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Paternity/Filiation Questions & Answers August 10, 2016

Introduction by Carmen Brady-Wright, AAIC, ChAS, DOJ

There can be inconsistencies across the state in the process of establishment and dis-establishment of paternity in juvenile court cases because the intersection between juvenile law and paternity law is not always clear. Moreover, paternity issues are very fact-specific.

A filiation petition may be used to establish and dis-establish paternity, depending on the manner in which the paternity to be dis-established was established (e.g. voluntary acknowledgement of paternity, paternity judgment, marital presumption). However, DHS does not have standing to file a filiation petition until it is granted guardianship of the child. In some counties, courts and/or parties have expressed frustration with DHS not filing filiation petitions in pre-jurisdictional cases. DHS and DOJ have had to explain to those courts and parties the department's limitations in filing a filiation petition.

QUESTION: Who can file the petition for filiation?

ANSWER (CARMEN): Other individuals or entities besides DHS may file a filiation petition, including, for instance, the mother or alleged father. However, courts and parties often look to DHS to file the petition.

DHS has authority to file a filiation petition only when it has been granted guardianship of the child. Refer to ORS 109.125(1)(b). Temporary custody granted to DHS after a shelter hearing does not give the agency that authority, nor does only legal custody (and not guardianship) granted after adjudication of the jurisdictional petition. Prior to DHS filing a filiation petition, the judgment of jurisdiction and disposition should be reviewed to confirm that the box granting guardianship to DHS has been checked. Sometimes DHS has had to go back later and seek a corrected judgment granting guardianship when the box on the judgment was inadvertently unchecked.

QUESTION: What is the impact of the recent appellate case law on judicial filiation?

ANSWER (CARMEN): Appellate case law from 2014 has had an impact on the timing of when DHS may be granted guardianship of the child and thus have the authority to file a filiation petition. *See DHS v. W.A.C*., 263 Or App 382 (2014) and *DHS v. A.F*., 268 Or App 340 (2014). In the W.A.C.case, one parent admitted to jurisdictional allegations but the other parent, who had been served and summoned and had appeared in the jurisdictional case, contested the allegations and proceeded to trial. On appeal, the court held that in this scenario, the juvenile court cannot establish jurisdiction and make the child a ward of the court until the allegations as to both parents have been resolved. The facts were similar in the *A.F.* case – one parent admitted and the other parent was served and summoned, appeared and contested the allegations. The court again held that the court did not have jurisdiction over the child until both parents' allegations were resolved.

Based on this appellate case law, some courts have changed their practice, if they weren't already, to entering a limited judgment of jurisdiction upon resolution of allegations as to one parent named in the petition and then entering the judgment of jurisdiction and disposition upon resolution of the other parent's allegations. It is in the judgment of jurisdiction and disposition, after both parents' allegations have been addressed, that the court may grant custody and guardianship to DHS. Thus, DHS cannot be granted guardianship until both parents named in the petition have been addressed.

Both the *W.A.C.* and the *A.F.* cases were decided on the specific facts of both parents pled on a petition with one making admissions and the other, served and summoned and having appeared, contesting. Under a different set of facts, the court might grant legal custody and guardianship to DHS based on allegations as to only one parent. For instance, if only the mother was pled on a petition because no legal or Stanley putative father had been named, then upon resolution of the mother's allegations, the court could enter a judgment of jurisdiction and disposition and thus grant custody and guardianship to DHS. Again, in order to determine whether DHS has authority to file a filiation petition, the jurisdictional judgments in the case should be carefully reviewed.

QUESTION: Is it possible to dis-establish paternity when DHS has only been granted custody of the child?

ANSWER (CARMEN): Assuming other requirements are met, DHS may seek to dis-establish a presumed legal father by marriage when it is made the custodian of the child; the agency does not need to be granted guardianship to do so. ORS 109.326.

