SETTING ASIDE BINDING CHILD SUPPORT AGREEMENTS

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Part 6 of the *Child Support (Assessment) Act 1989 (Cth)* ("the Assessment Act") provides for two types of agreements that set or alter the amount of child support to be paid by a liable parent; Binding Child Support Agreements ("binding agreements") and Limited Child Support Agreements ("limited agreements").

Child Support Agreements provide a means for parties to enter into consent arrangements in relation to child support, rather than relying upon the formula assessment method.

Binding Agreements v Limited Agreements

Each party to a binding agreement must have received legal advice before entering into the terms of the Agreement[1] and each party must also receive legal advice before terminating a binding agreement[2]. An administrative assessment does not need to be in place in order for a binding agreement to be accepted by the Child Support Agency ("CSA"), except where the binding agreement provides for the crediting of a lump sum. The Court can set aside a binding agreement in very limited circumstances.

Each party to a limited agreement are not required to obtain independent legal advice prior to entering into a limited agreement. However, an administrative assessment must be in place before a limited child support agreement is accepted by CSA. The annual rate of child support payable under a limited agreement must be at least the assessed annual rate of child support.[3]

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[1] Section 80C - Child Support (Assessment) Act 1989 (Cth)
[2] Section 80D – Child Support (Assessment) Act 1989 (Cth)
[3] Section 80E – Child Support (Assessment) Act 1989 (Cth)

It should be noted that whilst the requirement for Centrelink to approve a child support agreement has been removed from 1 July 2008, a party's entitlement to Family Tax Benefit Part A will be assessed on the amount of child support that would have been paid if the agreement had not been made, regardless of whether the agreement is a binding or limited agreement.

Section 81 of the Assessment Act provides that a child support agreement, whether binding or limited, must comply with the following provisions;

(a) Section 82 – Children in relation to whom agreements may be made;
(b) Section 83 – Persons who may be parties to an agreement; and
(c) Section 84 – Provisions that may be included in agreements.

Binding agreements

Binding agreements are intended to provide for "longer term" arrangements than those contained in a limited agreement, and they also provide a high level of certainty and finality about child support arrangements. For this reason, parties to a binding agreement must obtain legal advice of the consequences of entering into a binding agreement. This is to ensure that parties enter into binding agreements for the right reasons and not due to coercive or misleading behaviour and/or undue influence by the liable parent.

Section 80C of the Assessment Act outlines that an agreement is a Binding Child Support Agreement if;

(a) the agreement is binding on parties in accordance with subsection (2); and
(b) the agreement complies with section 81(2).

Section 80C (2) outlines that for the purpose of subsection (1), an agreement is binding on the parties to the agreement if, and only if:

(a) the agreement is in writing; and
(b) the agreement is signed by the parties to the agreement; and;
(c) the agreement contains, in relation to each party to the agreement a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to

the agreement, with independent legal advice from a legal practitioner as to the following matters:

(i) the effect of the agreement on the rights of that party;

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

(d) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(e) the agreement has not been terminated under section 80D; and

(f) after the agreement is signed, either the original agreement or a copy of the agreement is given to each party.

Setting aside a binding agreement by consent

Child support agreements cannot be varied, although an agreement can be terminated by consent and its provisions incorporated by reference into a new agreement[4].

Setting aside a binding agreement by order of the Court

If only one party seeks to end a binding agreement, they must make an application to the Court seeking to set aside the agreement; however such orders are only made in very limited circumstances.

For a binding agreement to be set aside the court must be satisfied that the agreement of the party was obtained in one of the following circumstances;

(a) by fraud or failure to disclose material information;

(b) through undue influence, duress or unconscionable conduct;

such that it would be unjust not to set the agreement aside.

[4] Section 80CA – Child Support (Assessment) Act 1998 (Cth)

The Court can also set aside binding agreements in circumstances where the Court is satisfied that exceptional circumstances have arisen since the agreement was made, such that the child or applicant will suffer hardship if the agreement remains in place.

Section 136 of the Assessment Act outlines the power of the Court to set aside binding agreements and termination agreements.

Section 136 (2) outlines that if a party has applied to set aside an agreement then the Court may do so if it is satisfied as to the following;

(a) that the party's agreement was obtained by fraud or a failure to disclose material information; or

(b) that another party to the agreement, or someone acting for another party:

(i) exerted undue influence or duress in obtaining that agreement; or

(ii) engaged in unconscionable or other conduct;

to such an extent that it would be unjust not to set aside the agreement; or

(c) 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); or

(d) in the case of a binding child support agreement--that because of exceptional circumstances, relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made, the applicant or the child will suffer hardship if the agreement is not set aside.

