



The *Legal* Practitioner's Guide

Precedents for child support agreements and court orders



Australian Government

Child Support Agency



*Representing Family Lawyers
Throughout Australia*



Family Law Council

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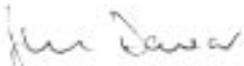
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The Legal Practitioner's Guide is a joint project of the Family Law Council, the Family Law section of the Law Council of Australia, and the Child Support Agency (CSA). It provides precedents for court orders and child support agreements made under the *Child Support (Assessment) Act 1989* (the Assessment Act).

The Legal Practitioner's Guide covers a range of common situations, with suggested terms and tips and problems for parents and the drafter to consider. By using the Legal Practitioner's Guide, family law practitioners can make sure that a court order or agreement reflects the parents' intentions and can readily be administered by CSA.

This publication should assist family law practitioners to help their clients obtain court orders and agreements that properly balance their wish for finality and their need for flexibility, while providing their children with a proper level of financial support.



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1. *Departure* orders or agreements that vary the child support assessment

1.1 Summary

The *Child Support (Assessment) Act 1989* (the Assessment Act) provides that when CSA accepts an application for an administrative assessment of child support, it must calculate the amount payable using the formula in Part 5 of the Assessment Act.

The formula takes into account the number of children for whom child support is payable, the income of both parents, and whether the liable parent (the 'payer') has any relevant dependent children living with them. A modified formula applies when the parents share care of the children, with the payer having care for at least 30% of the time.

1.1 (a) Departure orders

Part 7, Division 4 of the Assessment Act provides that parents with a child support assessment can apply to a court for a departure from their assessment. The court can make a departure order if one of the legislated grounds for departure exists and it would be just, equitable and otherwise proper to do so (section 117). A person's right to apply to court for a departure order is usually dependant upon one or both parents having previously applied to CSA for a change of assessment and objected to CSA's decision on that application (section 116)¹. The exception is where the payer and/or the payee are a party to proceedings before a court with jurisdiction to hear a departure application and the court is satisfied that it would be in the payer and payee's interests to consider the matters together (section 115(c)). Section 118 specifies the types of departure orders that a court can make.

1.1 (b) Child support agreements

Part 6 of the Assessment Act provides that parents can make a written child support agreement. They can apply to CSA for that agreement to be accepted (section 89). A written agreement is a child support agreement if it contains provisions of the type specified in section 84. If CSA accepts the agreement, it will amend the existing assessment to take into account relevant provisions (section 94). If there is no assessment in place, CSA will make a new assessment in accordance with the terms of the agreement (section 93).

Parents can make a child support agreement to vary the effect of an earlier child support agreement (section 97) or to vary the effect of a prior court order that departs from their child support assessment (section 95(5)).

¹ The Child Support Legislation Amendment Bill 2004 will, if enacted, amend section 116 of the Child Support (Assessment) Act 1989 to make an objection to the Registrar's change an optional step before applying to a court for a departure order.

1.2 Suggested draft terms

1.2 (a) Setting the annual rate

The simplest and most common type of court order or agreement is one that sets the rate of child support. This is often expressed as an annual rate.

Departure orders

*1. That pursuant to section 117 of the Child Support (Assessment) Act 1989 there be a departure from the administrative assessment of child support payable by **[payer's name]** to **[payee's name]** for the child(ren) **[child(ren)'s names]** as follows:*

2. For the period from [start date] to [end date] the annual rate of child support be set at \$x. This amount is to be apportioned equally between the children.

OR

2. For the period from [start date] to [end date] the annual rate of child support be set at \$x per child.

Child Support Agreements

[Payer's name] and [payee's name] agree that [payer's name] will pay child support to [payee's name] of \$xx per month for [child 1's name] and \$yy per month for [child 2's name] for the period from [start date] to [end date].

Tips and problems

When the payee receives Family Tax Benefit

If the payee receives Family Tax Benefit (Part A) at more than base rate, CSA cannot accept a child support agreement unless it has been approved by the Secretary of the Department of Family and Community Services (sections 91A(3) and 92(3)). In deciding whether to approve an agreement, the Secretary must decide whether the payee has, by making the agreement, taken reasonable action to obtain maintenance. This involves a comparison of the total amount payable under the agreement with the amount payable under the existing administrative assessment. As a general principle, the Secretary requires the agreement to be at least 100% of the assessment. In addition, there are specific requirements for children with disabilities. For more information about the reasonable action for maintenance test, refer to the Family Assistance Guide published on the website of the Department of Family and Community Services at the following address: <http://www.facs.gov.au/faguide/index.htm> (refer to chapter 3.1.6.50 'Child Support Agreements').

However, a court does not require approval of the Secretary when making a court order to depart from the assessment. The court considers social security implications before it makes the order (section 117(5)).

Amount per child

An order or agreement should set an amount for each child or indicate how the amount is apportioned between children. This will ensure that if a terminating event (section 12) happens in relation to one or more of the children only the amount per child will remain payable rather than the full annual rate set by the order.

Payment frequency and rate

The periodic amount of child support can be expressed as an amount per week, fortnight, month, or any recurring period. However, when CSA collects the debt, it will convert the periodic amount to an annual rate; and collect and disburse the payments in accordance with the *Child Support (Registration and Collection) Act 1988* (see section 28B).

Stating the period covered

It is best to specify the actual dates of the period to which the order or agreement applies, rather than using terms such as a 'child support year' or 'child support period'.

If no start date is specified, the order or agreement has effect from the date it was made (see sections 93, 94 and 119).

If no end date is specified, the order or agreement will continue to have effect until there is a terminating event for the payer, payee or the child.

What happens when the order or agreement expires?

CSA will use the child support formula to calculate the rate of child support payable for the days after the order or agreement ends. For cases that started because of an agreement, the payer or payee may need to apply for an administrative assessment.

Can CSA change the rate of child support set by an order or agreement?

CSA is obliged to give effect to an order, or accepted child support agreement whenever it makes a child support assessment (section 35 and 94(2)). Where an order or agreement fixes child support at an annual rate, CSA cannot change it to a different annual rate for the period covered by that order or agreement even if a party's circumstances change. The parents will need to make a child support agreement, or obtain a court order to change the rate of child support. However, an order that changes one of the formula components does allow some flexibility (see 1.2 (d) pg 12).

1.2 (b) Indexing the amount payable

If an order or agreement that sets the annual rate of child support is expressed to last for a number of years, the value of that child support may decrease over time. It may be appropriate to index the amount payable so that the amount of child support retains its value. The clauses below can be used in any agreement or order that sets the periodic rate of child support.

Consumer price index

The annual rate of child support payable by [payer's name] to [payee's name] will increase from [day and month] each year, in accordance with variations in the consumer price index for [specify capital city or weighted average].

Index by a fixed percentage

The annual rate of child support payable by [payer's name] to [payee's name] will increase by $x\%$ from [day and month] each year.

Increase by a set dollar amount

The rate of child support payable by [payer's name] to [payee's name] will increase by [\$x per period] from [day and month] each year.

Tips and problems

What if the cost of living decreases?

The suggested terms above provide only for an increase in the rate of child support. If the cost of living decreases, the rate of child support will remain the same. If it is intended that child support will reduce if the cost of living reduces, replace the word 'increase' with the words 'be adjusted' or 'increase or decrease'.

