FAMILY LAW CHILDSUPPORT Jurisdiction Application by mother seeking orderspursuant to s 116(1)(b) for a departurefrom administrative assessment in thecontext of parenting proceedings between the parties to the assessment pendingin the FamilyCourt of Australia Whether Court is able to make order Application adjourned for determination at same time as parentingissues. Family Law Act 1975 (Cth) Child Support(Assessment) Act 1989 (Cth) s 116 and 117 Harris & Ellis [2011] FamCAFC90 APPLICANT: Ms Kemp RESPONDENT: Mr Parsons FILENUMBER: LNC 628 of 2012 DATE DELIVERED: 14 October 2014 PLACE DELIVERED: Hobart PLACE HEARD: Hobart JUDGMENT OF: Benjamin J HEARING DATE: 27 August 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mrs Mooney SOLICITOR FOR THE APPLICANT: Wallace Wilkinson & Webster COUNSEL FOR THE RESPONDENT: Mr Murray SOLICITOR FOR THE RESPONDENT: Murray & Associates ORDERS Theapplication in a case filed on behalf of the applicant mother on 1 August 2014be stood over for determination at the same timeas the hearing of the parentingproceedings listed to commence 10.00am 13 October 2014. IT ISDIRECTED Themother file and serve, on or before 4.00pm 12 September 2014, thefollowing:- (a) herapplication for departure from the administrative assessment issued 28 July 2014(for the assessment period 7 July 2014 to6 October 2015) including the basisupon which she seeks departure from the administrative assessment having regardto the provisionsof s 117 of the Child Support (Assessment) Act 1989(Cth). Such application and supporting affidavit shall comply with the FamilyCourt Rules, including Div 4.2.5 of the Rules; and (b) anyaffidavits upon which the mother seeks to rely regarding the change of departureapplication include such issues as her income,expenditure, assets, liabilitiesand financial resources and those of the father, the alleged high cost of childcare, medical insurance,school fees and paternity leave. Themother be restrained from filing or serving any further material in relation tothe child support aspect of her claim after 12September 2014 without the leaveof the Court. Nothingin this order derrogates from the directions made 7 July 2014 with regard toparenting proceedings. Thefather file and serve any response to the application for departure fromadministrative assessment and affidavits in support ofthat response on orbefore 8 October 2014. Nothingin this order derrogates from the directions made 7 July 2014 with regard toparenting

proceedings. Eachparty shall ensure that sealed copies of their respective application andresponse to application in regard to child supportare served upon the Registrarof the Child Support Agency, together with a letter informing the Registrar thatthe proceedings maybe heard at the hearing commencing 13 October2014. IT IS CERTIFIED Pursuantto Rule 19.50 of the Family Law Rules 2004 it was reasonable to engage counselto attend. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Kemp & Parsons has been approved by the Chief Justicepursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT HOBART FILE NUMBER:LNC628 of 2012 Ms Kemp Applicant And Mr Parsons Respondent REASONS FOR JUDGMENT INTRODUCTION MrParsons (the father) commenced proceedings against Ms Kemp(the mother) in the then Federal MagistratesCourt in December2012. On13 August 2013 those proceedings were transferred by Judge Baker of the FederalCircuit Court to the Family Court of Australia. On7 July 2014 the parenting proceedings between the parties was listed for hearingat Hobart on 13 and 14 October 2014. Trial directionswere made and on 7 July2014 the solicitor for the wife sought leave to include proceedings under theChild Support (Assessment) Act 1989 (Cth) (the Child Support(Assessment) Act) at the same time. A direction was made that any suchapplication be filed and served on or before 1 August 2014. Anapplication in a case was filed by the mother on 1 August 2014 and it was listedfor interim determination before me on 27 August2014. ISSUES Thequestions for the Court were whether it is, at the present time, satisfied thatpursuant to s 116(1)(b) of the Child Support (Assessment) Actthat:- (a) the partiesto the subject assessment have an application pending in a court havingjurisdiction under the Act; and (b) it would bein the interest of the liable parent and carer entitled to child support (thefather and mother respectively) to considerwhether an order should be madeunder the division in relation to the children in the special circumstances ofthe case. BACKGROUND Themother is aged 46 and is presently a home-maker although she is on maternityleave from her Government employment. The motherdeposes that if or when shereturns to full time employment she has the ability to earn about $85,000 peryear. Thefather is aged 43 and is a professional by occupation. Themother has one child of a previous relationship, N, who is aged about 11for whom the mother asserts she receives