Also, again assuming other requirements are met, DHS may file a petition to set aside a voluntary acknowledgement of paternity once DHS is granted custody of the child; DHS does not need to be the guardian to file. ORS 109.070(5)(a)(C). Finally, again assuming other requirements are met, DHS may file a petition to set aside the paternity determination in a paternity judgment once DHS is granted custody of the child; DHS does not need to be the guardian to file. ORS 109.072(2)(a)(B). Please note, however, the petition under ORS 109.072 likely must be filed in circuit court and possibly be consolidated with the juvenile court case because ORS 419B.395, which authorizes the juvenile court to enter judgments about paternity does not reference ORS 109.072. Thus, it's not clear that the juvenile court has authority to hear a petition filed under ORS 109.072.

QUESTION: In Lane County, we plead the presumed legal father by marriage on the jurisdictional petition but if we determine that the presumed legal father is not the child's biological father, we will obtain a judgment of nonpaternity prior to the establishment of jurisdiction. Is that an appropriate course of action?

ANSWER (CARMEN): Yes. Upon the granting of temporary custody to DHS, prior to adjudication of the dependency petition, DHS could file pleadings to dis-establish the presumed legal father. The advantage to dis-establishing prior to adjudication is that DHS then doesn't have to prove the jurisdictional allegations as to the presumed legal father, which could result in the juvenile case moving forward more quickly. Note, though, that in practice DHS does not typically dis-establish a legal father, when the permanency plan is other than adoption, unless there is an alleged father whose paternity will be established.

QUESTION: Does the information about paternity provided in the Father's Questionnaire provide sufficient information for purposes of filing a motion and order to show cause for a judgment of nonpaternity under ORS 109.326?

ANSWER (CARMEN): It can, depending on the specific facts of the case. Often, where there is no other alleged father, paternity testing is not done for the presumed legal father who claims, or who the mother claims, is not the child's father. Thus, DHS relies on information in the Father's Questionnaire. However, the Father's Questionnaire is not a sworn document or affidavit so best practice is to seek corroborating information from the mother, father, alleged father, family members or anyone else who may have knowledge of the facts relevant to paternity.

- Take a look at the quick reference guides posted on the Staff Paternity Tools Page
- Branch staff is encouraged to first staff with their supervisor/paralegal then involve their AAG early in the case, including when parties to the juvenile case are asking for paternity testing. The AAG can assist the branch in understanding whether appropriate timelines for various paternity actions support paternity testing being done. For instance, ORS 109.072 authorizes the filing of a petition to set aside a paternity judgment within certain timelines. If the case is outside of those timelines, then it may not be prudent or helpful for DHS to refer for paternity testing. This doesn't mean the other parties to the case, for instance mother or father, couldn't seek paternity testing if that's what they wished to do, but DHS would want to be mindful of timelines before referring for testing. With that said, if DHS is ordered to refer for paternity testing, the agency should do so and comply with the court order.

QUESTION. I've been hearing the DCS process is too slow. What can you tell me about this?

ANSWER (CARMEN): Some courts or parties may perceive the DCS process to conduct paternity testing and, if appropriate, establish paternity as slower than when DHS facilitates the paternity testing and files a filiation petition. There are a number of considerations in deciding whether to refer to DCS or to have DHS handle the matter.

For instance, what, if anything, did the juvenile court order? Did the court order DHS to pay for paternity testing? If so, DHS should do so. Or did the court order DHS to refer for, or facilitate, testing? If so, DHS could look at referring the matter to DCS. Another consideration is whether the juvenile court will consider DHS' efforts to accomplish paternity testing and, if appropriate, to establish paternity, as part of the agency's overall reasonable or active efforts in the juvenile case. If so, referring the matter to DCS does take away from DHS some of the control over the timing of these processes, which could have an effect on a reasonable or active efforts determination. Related considerations could be the point in the case where the paternity matter has arisen and/or have there already been delays in addressing paternity.