Increasing by a set dollar amount

The amount of child support can also be indexed by a set dollar amount, at specified intervals. To avoid confusion, the increase should be expressed with reference to the period used to set the original rate of child support. See example above.

1.2 (c) Unemployment clauses

CSA cannot vary or suspend an assessment that is based on a departure order or agreement that sets the periodic amount of child support. The payer is liable to pay the same amount of child support during any period of unemployment. If the payer cannot afford to do so, he or she can negotiate with the payee about making a child support agreement for a lower amount of child support, or apply to the court for an order departing from their existing court order or agreement. A better alternative is to avoid the problem by including a suitable unemployment clause in the original departure order or child support agreement.

Departure order

1. *That pursuant to section 117 of the Child Support (Assessment) Act 1989 there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:*
2. *For the period from **[start date]** to **[end date]** the annual rate of child support be set at **\$x** per child.*
3. *The annual rate of child support payable under this order will reduce to **\$y** for any period in which **[payer's name]** is not in full time employment. For the purpose of this clause, 'full time employment' means **[definition – eg working at least X hours per week or earning a gross income of \$X per week]**.*

OR

3. *The annual rate of child support payable under this order will reduce to **\$y** for any period in which **[payer's name]** receives an income tested social security benefit or pension at the full rate.*

(The underlined words are optional – see 'Tips and problems' on the next page.)

Child support agreement

1. ***[Payer's name]** and **[payee's name]** agree that **[payer's name]** will pay child support to **[payee's name]** of **\$x** per month for **[child 1's name]** and **\$y** per month for **[child 2's name]** for the period from **[start date]** to **[end date]**.*
2. *The child support payable under this agreement will reduce to **\$z** per month for any period in which **[payer's name]** is not in full time employment. For the purpose of this agreement, 'full time employment' means **[definition – eg working at least X hours per week or earning a gross income of \$X per week]**.*

OR

2. *The child support payable under this agreement will reduce to **\$z** per month for any period in which **[payer's name]** receives an income tested social security benefit or pension at the full rate.*

(The underlined words are optional – see 'Tips and problems' on the next page.)

Tips and problems

How much child support should be paid during a period of unemployment?

The appropriate level of child support will vary according to the circumstances of the parents and children.

As a guide, however, under the usual formula assessment provisions, a payer who derives his or her income solely from a social security benefit is liable to pay the minimum child support assessment (section 66). This is currently a flat rate of \$260 per annum, or \$21.67 per month, irrespective of the number of children. The minimum child support assessment does not apply in cases where the parents share care of the children, with the payer having care for at least 30% of the time, or where each parent has at least one of their children in their care for 30% of the time (section 66B(1)).

If the order or agreement provides for more than the minimum assessment amount during a period of unemployment, and there is more than one child, specify the amount, or proportion, for each of the children.

Choosing the 'trigger' for an unemployment clause

There is no foolproof way to choose the right 'trigger' for an unemployment clause. The important thing is to think through the possibilities and make sure that the parents understand what is meant, and that the intention is properly reflected in the clause used.

Here are some things to consider:

- A clause that operates only when a person is unemployed will not change the rate of child support when they are working part-time, even if they earn less than the rate of social security payment.
- Defining the 'trigger' term is a good way to ensure you have canvassed the possibilities, as well as making sure CSA can apply the term as was intended by the court and/or the parents. Check with CSA to make sure there is no problem with an intended clause.
- CSA can readily administer a clause that makes reference to the payer receiving an income tested social security benefit or pension, as it can readily obtain this information from Centrelink.
- Not every person who is unemployed will be entitled to a social security benefit. Apart from the obvious case of a person whose income or assets preclude them from payment, a person may be ineligible because of their new partner's income or assets.
- An unemployment clause that operates only when a person receives an income tested social security benefit or pension at the full rate will substantially narrow the range of circumstances when the clause applies. An unemployed person with some investments or a casual job may receive a reduced rate of pension or benefit. Similarly, if their partner works part-time, or has casual work, this may reduce their social security benefit.

When the payee receives Family Tax Benefit

If the payee receives Family Tax Benefit (Part A) at more than base rate, CSA cannot accept a child support agreement unless it has been approved by the Secretary of the Department of Family and Community Services (sections 91A and 92).

The Secretary will consider whether the employment clause provides the payee with a reasonable level of child support when the payer is unemployed. An unemployment clause that sets the rate of child support at the minimum assessment rate will generally meet this requirement.

The Secretary does not need to approve a court order to depart from the assessment. The court considers social security implications before it makes the order. The court can make an order that sets the annual rate of child support at less than \$260 if it considers this is just, equitable and otherwise proper (sections 117(4) and (5)).

1.2 (d) Setting components of the formula

A court can make a departure order that modifies one or more of the components of the administrative formula which CSA uses to calculate the rate of child support (section 118(1)). Parents can also modify the formula for their case, by making a child support agreement.

Formula components

The administrative formula in the Assessment Act takes into account the following information:

- payer's child support income amount (section 38)
- payer's exempt income amount (this varies according to whether the payer has any relevant dependent children in his or her care) (section 39)
- payer's adjusted income (payer's child support income amount minus the exempt income amount) (section 36(2))
- payee's child support income amount (if the payee is the child's parent) (sections 43, 44 and 45)
- payee's disregarded income amount (a set figure for all payees) (section 46)
- payee's excess income amount (payee's child support income amount minus the disregarded income amount) (section 44)
- child support percentage (varies according to the number of children) (sections 37, 48 54 and 54B).

In order to preserve some of the flexibility of the administrative formula, it may be appropriate to set other components of the formula rather than set a fixed annual rate. In this way, CSA can amend the child support assessment to take into account new information, while continuing to give effect to the order or agreement. Here are some examples of clauses for agreements and orders that only change one element of the formula.

Setting the payer's or payee's child support income amount

An order or agreement can set the payer's or payee's child support income amount. This type of clause may be appropriate if the administrative assessment does not accurately reflect current income. It fixes the income that CSA uses to work out the rate of child support, but allows other changes, such as a change to the child support percentage and the payer's exempt income if the payer's circumstances change, or if one of the children moves from the payee's household to live with the payer.

Departure order

*1. That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:*

2. For the period from **[start date]** to **[end date]** **[payer's name]**'s child support income amount be fixed at an annual rate of **\$x**.

OR (for the payee)

2. For the period from **[start date]** to **[end date]** **[payee's name]**'s child support income amount be fixed at an annual rate of **\$x**

Child support agreement

[Payer's name] and **[payee's name]** agree that **[payer's name]**'s child support income amount will be fixed at an annual rate of **\$x** when calculating child support payable to **[payee's name]** for the child(ren) **[child(ren)'s names]** for the period from **[start date]** to **[end date]**.

OR

[Payer's name] and **[payee's name]** agree that **[payee's name]**'s child support income amount will be fixed at an annual rate of **\$x** when calculating child support payable to **[payee's name]** for the child(ren) **[child(ren)'s names]** for the period from **[start date]** to **[end date]**.

