

Family law update

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Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010

Commencing from 1 July 2010, the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (the *Amendment Act*) has made several amendments to the child support and family assistance law. These amendments are principally in relation to the calculation of the percentage of care for child support and family assistance and estimations of income for child support purposes.

Calculation of the percentage of care for child support and family assistance

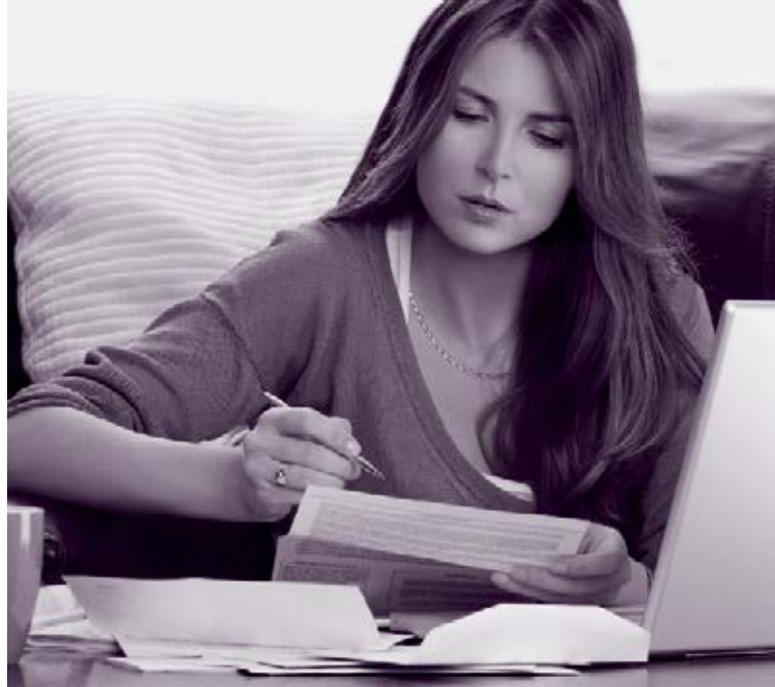
The amount of direct care a parent provides for their child is an important factor in determining their assessment of child support and their entitlement to Family Tax Benefit (Part A).

Prior to 1 July 2010, there were different rules for calculating the percentage of care for child support and family assistance purposes. These different rules meant that a parent could, quite correctly, have different decisions made about their level of care for the purpose of calculating their child support assessment and family assistance entitlement.

From 1 July 2010, the rules for calculating the level of care for child support and family assistance were aligned. Parents are now able to seek one decision, from either the Child Support Agency or the Family Assistance Office, about their level of care and have that decision applied to calculate their child support and family assistance. This means parents only need to tell their story once, removes duplication of decision-making and simplifies the service delivery arrangements between the Child Support Agency and the Family Assistance Office.

In order to align the two sets of rules, the *Amendment Act* made some changes to how the percentage of care is calculated. In general terms, the calculation of the percentage of care reflects the former family assistance rules and is based on the actual care arrangements that are likely to continue for the foreseeable future. These arrangements are determined on the information provided by parents to the Child Support Agency or Family Assistance Office.

In many families, care will occur in accordance with an oral or written agreement made between the parents, a parenting plan or a court order. Where that is the case, the percentage of care will be calculated by reference to that agreement, parenting plan or order.



Sometimes parents will be unable to agree on what care arrangements are in place for their child(ren), or the parents or child(ren) will cease to comply with a written agreement, parenting plan or order. If this occurs, the Child Support Agency or the Family Assistance Office will make a new determination of the percentage of care to be used for child support and family assistance purposes.

In most circumstances, the new determination of the percentage of care will be based on the actual care arrangements for the child(ren). These new actual care arrangements will be determined on information provided by the parents to the Child Support Agency or Family Assistance Office. This may mean that one parent is assessed, for child support or family assistance purposes, as having less care than is otherwise provided for in their written agreement, parenting plan or order.