Another consideration is that when DCS establishes paternity, the agency is required to formally serve the parties to the DCS administrative action with the pleadings and papers. Formal service can take time, depending on the whether the whereabouts of the parties to the action are known. In some instances, if the paternity action is filed by DHS in juvenile court, formal service can be dispensed with and this can shorten timelines for resolving paternity issues. On the other hand, if formal service is required

in a case by DHS or DCS, DCS may have more resources to locate missing parties, which could speed up the process.

QUESTION: When is a voluntary acknowledgement of paternity (VAP) a good option for establishing paternity?

ANSWER (CARMEN): The mother and alleged father signing a VAP is the most expedient way to establish paternity. However, a barrier to the signing of a VAP is if there a legal father who has not been dis-established. Consideration must also be given to the likelihood that the mother and alleged father will follow through with signing the VAP.

QUESTION: If the mother and alleged father are present in the courtroom during a juvenile court hearing, could the judge sign the VAP as a notary?

ANSWER (CARMEN): It would depend on the judge but this option could be explored. Judges have signed relinquishment documents in lieu of a notary so it is possible.
COMMENT (CARMEN): An additional issue to be discussed today is the juvenile court's authority to order paternity testing. AAGs in the Child Advocacy Section (ChAS) of DOJ use a form of motion and order for paternity testing but it is not generally used to seek to compel an unwilling individual to participate in paternity testing. Rather, it is used to obtain an order so that LabCorp can gain access to the individual if he or she is incarcerated in order to obtain a buccal swab for the testing. However, in speaking to Tamara, a question was raised about the court's authority to order an unwilling mother, father or alleged father to participate in testing.

There is no single statute that clearly and explicitly authorizes the juvenile court to order paternity testing under any circumstances. Therefore, if DHS is dealing with an unwilling mother, father or alleged father, the agency should staff with their assigned AAG.

With that said, under some circumstances, the juvenile court has clear authority or, while less clear, **may** have authority to order paternity testing.

- For instance, in a filiation proceeding, the court or DCS may order paternity testing, depending on the circumstances of the request or motion. ORS 109.252(1). Reading ORS 419B.395 and 109.252 together, the juvenile court has authority to order paternity testing during a filiation proceeding. The challenge with juvenile cases is that often the paternity testing is done prior to the filiation petition being filed. If an individual is unwilling to submit to paternity testing, DHS could file a filiation petition, once granted guardianship, as long as it

had sufficient information to support the filing of the petition, and then the court could order paternity testing.

- ORS 109.070(6) authorizes a party to a VAP or DHS to seek from DCS an order for paternity testing within one year of the VAP being filed and if paternity testing was not previously done, pursuant to ORS 416.443. Upon a timely request, DCS is required to order paternity testing. Reading ORS 419B.395 and 109.070(6) together, it is possible but not entirely clear that the juvenile court has authority to order paternity testing in this situation.

QUESTION. I've received a lot of pushback from within our agency and others to just do the DHS Form 5600. Are there some clear-cut scenarios I can use to talk about why it might be better to use one pathway over another for paternity establishment?

ANSWER (TAMARA): This continues to be a training issue, particularly with so many newer caseworkers. Caseworkers may also be receiving pressure from courts to follow this process to resolve paternity quickly. In deciding which pathway to use, DHS or DCS, there are a number of considerations including those identified by Carmen Brady-Wright earlier in this Q&A session.

There is an upcoming transmittal that the DHS Child Support Team will use to provide a reminder to staff about their resources, particularly the often underused CW Paralegal. Additionally, staff is encouraged to review the Parentage Testing QRG 3 posted on the Staff Paternity Tools page.

COMMENT (JEANNE): In my office we had a recent case where there was a presumed legal father, and an alleged bio father. I told the team we are careful about dis-establishing a legal dad because we all agree we don't want to create parentless children, and we want to of course pursue who the alleged bio father is. I raised the question of why without first making contact with the alleged bio father to gather information, we were testing the legal father. We discussed with our assigned AAG and now we're going to search for the alleged bio father.

