

Family Law Practitioners' Association

2021 Family Law Retreat

Peppers Noosa Resort – 26 November 2021

Top tips to sharpen your child support practice

Matt Black

Speaking Notes

Outline

1. Discuss two broad topics:
 - (a) Departure prohibition orders
 - ▶ Operation of orders
 - ▶ Appealing / reviewing orders
2. Appeals on questions of law:
 - (a) Procedure.
 - (b) Grounds.

Departure prohibition orders

3. COVID-19 and opening borders.
 - (a) Closure of international borders since COVID had practical impact on travel
 - (b) Consequential impact on DPOs

4. ***Child Support (Registration and Collection) Act 1988, Part VA:***
 - (a) 72D: DPO may be made by the Child Support Registrar or delegate in respect of certain persons who have a child support liability.
 - (b) 72F: Must not leave Australia if DPO in force (and know / blind eye) and no departure authorisation certificate – 12 months or 60 penalty units (\$13,200)
 - (c) 72I: Must revoke DPO if the person no longer has a child support liability; has made satisfactory arrangements to pay; or the liability is completely irrecoverable.

5. So, the nature of a departure prohibition order is that it essentially puts the person in a position where they are prohibited from leaving Australia unless they:
 - (a) Pay their child support liability (or make satisfactory arrangements to pay); or
 - (b) Obtain specific authorisation from the Child Support Registrar.

6. The purpose of DPOs emerges clearly enough:
 - (a) Section 3(1)(a): “that children receive from their parents the financial support that the parents are liable to provide”.
 - (b) *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18; (2008) 166 FCR 9, at [22]: “The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia simpliciter: it is the prevention of such persons from leaving Australia where, in the Commissioner’s belief reasonably arrived at, the recovery of tax would or might thereby be impaired”.

- (c) *Poletti v Commissioner of Taxation* (1994) 52 FCR 154, 159-160: “The making of such an order is a severe intrusion into a person’s liberty, privacy and freedom of movement. On the other hand, the protection of the revenue is of great importance to Australia. These two interests must be balanced....”.
- (d) *Kenyon and Child Support Registrar* [2012] AATA 714, [10]: “it is no object of the Act, nor could it be, to punish those who are delinquent in meeting their obligations” and [12]: “the power to prevent a citizen from travelling overseas at will, a right generally taken for granted, is an extraordinary power. The power to impose, and to maintain, that restriction ought be considered with that firmly in mind”.

7. **Making of a departure prohibition order.**
8. Section 72D – four criteria for the making of a DPO:
 - (a) Existence of a child support liability.
 - (b) No “satisfactory” arrangements to discharge.
 - (c) “Satisfied” person has “persistently and without reasonable grounds” failed to pay a child support debt.
 - (d) “Believes on reasonable grounds” it is “desirable” to ensure the person does not leave Australia without either wholly discharging the liability or making “satisfactory” arrangements.
9. Existence of a child support liability is objective fact; other three criteria are about the decision-maker’s belief or state of satisfaction: subjective.
10. A DPO is made without giving any notice to the person – there is no right to be heard: *Whittaker v Child Support Registrar* [2010] FCAFC 112.
11. However, as soon as practicable after the order is made the Registrar must then notify the person: s 72G. Order comes into force as soon as it is made (s 72H) but, as noted, generally not an offence to depart until the person is given notice.
12. Enforcement of orders:
 - (a) Registrar gives Immigration the order and information to identify the person: s 72G.
 - (b) Order may be enforced by AFP or Customs / Border Force, including by preventing person from boarding or removing a person: s 72U (‘authorised officer’).
 - (c) As departing Australia is an offence, *attempting* to do so is an offence and *aiding* a person in doing so is an offence: *Criminal Code* (Cth), ss 11.1, 11.2.

13. **Appeal against the making of an order.**
14. Appeals against the actual making of an order are of limited scope and utility.
15. May appeal to the FCA or FedCFamCA Div 2 against the making of the order: s 72Q.
16. The Court can either set aside the DPO or dismiss the appeal: s 72S.
17. The nature of an appeal against the making of a DPO was explained in *Jones v Child Support Registrar* [2007] FCA 1732:
 - (a) The person must establish that the order was wrongly made by satisfying the Court that at least one of the essential elements of s 72D is absent: [5].
 - (b) In relation to the existence of a child support liability, the question is objective: whether or not the person had a liability when the order was made: [6], [7].
 - (c) In relation to the beliefs or states of satisfaction referred to in s 72D (at [6], [7]):
 - ▶ Did the decision-maker in truth have the belief or state of satisfaction?
 - ▶ If so, were there reasonable grounds for the belief or state of satisfaction?
 - (d) Making of an order largely depends on the decision-maker's state of mind, so the prospects of demonstrating that the state of mind was not reasonably formed are difficult – and impossible to know without obtaining the material that the decision-maker had available: [9].
18. Judge cannot substitute Court's view for that of the Registrar: *CDL19 v Child Support Registrar* [2021] FCA 689, [30].
19. An appeal against the making of a DPO is unlikely to be fruitful.
20. Costs follow the event.

