

Senate Finance and Public Administration Standing Committee
ANSWERS TO QUESTIONS ON NOTICE
ADDITIONAL ESTIMATES – 24 FEBRUARY 2009

Human Services Portfolio

Department/Agency: Department of Human Services
Outcome/Output Group: Outcome 1/Output Group 2
Topic: Private Agreements

Senator: Scullion

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Type of question: Written

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Question:

HS21a: Can one parent elect to opt in or out of a private agreement at any time and without the consent of the other party?

HS21b: If so what effect or binding powers are contained within private agreements?

HS21c: If a statutory declaration has been signed and submitted by both parents stating that neither party will request money from each other for child support throughout the children's childhood and adolescent years, on what grounds can the CSA award child support payments against a parent?

HS21d: If a statutory declaration has been signed and lodged by each parent, and this statutory declaration has not been contested or voided by a court order, what authority if any does the CSA exercise to act contrary to the provisions specified in the statutory agreement?

Answer:

HS21a: *The Child Support (Assessment) Act 1989* provides for two types of child support agreements; binding and limited. Agreements allow parties to a child support assessment to tailor their child support arrangements to suit their particular circumstances. To protect the interests of the children, both parties and the community, agreements must also meet certain legislative requirements. At no time can either party opt into any type of agreement without the consent of the other party.

Binding child support agreements operate in a similar manner to financial agreements that separating parents might make in relation to property, superannuation and spousal maintenance. Before a person enters into a binding child support agreement, they must have sought legal advice from a legal practitioner and must also receive legal advice before terminating the agreement by mutual consent.

A binding agreement must be in writing and include a statement to the effect that each party has received independent legal advice regarding the advantages and disadvantages of the agreement. To certify that legal advice has been provided, a binding agreement must also include a certificate for each party signed by the person who provided the legal advice to that party.

A binding child support agreement can only be terminated by a new binding agreement that either expressly ends or replaces the previous agreement or by a court order setting aside the child support agreement (section 80D).

Limited child support agreements are more flexible and do not require the parties to have received legal advice before entering into the agreement, but a limited agreement must still be signed by both parties to the agreement and comply with legislative requirements (section 80E).

A limited child support agreement can be terminated by either party without the consent of the other in certain situations (section 80G). These are where the agreement has been in place for at least three years, or where the amount that would be payable under a child support assessment, if not for the agreement, has changed significantly, and the agreement does not account for those changes. This acknowledges that circumstances can change in ways not expected or anticipated by either party and provides a safeguard so that the parties who entered into an agreement without legal advice will not be locked into an agreement that does not reflect their circumstances.

Limited child support agreements can also be terminated if both parents agree to terminate the agreement, or by replacing the limited agreement with a new limited or binding agreement, or by a court order.

A court has power to set aside both binding and limited agreements in cases of duress, undue influence or unconscionable conduct, or fraudulent and misleading conduct. In addition, a Court may set aside a binding agreement if there are exceptional circumstances that have arisen since the agreement was entered into that mean a parent or child will suffer hardship if the agreement is not set aside. A court can set aside a limited agreement if satisfied that, because of a significant change in the circumstances of the parents or the children, it would be unjust not to set aside the agreement, or if the agreement provides for a rate of child support that is not proper or adequate in the circumstances of the case (see section 136).

Both limited and binding agreements may include an end date, and the agreement, with regard to child support, will cease to have effect on that date.

The safeguards that allow parents to end limited agreements without the consent of the other party were introduced in July 2008, as part of the Child Support Scheme Reforms recommended by the Ministerial Taskforce on Child Support. The changes were recommended in response to concerns that parents were entering into long-term agreements without legal advice, and that they needed to go to court if the agreement was no longer appropriate for their circumstances and the other parent would not agree to end it. As part of the changes, the requirements for entering into and ending binding agreements were also made more stringent, to provide greater certainty for parents who do choose to enter into long-term agreements with legal advice.

HS21b: Child support agreements can provide for a variety of matters, including setting or varying the periodic amount of child support payable, non-periodic or lump sum payments, payments to third parties (for example school fees or mortgage payments) or other variations to the child support formula assessment.

Once the Child Support Registrar (the Registrar) has accepted an agreement, the agreement cannot be varied and the provisions contained in the agreement are binding until the agreement is terminated (see above). An agreement can be replaced by a new agreement, subject to the new agreement satisfying certain requirements.

HS21c: A valid child support agreement requires the signatures of both parents and must meet certain legislative requirements. A child support agreement that meets the legislative requirements can be enforced by the Registrar. However, a declaration, private agreement or other document that purports to set out the rights and obligations of the parties, but which does not meet the legislative requirements, cannot be enforced by the Registrar. This is designed to protect both the parties and the children involved.

Accordingly, an agreement can be made to reduce a child support assessment to nil and such an agreement could be made for the life of the case (i.e. until the children turn 18). However, there may be reasons why such an agreement does not meet the legislative requirements that would allow the Registrar to accept and enforce such an agreement. For example, in the case of limited agreements, the annual rate of child support payable under the agreement must be equal to or more than the annual rate that would be payable under a child support assessment. An agreement to end the assessment, or reduce it to nil, may be unlikely to meet this requirement unless the annual rate of child support payable under the formula assessment was also nil. Such an agreement would also be terminable by either party after three years, or if the rate of child support otherwise payable changed significantly. In the case of a binding agreement, the parents need to obtain independent legal advice before signing the agreement. Such advice would set out for the parents the potentially significant disadvantages of signing such an agreement, as well as any advantages.

Parents can use a child support agreement to elect to end their child support assessment from a certain day, however, a valid child support agreement can not make provisions for either parent not to seek child support from the other in the future. The Registrar could not accept such an agreement because it would not meet the requirements of a valid child support agreement.

A parent cannot relinquish their statutory right to seek a child support assessment by signing a statutory declaration, agreement, or other document. If the parties agree to end the child support assessment, and that agreement is accepted by the Registrar, either parent may re-apply for a child support assessment at any time.

HS21d: Provided an agreement is properly made and meets all the requirements mentioned above, the Registrar must accept and enforce the agreement (section 92(1)). Any variation or proposal to terminate that agreement must then also meet the statutory requirements. The Registrar cannot accept or enforce a statutory declaration, agreement or other document that does not meet the legislative requirements.

The Registrar must continue to apply the child support agreement until such time as it is terminated. This will be on the end date specified in the agreement, or when one of the circumstances provided in the answer to question (a) exists.

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