It should be noted that the list of grounds to set aside binding agreements as outlined in section 136 (2)(a) and (b) of the Assessment Act are similar to the grounds found in s79A of the Family Law Act for varying property settlement orders.

Section 137 outlines that where a child support agreement is set aside by a Court, the Court may make orders consequential on the setting aside of the agreement.

Section 137(2) outlines that a Court having jurisdiction may make such orders (including order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of the child or a party to the agreement.

SETTING ASIDE A BINDING AGREEMENT

1. Change in Circumstances

Pursuant to section 136(2) (d) of the Assessment Act, it is difficult for a party to be successful in setting aside a binding agreement on the basis of a change in circumstances since the agreement was made, such that it would cause a party to the agreement 'hardship'. This is because the legislative intention behind section 136 of the Assessment Act was to provide certainty to parties whilst still also making provision for those cases where there has been an 'exceptional' change in circumstances.[5]

In *Haoucher v Minister for Immigration & Ethnic Affairs*,[6] McHugh J considered the term "exceptional circumstances", saying (at [23]):

> *"No doubt the term 'exceptional circumstances' is vague. [however] … mere disagreement does not constitute 'exceptional circumstances'."*

In *Tanwar Enterprises Pty Ltd v Cauchi*[7] Kirby J stated (at [106]) when speaking of 'exceptional' circumstances when used in equity:

> *"In judging whether the circumstances are 'exceptional', regard must be had to the entire relationship between the parties, the concern of equity being with substance, not form. The entire circumstances must be judged as exceptional".*

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[5] CCH, *Australian Torts Commentary* (at 23 June 2010) 37-230
[6] [1990] HCA 22; (199) 169 CLR 648
[7] [2003] HCA 57; 217 CLR 315; 201 ALR 359; 77 ALJR 1853

In *Nikac & Ors v Minister for Immigration & Ethic Affairs*[8] Wilcox J when considering what constitutes 'exceptional circumstances' said (at [56]):

> *"Like beauty, 'exceptional circumstances' lies in the eye of the beholder".*

In the more recent case of *Balzano & Balzano*[9] Warnick J noted that the term 'exceptional circumstances' had been considered in a number of cases, however they were not necessarily in relation to its use in the Assessment Act. Warnick J referred to the case of *Sandrk and Sandrk*[10] where McGee J said (at 78,750):

> *"What amounts to exceptional circumstances is very much a question of fact and degree and the 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.*
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> *A feature of Simpson and Hamlin*[11] *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 this is the situation in this case". [emphasis added].*

In the more recent case of *Daley & Daley*[12] Brown FM said [at (85)];

> *'Exceptional is defined by the New Shorter Oxford English Dictionary as follows:*

[8] [1988] FCA 400
[9] (2010) FLC 98 – 048; [2010] FamCAFC 11
[10] (1991) LC 92 - 260
[11] (1984) FLC 91 - 576 (a case with respect to the term as it appears in s79A of the Family Law Act 1975).
[12] (2009) FLC 98 - 039

> Of the nature of or forming an exception; unusual, out of the ordinary; special; (of a person) unusually good, able, etc.

Accordingly, for circumstances to be exceptional, they must be "unusual", "out of the ordinary" or "special". In the child support context, in respect of an application for departure, Kay J held that "special circumstances" were "facts peculiar to that particular case which set it apart from other cases".[13]

In *Gallup & Gallup*[14] Demack FM differentiated between "exceptional circumstances" and "special circumstances", saying;

> *'52. "Exceptional", it seems to me, carried with it something more than "special". In its most basic sense, "exceptional" is derived from "except". This provides the starting point for understanding that the word is meaning to exclude or create a barrier. Circumstances, then, which are "exceptional", must be outside the normal experience, in such a way that they are the exception and something more than a minor abnormality. As the exceptional circumstances are arising in the context of change, the expression in Simpson and Hamlin seems apt: that the change was such as to "take it out of and beyond the ordinary circumstances in which such change might be reasonably expected to occur".*
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> *53. The legislation clearly contemplates the relevant circumstances being in the plural, and I may well consider that although severally no circumstances are exceptional, jointly, their character changed to create exceptional circumstances."*

Her Honour therefore found it appropriate to consider the whole of the circumstances of the case in order to determine whether the circumstances fell within "exceptional" for the purpose of the Assessment Act.

