumstances of the case; and

(b) the court is satisfied:

(i) that **one or more of the grounds for departure mentioned in subsection (2) exists or exist**; and

(ii) that it would be:

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

(B) otherwise **proper**;

to make a particular order under this Division;

the court may make the order.

Additional powers to make departure orders: sections 136(4) & 136(5)

(4) If:

(a) the court sets aside a child support agreement under this section; and

(b) the court **is satisfied** as mentioned in paragraph 117(1)(b) (departure orders);

the court may **make an order under Division 4 of Part 7 without an application having been made under section 116.**

(5) If:

(a) the court sets aside a child support agreement under this section; and

(b) the court **is not satisfied** as mentioned in paragraph 117(1)(b) (departure orders); and

(c) the payee has received or will receive benefits pursuant to the agreement;

the court may still **make an order that departs from the administrative assessment where it is just and equitable to do so**, having regard to the benefits that the payee has already received pursuant to the agreement.

Why might a party apply?

- Parents are involved in objections/review process with the Child Support Agency and/or appeals to the SSAT every time a new assessment issues and they want orders with longer term ramifications, may have been ongoing difficulties encountered in terms of disclosure and substantial costs incurred
- Two birds one stone - a parent may be applying for parenting, property and/or spousal maintenance orders (or responding to same):
 - which would require them to make certain payments and that parent may be agreeable to meeting particular costs provided their obligation under the child support assessment is reduced
 - in circumstances where the combined child support income of the parents is higher than \$176,423
 - in circumstances where one parent is unemployed or underemployed, but there is an argument regarding earning capacity
- A parent may wish to seek orders either as part of an application to set aside a binding child support agreement, or in response to such an application

Keep the Objects in mind

- Principal object of the Act at section 4(1): **that children receive a proper level of financial support from their parents**
- See also the five further particular objects of the Act at section 4(2)
- Also note the two additional particular objects at section 114 applicable to Part 7, Division 4
 - that children have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents
 - that parents share equitably in the support of their children

The three steps of s 117

In the marriage of Gyselman (1992) FLC 92-279 at 79-064:

The structure... is that s 117(1)(b) identifies concisely the matters about which the Court must be satisfied and those components are then expanded in sub-sections (2) to (9). Section 117(1)(b) identifies a clear three-step process:

- 1. Whether one or more grounds of departure in s 117(2) is established.*

If so:

- 2. Whether it is “just and equitable” within the meaning of s 117(4) to make a particular order.*

- 3. Whether it is “otherwise proper” within the meaning of s 117(5) to make a particular order.*

It is clear from the careful way in which s 117 has been structured that the Court must address each of those three separate issues.

Step 1: ground of departure in s117(2)

(2) For the purposes of subparagraph (1)(b)(i), the grounds for departure are as follows:

(a) that, **in the special circumstances of the case, 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 person;** 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 **necessary to enable the parent to support:**

(A) **himself or herself;** or

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

Step 1: ground of departure in s117(2)

(aa) that, **in the special circumstances of the case**, 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));

(b) that, **in the special circumstances of the case**, 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 child**; or

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

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

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

Step 1: ground of departure in s117(2)

(c) that, **in the special circumstances of the case**, application in relation to the child of the provisions of this Act 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 child**; or

(ia) because of the **income, property and financial resources of either parent**; or

(ib) because of the **earning capacity of either parent**; 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 child**.

