

**DNA AND THE LAW –
CHILD SUPPORT IMPLICATIONS AND RECOVERY OF MONIES PAID**

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The issue which I address in this paper is recovery of overpayments of child support made by payers pursuant to administrative assessment of child support for a child particularly where the overpayment results from circumstances where the payee can establish through parentage testing that he is not the father of the relevant child or children.

I also consider reforms proposed by the ministerial task force on child support established in 2004.

In examining these issues I have had reference to the Child Support Agency's Online Law and Policy Guide on the agency's website which I recommend as a straightforward explanation of the relevant provisions and policies. I have also referred to the CCH Australian Family Law Child Support Handbook edited by Riethmuller in addition to other materials and cases.

Background

The *Child Support (Assessment) Act* commenced operation in 1989 and essentially provides for administrative assessment of child support by reference to the taxable incomes of each of the parties. I will refer to this legislation as *The Assessment Act* and to the Child Support Agency as the CSA.

We have two different schemes in operation in Australia for the assessment of child maintenance and child support. The first is a discretionary scheme under the Family Law Act 1975 which applies where marital separations or childbirths occur before 1 October 1989. The second is

principally a formula scheme under the Assessment Act which applies where marital separations or childbirths occur after 1 October 1989.

Both the discretionary and formula assessment schemes have access to methods of collection through the CSA under the Child Support (Registration and Collection) Act 1988 which I will refer to as the Collection Act.

The procedure under *The Assessment Act* involves an “eligible carer” lodging an application with the agency for an assessment of child support payable in respect of an “eligible child or children” to issue.

The carer lodging the application for administrative assessment nominates the father of the child or children against whom the assessment will issue.

The CSA is not obliged under *The Assessment Act* to undertake investigations concerning parentage but is entitled to rely on the information in the application.

Provided certain pre-conditions are met the Registrar will accept the application for administrative assessment and issue an assessment against the “liable parent”.

Under Section 30 of *The Assessment Act*, if the Registrar is satisfied that an application has been properly made for administrative assessment of child support for a child then the Registrar must accept the application.

Subsection 31(1) of the Assessment Act provides that if the Registrar accepts an application for administrative assessment of child support for a child, the person from whom the application seeks payment of child support is a “liable parent” in relation to the child and the liable parent immediately becomes liable to pay child support at the assessed rate. This person is referred to as the payer.

There is therefore plenty of scope for the person nominated as the liable parent to subsequently establish that he is not in fact the father of the relevant child or children.

If a carer has made an application for a Child Support Assessment they can also apply to a Court for **urgent** maintenance from the person from whom they seek child support. This is to deal with situations where there is a delay between the date of lodging an application for administrative assessment and the date of the first payment of child support.

Disputed Entitlements

The assessment will issue to the respondent who may wish to dispute the entitlement of the carer to an assessment issuing against him in respect of the particular child on the basis that he is not the father of the child.

Assessments once made are routinely registered and once registered, the assessment becomes a debt owed exclusively to the Commonwealth.

Section 30 of *The Collection Act* provides inter alia as follows:

“30(1) [Debts Due to Commonwealth]

If a registrable maintenance liability is registered under this Act, amounts payable under the child support assessment, court order or maintenance agreement under which the liability arises are debts due to the Commonwealth by the payer in accordance with the particulars of the liability entered in The Child Support Register.

30(3) [Payee Not to Enforce Payment]

If a registrable maintenance liability is registered under this Act, the payee is not entitled to, and may not enforce payment of, amounts payable under the liability.”

Child support as assessed then is a debt due to the Commonwealth however as will be shown, overpayments are not necessarily debts due by the commonwealth to the payer and this can have very significant consequences in terms of recovering overpayments.

Section 107 Declarations

Section 107 (1) of *The Assessment Act* effectively provides that where the Registrar accepts a carer application for administrative assessment of child support for a child, the payer may apply to the Court for a declaration that the payee is not entitled to administrative assessment of child support for the child from the payer.

Under Section 107 (1A) normally the person seeking the declaration would first have to go through the objection process. Generally *The Assessment Act* requires a person who is aggrieved by a decision to use the objections procedure under Part 6B of *The Assessment Act* before asking a court to consider decisions of the Registrar. However S.107 (1B) provides that the objection process does not apply if the ground on which the declaration is sought is that the person is not a parent of the child concerned. In such circumstances the payer can apply directly to the Court for a declaration.

A payer who wants to apply to a Court for a section 107 declaration on grounds other than paternity may only do so after the CSA has disallowed their objection to its decision to accept the assessment of child support.

Under Section 107, a payer can therefore apply for a declaration that the payee is not entitled to an assessment of child support payable by him. The payee is the respondent to the payer's Court application. The CSA is not a party to the Application unless it decides to intervene in the proceedings.

Where the agency is collecting child support, it will continue to collect child support from a payer who seeks a declaration under Section 107 but may suspend the payment of child support to the payee for that particular child until the Court deals with the application. This provision saves the

agency the difficulty of recovering money from the payee, if it is shown that the case is not one eligible for administrative assessment.

