

Change in circumstances for the review of a current child support assessment

Child Support

Child support is the payment from one parent to the other for the financial support of their children where the parents have separated.

Arrangements for the payment of child support, including the amount of child support that one parent is to pay to the other and any other expense toward which they will contribute, can be made by way of the following:

1. a private agreement between the parties known as a Child Support Agreement which is entered into by both parents, or
2. by an assessment by the Child Support Agency under the Child Support (Assessment) Act 1989.

The Child Support (Assessment) Act 1989 provides a formula for the Child Support Agency to calculate the amount of child support to be paid by one parent to the other based on the combined income of both parents, the “standard of living” such a combined income theoretically supports, and the amount of time each parent spends with their children.

The Child Support Agency is a branch of the Australian Tax Office and can access the parties’ respective tax files for information regarding their incomes.

Parties can elect whether child support payments under a Child Support Assessment are to be collected by the Child Support Agency from the liable parent or their employer to be paid to the other parent, or whether they are paid privately from the liable parent directly to the other parent.

A child support assessment creates a periodic payment obligation for the liable parent to pay to the other parent. That is a set amount of money is to be paid by the liable parent to the other parent each week, fortnight or month.

Child Support Agreements are usually registered with the Child Support Agency and can include both periodic payments and/or non-periodic payments. Non periodic payments include the payment of expenses for a child or children to third party providers such as school fees, health insurance and other educational costs.

The parties to a Child Support Agreement can registered that agreement with the Child Support Agency and may also elect that the Child Support Agency collect the child support amount from the liable parent and send it to the other parent, or that the payments are made directly.

Change of Assessment

A Child Support Agreement is binding for the period set out in the terms of the agreement and a child support assessment by the Child Support Agency is also for a set period of time.

This article considers what constitutes a relevant change of circumstances to permit the amount of child support being paid to be varied where:

1. The parties have a child support assessment which provides for the payment of child support based on the respective incomes of the parties at the time; and
2. One parent is now earning substantially more than the other, or substantially more than they were at the time of that the child support agreement or assessment was entered into; and
3. The care arrangements of the children change.

Change of assessment in special circumstances – administrative assessment process

Where a party believes that their current child support assessment by the Child Support Agency does not reflect the parents’ special circumstances, then that party may apply for a change of assessment.

Where a party’s income increases, there is no obligation to notify the Child Support Agency or the other party, unless that party voluntarily lodges an estimate that reflects the change in income. In this situation the aggrieved (other) party must apply for a departure from the administrative assessment under Part 6A of the Child Support (Assessment) Act 1989 (Act). However, in due course the Child Support Agency will become aware of any increase in a party’s taxable income when tax returns are lodged at the end of the financial year, and following such lodgement the Child Support Agency will automatically make a determination to vary or retain the administrative assessment amount.

The Act states that where an administrative assessment is in force in relation to a child, a liable parent may, due to ‘special circumstances’, seek to depart from the administrative assessment by making a written application to the Child Support Registrar.

‘Special Circumstances’

The phrase ‘special circumstances’ is not defined. The Family Court has held that ‘it is intended to emphasise that the facts of the case must establish something which is special or out of the ordinary’ (Gyselman and Gysleman (1992) FLC).

The Child Support Agency (CSA) will be satisfied that there are special circumstances if a parent’s current income is not adequately reflected in the child support assessment (whether it is more or less than the income used to calculate the original assessment).

Whether a change in income will be sufficient to justify a departure from the assessment will depend upon the facts of each individual case.

In *Onans and Onans* (1993) Justice Kay found that it was appropriate to depart from an administrative assessment based on the income of the parties two years prior to the time of the application, by which time the party's income had changed, especially as there was no other source of finance available to provide for child support. Justice Kay stated that "the obligation to support children exists only if there is an ability to support".

Percentage change in income

If the change in income amount is less than that required for a variation based on an income estimate (an estimate will be available where a parent's current income is 15 per cent lower than the income used in the assessment), such a change may nonetheless amount to grounds for a departure from the administrative assessment. This will depend on the circumstances of each case, however it is likely that minor changes will amount to a special circumstance in cases involving very low incomes, but will not be so important in families with high incomes.

In *Savery and Savery* (1990) the wife sought a departure order from the court under section 117 of the Act on the basis that her husband's income had substantially increased from that on which the original assessment was based. The Court held that the original assessment produced an 'unjust and inequitable determination' under s 117(2)(i) of the Act, as the original administrative assessment made two years prior produced a child support liability of \$26 per week, whilst an assessment based on the current estimated incomes of the husband and wife would produce a liability of \$91 per week.

Role of Child Support Agency

The CSA will usually wait until both parties' tax returns have been lodged and make a determination to vary or keep the administrative assessment amount.

If the process for an administrative assessment is initiated by one of the parties this will take from 6 – 12 weeks for the CSA to make a final determination. Parties can initiate the administrative assessment process by completing a Change in Assessment in Special Circumstances Application Form and lodging it with the CSA.

When there is a change in the level of care of the child

When the care arrangements of a child vary (for example, the current assessment may assume a child spends two nights per week with their father, however by agreement between the parents this has now increased to four nights per week), there is an obligation on the parents to inform the Child Support Agency of this change immediately. Based on the details of the change in care provided by the parties, the CSA will then make a determination to vary or retain the administrative assessment amount.

When a Child Support Agreement or court departure order sets the annual rate of child support payable based on an agreed level of care, changes in the level of care of a child cannot be reflected in the assessment, unless there is a clause that terminates or varies the agreement when there is a specified change in the level of care.

For example, if a child who was in a parent's sole care goes into the shared care of each parent. If the agreement did not make provision for this possibility, then the previously set annual rate would remain payable. This could be difficult for the paying parent who is now incurring the additional costs of also accommodating the child. Accordingly it is important to draft such agreements carefully to allow for changes to the level of care of the child.

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