21. Revocation of departure prohibition order.

22. A person may at any time ask the Registrar to revoke a DPO: s 72I(4).

23. Broadly, there are two grounds for revocation:

(a) 72I(1): The Registrar must revoke the DPO if:

- ▶ The person no longer has a child support liability; or
- ▶ “Satisfactory” arrangements to pay are made; or
- ▶ The liability is completely irrecoverable.
- ▶ BUT if may later become subject to child support liability, consider those matters for future prospects as well: 72I(2).

(b) 72I(3): The Registrar may revoke a DPO if “considers it desirable to do so”.

24. Ground of ‘completely irrecoverable’ fixes a high threshold – if any reasonable prospect of recovering money, then not completely irrecoverable: *Naboush and Child Support Registrar* [2014] AATA 930, [13], [15].

25. If DPO no longer furthering any legitimate purpose, then it should be revoked: *Walsh and Commissioner of Taxation (Taxation)* [2018] AATA 235.

26. Health or personal circumstances might support revocation: *Walsh and Commissioner of Taxation (Taxation)* [2018] AATA 235.

27. *Kenyon and Child Support Registrar* [2012] AATA 714: payer was in receipt of Centrelink pension, no capacity to pay anything more than the modest amount that was being deducted from his pension – wanted to move to Indonesia where the deductions from his pension could continue – DPO revoked.

28. *Walsh and Commissioner of Taxation (Taxation)* [2018] AATA 235: various grounds considered – DPO in force for 2.5 years – no assets or income to pay the liability – DPO was not improving ATO’s prospects of recovering the liability – Tribunal not satisfied that departure from Australia would make payment less likely or impair ATO’s capacity to

recover – DPO revoked.

29. Entitled to rely on alternative grounds when requesting revocation: eg, “satisfactory” arrangements have been made / alternatively circumstances make it “desirable” to revoke.

30. Departure authorisation certificates.

31. Short of having a DPO revoked, it is possible to obtain a departure authorisation certificate to permit travel at a specific time and for specific purpose.

32. 72K: may apply for a departure authorisation certificate at any time. Apply early; well in advance of the proposed travel dates.

33. 72L(2): Registrar “must” issue certificate if “satisfied”:

(a) Depart and return within appropriate period, and DPO will have to be revoked within a reasonable period (eg, liability being paid off and will be paid off within that period); and

(b) Security not necessary.

34. 72L(3): Registrar “must” issue certificate if:

(a) Person has given security under s 72M; or

(b) If unable to give security, “humanitarian grounds” or refusal would be “detrimental to Australia’s interests”.

35. Generally, obtain a certificate if give security under s 72M:

(a) 72M(1): “A person may give such security as the Registrar considers appropriate by bond, deposit or **any other means**, for the person’s return to Australia by such day as is agreed by the person and the Registrar and is specified in the departure authorisation certificate”.

(b) Borrowing money to give security is ok: *Wetzell and Child Support Registrar* [2005] AATA 607.

(c) Offering up your family's passports is probably not: *Koueider and Commissioner of Taxation* [2003] AATA 101.

36. Child Support Guide 5.2.11:

The Registrar will only accept a security that:

- *is in a form that is readily convertible to cash, for example, bank cheque*
- *is offered by the debtor rather than third parties on the debtor's behalf*
- *is generally not significantly less in value than the amount of the debt owing.*

37. Guide seems inconsistent with Act – difficulty in negotiating with Registrar.

38. Review of refusal to revoke a DPO or refusal to grant departure authorisation certificate.

39. Better avenue for challenging the effect of DPO is through review of CSR refusal to revoke, or refusal to grant departure authorisation (or both).

40. Section 72T: may apply to AAT for review of:

- (a) 72I – refusal to revoke a DPO.
- (b) 72L – refusal to issue departure authorisation certificate.
- (c) 72M – decision about giving security.

41. The effect of s 72T is that the review goes directly to the AAT's General Division.

42. AAT conducts a full merits review – important to identify and marshal best evidence – financial circumstances almost always relevant – establishing circumstances for revocation discretion.