Where the CSA suspends payment of child support to the payee it usually continues to collect child support from the payer but holds it in reserve pending the outcome of the application and where a determination is made in favour of the payer then the payer will be refunded those moneys held.

Stay Orders

The payer can also apply to the Court for a stay order while the Section 107 declaration is being sought.

Any party to a Court proceeding or an application under Part 6A of *The Assessment Act* (departure from assessment by the Registrar) can apply for a Stay Order.

Under Section 140 of the Assessment Act, a Court can make an order staying or stopping the operation of a child support assessment pending the resolution of a Court application. However, unless the order specifically provides otherwise, then a stay order under *The Assessment Act* does not prevent the CSA from enforcing payment of arrears of child support accrued before the commencement of the stay order.

The Child Support Registrar is not a party to an application for a stay order but again may intervene in the application.

Effect of Stay Order

In the absence of a provision to the contrary in its terms, the Child Support Registrar will give immediate effect to a stay order.

The effect of the order will depend on its terms as to whether it is an order that stays the operation or implementation of *The Assessment Act* or otherwise affects the operation or implementation of the Act. The stay order may also apply to *The Collection Act*.

If the Court grants the application for a stay and makes a stay order then the amount payable under the child support assessment is not payable until the end of the Court proceedings and of course if the result of the Court proceedings is that the payer is not liable for payments under the assessment then no further amounts will be payable.

Effect of Section 107 Application

If a Court makes a declaration under Section 107(1) then the effect is that the agency is taken never to have accepted the payee's application for child support for that child and will treat the administrative assessment for that particular child as ended from the start date.

Subsection 5 of Section 107 provides that:

“If the court grants the declaration, the application for administrative assessment of child support is to be taken never to have been accepted by the Registrar.”

Where a Court makes a Section 107(1) declaration the CSA will refund to the payer any payments held because of a suspension determination but will not repay any amounts already disbursed to the payee.

A payer who seeks a declaration under Section 107 may also bring an application under Section 143 of the Assessment Act (see below) seeking an order that the payee refund any child support that they have already received.

A Court however cannot order the CSA to refund child support paid to the payee through the agency.

Overpayments

Overpayments of child support occur when a payee has been paid child support to which they are not entitled, usually because the CSA has made a retrospective variation to a child support assessment, or where a Court makes an order or declaration with retrospective effect.

Overpayments can occur in the ordinary course of child support cases.

The Financial Management and Accountability Act 1997 requires the CSA to deal with Commonwealth revenue in an efficient, effective and ethical manner (Section 44). It also requires the agency to pursue all relevant debts owed to the Commonwealth unless the debts are not legally recoverable or the agency considers that it would not be economical to pursue recovery of them (Section 47).

There are two kinds of child support overpayments:

1. Overpayments where there is no registered maintenance liability (which are not debts the payee owes the Commonwealth);
2. Overpayments where there is a registered maintenance liability (which can be debts the payee owes to the Commonwealth).

The overpayments with which I am mainly concerned in this paper are overpayments where there is no registered maintenance liability.

There is no registered maintenance liability if a liability that was registered was never entitled to be registered.

To reiterate, when the CSA receives applications to register liabilities or make child support assessments, then provided all the requirements of the law are satisfied, the CSA must register the liability or make the assessments. But later, other evidence or a Court order might require that a registered liability be cancelled. In such circumstances, the liability was never entitled to be registered.

The CSA cannot recover overpayments that occur when there is no registered maintenance liability because they are not debts due to the Commonwealth under Section 79 of *The Collection Act*. However a payer can take action to recover these overpayments from the payee in a Court with Family Law jurisdiction.

For example, if a Court makes a declaration under Section 107 of *The Assessment Act* that F is not entitled to a child support assessment payable by M for child C then the effect of that declaration is that the CSA is taken to have never made a child support assessment for C. F is taken never to have been the payee of a registered maintenance liability and the child support that the CSA collected from M and paid to F is not a debt due by F to the Commonwealth under Section 79 of *The Collection Act*.

Therefore Section 79 of *The Registration Act*, which provides for the recovery of debts due to the Commonwealth cannot apply to the situation where an amount is paid and no liability exists as in such circumstances there is no debt due to the Commonwealth.

Section 143 Application – Adjustment of Rights

If child support was wrongly payable under a child support assessment then the application by the payer is one to the Court under Section 143 of *The Assessment Act* which makes provision for the adjustment of rights between parties.

The relevant provisions of Section 143 are as follows:

“143(1) [Recovery of child support paid] Where:

- (a) an amount of child support is paid by a person to another person; and
- (b) the person is not liable, or subsequently becomes not liable, to pay the amount to the other person;

the amount may be recovered in a court having jurisdiction under this Act.

143(2) [Recovery of urgent maintenance payment] Where:

- (a) an amount is paid by a person to another person for a child in relation to a period under an order made under section 139 (Urgent maintenance orders); and
- (b) child support does not become payable by the person to the other person for the child in relation to the period;

the amount may be recovered in a court having jurisdiction under this Act.