childsupport of about $260 per weekfrom her father.[1] Thereare three children of the relationship between the mother and father, namely, Baged seven, W aged six and L aged three. Themother is the primary carer for the children and has been on long term leavefrom paid employment since about 2006. Theparties separated in February 2012 and proceedings were commenced in December ofthat year in the then Federal Magistrates Court. Theproceedings were transferred to the Family Court in 2013 and in early 2014 ahearing was commenced in relation to the mothersapplication to set asidea financial agreement under the provisions of the Family Law Act 1975(Cth). The parties resolved that issue and the property agreement was set asideby a consent order made 4 February 2014. On29 April 2014 an order was made that the father pay to the mother a sum of$50,000 within seven days and that some of this amountbe treated as a partialproperty settlement. By orders made 20 May 2014 the father and mother settledtheir property disputes byway of consent orders which included a furtherpayment to the mother of $1,100,000 and other consequential orders. At the sametimethe Court was asked to note, and did note, that the parties were enteringinto a financial agreement bringing an end to the partiesresponsibility to payspousal maintenance, one to the other, into the future. Itwas said that it was the intention of both parties that these orders bein full and final settlement of their rights andclaims pursuant to Part VIIABof the Family Law Act for spousal maintenance and property settlement pursuantto Part VIIB of the Act for superannuationorders.[2] Oncethose property orders were made the only issue, at that time, left to bedetermined was the question of parenting orders in respectof the partiesthree children. Thefather conceded that he has an income in excess of seven hundred thousanddollars per year. The father was unable to file anup to date financialstatement due to the complexities of his financial arrangements and theproximity of time to the end of the2013/2014 financial year. Withinthe last week or so the mother vacated the former matrimonial home and thefather took full occupation of that home. Themothers application to enable the hearing of the child support departureapplication at the same time as the property applicationis made pursuant to s116(1)(b) of the Child Support Assessment Act. Inthe mothers financial statement of 21 August 2014 she asserted that thecost of maintaining the children of the relationshipamounts to some $1,322 perweek. The mother is entitled

to receive $616.75 per week pursuant to the ChildSupport Assessment. Therewas an issue between the parties as to the fathers willingness to paychild support. On the evidence the father assertsthat he will only pay childsupport to the mother to the extent that he is required to pay under anyassessment. However, he assertsthat he will pay other expenses for the childrensuch as school fees, medical insurance and the like. THE EVIDENCE Themother relied upon her:- (a) Applicationin a case filed 1 August 2014; (b) Affidavitof the mother filed 1 August 2014; (c) Affidavitof the mother filed 21 August 2014; and (d) Financialstatement of the mother filed 21 August 2014. Themother tendered the Costs of ChildrenTables.[3] JURISDICTION AND POWER Thejurisdiction of the Court in relation to a change of assessment and under theChild Support (Assessment) Act is contained in s 99 of the Act. Thepower pursuant to which the mother seeks to have these proceedings dealt withother than through the administrative process iscontained in s 116(1) whichprovides:- (1) A liableparent or a carerentitled to child support may, in respect of an administrative assessment ofchildsupport for achild, apply to a court having jurisdiction under this Act foran order under this Division in relation to the child in the specialcircumstances of the case if: (b) both of the following apply: (i) the liableparent or carerentitled to child support is a party to an application pending in acourthavingjurisdiction under this Act; (ii) the court is satisfied that it would be in the interest of the liableparent and the carerentitled to childsupport for the court to consider whether an order should be made underthis Division in relation to the child in the special circumstancesof the case;or [emphasis added]. Thissection provides at the commencement that a party may ask the Court havingjurisdiction under the Act for an order in relationto a child in the specialcircumstances of the case if and then sets out the thresholdscontained in ss (b)(i) &(ii). Thisprovision empowers the Court to make a departure having regard to the provisionscontained in s 117 of the Child Support (Assessment) Act. Thereis no issue between the parties that there is an application pending or theCourt having jurisdiction under the Act betweenthe liable parent and the carer. Thequestion for the Court to determine is whether it is:- (a) satisfiedthat it will be in the best interests of the liable parent; and (b) the carerentitled to child support. to consider whether an order should be made under this Division in relation to achild in the special circumstances of the case. Thespecial