Setting the payer's exempt income amount

An order or agreement can vary the payer's exempt income amount. This type of clause may be appropriate if the payer has a legal duty to maintain another person who isn't otherwise taken into account in the assessment, for example a child over 18 years of age who is still receiving full-time education. It allows CSA to take into account the latest taxable income for each parent when they lodge their tax returns, and to make any changes to the child support percentage or to the payee's disregarded income amount, if necessary.

Departure order

1. That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:

2. For the period from **[start date]** to **[end date]** the payer's exempt income amount is increased by the sum of **\$x***.

*The amount **\$x** must be specified and can be equal to a portion of the payer's costs of supporting the child who is over 18 years of age during the period. Increasing the assessment by the allowance for a relevant dependent used in the child support formula may be appropriate (section 39 defines this by reference to the rates of Social Security pension or Family Tax Benefit - contact CSA for details of the current amount).

Child support agreement

[Payer's name]** and **[payee's name]** agree that **[payer's name]**'s exempt income amount will be increased by the sum of **\$x when calculating child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** for the period from **[start date]** to **[end date]**.*

*The amount \$x must be specified and can be equal to a portion of the payer's costs of supporting the child who is over 18 years of age during the period. Increasing the assessment by the allowance for a relevant dependent used in the child support formula may be appropriate (section 39 defines this by reference to the rates of Social Security pension or of Family Tax Benefit - contact CSA for details of the current amount).

Setting the payee's disregarded income amount

An order or agreement can vary the payee's disregarded income amount. This type of clause may be appropriate, if the payee is employed and earns more than the disregarded income amount, but also has high child care costs, which are not recognised as a tax-deductible expense. It allows CSA to take into account the latest taxable income for each parent when they lodge their returns, and to make any changes to the child support percentage and the payer's exempt income, if necessary.

Departure order

*3. That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:*

*4. For the period from **[start date]** to **[end date]** the payee's disregarded income amount is increased by the sum of **\$x***.*

*The amount \$x must be specified and can be equal to the payee's annual child care costs for the period.

Child support agreement

[Payer's name]** and **[payee's name]** agree that **[payee's name]**'s disregarded income amount will be increased by the sum of **\$x when calculating child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** for the period from **[start date]** to **[end date]**.*

*The amount \$x must be specified and can be equal to the payee's annual child care costs for the period.

Varying the child support percentage

An order or agreement can adjust the amount payable by increasing or decreasing the child support percentage. This type of clause may be appropriate if the payer has a court order under the *Family Law Act 1975* requiring him or her to pay child maintenance for a child (a stage 1 order), which is not taken into account in their child support for the children of a subsequent relationship (a stage 2 assessment). It can also be used where the parents agree that the special needs of the child require that the payer contribute a higher level of child support than is normally paid under the formula. It permits CSA to take into account changes to the parent's income, the number of children and the payer's exempt income.

Departure order

Where child support is payable for only one child

1. *That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child **[child's name]** as follows:*
2. *For the period from **[start date]** to **[end date]** the child support percentage is varied to **x%**.*

Where child support is payable for more than one child

1. *That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:*
2. *For the period from **[start date]** to **[end date]** the total child support percentage is **increased/decreased** by **n** percentage points.*
3. *The orders in clauses 1 and 2 shall remain in force **[specify condition]**.*

Examples of conditions:

If the increase relates only to one child:

*as long as child support continues to be payable by **[payer's name]** to **[payee's name]** for the child **[child's name]**.*

If there is a reduction because the payer has a stage 1 liability to pay child maintenance:

*as long as **[payer's name]**'s liability to pay child maintenance for **[child's name]** continues.*

Child support agreement

Where child support is payable for only one child

***[Payer's name]** and **[payee's name]** agree that the child support percentage to be used when calculating child support payable to **[payee's name]** for the child **[child's name]** is varied to **x%** for the period from **[start date]** to **[end date]**.*

Where child support is payable for more than one child

1. *[Payer's name] and [payee's name] agree that the total child support percentage to be used when calculating child support payable to [payee's name] for the child(ren) [children's names] is **increased/decreased** by **n** percentage points for the period from [start date] to [end date].*

2. *Clause 1 of this agreement shall remain in force [specify condition].*

Examples of conditions:

If the increase relates only to one child:

as long as child support continues to be payable by [payer's name] to [payee's name] for the child [child's name].

If there is a reduction because the payer has a stage 1 liability to pay child maintenance:

as long as [payer's name]'s liability to pay child maintenance for [child's name] continues.

Tips and problems

Income amount orders and estimates

The usual formula provisions allow a parent to make an election to have their child support based on an estimate of their income, if their income has changed (section 60). Estimates are normally available whenever a parent's income has dropped by 15% (section 60(3)). They are prospective and relate to a particular child support period (section 61). Once a parent has made an estimate election, they can update it at two-monthly intervals (section 62).

However, a parent with an income amount order (section 59) **cannot** use an estimate (section 60(2)).

A departure order or an agreement is an income amount order if it:

- varies the annual rate of child support payable (either by setting an annual rate or by varying the annual rate otherwise payable by a percentage, or a nominated amount)
- varies the child support income amount of a parent, the adjusted income amount of a payer, or makes provision for the calculation of either of those amounts
- directs that the high-income cap for payers (section 42) or the cap on the combined liability of 2 liable parents (section 52) does not apply.

An order or agreement that varies the child support percentage, payer's exempt income amount or the payee's disregarded income amount is **not** an income amount order.

An income amount order can relate only to the payer or the payee, or to both of them. An income amount order relating to only one parent will not prevent the other parent from making an estimate (section 60(2)).

1.2 (e) A child's income

A child remains an eligible child for a child support assessment until their 18th birthday (section 12(1)(c)). Where the child's secondary education continues beyond their 18th birthday, the assessment can be extended to the last day they receive secondary education in the calendar year of their 18th birthday (sections 151B, 151C and 151D).

CSA cannot end a child support assessment because of the income earned by an eligible child. However, a court can make a departure order that varies the assessment for that child if it believes it is fair to change the assessment because of the child's income, earning capacity or financial resources (section 117(2)(c)(i)). The parents can also make a child support agreement to cover this situation, or the payee can make an election to end the assessment (sections 151 and 151A) for that child if he or she believes this is appropriate.

Departure order

Where child support is payable for only one child

1. *That pursuant to section 117 of the Child Support (Assessment) Act 1989 there be a departure from the administrative assessment(s) of child support payable by **[payer's name]** to **[payee's name]** for the child **[child's name]** as follows:*
2. *The annual rate of child support will reduce to **[\$nil or some other specified amount per period]** for any period in which **[child's name]** is self-supporting. For the purpose of this clause, 'self supporting' means **[definition – eg working at least X hours per week or earning a gross income of \$X per week]**.*

Where child support is payable for more than one child

1. *That pursuant to section 117 of the Child Support (Assessment) Act 1989, there be a departure from the administrative assessment(s) of child support payable by **[payer's name]** to **[payee's name]** for the child(ren) **[child(ren)'s names]** as follows:*
2. *For any period in which an eligible child of the assessment is self-supporting the child support percentage for all of the children will be calculated as if the self supporting child were not an eligible child; and an additional amount of \$x will be added to the amount of child support that would otherwise be payable.*

(The underlined words are optional – see 'Tips and problems' on the next page.)