QUESTION: In my branch, based on consultation with our assigned AAG, we don't typically dis-establish the presumed legal father without identifying an alleged biological father. However, we had one case where we couldn't locate the legal father. We knew he went back to Mexico so the local office went through the Mexican Consulate. We're

saying he isn't the biological father but he's nowhere to be found. This is a new one for me. What should we do?

ANSWER (CARMEN): Regardless of where the legal father resides, the process is the same. In order to dis-establish a presumed legal father, the appropriate process is either a motion and order to show cause for a judgment of nonpaternity under ORS 109.326 or a filiation petition to both establish paternity and dis-establish paternity under ORS 109.124. For purposes of serving the pleading on the presumed legal father, formal service is required and therefore efforts must be made to locate him. In this case, if the presumed legal father is believed to have moved to Mexico, communication with the Mexican Consulate in seeking assistance with locating him is appropriate. Whether you have a sufficient legal basis for seeking dis-establishment is, as in every case, going to be fact-specific.

** Please note that depending on the specific facts of a case, a motion (which does not require formal service), rather than a motion and order to show cause, may be filed to dis-establish a presumed legal father but a decision on which process to use must be made with the branch's assigned AAG.

QUESTION: Can you provide clear direction on when it's appropriate to refer to DCS versus use the DHS 5600 process for paternity establishment?

ANSWER: (TAMARA): While the process to use will depend on the specific facts of each case, here are some hypothetical case scenarios for consideration:

- When it is early on in the case, DHS has been granted at least temporary custody, the court has not ordered DHS to conduct parentage testing, a referral to DCS may be appropriate. The Mother and/or alleged father would complete an affidavit to initiate the process. Be aware DCS will enter a default finding of paternity after two no-shows for testing or if an alleged father doesn't challenge the establishment of his paternity.
- If mother and the alleged father are around and there is no legal father, the VAP is the most expedient process for establishing paternity. Paternity testing is not needed.
- If there is a legal father to be dis-established, consider whether there is also an alleged biological father to avoid creating a fatherless child. Also consider how early or late in the juvenile case is this issue coming up. Are you appearing before a court that considers the resolution of paternity as part of the agency's reasonable or active efforts? Has the court ordered DHS to pay for paternity

testing? Consider the 5600 process and, if appropriate, filing the filiation petition to establish and dis-establish paternity.

- Are the mother, father and/or alleged father involved in the juvenile case and are their whereabouts' known? DCS has the ability to serve the pleadings and papers and do the buccal swabs all in one day. Similarly, if the mother, father and/or alleged father are parties to the juvenile case and are participating in the case, the judicial process in juvenile court may be expedited with quicker service. The parties can appear at a hearing and stipulate to the establishment and/or dis-establishment of paternity. If the mother, father and/or alleged father are not participating in the juvenile case and their whereabouts are unknown, depending on consideration of other factors, DCS may have additional resources to more quickly locate them and get them personally served.
- Another consideration is that DCS' administrative filiation process is not affected or hindered by whether DHS has been granted guardianship of the child.

In addition to the above summary of the Q&A held on August 10, 2016, below is some additional information provided by Tamara Hammack:

1. If a case involves only an alleged biological father and no legal father, then available options for paternity establishment include:

- Voluntary Acknowledgment of Paternity
- DCS Administrative Filiation
- Judicial Filiation (typically starts with paternity testing paid through CW funds)

ORS 109.070(1) sets forth all the ways in which paternity may be established in Oregon.

2. DHS may not seek to dis-establish the paternity of a presumed legal father by marriage if the father and mother are still married AND are cohabiting unless the father and mother consent to the challenge. ORS 109.070(2).

3. If the mother, father and/or alleged father are incarcerated, a motion for paternity testing can be filed seeking an order from the juvenile court to allow LabCorp to enter the jail or prison to obtain a DNA sample for purposes of testing. Branch staff must consult with their assigned AAG about filing such a motion.