However, if a parent who has reduced care is taking reasonable action to have their written agreement, parenting plan or order complied with, their child support assessment or family assistance may continue to reflect the terms of that agreement or order for a period of up to 14 weeks, or 26 weeks in special circumstances. This interim period is intended to give parents some flexibility to either make a new agreement, or get their former arrangements back on track, before the child support assessment or family assistance payments are affected.

What will be considered reasonable action depends on the circumstances of the case and may include, but is not limited to:

- initiating court action for contravention of a court order;
- initiating mediation, through a Family Relationship Centre or other service, to re-establish the care arrangement; or
- negotiating with the other parent with a view to re-establishing the care arrangement.

There are also new rules about the date of effect where care arrangements change. If parents notify either the Child Support Agency or Family Assistance Office within 28 days, the changed percentage of care may have effect from the date the change occurred. If a parent delays in making a notification that the care arrangements have changed, the change may only be applied to a more limited period. For child support purposes, if a change is notified after 28 days have passed, that change may only be applied from the date of notification.

For family assistance purposes, if a change in care is notified more than 28 days after the care change occurred, the date of effect is the date the change occurred, subject to arrears being limited to the start of the previous financial year.

As was the case prior to 1 July 2010, parents continue to have the right to seek an internal review of a decision about a percentage of care and may then appeal that review to the Social Security Appeals Tribunal. However, to promote finality, once a parent has sought a review of the decision through either the Child Support Agency or the Family Assistance Office, they will be unable to seek another review of the decision by the other agency.

Estimate of income

In order to make an assessment of child support, the Registrar must determine a parent's child support income. In most, but not all, circumstances the Registrar will make a determination of a parent's child support income with reference to that parent's taxable income for the last completed financial year. Once made, the child support assessment will be issued for the child support period, which is a varying period lasting up to 15 months.

Where a parent's most recent taxable income does not provide an accurate reflection of the current income, the child support legislation provides that a parent may elect to have their child support assessed using a prospective estimate of their income. The parent's estimated income is then later reconciled against their actual taxable income for the same period.

Prior to 1 July 2010, a parent who elected to provide an estimate of their income was required to do so in relation to the remainder of the 15-month child support period. The practical effect of this requirement was that the parent's estimate would span as many as three financial years. This was complicated for parents and could result in long delays in the reconciliation of their income as they waited for tax returns from up to three financial years to be assessed.

From 1 July 2010, estimate periods were aligned with financial years. This means parents who elect to estimate their income do so in relation to the remainder of the financial year in which they make the estimate. When making the estimate, parents are required to provide their year-to-date income, and an estimate of their income for the remainder of the financial year. These figures are then annualised to calculate a new estimated taxable income for child support purposes.

Example

Alex has a change to his work hours and elects to provide an estimated income for child support on 4 September 2010. Alex notifies a year-to-date income amount of \$10,000 and estimates an income for the remaining period of \$40,000.

Alex's remaining period estimate is annualised by dividing \$40,000 by the number of days in the remaining period (\$40,000 divided by 300 days for the period 4 September to 30 June inclusive), and multiplying the result (\$133.33) by 365 days. The annualised amount is \$48,667 (\$133.33 × 365 days). This income amount is then used to calculate Alex's child support assessment for the remainder of the financial year.

As was the case prior to 1 July 2010, a parent may make an estimate of their income if:

- there is no income amount order in force for any period covered by the estimated income;
- an adjusted taxable income for the last relevant year of income has been notified by the Australian Taxation Office, the parent or an overseas authority; and
- in the case of a first election for a year of income, if the estimated income is 85% or less than the adjusted taxable income for the last relevant year of income.

A parent may make a subsequent estimate election any time within that year of income, and the election may be higher or lower than the previous estimate.