43. No costs orders.

44. Stay orders.

45. Stay of decision to make a DPO? Very unlikely.
46. Although merits review to AAT of refusal to revoke or refusal to grant DAC, AAT appears not to have power to grant a type of 'stay order' that would operate as an interim authority to travel.
47. In AAT, an alternative option is to seek an expedited hearing – if date for travel coming up and need revocation / DAC, can sometimes have the matter heard and decided urgently.
48. Alternatively, stay order under s 111C – eg, *Yathopoulos & Komine* [2013] FCCA 267.
49. Section 111C broad enough power to enable:
- (a) Temporary stay of operation of DPO.
 - (b) High threshold – need to persuade Judge of grounds – probably urgency.
 - (c) Bear in mind: DAC is available in fairly broad circumstances, so probably need to show why that is not an adequate 'remedy'.
50. Section 105: *Family Law Act 1975* applies to “proceedings under this Act” (which will include proceedings under s 111C) as if they were proceedings under the FLA – that appears to apply the s 117 FLA costs rules to applications for a stay order – not automatic making of costs orders, but beware costs if stay refused: “wholly unsuccessful”.

51. **Appeals on questions of law.**
52. Appeals against AAT first review decisions:
 - (a) Most commonly, AAT decisions about departure orders – ie, departure from administrative assessment.
53. Appeals against AAT second review decision – decisions about care percentages in administrative assessments.
54. Appeals against other AAT decisions (general division) – decisions about DPO revocation or DAC refusals.
55. *Administrative Appeals Tribunal Act 1975*, s 44AAA: “If the Tribunal as constituted for the purposes of a proceeding that is a child support first review does not consist of or include a presidential member, a party to the proceeding may appeal to the Federal Circuit and Family Court of Australia (Division 2), on a question of law, from any decision of the Tribunal in that proceeding”.
56. Non-presidential AAT decisions about departure from administrative assessment can be appealed to Division 2 of the New Court.
57. Alternatively, under s 44 of the AAT Act an appeal can be brought to the Federal Court against, relevantly, an AAT decision about departure from administrative assessment or any second review or general division decision.
58. Section 44AA permits transfer of an appeal from the Federal Court to Division 2.
59. Likely to be preference for the consistency of appeal proceeding to the Federal Court.
60. Either way, costs jurisdiction (proceedings under AAT Act; not under CS Acts).
61. Scope of appeal – question of law – *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315.

62. Extensive case law on:
- (a) Errors of law.
 - (b) Jurisdictional error.
63. Jurisdictional error somewhat higher threshold; error of law somewhat lower. Do not need to establish jurisdictional error, but cases in that field relevant: if can show jurisdictional error, then you've shown an error of law.
64. Procedural grounds:
- (a) General procedural unfairness.
 - (b) Requirements or procedures not followed.
 - (c) Things not considered which should have been.
 - (d) Things taken into account which should not have been.
65. Statutory construction / application of the law:
- (a) Has the law been properly interpreted?
 - (b) Registrar sometimes adopts an interpretation which is contestable.
 - (c) Long standing does not necessarily mean correct.
66. Unreasonableness:
- (a) Legal unreasonableness now understood as being broader than perhaps in past.
 - (b) Very high threshold.
 - (c) Modern classic is refusal of adjournment when the adjournment is sought for a short, fixed time to obtain critical evidence for the review and no prejudice to anybody.
 - (d) Still a ground of last resort.

67. Compromising / settling appeal:
- (a) Consider the parties' broader circumstances.
 - (b) Is there an opportunity to negotiate a larger resolution?
 - (c) A binding agreement?
 - (d) Wrap up property and other matters?
 - (e) Wrap up property, parenting and child support together?
68. Consent orders:
- (a) Parties can consent to an appeal be allowed and a decision being set aside.
 - (b) Must briefly outline in a notation to the order the error of law upon which the parties have agreed – properly defensible.
69. Conduct of appeal:
- (a) The appeal is not a rehearing.
 - (b) The Court cannot decide the underlying facts – must determine the question of law against the facts found by the AAT. †
 - (c) Material considered by Court will generally be limited to the documents that were before the AAT.
 - (d) Generally no “new” evidence on appeal – main exception is evidence to establish procedural fairness or related circumstances – then, by affidavit.
70. As focus is error of law, written submissions tend to be central:
- (a) Grounds need to be sufficient particular to identify the error.
 - (b) Written submissions should be comprehensive – if new grounds identified in preparation of submissions, seek leave to amend and rely on those grounds.

Matt Black

26 November 2021