

Setting Aside a Binding Child Support Agreement While Driving a Mercedes

In **Lincoln [2015] FCCA 18** the applicant father sought to set aside a **Binding Child Support Agreement ('BCSA')** signed in February 2012 by which he was to pay the sum of \$2,200 per month as child support for one child.

S.136(2)(d) Child Support (Assessment) Act 1989, empowers the Court to set aside a BCSA where there are "exceptional circumstances, relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made and the applicant or the child will suffer hardship if the agreement is not set aside".

The father sought that:

- the agreement be wholly set aside and that henceforth he be assessed to pay child support by the Child Support Agency on an administrative basis; and
- the arrears in excess of \$20,000 be set aside.

Judge Burchardt noted that during the marriage the father had been a very successful businessman with a well known business which supported the very extravagant lifestyle enjoyed by the parties.

In May 2012 only months after signing the Agreement the father's business went into liquidation and he entered, a **Part X** Personal Insolvency Agreement which concluded in June 2013 and in making this application he asserted that his "financial circumstances were abject and at polar opposites compared to when he signed the agreement."

The mother took considerable issue with the father's asserted lack of resources, complaining of his failure to pay child support while continuing to lead an extremely opulent lifestyle.

Both parties filed Financial Statements deposing to very low incomes and a general absence of any assets of any moment. However the father did have some significant factual hurdles of his own making to overcome considering he owed more than \$20,000 in arrears of child support.

As well as paying \$700 per week rent, the father was driving a late model Mercedes which he claimed belonged to an associate who had lost his licence and was unable to sell the vehicle as he did not have the necessary funds to pay out the hire purchase. The friend apparently offered the father the use of the Mercedes until May 2015 if he paid for the service, the registration and \$3,000.

The Judge concluded that the truth of the matter lay somewhere between the parties' competing positions. On the one hand he considered the mother's assertion that the father still had a six figure income and was simply not paying child support out of spite was overstated, while the father's position was not as bad as he said it was.

The Judge noted that while the father may well have to obtain far cheaper accommodation and adjust his taste in cars to something more modest and suited to his reduced income, it was clear that he was simply in no position to pay \$2,200 per month in child support and that this did constitute 'an exceptional circumstance that had arisen since the Agreement was made'.

Despite findings of fact which may have entitled the mother to expect otherwise, the Judge accepted that the father was now unable to pay the sum he had previously agreed to pay and considered it was just and equitable that the agreement be set aside and further ordered that the father now be the subject of an administrative assessment.

However contradictory it may appear the Judge took a different view insofar as the arrears were concerned concluding that the arrears of more than \$20,000 should not be discharged and would remain a matter for collection by the Child Support Agency (and the ATO).

The Judge considered it was not just and equitable to discharge the arrears as the father had entered into a 'bargain' with the mother and if he had adjusted his lifestyle it would have been possible for him to have met his commitments for a longer period than he did.