At the conclusion of the financial year, the parent's estimated income will be reconciled against their assessed taxable income for that same year. If the assessed taxable income is higher than the estimated income, the child support assessment will be adjusted

to reflect the higher income for the duration of the estimate period. The parent will be liable to pay any additional child support that becomes due in respect of this period, or in the case of a receiving parent, to repay any overpaid child support.

If the assessed taxable income is 110% or more of the parent's estimated income, the parent will also be required to pay a penalty equal to 10% of the difference between the liability under the estimated income and the liability under the assessed taxable income. The estimate penalty is a debt due to the Commonwealth.

Legislation introduced to increase emphasis on protection-from-harm principle in family law children's cases

A Bill seeking to increase the emphasis placed on protecting children from harm in family law parenting cases has been introduced into Parliament. Key measures in the Bill include provisions specifying that protecting children from harm should receive greater emphasis than maintaining meaningful involvement with each parent in cases where these two principles are in conflict. It also introduces a wider definition of family violence that explicitly recognises emotional and financial abuse, among other behaviours.

The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 responds to the findings and recommendations of three reports released last year. The Australian Institute of Family Studies *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009), the *Family Courts Violence Review* (Chisholm, 2009) and the *Improving Responses to Family Violence in the Family Law System* report (Family Law Council, 2009) all indicated that there was room for improvement in the way in which the family law system dealt with matters involving family violence and child abuse.

Other measures in the Bill, which was introduced into the House of Representatives on 25 March, include:

- placing obligations on advisers to inform clients that the child's best interests are paramount, and where a meaningful relationship with both parents is inconsistent with protecting them from harm, greater weight should be given to protection from harm;
- repealing the provision that requires courts to consider the extent to which one parent has facilitated the child's relationship with the other; and
- repealing the provision that requires courts to make a costs order against a party found to have knowingly made a false statement in proceedings.

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs, which tabled its report on 22 August 2011.

Senate Committee recommends national consistency in assisted reproduction laws

The Senate Legal and Constitutional Affairs References Committee (the Committee) has called for nationally consistent approaches to the regulation of donor-assisted conception in Australia (The Committee, 2011). In a report on *Donor Conception Practices in Australia*, tabled in February 2011, the Committee expressed concern that only four of the eight state and territory jurisdictions had legislation regulating the issue, and these regimes were inconsistent in a number of key areas, including requirements for counselling, the information available to donor-conceived people about their donor, and limits on the number of children any one donor may conceive.

While Victoria,¹ South Australia,² New South Wales³ and Western Australia⁴ have legislation governing medically assisted donor conception, the issue is addressed in the ACT, the Northern Territory, Queensland and Tasmania through the non-enforceable National Health and Medical Research Council (NHMRC) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2007* (NHMRC, 2007).



The Committee has called for the Council of Australian Governments (COAG) and the Standing Committee of Attorneys-General to work towards a nationally consistent approach as a matter of priority.

According to data cited in the report, statistics provided by reproductive technology clinics indicate that there have been some 4,446 live births in Australian and New Zealand as a result of medically assisted donor conception between 2002 and 2008 (The Committee, 2011, ¶1.7). However, there is no data available on children born as result of non-medically assisted private arrangements. Nor is there comprehensive information available on the types of families (heterosexual, single-parent, same-sex) that use medically assisted reproductive technology (ART).

The Committee identified the following areas of concern on the basis of submissions:

- anonymous donations being used in clinics in breach of the NMRC guidelines, which provide that ART practices should uphold the right-to-know of genetic parents and siblings (NHMRC, 2007, 6.1);
- the lack of tracking across jurisdictional boundaries means donors can donate in a number of states and territories, making any cap on the numbers of conceptions from one donor impossible to police;

- no regulation of the importation of sperm and oocytes (eggs) into Australia;
- no consistent limits on the numbers of conceptions in which a particular donor is involved;
- donor-conceived people having no consistent right to identifying or non-identifying information about their donor and siblings, with provisions in the state where legislation exists having varying approaches to these questions (The Committee, 2011, ¶7.4).