3. *For the purpose of clause 2, 'self supporting' means **[definition – eg working at least X hours per week or earning a gross income of \$X per week]**.*

Child support agreement

If the payer and payee agree that the payer should not pay any child support for a child who is self-supporting and the payee does not receive Family Tax Benefit (Part A) at more than base rate, the simplest option is for the payee to make an election to end the child support assessment for that child. The payee can then re-apply for child support for the child if he or she ceases to be self-supporting before turning 18.

If the payee receives Family Tax Benefit (Part A) at more than base rate the parents can make a child support agreement to vary the rate of child support payable for a self-supporting child. CSA may only accept the agreement if the Secretary of the Department of Family and Community Services approves it (sections 91A and 92).

Where child support is payable for only one child

1. ***[Payer's name] and [payee's name] agree that [payer's name]'s child support payments for [child's name] will reduce to [\$nil or some other specified amount per period] for any period in which [child's name] is self-supporting.***
2. ***For the purpose of this agreement, 'self supporting' means [definition – eg working at least X hours per week or earning a gross income of at least \$X per week].***

Where child support is payable for more than one child

1. ***[Payer's name] and [payee's name] agree that for any period in which **an eligible child of the assessment** is self-supporting the child support percentage for all of the children will be calculated as if **the self supporting child** were not an eligible child; and an additional amount of \$x will be added to the amount of child support that would otherwise be payable.***
(The underlined words are optional – see 'Tips and problems' below.)
2. ***For the purpose of clause 1, 'self supporting' means [definition – eg working at least X hours per week or earning a gross income of at least \$X per week].***

Tips and problems

Defining 'self-supporting'

Generally, a person aged 18 or less will not be earning an income sufficient to provide for all of their needs, especially if they are still attending school or undertaking tertiary study or vocational training. It is recommended that a clause modifying child support when a child is self-supporting refers to the number of hours the child would need to work to be considered self-supporting, or perhaps the level of income that the child would need to earn.

Different clauses to be used if there is more than one child

CSA makes just one child support assessment for all of the eligible children in a case. In most cases, where one child is self-supporting, but the others are not, it is likely that parents would intend that child support for the remaining children would be calculated as if they were the only eligible children in the assessment. To achieve this, it is necessary to use a more complex provision than the one suggested for cases where there is only one child. The following example illustrates why.

EXAMPLE

Lee is the payer; Sam is the payee. They have two children, Mark and Melanie, aged 17 and 15. Mark is working full-time and is earning an income of \$480 per week. Sam and Lee agree that Lee should not have to continue paying child support for Mark.

Lee and Sam make the following agreement:

Lee and Sam agree that Lee's child support payments for Mark will reduce to \$nil for any period in which Mark is self-supporting. For the purpose of this agreement, 'self-supporting' means earning a gross income of at least \$400 per week.

Before Lee and Sam made this agreement, Mark and Melanie's rate of child support was \$6,494, worked out as follows:

<i>Lee's child support income amount</i>	<i>\$37,000</i>
<i>minus exempt income</i>	<i>\$12,950</i>
<i>Lee's adjusted income</i>	<i>\$24,050</i>
<i>multiplied by child support percentage</i>	<i><u>27%</u></i>
<i>(2 children)</i>	
<i>Child support for Melanie and Mark</i>	<i>\$6,494</i>

CSA gives effect to the agreement as follows:

Child support payable for Melanie:

<i>Lee's adjusted income</i>	<i>\$24,050</i>
<i>multiplied by child support percentage</i>	<i><u>13.5%</u></i>
<i>(1 of 2 eligible children)</i>	<i>\$3,247</i>
<i>Plus child support payable for Mark</i>	<i>\$0</i>
<i>Total child support for Melanie and Mark</i>	<i>\$3,247</i>

Six months later - Mark turns 18. Melanie is now the only eligible child.

Child support payable for Melanie:

<i>Lee's adjusted income</i>	<i>\$24,050</i>
<i>multiplied by child support percentage</i>	<i><u>18%</u></i>
<i>(1 eligible child)</i>	<i>\$4,329</i>

Adding a set dollar amount for a child who is self-supporting

The optional wording suggested above for cases where there is more than one eligible child in the assessment (i.e. '*and an additional amount of \$xx will be added to the amount of child support that would otherwise be payable*') would turn that clause into an income amount order. Refer to 1.2(d) on pg 12, under the heading 'Income amount orders and estimates' for an explanation of the effect of an income amount order (section 59).

1.2 (f) Discharging arrears

The Assessment Act does not make provision for parents or a court to discharge arrears payable under a child support assessment. However, where this outcome is appropriate, it can be achieved by an agreement or order that sets the rate of child support at an amount equivalent to the amount already paid.

Departure orders

1. That pursuant to section 117 of the *Child Support (Assessment) Act 1989*, there be a departure from the administrative assessment of child support payable by **[payer's name]** for the child(ren) **[child(ren)'s names]** as follows:

2. For the period from **[start date]** to **[end date]** the total amount of child support payable is **\$x***.

*Where \$x equals the amount of child support that has already been paid for the stated period.

Child support agreements

[Payer's name] and **[payee's name]** agree that **[payer's name]** is liable to pay **[payee's name]** a total amount of child support of **\$x*** for the child(ren) **[child(ren)'s names]** for the period from **[start date]** to **[end date]**.

*Where \$x equals the amount of child support that has already been paid for the stated period.

Tips and problems

Finding out how much has been paid

Contact CSA for details of the total amount of child support that has already been paid in the case. CSA can provide this information over the telephone to either parent or their authorised representative.

What if the payee has a debt to CSA for overpaid child support?

Usually the amount that has been paid to the payee will be the same as the amount that CSA has collected from the payer. However, if the payee has a debt to CSA for overpaid child support (section 79), he or she will have received from CSA more than CSA has collected from the payer. A payee's overpayment (which is owed to the Commonwealth and not the payer) cannot be 'discharged' in the same way as a payer's child support arrears. The payee will still be obliged to repay any debt they owe to the Commonwealth, even if an order or agreement discharges the arrears of child support that the payer owes to CSA.

2. *Departure* orders or agreements that provide for a lump sum or payments to third parties

2.1 Summary

The Assessment Act provides CSA may only make an administrative assessment that provides for a payer to make periodic payments of child support to the payee. However, a court may make orders for provision of child support in ways other than by way of a periodic payments to the payee. Parents can also make a child support agreement to achieve the same result without resorting to legal proceedings.

2.1 (a) Departure orders

Part 7, Division 5 of the Assessment Act provides that parents with a child support assessment can apply to a court for an order requiring the payer provide child support in the form of a lump sum or payments to third parties (section 123). The court can make an order of this type if it would be just, equitable and otherwise proper to do so (section 124). The court may specify that payments under the order will be credited towards the child support assessment, or that they are additional to the periodic amounts payable under the assessment (section 125).

2.1 (b) Child support agreements

Part 6 of the Assessment Act provides that parents can make a written child support agreement and apply to CSA for that agreement to be accepted (section 89). A written agreement is a child support agreement if it contains provisions of the type specified in section 84. If CSA accepts the agreement, it will amend the existing assessment to take into account the relevant provisions (section 94). If there is no assessment in place, CSA will make a new assessment in accordance with the terms of the agreement (section 93).