circumstances referred to in s 116(1)(b)(ii) is different from thespecial circumstances referred to at the commencement of the section. It doesnot relate to the factors unders 117 but relates to that thresholdconsideration. ThackrayJ noted in Harris & Ellis [2011] FamCAFC 90 at 23 and 24 thefollowing:- Therehave always been limitations on the circumstances in which a party can apply toa court for a departure order. Those limitationswere significantly amended bythe Child Support Legislation Amendment (Reform of the Child Support Scheme New Formula and Other Measures) Act 2006 (Cth) (the ReformAct). Themajor difference following the commencement of the amendments made by the ReformAct was the requirement for a party aggrievedby a decision of the Agency toseek a review from the Social Security Appeals Tribunal (theSSAT), rather than applyingto a court for a departure order. A partyaggrieved by a decision of the SSAT may appeal to a court, but the right ofappeal isrestricted to questions of law: Child Support (Registration andCollection) Act 1988 (Cth) s 89 and s 110B. HisHonour noted that in the clear understanding that the policy that:- Theclear policy intention of the legislation is that the internal review/objectionprocesses of the Agency are generally to be preferredover court basedprocesses. Nevertheless, s 112(2) and s 116(1)(b) make clear that thereare circumstances in which it will be in the interests of the parties for acourt to deal with the dispute,even when the Agencys internal objectionprocedures have not been utilised, because the court is, at the same time,alreadydealing with matters involving the parties. TheChild Support (Assessment) Act provides an administrative review process towhich Thackray J referred to above. Theextant proceedings do not necessarily need to be property or spousal maintenanceproceedings (see Blanchard & Blanchard [2009] FamCA 321 at 55). Thereis no requirement under s116(1)(b) for there to be such financial proceedings ofone form or another. Iaccept the submissions made on behalf of the mother that the onus onestablishing special circumstances is that of the mothers. Themother asserted the following special circumstances:- (a) The disputebetween the parties has been long running and that it is the fathersdesire for there to be a long term jointparenting arrangement for the children.The submission on behalf of the mother was that the determination of the complexfinancialarrangements regarding child support would run for some time in thechild support administrative system and it could be quickly andeffectivelyresolved in

the Family Court. I accept that a determination in the Family Courtis likely to be more prompt (albeitmore expensive) than in the child supportadministrative system. (b) The motherasserted that she will adduce evidence as to the high cost of child care in theevent that she returns to work. Themother has not been in paid employmentsince 2006 although she asserted that it is open for her to return to work. (c) The motherasserted that the father has shown a disinclination to be co-operative with theadministrative process. The fatherasserted that he will comply with the ordersand has complied with the orders although he wishes to make payments directlyfor theneeds of the children rather than through the mother. It is submittedthat there is complexity to the fathers financial affairsand given hisincome and his financial statements I accept that that is likely to be thecase. Asa consequence of the complexity it is likely that lawyers and accountants willneed to be involved so that there can be a clearunderstanding of the financialcircumstances of the father to enable an adequate determination. Themother claimed that the children would suffer financial hardship if she isforced to go through the administrative review process. I do not accept thatsubmission although I accept that it will take time and will prolong theconflict. The application would need to be seen in the stark light of it being capped atan income of $176,423 given the profound income ofthe father. Itwas submitted, and I accept, that the legislation relating to departure from anadministrative assessment discourages parties fromcoming to court but theexception is put there given the special circumstances and as asserted in s116(1)(b) of the Child Support (Assessment) Act. Thefather relied upon his response to an application in a case and his affidavitboth filed 19 August 2014. Written submissionswere prepared and lodged. Therewas little disagreement between the parties as to the law although counsel forthe father asserted,as I said earlier, that the special circumstances in termsof sub-section (b)(ii) was different to that at the commencement of thesection.I accept that submission. Counselfor the father submitted that the mother had an opportunity to include the childsupport aspect in her property proceedingsbut did not do so and only sought tomake that part of these proceedings after property was settled. That is asignificant factorto which I have had regard in this determination. Counselfor the father asserted that the addition of child support will add time to thehearing. I accept that submission. It islikely to

add at least one possiblytwo days to the proceedings and force the parties to provide furtherevidence. Itis asserted that the facts are not complex. Given the complexity of the incomeof the father I do not accept the facts, in allof the circumstances, are notcomplex. Itwas submitted by counsel for the father that the determination would involveongoing litigation. The application only relatesto the period up to 15 October2015 and any further assessments would be subject to the usual administrativeentitlements to whichthe parties would be otherwise entitled. Thefather asserted that he wishes to change the parenting arrangements for thechildren to enable it to return to equal time. Ireiterate what I said earlierin relation to the limited time. Thefather asserted that his capacity to earn a large income is not a specialcircumstance. That will be a matter for determinationeither administrativelyor by curial determination in the future. Atthe end of submissions counsel for the mother asserted that she did not needleave, she simply needed to file the application andthen it was a thresholdquestion to be determined by the Court. Itis of course open for the Court to have that consideration ahead of the hearing(which was what this short interlocutory hearingwas to determine). However,given the lack of evidence of the fathers financial circumstances and thelack of clarity as to the nature of thedeparture sought by the mother, I am notsatisfied that that threshold determination can be made given the current statusof theproceedings. Accordingly,I will make direction for the filing of material in relation to the childsupport proceedings taken by the mother andI will consider the thresholdquestion at the same time as I consider other questions during the course of thehearing. I certify that the preceding forty nine (49) paragraphsare a true copy of the reasons for judgment of the Honourable Justice Benjamindelivered 14 October 2014. Associate: Date: 14October 2014 [1] Mothers financialstatement filed 21 August 2014 part D (paragraph13) [2] Orders made 4 February2014. [3] Exhibit W1.