143(3) [Just and equitable orders]

In a proceeding in a court under this section, the court may make such orders as it considers just and equitable for the purpose of adjusting or giving effect to the rights of the parties and the child concerned.

143(4) [Payment to Commonwealth]

An amount paid to the Commonwealth under section 30 of the *Child Support (Registration and Collection) Act 1988* is to be taken, for the purposes of this section, to have been paid to the person to whom, apart from that section, the amount would have been payable.”

Where an overpayment occurs (when there is no registered liability) the CSA will advise a payer that Section 143 of the Assessment Act specifically provides for them to make an application to a Court for recovery of child support paid where a liability no longer exists. The payer must name the payee as the respondent to the application.

The Court may make orders that are just and equitable in the circumstances to give effect to the rights of the parties and the child/ren.

The Court cannot however make an order requiring the CSA to repay the overpaid amount to the payer.

An interesting example of this was reported in the Australian of 27 October 2005 where a father had mistakenly paid his former partner \$30,000 in child support even though his two children were not in her care.

Centrelink had apparently failed to tell the CSA that the children were in foster care and had been for much of the time since 1999.

If the CSA had been advised of the terminating event (children not in mother's care) then the CSA would have had to vary the liability from the date the terminating event occurred. This would have been a variation to a liability that was entitled to be registered, so any overpayment is recoverable by the CSA from the payee under Section 79 of the Collection Act.

According to the report Centrelink had acknowledged its failure to pass on the information however the government was unwilling to repay the \$30,000. The CSA had attempted to recover the money from the payee but so far had failed, presumably because the mother was without financial resources.

Understandably the father in this instance considered he had some right to compensation from the government if the CSA could not recover the overpayment from his ex-partner.

There is a registered maintenance liability if, at any time, a liability was entitled to be registered.

All overpayments that occur in relation to registered liabilities are debts due to the Commonwealth and recoverable from the payee by the CSA under Section 79 of the Collection Act.

For example, the CSA receives a payment from F by cheque and makes a payment to M (the payee). F's cheque is later dishonoured. M has therefore received a payment under Section 76 but was not entitled to be paid the amount because the CSA did not in fact receive the amount from F. In the circumstances M has been overpaid and the overpayment is a debt due by M to the Commonwealth under Section 79 of *The Collection Act*.

If a payee's overpayment is a debt due to the Commonwealth under Section 79 then the CSA will contact the payee to discuss payment in full or a negotiated payment arrangement.

Any payment arrangement will take into account a payee's capacity to pay.

Although the overpayment should be paid in a lump sum where possible, the CSA will generally seek a payment arrangement that:

- Reflects the payee's capacity to pay;
- Will not disadvantage the child(ren) of the payee by minimizing the child support;
- Reflects the size of the debt and a reasonable repayment period;
- Takes into account the circumstances surrounding the overpayment.

The CSA will take necessary further action to recover an overpayment from a payee, including legal action if considered appropriate.

The CSA does not have authority to refund amounts overpaid (to payers) where the overpayment is not recoverable from the payee under Section 79.

Even if the overpayment is recoverable from a payee under Section 79, the CSA is not obliged to refund amounts overpaid until the amount is recovered from a payee. The CSA will not refund overpaid amounts to child support payers unless:

- It will further the objects of the Act; and
- The interests of the Commonwealth are protected; and
- The interest of the payee is taken into account.

To balance the interests of the Commonwealth and to promote regular and timely payment of child support, the CSA will refund amounts overpaid if all of the following conditions are met:

- The case is ongoing and likely to continue;

- The payer has a history of making full and regular payments and there are no new circumstances that indicate that this will change;
- The CSA and the payee have negotiated an amount to be deducted from continuing payments of child support that will result in the overpayment being fully repaid before the case ends;
- The payee is not seeking to have the liability increased retrospectively.

If the payee's ongoing entitlement to child support has ended then as I have said, the CSA will seek to recover the debt from the payee and will refund any recovered amounts to the payer as and when they are received.

Where there is an ongoing entitlement (in the payee) but a suitable arrangement cannot be made with the payee, the CSA will generally decide not to refund the overpayment but will offset the overpaid amount against the ongoing liabilities and the payer will not have to make further payments until the overpayment credit is exhausted.

It is important to note that *The Assessment Act* and *The Collection Act* do not confer any jurisdiction on the Family Court to make an order for payment against the Child Support Registrar in favour of the payer under a retrospectively invalidated maintenance liability.

This issue was considered by the Full Court of the Family Court in **Child Support Registrar v Z & T [2002] FamCA 182**

This was an appeal by the Child Support Registrar against an order of Kay J who having made the declaration sought by the respondent father under Section 107 of *The Assessment Act* (that the mother was not entitled to an administrative assessment of child support), further ordered that the Child Support Registrar and the mother repay to the father the sum of \$4,290.32 paid by him in child support after it had been established and accepted by the parties that the father was not the father of the subject child.