A child support agreement can make provision for a payer to provide child support by way of a lump sum, or payments to third parties (section 84(2)). The agreement may specify that these payments will reduce the child support assessment (sections 84(2), (3) and (8)), or that they are to be paid in addition to the periodic amounts payable under the assessment.

2.2 Suggested draft terms

2.2 (a) Lump sum payments

Court orders

1. That pursuant to section 124 of the *Child Support (Assessment) Act 1989* **[payer's name]** provide child support to **[payee's name]** for the child(ren) **[child(ren)'s names]** by way of lump sum payment of **\$x**. This amount is to be credited against the administrative assessment(s) of child support and:

2. For the period from **[start date]** to **[end date]** the lump sum child support is to have an annual value of **\$x** and the annual rate of child support is to be reduced by that amount (**\$x**).

OR

2. For the period from **[start date]** to **[end date]** the lump sum child support is to count for **[x% (100% or some other specified percentage)]** of the annual rate of child support.

Child support agreement

1. **[Payer's name]** and **[payee's name]** agree that **[payer's name]** will provide child support to **[payee's name]** for the child(ren) **[child(ren)'s name(s)]** by way of lump sum payment of **\$x**. This amount is to be credited against the administrative assessment(s) of child support and:

2. For the period from **[start date]** to **[end date]** the lump sum child support is to have an annual value of **\$x** and the annual rate of child support for that period is to be reduced by that amount (**\$x**).

3. The parties intend to register this agreement with the Family Court of Australia.

OR

2. For the period from **[start date]** to **[end date]** the lump sum child support is to count for **[x% (100% or some other specified percentage)]** of the annual rate of child support.

Tips and problems

Credit clauses

Lump sum orders and agreements should specify whether the lump sum is to be credited against the administrative assessment and, if so, the rate at which it is to be credited. If a court order or agreement does **not** include a credit clause, the lump sum is paid **in addition** to the child support assessment (sections 125 and 95).

The credit clause cannot simply refer to crediting the value of the assessment each year until the amount of the payment of child support has been fully credited (sections 125(3) and

95(4)). This is not a specified amount and does not state the periods in which the assessment is to be reduced.

The crediting rate does not need to be constant for the entire period. The order or agreement can state a number of different periods, with different crediting rates for each (sections 125(4) and 95(4)).

The amount to be credited against the child support assessment cannot reduce the assessment below nil (section 127(3) and 95(4)). The payer cannot carry over any 'unused credit', or seek a refund of that amount.

Collecting the lump sum payment

CSA can only register periodic amounts of child support for collection. The payee must make his or her own arrangements to enforce payment of any lump sum amount that the payer is required to pay under a court order or agreement (sections 95(3) and 141). They do this by registering the agreement in a court with jurisdiction under the Assessment Act.

Registering an agreement in a court with Assessment Act jurisdiction

Sections 98 and 136 of the Assessment Act allow for registration of a child support agreement in a court with jurisdiction under the Act. Registration is a prerequisite for the court to enforce the terms of the agreement, or to consider an application to vary an agreement, or set it aside.

Chapter 23 of the *Family Law Rules 2004* deals with registration of documents. Rule 23.01 allows for the registration of a child support agreement by filing an affidavit with a copy of the agreement attached.

When does the reduction take effect?

There is no provision in the Assessment Act for the reduction to be dependent on payment of the lump sum.

If a court order for lump sum payment of child support contains a credit clause, CSA must amend the child support assessment to give effect to that credit clause as soon as the order becomes final (section 127).

If CSA accepts a child support agreement that requires the payer to make a lump sum payment it must immediately give effect to any credit clause in that agreement (sections 94(1) and 95(4)).

When the payee receives Family Tax Benefit

If the payee receives Family Tax Benefit (Part A) at more than base rate, CSA cannot accept a child support agreement for payment of a lump sum unless it has been approved by the Secretary of the Department of Family and Community Services (sections 91A and 92). In deciding whether to approve an agreement, the Secretary must decide whether the payee has, by making the agreement, taken reasonable action to obtain maintenance. This involves a comparison of the total amount payable under the agreement with the amount payable under the existing administrative assessment. As a general principle, the Secretary requires the agreement to be at least 100% of the assessment. In addition, there are specific requirements for children with disabilities. For more information about the reasonable action for maintenance test, refer to the Family Assistance Guide published on the website of the Department of Family and Community Services at the following address:

<http://www.facs.gov.au/faguide/index.htm> (refer to chapter 3.1.6.50 'Child Support Agreements').

CSA does not require the Secretary's approval to implement a court order requiring lump sum payment. The court considers social security implications before it makes the order (section 124). The Family Assistance Office can advise the payee how lump sum child support will affect his or her Family Tax Benefit entitlement.

2.2 (b) Payments to third parties

A court order or child support agreement can also make provision for the payer to pay child support in the form of payments to third parties (sections 123 and 95). The Assessment Act does not limit the types of payments that can be included in these provisions, but the most common forms are school fees, mortgage payments, health insurance and the known costs of orthodontic treatment.

Court orders

1. *“That pursuant to section 124 of the Child Support (Assessment) Act 1989 [payer’s name] provide child support to [payee’s name] for the child(ren) [child(ren)’s names] by way of payment of all school fees for [child(ren)’s names] while the said children continue to attend [name of school]. Payment is to commence with the 20XX school year.*

2. *The child support ordered to be paid by way of school fees is to be credited against the administrative assessment of child support. For the period from [start date] to [end date] the school fees are to count for [x% (100% or some other specified percentage)] of the annual rate of child support for that period.*

OR

2. *The child support ordered to be paid by way of school fees is to be credited against the administrative assessment of child support. For the period from [start date] to [end date] the school fees are to have an annual value of \$x and the annual rate of child support for the days in that period is to be reduced by that amount (\$x).*

OR

2. *The child support ordered to be paid by way of school fees is to be credited against the administrative assessment of child support. For the 20XX calendar year the school fees are to have an annual value of \$y and the annual rate of child support for the days in that year is to be reduced by that amount (\$y).*

Child support agreement

1. *[Payer’s name] and [payee’s name] agree that [payer’s name] will provide child support to [payee’s name] for the child(ren) [child(ren)’s names] by paying school fees for [child(ren)’s name(s)] while they continue to attend [name of school]. Payment is to commence with the 20XX school year.*

2. *The child support that [payer’s name] will pay by way of school fees is to be credited against the administrative assessment of child support. For the period from [start date] to [end date] the school fees are to count for (x% or \$z) of the annual rate of child support for that period.*

OR

2. *The child support that [payer’s name] will pay by way of school fees is to be*

credited against the administrative assessment of child support. For the 20XX calendar year the school fees are to have an annual value of \$y and the annual rate of child support for the days in that year is to be reduced by that amount (\$y); and

3. For each subsequent calendar year, the annual value of the school fees is to be increased by (x% or \$z). The annual rate of child support payable in each of those years is to be reduced by the annual value of school fees for the relevant year.

Tips and problems

Credit clauses

Orders and agreements for child support by way of payments to third parties should specify whether the payments are to be credited against the administrative assessment and, if so, at what rate. If the court order or agreement does **not** include a credit clause, the third party payments are **additional** to the amounts to be paid to the payee under the child support assessment (sections 125 and 95).

