



PATERNITY

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This media backgrounder on Paternity is intended to assist journalists and others interested in this topic to have an accurate understanding of service delivery and legislation issues relating to paternity decisions.

What is the law around presumption of parentage for child support payments?

The law is very clear that only parents have to pay child support. A person can be presumed to be the parent of a child, and is therefore required to pay child support, if they:

- are named on the child's birth certificate;
- were married and the child was born during the marriage to one of the parties to the marriage;
- cohabited with the mother during the presumed period of conception;
- legally adopted the child;
- signed a statutory declaration acknowledging they are the parent; or
- have a court order which states they are the parent.

If a child support application is refused, as the Child Support Agency is not satisfied the person being asked to pay child support is a parent, the person claiming child support can apply to the Family Court or the Federal Magistrates Court or any State or Local Court exercising Family Law jurisdiction, for a declaration that the application should be accepted because the person is parent.

If one of the above criteria is met, the application for child support has been accepted and the person being asked to pay believes they are not the parent, they can apply to the Family Court or the Federal Magistrates Court or any State or Local Court exercising Family Law jurisdiction, for a declaration that the application should not have been accepted, as they are not a parent of the child. If the Court determines that they are not a parent, the Court can also make a decision about whether any child support that has already been paid should be repaid by the person who received it.

What happens when a parent believes they are not the biological father of a child they are paying child support for?

The Child Support Agency (CSA) has no legal power to make decisions about paternity; it is a matter for the courts. The Courts have the power to make a determination about parentage and can then make a declaration that a person is not entitled to an assessment against the person who is not a parent (section 107 of the *Child Support (Assessment) Act 1989 (the Assessment Act)*) or that a person is entitled to an assessment because the other person is a parent (section 106A of the *Assessment Act*).

When the CSA receives documentation to show a person has applied to a Court for a section 107 declaration that the child support application should not have been accepted, as they are not a parent of the child, the CSA is legally required to continue the collection of child support but must suspend the transfer of that money to the receiving parent until the court has reached a decision. All monies collected by CSA will be held in trust until the court makes a final order.

A parent can also apply to the courts to make a Stay Order pending the decision on the section 107 application. The court can make an order to suspend the collection and assessment of child support, pending the outcome of the section 107 application.

If the Court has made a declaration under section 107, CSA is taken never to have accepted the application for an administrative assessment of child support payable made by the receiving parent against the person who has been found not to be a parent. As a result all child support paid is regarded as being overpaid. Any money that is being held by the CSA can be paid back to the person who made the payments (but not money that has already been paid to the receiving parent).

The Court must then immediately consider whether they should also order, under section 143 of the *Assessment Act*, that the receiving parent repay previously paid child support – without requiring the person



who disputed parentage to make a separate Court application, as had been the case prior to January 2007. The legislation clearly articulates the matters the Court must consider when deciding if a receiving parent should repay child support.

Only if a Court orders a parent to repay child support under section 143, the person who has paid the child support can ask the CSA to collect the ordered payments on their behalf. The CSA will then be able to collect these amounts in same way that they collect child support.

Some key facts

- The CSA adheres to court orders made in relation to child support matters.
- The CSA does not conduct or process any DNA testing at any time.
- The receipt of a court order by the CSA does not provide the CSA with any information regarding DNA results, or even any knowledge of DNA testing having taken place.
- The customer or their legal representative needs to provide a copy of the court order to the CSA before it can be implemented.
- The CSA does not request a copy of DNA test results from customers, their legal representatives or the court.
- Section 107 orders can also be made in cases where no DNA testing is involved (eg adoption/surrogate parenting). For this reason the numbers of section 107 orders cannot be used to demonstrate how many people have been shown not to be the father of a child where an application for child support has been made. It is also incorrect for media to represent data about section 107 orders as child support assessments being overturned because of DNA testing. The CSA does not collect data or receive any statistical breakdown from the courts about the reasons behind Section 107 orders.

Occurrence of misattributed paternity in Australian society

Reporting of misattributed paternity in the media often cites references to the number of paternity tests conducted each year in Australia that show that the person being tested is not the father. These references can give the impression that misattributed paternity is occurring at a much higher rate than evidence suggests. This is because the figure is derived from a specific sample group – that is, people who have reason to believe paternity may have been misattributed – rather than showing the overall incidence of misattributed paternity in the general population.

Evidence-based Australian research shows that the actual rate of misattributed paternity in the general population is closer to 1 per cent and not more than 3 per cent.*

“Medical studies provide one of the best sources of evidence in relation to the incidence of non-paternity in the general population, given that they often derive their subjects on the basis of medical conditions that are unrelated to paternity issues...since the advent of DNA analysis, not one medical study in a Western country indicates a non-paternity rate of more than three per cent.”¹

What about the biological father?

If a court has made a declaration that a child support application should not have been accepted as the person applied against is not a parent, the receiving parent can then apply for child support against the actual parent of the child if their parentage can be established. This assessment will only apply from the date the application for assessment is lodged – it cannot be made retrospective.

*¹ Gilding, M. Rampant misattributed paternity: the creation of an urban myth, *People and Place*, vol. 13, no. 2, 2005



What is the law for presumption of parentage for artificial conception?

When a child is born as a result of an artificial conception procedure, for child support purposes, the parents of the child are the persons who are regarded as parents under section 60H of the *Family Law Act*.

Under this Act, a child born as a result of an artificial conception procedure where a man and woman are married or in a de facto relationship will generally be regarded as a child of that man and woman (regardless of whether they are the child's biological parents).

The 'parents' must have consented to the procedure. This is assumed to be the case when the parents are married or in a de facto relationship unless a party can prove otherwise.

Depending on the State or Territory in which the family resides, there are some other circumstances under section 60H in which a person can be regarded as the parent of a child born from an artificial conception procedure.

A person who provides sperm for artificial insemination will not be treated as the father of a child under Family Law or child support law (unless a court has declared them to be a parent).

Further information on paternity

Presumption of parentage: <http://www.csa.gov.au/ChildSupportFormula/formulaAssessment.aspx#parentage>

Parentage legal reference: http://www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=2_2_3

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