The nub of the matter for determination on appeal was whether an amount may be recovered from the Child Support Registrar pursuant to Section 143 of *The Assessment Act* or whether the section

is limited in its scope to recovery of amounts from the payee mother to whom money collected by the Child Support Registrar had been paid out.

On appeal the Court held that there was nothing in Section 143 that specifically, or by necessary implication, provides for recovery of monies paid, in the circumstances predicated by the section, from the Child Support Registrar.

The Court held that for the purpose of its collections and enforcement functions under *The Collection Act*, the Child Support Registrar may essentially be perceived to be the agent of a disclosed principal, namely the mother, and that by analogy with the law of agency, actions for recovery in the event of total failure of consideration or rescission for fundamental breach after payment lie against the disclosed principal / mother, not the agent / Child Support Registrar.

The Court on appeal placed emphasis on the wording of Section 143 (4) which provides:-

“143 (4) An amount paid to the Commonwealth under Section 30 of the Child Support (Registration and Collection) Act 1988 is to be taken, for the purposes of this section, to have been paid to the person to whom, apart from that section, the amount would have been payable.”

The Court concluded that if the effect of Section 143 (4) was to deem monies paid to the Commonwealth to be paid to the ultimate recipient then *“that deeming necessarily limits recovery under the Section to recovery from the ultimate recipient, since he/she is, for the purposes of this section, the only “person” to whom the monies in question were paid.”*

The case provides a worthwhile analysis of the mechanics of the Collection Act.

Parentage Testing and Section 107

The application of Section 143 of the Collection Act is of course usually predicated by an application by the payer under Section 107 of the Assessment Act that the payee is not entitled to an administrative assessment of child support for the particular child. This normally involves the

payer establishing that he is not the father of the child and this is normally achieved through paternity testing.

The court can make an order for parentage testing at the request of a party to the proceedings, or on its own initiative (Section 69 W(2) Family Law Act).

Before a court can make an order for parentage testing, the parentage of a child must “in issue”. Thus there must be some evidence that questions the parentage of a child and an order cannot be made simply to satisfy one parent’s personal doubts concerning a child’s parentage.

The whole issue of paternity testing and the ordering of same is highly controversial and it is beyond the scope of this paper to consider the complex issues of whether paternity testing should be ordered or to fully examine the circumstances when testing will be ordered.

I do however draw attention to a number of recent and not so recent decisions which cast some light on the issues.

In The Marriage of Diggins and Diggins (1992) FLC 92-299

Mullane J sitting in the Family Court at Newcastle held that for paternity testing to be ordered “*there must be some real issue as to paternity, some evidence which places the paternity of the child in doubt*” and that it is not a proper use of the section “*to allow a fishing expedition by way of paternity tests*”.

In The Marriage of F v R (1992) FLC 92-300

Butler J in the Family Court Melbourne held that the Court will not order parentage testing merely because it is requested to do so and that “*an applicant must have an honest, bona fide and reasonable belief as to the doubt. An objective test is not to be applied, for the evidence in such applications is seldom (if ever) sufficient to enable the Court to come to any objective conclusion,*

and if it were, parentage testing orders would not be necessary, but the Court will objectively assess the circumstances giving rise to the applicant's belief. However in every case, the interests of the child are paramount and that consideration may supersede the interests of the parties, and may, whether the applicant's doubt is reasonably held or not, require the orders to be made."

TNL & CYT [2005] FamCA 77 was a decision of the Full Court of the Family Court of Australia delivered on 23 February 2005.

In determining the matter the Court on Appeal looked at the Court's jurisdiction to order parentage testing pursuant to Section 69 W of the Family Law Act stating that *"The Court's power to make an order for parentage testing is clearly subject to the parentage of the child being "a question in issue" in proceedings under the Act and that this threshold question involved two components the first being that parentage must be relevant to the nature of the proceedings and the second that there must be evidence which places the parentage of a child in doubt"*.

The Court referred to **G v H (1993) FLC 92-432** where the Full Court adopted the formulation by the trial judge, Bell J, who reiterated the earlier words of Butler J in **F v R (1992) FLC 92-300** as set out above regarding the occasions when the Court might exercise its discretion under Section 69 W (formerly Section 66 W).

The Court also discussed the importance of Courts having the best available evidence allowed by science and referred to the comments of Fogarty J in **G v H** (supra) that *"Paternity is now a medical and not a legal issue. Society is entitled through the legislature and the Courts to an inexpensive, prompt and virtually certain procedure to decide this question. Paternity is no mere inter partes issue. The child and society have a vested interest in the correct outcome. The reasons for that are many, including heredity, the sense of identity and the private and public obligation of financial support directly relevant in this case and so emphasized by the legislature over the past decade."*

The Court further noted that the English Court of Appeal had recently considered an application for paternity test in **Re H and A (Paternity: Blood Tests) 2002 1 FLR 1145** where the Court affirmed that the principles to be drawn from the English cases are:

1. The interests of justice are best served by the ascertainment of the truth; and
2. The Court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.