The credit clause cannot simply refer to crediting the value of the assessment each year until the amount of the payment of child support has been fully credited. This is not a specified amount and does not state the periods in which the assessment is to be reduced (sections 95(4) and 125(3)).

The crediting rate does not need to be constant for the entire period. The order or agreement can state a number of different periods, with different crediting rates for each (sections 95(4) and 125(4)).

If there is more than one eligible child and the crediting rate is expressed as a dollar amount, rather than a percentage, it may be appropriate to specify an amount per child.

The amount to be credited against the child support assessment cannot reduce the assessment below nil (sections 127(3) and 95(4)). The payer cannot carry over any 'unused credit', or seek a refund of that amount.

Enforcing payments to third parties

CSA can only register periodic amounts of child support for collection. The payee must make his or her own arrangements to enforce payment of third party payments the payer is required to pay under a court order or agreement (sections 95(3) and 141).

Registering an agreement in a court with Assessment Act jurisdiction

Sections 98 and 136 of the Assessment Act allow for registration of a child support agreement in a court with jurisdiction under the Act. Registration is a prerequisite for the court to enforce the terms of the agreement, or to consider an application to vary an agreement, or set it aside.

Chapter 23 of the *Family Law Rules 2004* deals with registration of documents. Rule 23.01 allows for the registration of a child support agreement by filing an affidavit with a copy of the agreement attached.

When does the reduction take effect?

There is no provision in the Assessment Act for the reduction to be dependent on the payer making the required payments to third parties.

If a court order requiring the payer to make payments to third parties contains a credit clause, CSA must amend the child support assessment to give effect to that credit clause as soon as the order becomes final (section 127).

If CSA accepts a child support agreement that requires the payer to make payments to third parties, CSA must immediately give effect to any credit clause in that agreement (sections 94(1) and 95(4)).

When the payee receives Family Tax Benefit

If the payee receives Family Tax Benefit (Part A) at more than base rate, CSA cannot accept a child support agreement for payments to third parties unless it has been approved by the Secretary of the Department of Family and Community Services (sections 91A and 92). In deciding whether to approve an agreement, the Secretary must decide whether the payee has, by making the agreement, taken reasonable action to obtain maintenance. This involves a comparison of the total amount payable under the agreement with the amount payable under the existing administrative assessment. As a general principle, the Secretary requires the agreement to be at least 100% of the assessment. In addition, there are specific requirements for children with disabilities. For more information about the reasonable action for maintenance test, refer to the Family Assistance Guide published on the website of the Department of Family and Community Services at the following address: <http://www.facs.gov.au/faguide/index.htm> (refer to chapter 3.1.6.50 'Child Support Agreements').

CSA does not require the approval of the Secretary to implement a court order requiring the payer to make payments to third parties. The court considers social security implications before it makes the order (section 124).

The Family Assistance Office can advise the payee how child support by way of payments to third parties will affect his or her Family Tax Benefit entitlement.

2.2 (c) The 25% rule

Parents who have a departure order or agreement that provides for child support to be paid as a lump sum or as payments to third parties should be aware of the '25% rule' (section 128 of the Assessment Act). The 25% rule allows a payee who receives an income tested pension, allowance or benefit to apply to have their child support assessment reduced by no more than 25%, irrespective of the amount of reduction specified in their departure order or agreement. It is possible the payee may be required to make such an election in order to qualify for Centrelink payments.

The aim of the 25% rule is to ensure that the payee and the children receive adequate regular payments of child support, rather than receiving a lump sum topped up by social security payments. While the payee may not be receiving social security payments when the order or agreement is made, it is important to remember that people's circumstances can change unexpectedly.

A simple way to avoid the 25% rule is to limit the extent of the credit clause so that it reduces the assessment by 25% or less. A different way is to provide for periodic payments as well as a lump sum. Another simple approach is not to include a credit clause in the order or agreement. The lump sum or third party payments will then be amounts paid in addition to the child support assessment, which can be fixed at a periodic rate (see 1.2 (a) on pg 6).

Alternatively, where a departure order or agreement provides that the payer is obliged to make child support payments by way of ongoing payments to third parties, a further clause can be included to suspend those third party payments when the 25% rule applies.

Court orders

The order under section 124 of the Child Support (Assessment) Act 1989 is suspended during any period in which the Registrar is required to reduce the assessment by no more than 25% pursuant to an application under section 128 of that Act.

Child support agreements

1. [Payer's name] and [payee's name] agree that [payer's name]'s obligation to provide child by paying [type of payments to third parties] is suspended during any period in which the Registrar is required to reduce the assessment by no more than 25% pursuant to an election under section 128 of the Child Support (Assessment) Act 1989.

Tips and problems

What if a lump sum has been paid and the payee makes a 25% rule election?

If a lump sum has been paid and a payee makes an election the payer can apply for a change of assessment on the basis that he or she has already paid money for the benefit of the child or children (section 117(2)(c)(ii)). There is no guarantee that the application for change of assessment will be successful.

Making an order for a short period

One way of protecting a payer may be to ensure that these types of orders are made for shorter rather than longer periods. This limits the risk that parents may be locked into an order which is not suitable for their changed circumstances.

2.2 (d) Lump sums plus a fixed periodic amount

An order or agreement can provide for the payment of a lump sum combined with a periodic amount.

Court orders

1. That pursuant to section 117 of the *Child Support (Assessment) Act 1989*, there be a departure from the administrative assessment of child support payable by **[payer's name]** to **[payee's name]** for the child(ren) **[child(ren)'s names]** as follows:

2. For the period from **[start date]** to **[end date]** the annual rate of child support be set at **\$x** per child.

3. That pursuant to section 124 of the *Child Support (Assessment) Act 1989* **[payer's name]** provide child support to **[payee's name]** for the child(ren) **[child(ren)'s names]** by way of a lump sum payment of **\$x**. This amount is to be credited against the administrative assessment(s) of child support and:

4. For the period from **[start date]** to **[end date]** the lump sum child support is to have an annual value of **\$x** and the annual rate of child support is to be reduced by that amount (**\$x**).

OR

4. For the period from **[start date]** to **[end date]** the lump sum child support is to count for **[x% (100% or some other specified percentage)]** of the annual rate of child support.

Child support agreement

1. **[Payer's name]** and **[payee's name]** agree that **[payer's name]** will pay child support to **[payee's name]** of **\$x** per month for **[child 1's name]** and **\$y** per month for **[child 2's name]** for the period from **[start date]** to **[end date]**.

2. **[Payer's name]** will provide child support to **[payee's name]** for the child(ren) **[child(ren)'s names]** by way of lump sum payment of **\$x**. This amount is to be credited against the administrative assessment(s) of child support and:

3. For the period from **[start date]** to **[end date]** the lump sum child support is to have an annual value of **\$x** and the annual rate of child support for that period is to be reduced by that amount (**\$x**).

OR

3. For the period from **[start date]** to **[end date]** the lump sum child support is to count for **[x% (100% or some other specified percentage)]** of the annual rate of child support.

Tips and problems

Credit clauses

Lump sum orders and agreements should specify whether the lump sum is to be credited against the administrative assessment and, if so, the rate at which it is to be credited (sections 95(4), 125(2) and 125(3)). If a court order or agreement does **not** include a credit clause, the lump sum is paid **in addition** to the child support assessment.

