



# Dixie Ann Middleton & ASSOCIATES

## Family Law & Estate Administration

Welcome to the spring edition of our Newsletter – *Yours, Mine, Ours*

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Please note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.

*Individual liability limited by a scheme approved under professional standards legislation.*

### Firm News

#### Morningside Festival

The firm had a great day attending the Morningside Festival on Sunday 30 July. This was a fantastic event which we hope to see you at again next year!



This year we ran a "Catch a Quacker" competition, with our lucky winner going home with a brand new bike! We also gave away a dinner at local restaurant, Ambrosia & Co in a free raffle. Here are Jade, Blake and Toby testing out their skills in the duck pond:



### Bridge to Brisbane

Emma, Amara and Tamara completed the Bridge to Brisbane on 27 August!



### September

Emma, Amara, Tamara and Tamara's daughter, Jade participated in September again this year! Between 4 September and 1 October, we each took the challenge of completing 10,000 steps a day to raise vital funds for Cerebral Palsy Alliance. **Please help us raise funds** for this very worthy cause by donating to our team via the [September website](#).



### Fundraiser for Chaplainwatch

Emma had a lovely time attending a charity lawn bowls day on 1 September, raising money for Chaplainwatch. The firm donated a raffle prize and Emma's team took home the trophy!!



### BNI Bulimba

Do you want to meet likeminded business people and grow your own business? BNI is launching a new chapter in Bulimba and is looking for new members. Come along to an [information session](#) on **3 November 2017** or contact BNI Brisbane Central Executive Director, Paul Lomas on 0430 499 366 for more details.

## Child Support Refunds

The child support regime ensures that children receive a proper level of financial support from their parents, noting that parents have a primary duty to maintain their child. However, there are cases where the Courts have found that a payer parent was/is not in fact liable to pay child support in relation to a child. The question for the Court then becomes whether the payee parent should be ordered to repay the child support received.

Two examples of instances where this question has arisen before the Courts is where the payer parent was found not to be a parent of the child and where the payee parent was found to have been ineligible for an assessment of child support at the time they applied and, therefore, not entitled to the payments received.

### Not a parent of the child

Section 107(1) of the *Child Support (Assessment) Act 1989* (Cth) gives the Court power to make a declaration that a person should not be assessed in respect of the costs of a child because the person is not a parent of the child. Pursuant to section 143 of the Act, where child support is paid in circumstances where the payer is not liable to do so, the Court may order that the amount be recovered from the payee. However, before making such an Order, the Court must take into account the following factors:

1. Whether the payee or the payer knew or suspected, or should reasonably have known or suspected, that the payer was not a parent of the child;
2. Whether the payee or the payer engaged in any conduct (by act or omission) that directly or indirectly resulted in the application for administrative assessment of child support for the child being accepted;
3. Whether there was any delay by the payer in applying under section 107 for a declaration once he or she knew, or should reasonably have known, that he or she was not a parent of the child;
4. Whether there is any other child support that is, or may become, payable to the payee for the child by the parent of the child;
5. The relationship between the payer and the child; and
6. The financial circumstances of the payee and the payer.

In the case of *Levine & Levine*, the parties were in a relationship for 26 years. The child, X was born in 1995 and the Applicant's name was recorded on the birth certificate as X's father. In 2010, the Applicant underwent a parentage test, without the Mother's knowledge, which revealed that he was not the biological father of X. The Applicant advised the Mother of the result a few weeks later.

The Mother took issue with the initial testing process but also refused to consent to further testing. In any event, the mother did not dispute the conclusion of the testing, being that the Applicant was not the child's father. In those circumstances, the Judge was satisfied that a declaration pursuant to section 107(1) should be made, such that the Applicant should not be assessed in respect of the costs of the child.

After considering the 6 factors outlined above, the Judge ordered the Mother to pay the Applicant the sum of \$12,969.34 by way of recovery of child support payments under section 143, in addition to costs in the amount of \$4,038.50. In reaching that conclusion, the Judge gave consideration to the following facts:

1. Other than comments made by the Applicant's mother's that the child did not resemble him (when the child was about 4 years old), the Applicant had no cause to suspect that he was not the father of the child, noting that the child was born during the marriage;
2. Once the Applicant obtained the results of the DNA test, he acted promptly in commencing legal action;
3. The Mother's financial circumstances. She received a nett income after expenses of approximately \$445.00 per week and had a bank account with a balance of only \$500.00. As the Mother did not have the capacity to pay the full amount at short notice, she was given 12 months to do so.

### Ineligibility for assessment

Section 25 of the Act provides that a parent of a child may apply for an administrative assessment of child support for the child as long as they meet certain conditions, including the following:

1. The parent applies for both parents to be assessed in respect of the costs of the child; and

2. The parents are not living together as partners on a genuine domestic basis (whether or not they are legally married).

In the case of *Percell & Mulroy*, the parties had been engaged in litigation for many years. As part of that litigation, a declaration was made by the Court that the parties were in a de facto relationship from March 2000 to April 2011. As a consequence, the Father argued that the Mother was precluded from properly making an application for a child support assessment over those years.

The Father submitted that because the parties were living in a de facto relationship at the time when the Mother applied for an assessment, the Mother had not complied with section 25 and the assessments were, therefore, improperly based (i.e. because the parents were living together as partners on a genuine domestic basis).

The Father further submitted that because the Mother was not able to properly apply for the assessments, all monies which he had paid pursuant to the assessments had been improperly paid and, therefore, he should be able to recover the amounts in accordance with section 143 of the Act.

The Court found that from 12 February 2001 to April 2011, the Mother was not a parent who could properly apply for an assessment of child support for the child because she was not able to satisfy the requirements of section 25. The assessments made during that period were, therefore, improperly made and any child support paid by the Father during that period could potentially be recovered from the Mother pursuant to section 143.

The Father's child support liability was stayed during that period, as was any enforcement action by the Child Support Agency. The proceedings were otherwise adjourned to allow the parties to file further material, as it was not clear to the Court what amounts had actually been paid by the Father. The Court would then be in a position to determine the amount, if any, to be recovered.

### Conclusion

Although the question of whether an individual is (or should) be liable to pay child support might appear to a straightforward one, like most areas of law, the answer is not always clear cut. If you have any concerns about your liability to pay child support, we recommend that you obtain legal advice.