The Court further noted that the Full Court of the Family Court had expressed the view that in parentage testing applications, the best interests of the child are the paramount consideration where parenting orders are also sought: **G v H (supra)**. However in the subject appeal it was not necessary for the Court to discuss matters concerning the trial Judge's exercise of discretion including the best interest of the child as the Court on appeal had formed the view that the Court had no jurisdiction to make parentage orders in the subject case.

F v Z [2005] FMCAfam 394

This was a judgement delivered by the Federal Magistrates Court on 11 August 2005.

In deciding the issue of whether parentage testing should be ordered, the Court considered the formulation approved in **TNL v CYT** requiring "*an honest, bona fide and reasonable belief as to the doubt*" whether he is the child's father to be the correct approach.

In concluding on the facts of this case that it was appropriate to order parentage testing the Court took into account a range of factors including the concept that paternity is now a medical and not a legal issue in the strict sense, the recognition that both children and society have a vested interest in the correct outcome and the Court's acceptance of the principles that:

1. the interests of Justice are best served by the ascertainment of the truth; and
2. The Court should be furnished with the best available science, and not be confined to such unsatisfactory alternatives as presumptions and inferences.

JFL v TP [1999] FamCA 335

His Honour Justice Smithers in the Family Court Melbourne looked at the issue as to whether a determination based on earlier scientific testing of blood samples would raise issues of *res judicata* and issue estoppel on a later application for parentage testing using DNA technology. In allowing the application, His Honour held that “*it is of great importance that matters such as child maintenance and paternity should be canvassed in the light of the best evidence that can be obtained*” and further that “*it is not fatal in these cases that a Court is being asked to come to a different conclusion from that of a previous Court on a fundamental finding.*” The Court held that the difference in the level of information now available from parentage testing was “*so marked*” that the earlier decision should be no bar to the hearing of the new application.

OP v HM [2002] FamCA 454

The Full Court of the Family Court in dismissing an appeal against a refusal to grant leave to file an application for a declaration pursuant to Section 107 found that the husband could not have had either a bona fide or reasonable belief that he was anything other than the father of the child and there was no error on behalf of the trial Judge in exercising her discretion. The Court found there was no cogent evidence putting in issue the paternity of the children apart from the husband harbouring doubts.

In **McK & K & O [2001] FamCA 990** Mullane J in the Family Court at Newcastle in dismissing an application for a declaration that a deceased person was the father of the subject child rejected an application for admissibility of a DNA testing certificate saying parentage testing orders had not been made and could not have been made in the circumstances of the case firstly because the power to make an order was subject to the parentage of the child being a question in issue in the proceedings and secondly because Section 69 W of the Family Law Act and the relevant regulations relate to procedures and testing of bodily samples from live persons not human remains.

Application of Section 143

The interaction of Sections 107 and 143 of *The Assessment Act* and paternity testing was set out concisely by Bryant CFM (as Her Honour then was) in **G & N 2003 FLC 93-160** where Her Honour stated inter alia as follows:

“23. The CSAA provides certain circumstances in which a person can be assessed as having a liability for payment for child support for a child. The Act then provides a means for a person who has been found liable to pay child support, but who contends that they are not the parent of the child, to make application for a declaration that the Applicant was not entitled to administrative assessment. This normally includes an Application to a Court exercising jurisdiction under the FLA to make an Order for parentage testing.

24. If it is established that the liable parent is not the parent of a child, then the Court can make a declaration pursuant to s 107(1) of the CSAA. Section 143 of the CSAA enables child support to be recovered and the Court having jurisdiction under the CSAA, where that person is not liable or subsequently becomes not liable to pay the amount to the other person.

25. Accordingly, the CSAA clearly provides a code for what is to happen in cases where a liable person turns out not to be the biological parent, and it is quite clear, pursuant to s 143, a Court having jurisdiction under the CSAA, can in its discretion order repayment to the person having made payments pursuant to an assessment.”

The application of Section 143 of the Assessment Act was analysed in detail by His Honour Federal Magistrate Reithmuller in **DRP & AJL [2004] FMCAfam 440** delivered in the Melbourne Registry of the Federal Magistrates Court on 20 September 2004.

His Honour undertook a comprehensive review of the authorities and compiled a list of factors relevant to the exercise of the court’s discretion under Section 143.

The proceedings involved an application by the father for a declaration pursuant to Section 107 of the Assessment Act that he be declared a non liable parent due to the absence of paternity in respect to the subject child.

The father further applied for recovery of child support payments made to the respondent mother.

The mother countered with a response seeking a similar declaration under Section 107 but then seeking that the father's application otherwise be dismissed.

At the hearing there was no dispute that the applicant was not in fact the biological father of the child, as evidenced by DNA testing.

The question for the Court was what if any moneys the father should be entitled to recover from the mother pursuant to Section 143 of *The Assessment Act* or putting it another way whether the mother should be ordered to repay any monies.