25% rule

An order or agreement that contains a credit clause is subject to the 25% rule (see 2.2 (c) pg 29).

2.2 (e) Payments to third parties plus a fixed periodic amount

An order or agreement can provide for the payment of child support in the form of payments to third parties, combined with a fixed periodic amount.

Court orders

1. That pursuant to section 117 of the *Child Support (Assessment) Act 1989* there be a departure from the administrative assessment of child support payable by **[payer's name]** to **[payee's name]** for the child(ren) **[child(ren)'s names]** as follows:
2. For the period from **[start date]** to **[end date]** the annual rate of child support be set at **\$x** per child.
3. That pursuant to section 124 of the *Child Support (Assessment) Act 1989* **[payer's name]** provide child support to **[payee's name]** for the child(ren) **[children's names]** by way of payment of all school fees for **[child(ren)'s names]** while the said children continue to attend **[name of school]**. Payment is to commence with the **20XX** school year.
4. The child support ordered to be paid by way of school fees is to be credited against the administrative assessment of child support. For the period from **[start date]** to **[end date]** the school fees are to count for **[x% (100% or some other specified percentage)]** of the annual rate of child support for that period.

OR

4. For the period from **[start date]** to **[end date]**, the school fees are to have an annual value of **\$xx** and the annual rate of child support for the days in that period is to be reduced by that amount (**\$x**).

Child support agreement

1. **[Payer's name]** and **[payee's name]** agree that **[payer's name]** will pay child support to **[payee's name]** of **\$x** per month for **[child 1's name]** and **\$y** per month for **[child 2's name]** for the period from **[start date]** to **[end date]**.
2. **[Payer's name]** will provide child support to **[payee's name]** for the child(ren) **[child(ren)'s names]** by paying school fees for **[child(ren)'s names]** while they continue to attend **[name of school]**. Payment is to commence with the **20XX** school year.
3. The child support that **[payer's name]** will pay by way of school fees is to be credited against the administrative assessment of child support. For the period from **[start date]** to **[end date]** the school fees are to count for **(x% or \$z)** of the annual rate of child support for that period.

Tips and problems

Credit clauses

Orders and agreements that provide for payments to be made to third parties should specify whether those third party payments are to be credited against the administrative assessment and, if so, the rate at which they are to be credited (sections 95(4), 125(2) and 125(3)). If a court order or agreement does **not** include a credit clause, the third party payments are **additional** to the child support assessment.

25% rule

An order or agreement that contains a credit clause is subject to the 25% rule (see 2.2 (c) pg 29).

3. *Court* orders about parentage/step-parents

3.1 Summary

Parents can apply for court orders which affect a child support assessment in ways other than departure orders or orders for lump sums or payments to third parties.

Division 2 of Part 7 of the Assessment Act makes provision for challenging CSA's acceptance or refusal of an application for child support in a court exercising family law jurisdiction. An unsuccessful applicant for a child support assessment can seek a court's declaration that they are a person who is entitled to child support from another person for a particular child or children (section 106). A payer in a child support assessment can seek a court declaration which states that they are not liable to pay child support for a particular child or children (section 107).

These declarations under the Assessment Act are usually sought where there is a dispute about a child's parentage: either the unsuccessful applicant cannot establish that the person from whom they seek payment of child support is the child's parent; or the payer believes he or she is not a parent of the child for whom the assessment was made. The proceedings often involve the court making orders for scientific testing in order to determine whether or not a person is a parent of a child.

Under the Assessment Act a payer who has care of a step-child is generally not able to have their assessment reduced on that basis unless the court has made an order under section 66M of the *Family Law Act 1975* in relation to the payer and the step-child. If an order has been made under section 66M, CSA can take the step-child into account as a relevant dependent child in making a child support assessment.

3.2 Suggested draft terms

3.2 (a) Section 106 declarations

1. *That pursuant to section 106 of the Child Support (Assessment) Act 1989, [applicant's name] is entitled to an administrative assessment of child support for [child's name] payable by [name of liable parent].*

Tips and problems

The applicant must object before they can apply to court

An application for a declaration under section 106 can only be made if an application for child support has been refused by CSA and an objection to that decision has also been refused (subsection 106 (1A)).²

Section 106 declaration versus a parentage declaration

It is not sufficient that the order state that the person from whom child support is sought is a parent of the child. This could serve as a form of proof of parentage under section 29(2)(c) but a new application would have to be made and child support would only be payable from the date of the new application.

Orders should make a declaration that the applicant was entitled to an administrative assessment for the child payable by the person from whom child support is sought. CSA can then backdate the liability to the date that the application for child support was made (section 106(5)).

3.2 (b) Section 107 declarations

1. *That pursuant to section 107 of the Child Support (Assessment) Act 1989, [payee's name] is not entitled to an administrative assessment of child support for [child's name] payable by [payer's name].*

Tips and problems

How does CSA give effect to the declaration?

Orders should make a declaration that the payee was not entitled to an administrative assessment for the child payable by the person from whom child support is sought. This will result in the application for child support for that child being treated as if it never had been accepted (section 107(5)).

Section 143 provides a mechanism for the payer to seek recovery of any child support paid before the court makes a section 107 declaration (see pg 36).

² The Child Support Legislation Amendment Bill 2004 will, if enacted, amend sections 98X and 106 of the Child Support (Assessment) Act 1989 to remove the requirement for a person to object before applying for a declaration under section 106, if the grounds of their application are that the person from whom they seek payment of child support is a parent of the child concerned.

3.2 (c) Section 143 orders

Where a payer has paid an amount of child support under an assessment and was not liable, or subsequently becomes not liable, to pay that amount he or she can ask a court for an order for repayment of the amount.

1. That [payee's name] repay to [payer's name] child support of \$x paid for [child's name]. The amount of \$x is repayable at the rate of \$y per [week, month, etc] commencing on [date]. The payments are to be made by depositing funds into a bank account nominated by [payer's name].

Tips and problems

Where child support was paid through CSA

The payer can only seek to recover money paid from the payee and not from CSA (Child Support Registrar and Z and T (2002) FamCa 182). Amounts paid under the Child Support (Registration and Collection) Act 1988 are taken to have been paid to the payee.

Contact CSA for details of the total amount of child support that has been paid for the child.

What does the court take into account when it makes an order for repayment?

Even though child support has been paid in a situation where the payer has been found to be not liable, an order for repayment of the money is not automatic. In making an order under section 143 the court must consider whether an order is just and equitable in order to adjust and give effect to the rights of the parties concerned and the child.

3.2 (d) Orders under section 66M of the Family Law Act 1975

1. That pursuant to section 66M of the *Family Law Act 1975*, **[step-parent's name]** has a duty to maintain **[step-child's name]**.

2. That from **[start date]**, **[step-parent's name]** shall pay child maintenance for **[step-child's name]** to **[step-child's parent's name]** at the rate of \$x per **[week, fortnight, month, etc]**.

3. The amount of child maintenance payable under clause 2 will increase from **[day and month]** each year, in accordance with variations in the consumer price index for **[specify capital city]**. [Or use another method of indexing the payment as set out in 1.2(b)].