Of the 32 recommendations made by the Committee, the main ones are for:

- nationally consistent legislation to include:
 - “at a minimum” a prohibition on donor anonymity;
 - a limit on the number of families a donor is able to assist;
 - rights of access for donor-conceived people to identifying and non-identifying information about donors and siblings;
 - protection for the “welfare and interests” of donor-conceived people (Recommendation 3);
- consideration to be given as to how private donor conception arrangements can be regulated to ensure appropriate protection for donors, recipients and donor-conceived individuals (Recommendation 4); and
- the establishment of a national register of donors and donor-conceived individuals (Recommendation 5);

When does family dispute resolution begin? A decision from the Federal Magistrates Court

Information collected by family dispute resolution practitioners and agencies as part of intake and assessment procedures are admissible as evidence in court, according to a first instance decision of the Federal Magistrates Court.

In *Rastall and Ball and Ors [2010] FMCAfam 1290*, Federal Magistrate Reithmuller held that intake and assessment procedures conducted prior to the family dispute resolution process did not attract the protection of s10H (confidentiality) and s10J (inadmissibility) provisions of *Family Law Act 1975 (Cth)*. These provisions respectively provide that communications made in family dispute resolution are confidential and inadmissible as evidence in court, except in certain narrow circumstances, mainly relating to situations involving child abuse or a risk of harm.



The question arose in the case because Reithmuller FM had previously made orders providing that the parties should attend family dispute resolution in relation to a parenting dispute, given that there “were no issues apparent on the material filed that this was not an appropriate process” (par. 3). However, a family dispute resolution practitioner subsequently determined that the matter was not suitable for family dispute resolution, after two of the three parties in the case attended appointments at the centre. Rejecting the centre’s arguments that communications made in the lead-up to the FDR practitioner’s assessment that the matter was not suitable for FDR, Reithmuller FM held that “to put it colloquially, the cone of silence” under s10H and s10J “only descends after an assessment by an approved person, and only covers the specific process then conducted by an approved person” (par. 33).

In brief: Addressing violence against women

Three developments in the national program to address violence against women have occurred.

National Plan to Reduce Violence Against Women and their Children

Most significantly, the multilateral 12-year National Plan to Reduce Violence Against Women and their Children has received endorsement from the Council of Australian Governments. The Federal and all State and Territory governments have committed to the plan, which involves the implementation of measures designed to contribute to six national outcomes:

- communities are safe and free from violence;
- relationships are respectful;
- Indigenous communities are strengthened;
- services meet the needs of women and their children experiencing violence;
- justice responses are effective; and
- perpetrators stop their violence and are held to account.

More information about the National Plan is at: <www.fahcsia.gov.au/sa/women/progserv/violence/nationalplan>.

National register for family violence orders

The second development, a national register for domestic and family violence orders, is part of the set of initiatives to be implemented as part of the National Plan. It has been endorsed by the Standing Committee of Attorneys-

General and will mean that protection orders obtained under state and territory family violence legislation will be recognised nationally. Rather than requiring people protected by such orders to register the order with a court if they are in another jurisdiction, recognition will occur automatically.

For more information, go to: <www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FirstQuarter_4March2011-Newnationalregisterfordomesticandfamilyviolenceorders>

Family violence training package for family law system professionals

Third, the Attorney-General’s Department has released a free, multidisciplinary training package about family violence for use by professionals across the family law system. The AVERT Family Violence training package was developed by Relationships Australia South Australia and is available online at <www.avertfamilyviolence.com.au>, or it may be requested through <FLSIsection@ag.gov.au>.

Endnotes

- 1 *Assisted Reproductive Treatment Act 2008* (Vic).
- 2 *Reproductive Technology (Clinical Practices) Act 1988* (SA).
- 3 *Assisted Reproductive Technology Act 2007* (NSW).
- 4 *Human Reproductive Technology Act 1991* (WA).

References

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