Appellant's Binding Child Support Agreement Reinstated: The Full Court Sets the Bar High for "Hardship"

The Full Court of the Family Court clarifies when a Binding Child Support Agreement can be set aside

INTRODUCTION

In *Masters & Cheyne* [2016] FamCAFC 255 (2 December 2016), the Full Court of the Family Court ("the Full Court") heard an appeal against Judge Terry's Orders regarding a Binding Child Support Agreement. The issue in dispute was whether the father should continue to pay the mother child support.

BACKGROUND

The Parties commenced living together in 1984 and married 11 years later. They had four (4) children born between 1989 and 1996. On February 2008, the Parties entered into a Binding Child Support Agreement which entailed payments to be made by the Respondent ("the Father") to the Appellant ("the Mother"). Later that year, Consent Orders were put in place which established the living arrangements for one of the children. After problems arose with the initial agreement, the Parties signed a new Binding Child Support Agreement ("the Agreement") on 31 July 2008 that would be the subject of this appeal. Under the Agreement, the Respondent was required to pay approximately $240.00 per week in child support, with the three (3) children living primarily with the Appellant, at least 60 per cent of the time.

Since then, two of the children had reached 18 years of age and the dispute regarding the Agreement related only to the youngest child ("the Child"). There have, too, been further developments regarding the living and care arrangements for the Child.

The Binding Child Support Agreement

The Child commenced spending six (6) nights a week with the Father, and the residue of time with the Mother. In or around 2009, the Mother set plans to relocate to Melbourne from the Hunter region. Due to the change in living arrangements, the Mother's care percentage under the *Child Support (Assessment) Act 1989 (Cth)* ("the CSA") was reduced to less than 35 per cent, with this percentage decreasing again upon her move to Melbourne in 2012.

Were the Agreement to stay on foot, the Father would be obligated to make payments of $220 per week until the Child became an adult as attended to in the Agreement. The Mother was not required to contribute any payment under the Agreement.

Their Honours, Justices Murphy, Aldrige and Austin delivered separate judgments.

The Full Court Decision

The Mother's Notice of Appeal provided 15 grounds which included over 90 challenges. Justice Murphy found that without legal representation, the grounds were not satisfactory as it did not particularise "proper grounds of appeal at all".

Beyond this, his Honour was predominantly concerned with the interpretation of Section 12 of the CSA, including considering "exceptional circumstances" and defining the meaning of "hardship." Essentially, first exceptional circumstances of the person wishing to disobey the Agreement must be found. And second, that person must have undergone "hardship" in going about discharging their obligations under the Agreement.

Justice Austin accepted that the Parties had changed their positions as carers radically—from the Child spending nine nights a fortnight with the Mother, to the Child spending virtually full time with the Father. Despite this, however, and given his literal definition of "exceptional circumstances" that must be shown in order to unwind a functioning Agreement, his Honour also stated that the Parties had chosen to bear risks when undertaking the Agreement. The Parties upon undertaking the terms therein understood that circumstances could change in the future. which they should have concerned themselves with seriously prior to engaging the Agreement.

Justice Austin noted that it was necessary for an agreement of this nature to be under a presumption of correctness. An appeal court, he believed, should in all cases affirm such an agreement "unless of course the Court of Appeal is satisfied that it is clearly wrong" (See *Norbis v Norbis* [1986] HCA 17). The changes, however, in relation to care were, to the Father, wholly unexpected and not reasonably foreseeable, it was, his Honour accepted, open for the judge to consider "exceptional circumstances" and Judge Terry's analysis was, indeed a correct application of the Act.

But Judge Austin's approval of the prior judge's analysis stopped there. He quickly distinguished the second limb of her Honour's Orders—namely, that the father had suffered "hardship" as a result of these exceptional circumstances. Justice Austin agreed with the proposed Orders of Justice Aldridge who in turned reissued many of the statements of Justices Austin and Murphy.

Hardship

The question was whether undue "hardship", as expressed by section 136 of the CSA, was suffered by the Father as a result of the requirements of the Agreement. Justice Terry had found that hardship was established, as, in part, it would conflict with the Father's ability to pay off his mortgage quickly. Hardship, Justice Murphy stated, was not a term of art but one defined by its literal meaning. His Honour made note of the Father's salary of over $190,000.00 per annum and his net assets exceeding $1 million. He also discussed the overall burden of the payment that the Respondent Father had ceased paying.

Justice Murphy interestingly commented that there was no legislative provision that the bargain struck be "fair" per the CSA nor was it required to fall within "societal mores". Justice Murphy found it impossible that "hardship" had been found in the circumstances, despite and while accepting the Father's extensive care of the Child. His Honour found further that in Judge Terry's judgment she had erred in taking into account "irrelevant" factors. Justice Murphy stated that balanced against the "relatively small amount of money" owing to the Mother due to his very decent financial position, that her Honour's discretion had been misguided and that the decision was ultimately erroneous.

The appeal was allowed.

DECISION

While the change in living arrangements in this case was stark—with the Father taking up considerable responsibility and care for the Child—the Court effectively affirmed the power of undertaking a Binding Child Support Agreement. Such an agreement was said to be necessarily "correct" until "exceptional circumstances" would arise to alter the relevance of the agreement. Only then, well evidenced, would the Court entertain the notion of "hardship". Here, the Father's financial position, though not expressed by the Full bench in explicit terms, was favourable to the Mother's application. It was not enough that the payment would be even morally unfair, as, per the Full Court, the above-mentioned Sections of the CSA are not concerned with what is or is not, "fair".