There was no dispute in relation to the monies then being held by the CSA which were to be refunded to the father as a result of the paternity order.

His Honour looked at a number of reported and unreported decisions in attempting to isolate the factors which might be of significance for the Court to consider in determining what orders would be "just and equitable for the purpose of adjusting or giving effect to the rights of the parties and the child concerned" under S.143(3).

His Honour held that "the process of considering the issues arising under section 143 must be approached judicially, and the factors relevant to the exercise of the discretion in the particular case identified and applied.

His Honour also looked at the criteria for determining the financial contribution of a step parent under the Family Law Act and noted that the considerations relevant to considering the obligations of a step-parent to support a child under the relevant provisions of the Family Law

Act “appear to be considerations that would be relevant to the exercise of the discretion to adjust the rights of the parties or child under Section 143(3)”.

His Honour appears to draw a distinction between the situation where a step-parent voluntarily assumes an obligation to another (being a child) who becomes dependant upon the payer and the present case where the relationship between the father and child was not assumed by the father “in full knowledge of the true nature of his biological relationship with the child”. Drawing on the step-parent analogy His Honour noted that “whether the step-parent obligation was taken on knowingly, or the payer assumed the obligation believing that he was fulfilling his obligation to a biological child must be carefully considered”.

His Honour goes on to state in paragraph 48 of the Judgement that “If the parent-child relationship is fostered in circumstances where the parent was mistaken or deceived as to the true nature of their relationship with the child, it appears unjust to require that person to continue to assist in supporting the child”.

In finding in favour of the putative father His Honour held that “whilst it is clearly inappropriate to attempt to limit or prescribe the factors that may be relevant to the exercise of the discretion to adjust rights in a just and equitable manner under Section 143 (3) it appears that the following factors will generally be relevant when considering an adjustment reducing or removing the payers right to repayment:

- a. **The state of knowledge and conduct of the parties.** It will be necessary to determine the state of knowledge of the payer at all relevant times, which may include: the time of birth, during the relationship, at separation, and thereafter. In general:
 - i. The absence of knowledge of circumstances that would lead a reasonable person to have doubts or concerns (on the part of the payer) that he was not the father of the child would generally be a significant factor in favour of an order for repayment.

- ii. *Any acquiescence or delay on the part of the payer, once aware of relevant information (which may be as little as circumstances giving rise to reasonable doubts as to paternity), would generally be a significant factor against an order for repayment.*
- b. ***The relationship of the payer with the child.*** *Of particular relevance must be the extent to which the payer has taken on the role of a parent and provide for the child. However, it must necessarily be weakened in cases where the relationship has broken down, been minimised (or even thwarted by the child’s carer), or where there is a biological parent available to take on that role, or where the obligation was not assumed in full knowledge of the nature of the relationship with the child. That is not to say that a prospective step-parent relationship will dictate that monies paid in erroneous circumstances will not be recoverable. The scheme of the step-parent provisions of the Family Law Act is to value relationships and continuity of support for children, even if the traditional biological connect is absent: this underlying principle must be appropriately reflected in the exercise of the discretion under Section 143. If there are circumstances that would establish an ongoing step-parent maintenance order this would mitigate strongly against an order for repayment.*
- c. ***Evidence as to the circumstances of the biological father.*** *The biological father’s relationship with the child and capacity to provide support will always be relevant: however, its absence will not, of itself, be determinative: for example see Hill & Hill supra.*
- d. ***The financial circumstances of the parties.*** *This will be particularly important when the repayment will place a burden upon the mother that will cause a significant detriment to the standard of living of the child. However, the mother’s penury, in isolation, cannot be allowed to be seen as a complete defence under the section, lest quite aberrant behaviour (usually with horrible emotional results for the child and the payer) is without consequences. In many cases it will also be relevant that the mother has received an adjustment in her favour pursuant to section 75(2) in the property settlement on the basis*

that the child is a biological child of the payer. Consideration of the parties' finances must also include the extent of the parties' obligations to support others.

Applying those factors to the case at hand His Honour concluded that it was just and equitable to order that the mother repay the sum sought to the father.

His Honour noted that “whether the section will allow for adjustment of the parties’ rights by way of orders for payment of a sum in excess of the child support amount to the payer by the payee is yet to be determined.”

Included among the decisions cited by FM Reithmuller in **DRP v AJL** were the following:

B & B & DCSR [2001] FCA 1371 (unreported)

In this case the parties had, in full knowledge that the father named in the documents was not the biological father, signed birth certificates and made representations to the child support registrar that he was the father. Her Honour, Dawe J, noted that the father “*had not been tricked*” and that the circumstances were not a mistake of fact or law.