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[13] CCH, *Australian Torts Commentary* (at 23 June 2010) ¶37-230.

[14] [2009] FMCAfam 839

Her Honour summarised the relevant circumstances as follows;

"The father would have me take into account the following cumulative factors to demonstrate that the circumstances here are exceptional:

a. *His pre-existing mental health which was worsened by the breakdown of the matrimonial relationship and the loss of time with the children and the subsequent impact upon his capacity to find employment bearing in mind his history of self-employment;*
b. *Due to the longer than expected period of unemployment, his need to use his capital to support himself;*
c. *His new relationship with his now wife having to be facilitated between Australia and Thailand;*
d. *That his new wife's visa restrictions mean that she will remain a financial burden to the father for at least the first two years of her time in Australia;*
e. *That the father and his new wife have a child together, for whom, only the father can receive government benefits and his wife cannot contribute at all financially;*
f. *That the father's new child is a legitimate cause for expenditure by the father and should be taken into account;*
g. *That the main capital base of the father's was a share portfolio, and that is now worthless following the downturn in the share market due to the present global financial crisis.*

Her Honour found that none of the factors, of themselves, constituted "exceptional" however she found that together they amounted to exceptional circumstances. Her Honour went on to say (at [90]);

> *"It could not have been within his knowledge or contemplation that he would lost the ability to supplement his income through his share portfolio due to the downturn in the share market at the same time as having difficulty to find work, while still responding emotionally to the end of a*

marriage and the loss of regular meaningful face to face contact with his children, made more difficult because of his history of misusing alcohol and being depressed, whilst forming a new relationship with a woman who has no lawful capacity to assist with bringing income into the household, and who bears him a child, thus creating a further financial burden"

Accordingly, when assessing whether a party to a binding agreement has the requisite "exceptional circumstances" to set aside the agreement, the whole of the circumstances must be considered as, individual circumstances of themselves may not be sufficient to set aside the binding agreement.[15]

It should also be noted that a period of unemployment has been determined not to be an unforeseeable event of itself and does not amount to an exceptional circumstance.[16] However, this is not a strict "test" of what would constitute an exceptional circumstance. For example, if a person has been in steady employment for a significant period of time and is not able to find alternative employment at a similar salary in a short period of time that may be sufficient to establish that an "exceptional circumstance" exists. However, if a party has had a number of different jobs and quickly finds alternative employment that may not be sufficient to satisfy the test.[17]

Thus, it is very important to provide factual context when any application is made to set aside a binding agreement as this may act as the key or precipitating circumstance that is relied upon.[18]

In *McConville & McConville*[19] it was said that re-marriage or a liable parent having subsequent children "may not be out of the ordinary". It has been argued however that this proposition is too strict given that one of the objectives of the Child Support scheme is to treat all children equally and a child from a second marriage should not

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15 CCH, *Australian Torts Commentary* (at 23 June 2010) 37-230
16 Jessup & Jessup [2010] FMCfam 124
17 CCH, *Australian Torts Commentary* (at 23 June 2010) 37-230
18 Ibid
19 [2009] FMCAfam 1034

receive less support simply by virtue of this. Accordingly, the question of how to take into account the birth of subsequent children must be subject to the "hardship" test.[20]

2. Fraud

Section 136 of the Assessment Act refers to a statutory fraud, which differs from the common law and equitable definitions. Fraud in equity is a far broader concept than at common law.

In *Green and Kwiatek*[21] the Full Court of the Family Court in relation to a maintenance agreement, adopted the definition of fraud given by Lord Herschell LC in *Derry v Peek*[22] (at p 374);

> "*Fraud is this context consists of a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact so acted upon."*

It should be noted however that the definition of fraud for the purpose of section 136 of the Assessment Act is not clear and remains to be determined.