Step 1: ground of departure in s117(2)

- All of the grounds are prefaced by the words **in the special circumstances of the case**: see *Gyselman* at 79-065 for the Full Court's guidance on what this means
- N.b. also what is required for:
 - Grounds (2)(a)(iv) and (2)(b)(i) to establish *High costs involved in enabling parent to care for a child* pursuant to ss 117(2B) & 117(2C)
 - Ground (2)(b)(ib) to establish *High child care costs* pursuant to ss 117(3A) to (3C)

Step 2: just and equitable per s 117(4)

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 of the Act](#)); and
- (b) the proper needs of the child - [see on this point s 117\(6\)](#); and
- (c) the income, earning capacity, property and financial resources of the child - [see on this point s 117\(7\)](#); and
- (d) the income, property and financial resources of each parent who is a party to the proceeding - [see on this point s 117\(7A\)](#); and

Step 2: just and equitable per s 117(4)

(da) the earning capacity of each parent who is a party to the proceeding - [see on this point s 117\(7B\)](#); 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 - [see on this point s 117\(8\)](#); and

Step 2: just and equitable per s 117(4)

(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 117\(10\)](#)) by the making of, or the refusal to make, the order.

Step 3: otherwise proper per s 117(5)

(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 of the Act) 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.

Types of orders: section 118

- (1) The orders that a court may make under this Division are as follows:
 - (a) an order varying the **annual rate** of child support payable by a parent;
 - (b) an order varying a parent's or non-parent carer's **cost percentage** for a child ([see s 55D](#));
 - (c) an order varying a parent's **child support income** ([see s 41](#));
 - (d) an order varying the parents' **combined child support income** ([see s 42](#));
 - (e) an order that:
 - (i) **the column in the Costs of the Children Table that covers a parent's child support income or combined child support income** that is, or is ordered to be, **greater than 2.5 times** the annualised MTAWWE figure for the relevant June quarter, is the column headed "2 to 2.5"; and
 - (ii) **the column is to apply as if the second dollar amount** in the heading to that column **did not apply**;

Types of orders: section 118

(1) The orders that a court may make under this Division are as follows:

...

(f) an order varying a parent's **child support percentage** (see s 55D);

(g) an order varying a parent's **adjusted taxable income** (see s 43);

(h) an order varying a parent's **relevant dependent child amount or multi-case allowance** (see s 46 or s 47);

(i) an order varying a parent's **self-support amount** (see s 45);

(j) an order varying **the costs of the children** (see **Costs of the Children Table on CSA website**).

Effect of orders

- Commencement
 - s 111(1)(b), 112(1)(b) & 112(2)
 - s 118(2B)
 - s 118(2C)
- Cessation:
 - s 142: upon the happening of a child support terminating event (see s 12 for definition)
- Child Support Registrar to implement orders
 - ss 119 and 138
- Variation:
 - *Sathra & Sathra* [2013] FamCAFC 142 at [42], [55]-[58] and [61] quoting *In the marriage of Bryant* (1996) FLC 92-690; *Wild v Ballard* (1997) FLC 92-771; and *Ross v McDermott* (1998) FLC 98-003