Tips and problems

The payer must be a 'step-parent'

To be able to get an order under section 66M the payer must be married, or have been married, to a parent of the step-child (section 60D(1) of the *Family Law Act 1975*). Payers in de facto relationships are not able to get orders under section 66M for children of their partner that are in their care.

There must be proceedings for child maintenance on foot

For an order to be made under section 66M of *The Family Law Act 1975* there must be proceedings between the child's parent and the payer about child maintenance (*Mulvena and Mulvena and Butler and Edwards* [1999] FamCA 280).

The things the court must take into account

In making an order under section 66M of *The Family Law Act 1975* the court has to take into account:

- The objects and principles of the legislation
- The length and circumstances of the marriage
- The relationship between the step-parent and the child
- The arrangements for the maintenance of the child
- Any special circumstances which would result in injustice or hardship to any person.

If a payer is living with their spouse and step-child there may be no basis for the court to order that the step-parent pay child maintenance for the step-child. To order payment in that situation would usually be an artificial device to reduce child support payable by the step-parent. To make an order in those circumstances would not meet the objects of the provision³.

³ Unreported decision of Brewster FM [2003] FMCAfam320

If you are seeking consent orders you must advise other people who may be affected

If the payer and his or her spouse consent to an order it can only be made if notice has been provided to those who may be affected by it. The *Family Law Rules 2004* [Division 4.2.4, Rule 4.16] require that the applicant serve a copy of the application, affidavit and financial statement on the step-child's other parent and any other person likely to be affected by the order sought, including CSA and any parent or carer of a child that the step-parent has a duty to maintain. A hearing will generally be required to enable the rights of those persons to be considered.

Consequences of an order under section 66M

An order under section 66M may mean that a payer pays less child support for his or her other children (see definition of a relevant dependant child in section 5, and section 39). However, payers should be made aware of the consequences of an order under section 66M. An order under section 66M means that the payer has a legal duty to maintain the step-child. Should he or she separate from their spouse they may be ordered to pay child maintenance for the step-child.

Can a step-child be taken into account in changing a child support assessment?

If a payer has a legal duty to maintain a step-child (because they are a relevant dependent due to an order under section 66M) they may be able to seek a further reduction of child support payable if their step-child has special needs that affect their capacity to pay child support (sections 98B, 98C and 117(2)(a)(ii)).

A person can also apply to CSA for a change of assessment if they are earning additional income for the benefit of the children residing in their home (sections 98B, 98C, 117(2)(c)(iii) and (iv) and 117A)). This includes additional income earned for the benefit of the children of the person's spouse or de facto partner.

4. *Court* orders staying the child support assessment pending proceedings

4.1 Summary

Under section 140 of the Assessment Act a court can make an order staying, or stopping the operation of a child support assessment pending the resolution of court proceedings under the Assessment Act, or a change of assessment application under Part 6A of the Assessment Act.

4.2 Suggested draft terms

4.2 (a) Stay order pending court proceedings

Paying current amounts, but stay arrears

1. *That pursuant to section 140 of the Child Support (Assessment) Act 1989 the operation of the child support assessment for the period up to **[today's date]** payable by **[payer's name]** to **[payee's name]** for **[child's name]** be stayed pending determination of the application made by **[applicant's name]** on **[application date]**.*
2. *That **[payer's name]** continue to make payments of **[\$xx per week, fortnight, month, etc]** in accordance with the current child support assessment. The amount payable is to be varied in accordance with any later assessments made for any period after **[today's date]**.*

Paying a different amount pending proceedings

1. *That pursuant to section 140 of the Child Support (Assessment) Act 1989 the operation of all child support assessments payable by **[payer's name]** to **[payee's name]** for **[child's name]** be stayed pending determination of the application made by **[applicant's name]** on **[application date]**.*
2. *Whilst the assessments are stayed and from **[today's date]**, **[payer's name]** shall make payments of child support to **[payee's name]** of **[\$xx per week, fortnight, month, etc]**.*

No payments pending proceedings

1. That pursuant to section 140 of the Child Support (Assessment) Act 1989 the operation of all child support assessments payable by **[payer's name]** to **[payee's name]** for **[child's name]** be stayed pending determination of the application made by **[applicant's name]** on **[application date]**.

2. Whilst the assessments are stayed and from **[today's date]**, **[payer's name]** is not required to make payments of child support to **[payee's name]**.

4.2 (b) Stay order pending a change of assessment decision

A court may also make a stay order to have effect pending CSA making a decision on a change of assessment application. The clauses suggested in 4.2 (a) above are suitable, but the clause suggested below may be added to extend the effect of the stay order pending any subsequent objection or departure application.

3. The orders in clauses 1 and 2 shall remain in force until [payer's name]'s application for a change of assessment has been decided and for 28 days thereafter. However, if [payer's name] objects to that decision within that 28 day period these orders shall remain in force until that objection is decided and for 28 days thereafter. In the event of an application being made to a court for a departure from the assessment within that 28 day period, these orders shall remain in force until the court application is finalised.

Tips and problems

There must be proceedings on foot

In order to apply for a stay order there must be proceedings or an application for a change of assessment on foot. Proceedings are not limited to proceedings under the Assessment Act. There just need to be proceedings instituted in a court that has jurisdiction under the Assessment Act, rather than proceedings instituted under the Assessment Act (section 140(1)).

How long does a stay order apply?

Unless it states otherwise, a stay order operates until the decision of the court determining the proceedings becomes final or CSA has finalised the application for a change of assessment (section 140(4)). When the stay order ceases to have effect, CSA must amend the assessment as if the stay order was never made.

Objections to change of assessment applications

Section 140 does not expressly provide for a person to apply for a stay order when CSA is considering an objection to a change of assessment decision. However, Scarlett FM found that given that a person may apply for a stay order while CSA is considering a change of assessment application, it would be anomalous for them not to be able to do so while CSA is considering their objection to that decision (*S and S [2000] FMCfam 70*).⁴

Effect of an order to stay the operation of the Assessment Act or to stay an assessment

The effect of a stay order will depend on its terms and whether it is an order which stays the operation or implementation of the Assessment Act, or otherwise affects the operation or implementation of the Assessment Act. An order that stays the operation or implementation of the Assessment Act will stay the operation of all the sections of the Act, affecting CSA's powers to make other decisions, such as to vary the assessment to give effect to an event or change in circumstances. It may be preferable to vary child support assessments for particular periods.

⁴ The Child Support Legislation Amendment Bill 2004 will, if enacted, amend section 140 of the Child Support (Assessment) Act 1989 to specifically permit a person to apply for a stay order pending CSA's decision on an objection to a change of assessment decision.

Can collection of child support be stayed?

There are no provisions allowing a court to make a stay order to prevent collection of arrears under the *Child Support (Registration and Collection Act) 1988*. However, if a court makes an order that stays the child support assessment for an earlier period, this will have the effect of staying collection of any arrears.

CSA should be served

Generally CSA need not be a party to an application for a stay order but should be served with a copy of the application (*Family Law Rules 2004*, Division 4.2.5. Rule 4.23).

Disclaimer

Every care has been taken in preparing this booklet and it is intended as a guide only.
The information contained within this booklet is current as of 1 September 2004.

For more information, visit these websites:

www.ag.gov.au/www/flcHome.nsf/

www.familylawsection.org.au

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