Y & Y [2001] FMCAfam 258 (unreported)

In considering what orders would be “just and equitable for the purposes of adjusting or giving effect to the rights of the parties and the child concerned” pursuant to subsection 3 of Section 143 of *The Assessment Act* Federal Magistrate Donald sitting at Newcastle noted that the mother may have had some suspicion or fear that the applicant was not the father but concluded the evidence was not sufficient for him to conclude that she did have actual knowledge. Nevertheless His Honour noted the provisions of the property settlement between the parties which provided for a sum of \$55,000 to be paid to the mother by the father on his retirement from the Royal Australian Navy and in all the circumstances concluded it was just and equitable for the mother to be required to repay the money. In making this determination His Honour considered that the future payment by the mother to the father was not likely to seriously impact upon the child.

G v N (2003) FLC 93-160

Bryant CFM (as Her Honour was then) stated that section 143 provided a statutory code for dealing with overpayments, but did not consider the relevant factors to be considered by the Court in exercising the discretion under the section, as *The Assessment Act* did not apply to the facts of the case as the parties separated and the child was born prior to the commencement of *The Assessment Act* in October 1989.

G & T (unreported, DGF 3156/94, Wilczek J, 18/10/02)

His Honour had little evidence upon which to consider the discretion under section 143 and said:

“In the absence of any other evidence I conclude that it is just and equitable to make the orders sought by the husband [for refund of the monies paid], on the basis that it is not just and equitable to require a man to have paid child support for a child that is not his and there being no other facts or circumstances which might suggest that the end result should be otherwise.”

B & M [2003] FMCA fam 113

Her Honour CFM Bryant (as Her Honour then was) sitting in Melbourne did not order repayment by the mother.

Her Honour found that the wife had not kept doubts as to paternity from the husband and he was aware of the possibility that the children might not be his. Her Honour said it was not a case where the wife had deceived the husband about the parentage of the children.

Her Honour concluded:

“47. That [the mother did not keep information from the husband] is important in my view because the husband thereafter made decisions about the support of the children and about the way in which the parties would conduct themselves as a family in this knowledge. The husband could at any time after the child support assessment was initially made in 1999 have requested paternity testing to satisfy himself that he had an obligation to support the children.”

Her Honour noted that even since separation the husband has regarded himself as having an important role in the children's lives and there are orders for him to have contact with the children and "*this reflects the reality of the ongoing personal relationship between the husband and the children*" and that it is in this context that the payments by the husband occurred and the wife conducted herself on a similar basis ie that they had a family unit comprising the husband, wife and three children. Furthermore the wife had not in the past pursued the biological father of the children for child support which Her Honour found was again commensurate with the way the parties conducted their lives together as a family.

An interesting situation involving tension between Section 79 of *The Collection Act* and Section 143 of *The Assessment Act* confronted the Federal Court in **Mercer v The Child Support Agency [2004] FCA 465** judgement being delivered on 23 April 2004.

In short the payer obtained a Section 107 Declaration in the Family Court that the relevant child was not entitled to an administrative assessment of child support because the payer was not a parent of the child.

Prior to the Section 107 Declaration the payee had successfully defended an application brought by the payer in the Magistrates Court seeking to have child support paid by the payer refunded by the payee.

The father appealed to the Family Court against the Magistrate's refusal to grant his application for recovery of moneys under Section 143 of *The Assessment Act*.

Prior to the appeal concerning Section 143 being heard, the CSA refunded moneys collected by the agency in relation to the child pursuant to Section 79 of *the Collection Act* and then sought to recover the amount refunded from the payee as a debt due to the Commonwealth. The applicant payee then sought judicial review of the decision to repay the monies in the Federal Court.

The payee's application claimed that the applicant payee was aggrieved by the decision because the amount was not repayable by the CSA to the payer and as a result any payment made by the CSA should not be the liability of the payee.

In determining the review the Court held that Section 79 of *The Collection Act* has no application in the circumstances of this case, where there is no registered maintenance liability for the child. In the court's judgement the fact that the CSA repaid an amount to the payer does not represent an overpayment to the payee recoverable as a debt due to the Commonwealth.

The Court held that the decision of the Magistrate to decline the payee's Section 143 application was a highly relevant matter which should have been taken into account by the CSA in its decision to pay moneys to the payer.

In the circumstances the Court declared that the payee was under no obligation to pay any money to the CSA or the Commonwealth.

The case provides a good analysis of the legislative framework pertaining to overpayments.

2004 Child Support Task Force

In 2004 a ministerial taskforce on child support was established as part of the Federal Government's response to the House of Representative's Committee on Family and Community Affairs report on child custody arrangements in the event of family separation (*Every Picture Tells a Story*, December 2003).