3. Undue Influence

In *O'Brien and O'Brien*[23] Baker J summarised the elements to be satisfied by a person who alleges undue influence (at 76,657) as follows:

1. *That some legitimate means of persuasion was used by the other party;*
2. *That the legitimate means used was a reason (although not necessarily the sole reason, nor the predominant reason, nor the clinching reason) why the parties entered into the agreement.*

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[20] CCH, *Australian Torts Commentary* (at 23 June 2010) 37-230
[21] (1982) FLC 91 - 259
[22] (1889) 14 AC 337
[23] (1981) FLC 91 - 094

Essentially, the case law suggests that conduct that results in the agreement being 'unjust' may be sufficient to establish undue influence of fraud. Further, it should be noted that section 136(2)(b)(ii) does not limit the relevant conduct which could constitute fraud or duress to be conduct at the time the agreement was made but can be conduct after the agreement and therefore the basis of a termination order.

4. Duress

At common law, "duress" is the compulsion of a person either by bodily restraint or through fear of bodily hard.

In *Kokl and Kokl*[24] Gee J said "duress" meant "the compulsion of a person by physical or mental harm" (p 76,557). It should be noted that this was said in the context of an application made under section 79A of the Family Law Act.

In *Kostomiris*[25] the Wife alleged a miscarriage of justice on the basis of duress and made an application to the Court pursuant to section 79A of the Family Law Act. The Wife alleged that at the time the Orders were made, the Husband was making threats that he would kill her if she sought certain property and that she feared for her safety and the safety of the children. There was also a domestic restraining order in place against the Husband.

Burr J dismissed the Wife's application and found that the period leading up to the making of the consent orders was characterised as "robust" negotiations during which the Wife also imposed terms of settlement. It was further held that the Wife was legally represented, received advice throughout the negotiation process and engaged in "extensive and thorough negotiations". His Honour found the Wife to be capable of applying clear and informed thinking to the matters in issue.

The Wife's application was dismissed because it did not have the requisite proximity between the threats and the making of the consent orders.

[24] (1981) FLC 91 - 078
[25] [2003] FamCA 274 (unreported but discussed in SH and DH (2003) FLC 93 - 164

In *Benson and Benson*[26] the Husband sought to set aside consent orders under section 79A of the Family Law Act on the grounds of duress. The Husband alleged that the Wife had made threats to commit suicide and that he had taken those threats seriously as his new partner's husband had committed suicide when they failed to end their affair. The Husband further alleged that he received threats that the children would be killed.

Cohen J dismissed the Husband's application on the basis that none of the Wife's threats were related to financial negotiations. His Honour further found that the Husband was not fearful that the Wife would act on her threats as he left her despite the threats.

In *Riley and Paterman*[27] the Wife sought to set aside consent orders on the ground of duress. In this case, the Husband had burnt down the former matrimonial home at separation, had harassed the Wife until three months prior to the signing of the Orders and the Wife was suffering from depression and emotional instability. Further, there was a domestic violence order in place against the Husband in favour of the Wife and the Wife had been seeing a therapist for 10 months due to the Husband's actions.

Jordan J held that in this case duress could not be established as the Wife was legally represented, took part in negotiations and instructed her solicitors to put offers to the Husband and therefore had a capacity to give clear instructions and apply clear thinking to the matters in dispute. Further, none of the threats or intimidation was directly related to the litigation. His Honour was therefore not satisfied that the Wife was subjected to duress in entering into the consent orders.

The case law suggests that when there is no requisite proximity between the actions which a party alleges constitute duress and the making of the consent orders/binding agreements, that the ground of duress will not be established and therefore not a ground to set aside a binding agreement.

[26] [2002] FamCA 569 (unreported but discussed in SH and DH (2003) FLC 93 - 164
[27] [2000] FamCA 1296

It is therefore important as practitioners to ensure that our clients are not being subjected to any actions that in our view would constitute duress or undue influence as the case law indicates that such an argument would not be successful in overturning a binding agreement if the parties had the benefit of legal advice. Accordingly, such remedy for the parties may lay in an action against the practitioner that provided the advice.

Conclusion

When bringing an application to set aside a binding agreement there are a number of matters that should be covered in your affidavit material;[28]

- What would the formula assessment have been at the time of the agreement? It is important when clients enter into binding agreements that you have an estimate of what the liable parent would pay if assessed with the CSA.

- What were the circumstances of the parties at the time of the agreement?

- What are the financial circumstances of the parties now?

- If it is a culmination of factors case, what is the list of factors to be relied upon?

- What would a formula assessment produce now?

- From what date is the agreement to be set aside, and will this require refunds or leave debts for either of the parties?

- Does the case require a departure from the formula assessment (s s117 application) that will replace the agreement if it is set aside?

[28] CCH, *Australian Torts Commentary* (at 23 June 2010) 37-230

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