A SUGGESTED APPROACH

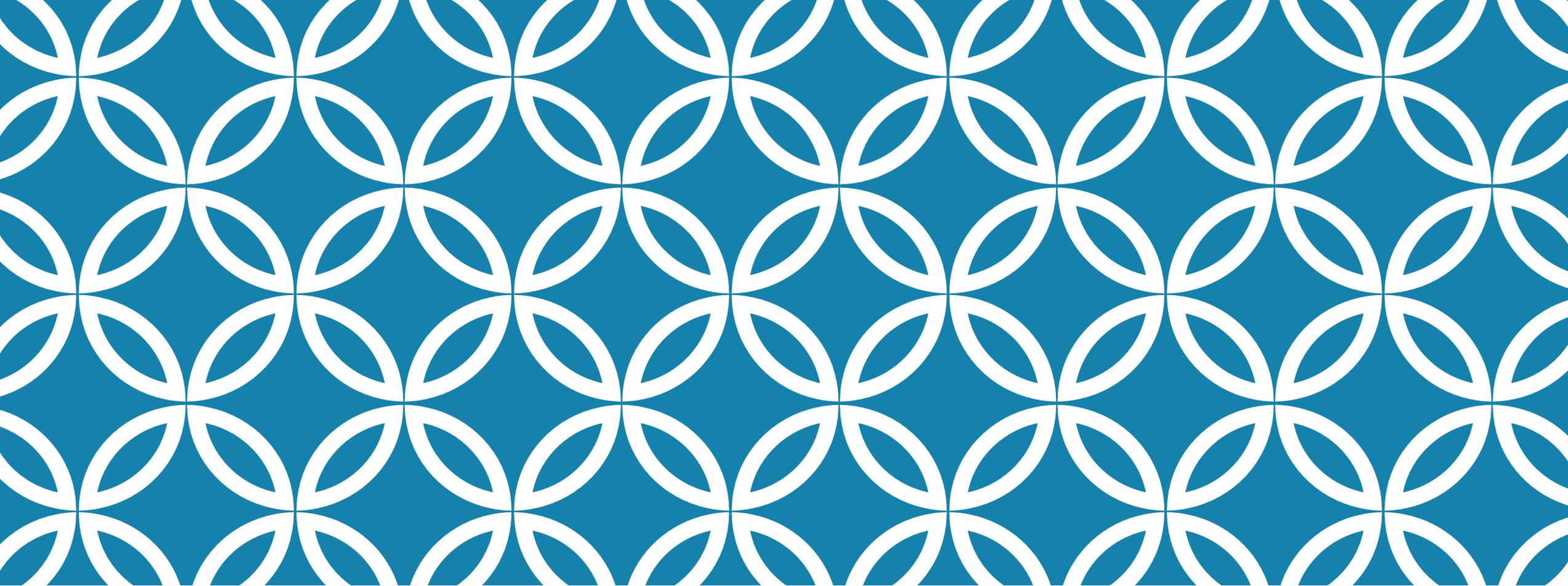
- Does your client have an administrative assessment in force?
- Is your client a party to an application pending before the Family Court or Federal Circuit Court (e.g. parenting, property or spousal maintenance)?
- Would it be in the parties' interest for the Court to consider whether a departure order should be made 'in the special circumstances of the case'?
- Make sure the order you are seeking is one which can be made under s 118
- Identify at least one ground for departure under s 117(2)
- Turn your mind to s 117(4) and the justice and equity of the proposed order as regards the child, liable parent and carer entitled to child support
- Consider s 117(5) and the propriety of the proposed order
- Ensure the evidence put before the Court is detailed and supports order sought (make sure there is evidence about financial circumstances of the parties and needs of the children for the period(s) which the order is intended to cover)
- Ensure compliance with the Rules applicable to the Court

Some examples in case law

- *Seymour & Seymour* [2011] FamCAFC 97: Application for orders under Part 7, Div 5 can be the “application pending” for s 116(1)(b) and review mechanism within orders means no need to re-satisfy 116(1)(b) again on review. Discussion regarding difference between orders under Part 7, Div 4 and Part 7, Div 5.
- *Lovine & Connor and Anor* [2012] FamCAFC 168; (2012) FLC 93-515: Failure of trial judge to deal with applications by both parties for departure orders on the merits as part of property settlement and parenting proceedings (remitted for rehearing)
- *Saberton & Saberton* [2013] FamCAFC 89: Discussion regarding difference between orders under Part 7, Div 4 and Part 7, Div 5 & authority that jurisdiction not exhausted if only Child Support appealed and then remitted
- *Prpic* (1995) FLC ¶92-574: Even where grounds for departure exist, it is desirable for the Court to have regard to the level of child support provided by the formula.
- *Babbit & Babbit* [2011] FamCAFC 151 – income splitting, intent to reduce child support
- *Firth & Hale-Forbes* [2014] FamCAFC 187 – change to previous departure orders, special circumstances, each party and Father’s partner had large incomes, impact of tax

Available resources

- Child Support Agency publication “*The Legal Practitioner’s Guide - Precedents for child support agreements and court orders*”
<http://www.humanservices.gov.au/business/publications/cs1174>
- Federal Circuit Court publication “*Child Support Applications*”
http://www.federalcircuitcourt.gov.au/pubs/docs/BRCSFCC_0313V2.pdf



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