Task Force Recommendations

A number of the recommendations of the taskforce impact on the issue of overpayments and included among them are the following:

The Stay Power – Section 140 *The Assessment Act*

The taskforce felt that Courts need to have all necessary powers to maintain the financial position of the parties pending final resolution of litigation. It was considered that Section 140 of *The Assessment Act* (the power to grant a stay) was not currently broad enough to deal with all the situations where it may be thought desirable to make orders staying or otherwise affecting the operation of the child support legislation pending resolution of a case. The taskforce considered

Recommendation 6

Pending the final outcomes of any application or appeal under Child Support legislation, whether in relation to assessment, registration or collection, the Court should have a wide discretion to make orders staying any aspect of assessment, collection or enforcement, including:

- a) implementing a departure from the formula on an interim basis;
- b) excluding formula components or administrative charges which might otherwise be available;
- c) suspending the accrual of debt, and/or late payment penalties, without necessarily having to substitute a different liability for a past period;
- d) discharging or reducing debt without needing to specify the changes to the assessment to effect this result;
- e) limiting the range of discretionary enforcement measures available to the Child Support Agency, or staying enforcement altogether; and
- f) suspending or substituting a different amount of available disbursement to the payee.

that Courts should have all necessary powers to maintain the status quo or balance the interests of the parties appropriately pending the outcome of the case.

Overpayments through CSA error

Recommendation 8.1

Where, as a result of administrative error, a payee has been paid an amount not paid by the payer as the result of administrative error, for example, as the result of the payer's cheque not being met, or as the result of an incorrect allocation of employer garnishee amounts, the Registrar should not require repayment by the payee.

In situations such as those outlined in recommendation 8.1 the taskforce noted that the carer may not have had any knowledge of the fact that the payment was made in error and may have spent the funds before being made aware of the overpayment. It was considered in such cases that the

CSA should carry the debt until it is recovered, as an outstanding payment, and not involve the carer in rectifying the error.

Payees Affected by Payers Non-compliance

Recommendation 8.2

Where a payer lodges a late tax return for a child support period, and that return shows a taxable income lower than that used in the assessment, the Child Support Registrar shall vary that payer's income from the date the return was lodged, but not for the intervening period unless the payer can show good reason for not providing income information at the time the assessment was made. In making a decision whether to vary the payer's assessment, the Registrar will consider the effect on the resident parent of having to repay any overpayment thereby created.

This is to overcome the situation where an overpayment results from a revised assessment issued following late lodgement of tax returns by payers. The resident parent must repay the overpayment unless they successfully apply for a retrospective change of assessment. The payee parent has no control over the payer's compliance with tax laws and so the taskforce considered the responsibility for seeking adjustment to the assessment should be shifted from the payee to the payer.

Paternity Disputes

Recommendation 8.3

Where a parent has made an application (under s.107 of the *Child Support (Assessment) Act 1989*) disputing an assessment on the basis that he is not the parent of the child, and informs the Agency of the application, the Child Support Registrar shall suspend payments of collected amounts to the payee until the application is finalised, unless the Court orders

Where a paternity challenge is pending, the Registrar may currently make a suspension determination under Section 79A of *The Collection Act*, under which the father would continue to pay child support, but the Registrar would pay nothing out to the resident parent until the dispute is finalised.

The taskforce considered that to minimise the risk of unjustified payments this should be obligatory upon the Registrar subject to a Court order to the contrary. It would be still open to the Court to make a determination if the payee applied for the money to be disbursed before the case is resolved.

Recommendations 8.4 and 8.5

8.4 Where the Court has considered a s.107 application, and has made a declaration that the assessment should not have been made, it should immediately proceed to consider whether an order should be made for repayment of any amount under s.143 of the *Child Support (Assessment) Act*.

8.5. When considering how much of the balance of money paid under a child support assessment should be repaid to a payer who has successfully disputed paternity, the court should have regard to:

- a) the knowledge of the parties about the issue of paternity;
- b) any acquiescence or delay by the payer after he had reason to doubt his paternity;
- c) the relationship between the payer and the child;
- d) the present financial circumstances of both parties; and
- e) the capacity of the biological father (if known) to provide child support in the future.

As stated above, once a Court makes a declaration that a man is not a child's father under Section 107 of *The Assessment Act*, it is as if the child support assessment had never been made and any child support paid under the assessment must be recovered from the carer by the payer. The taskforce proposed that rather than a separate application for repayment, the decision about repayment should be part of the Court's deliberation on the question of paternity thus minimising court costs and uncertainty for both parties.

The taskforce also recommended that the factors for determining the amount of repayment to the former payer set out in the decision of F M Reithmuller in the case of **DRP & AJL [2004] FMCAfam 440** (20 September 2004) should be codified in child support legislation to assist in the clarity of the law.

Recommendation 8.6

Where a Court makes an order for repayment of an overpaid amount under s.143 of the Act, the amount of such payment may be registered with the Child Support Registrar as a registrable maintenance liability, for enforcement.

This places the former payer in the same position as the payee, where they are owed repayment of child support related debt rather than having to rely on their own resources.

As a footnote it is interesting that in paragraph 9.4 of its report the task force advocated that the Child Support legislation should be rewritten as far as possible and noted that "it is highly complex and difficult to understand, due to an excessive reliance on technical language and complex phraseology. Legislation of this kind must be usable beyond the Agency entrusted with its implementation. Lawyers and other advisers, as well as courts, are significant users of the legislation and it is important to its utility that the legislation should be written without undue complexity".

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