



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON ADOPTION AND TERMINATION OF PARENTAL RIGHTS LAW

FROM: Anne Sappenfield, Senior Staff Attorney

RE: Declarations of Paternal Interest

DATE: September 2, 2004

This memorandum provides background on declarations of paternal interest, sometimes referred to as “a birth father registry.” Specifically, the Memo describes current law and 2003 Assembly Bill 476, relating to declarations of paternal interest and participation in termination of parental rights (TPR) proceedings by putative fathers.

2003 Assembly Bill 476 (“the bill”) was introduced by Representative Jeskewitz and others; cosponsored by Senator Plale and others on August 22, 2003. The Assembly committee on Family Law recommended passage of the bill on January 8, 2004, but the bill failed to pass either house of the Legislature.

DECLARATIONS OF PATERNAL INTEREST IN MATTERS INVOLVING CHILDREN

Current Law

Under current law, any person claiming to be the father of a nonmarital child who is not adopted and whose parents have not married (“nonmarital child”) may file a declaration of his interest in matters affecting the child with the Department of Health and Family Services (DHFS). The declaration may be filed at any time before the termination of the father’s parental rights.

The declaration must be in writing, must be signed by the person declaring the paternal interest, and must contain: (1) the person’s name and address; (2) the name and last-known address of the mother; (3) the month and the year of the birth or expected birth of the child; and (4) a statement that he has reason to believe that he may be the father of the child.

A copy of a declaration filed with DHFS must be sent to the mother at her last-known address. The fact that the mother may not receive a copy of the declaration does not affect its validity. The

mother may send a written response regarding the declaration to DHFS, and DHFS must file the response with the declaration. If the mother does not send a response, her lack of response does not constitute an admission of the statements contained in the declaration.

Current law specifies that filing a declaration of paternal interest does not extend parental rights to the person filing the declaration. [s. 48.025, Stats.]

DHFS is required to maintain a file containing records of declarations of paternal interest. DHFS may not release these records except under a court order or to the Department of Workforce Development (DWD) or a county child support agency upon request by DWD or the child support agency for purposes of establishing paternity or enforcing child support or upon request by any other person with a direct and tangible interest in the record. [s. 46.03 (7) (bm), Stats.]

The Bill

Under the bill, a declaration of paternal interest may be filed at any time before the birth of the child or within 14 days after the birth of the child. The declaration must be signed and verified upon oath or affirmation. If the person filing the declaration is under 18 years of age, the declaration must also be signed by a parent or guardian of the person.

The bill provides that a person who files a declaration may revoke it at any time by filing a statement with DHFS that the person, to the best of his knowledge and belief, is not the father of the child or that another person has been adjudicated as the father of the child. The statement must be signed by the person and verified upon oath or affirmation. If the person filing the revocation is under 18 years of age, the revocation must also be signed by a parent or guardian of the person.

The bill provides that DHFS generally must keep declarations and revocations of declarations confidential and may not open them to public inspection or disclose their contents. There are several exceptions to the confidentiality requirement. As under current law, a copy of a declaration filed with DHFS must be sent to the mother. Also, a court in a proceeding under the Children's Code or a juvenile in need of protection or services proceeding, or a person authorized to file a petition or bring an action or motion in such a proceeding or to commence such a proceeding may request that DHFS search its files to determine whether a person who may be the father of the child who is the subject of the proceeding has filed a declaration. This also applies to courts and persons in other states who are acting or authorized to act under substantially similar laws of that state. If DHFS has on file a declaration regarding the child, DHFS must issue a certified copy to the requester. If DHFS does not have an applicable declaration on file, DHFS must issue a certified statement that no declaration could be found. A person who obtains information under this provision may not use or disclose the information for any purpose other than for purposes of the juvenile court proceeding for which it was requested. Finally, a declaration or revocation may be disclosed by order of the juvenile court for good cause shown.

The bill requires DHFS to publicize all of the following information in a manner calculated to provide maximum notice to all persons who might claim to be the father of a nonmarital child:

- a. That a person claiming to be the father of a nonmarital child may file a declaration of paternal interest.
- b. The procedures for filing a declaration.

- c. The consequences of filing a declaration.
- d. The consequences of not filing a declaration.

Under the bill, a person who makes a false statement in a declaration, revocation, or response to a filed declaration (i.e., the mother) that the person does not believe is true may be subject to prosecution for false swearing. The penalty for false swearing is a fine of \$10,000 and imprisonment for not more than nine months. In addition, any person who intentionally obtains, uses, or discloses information from a declaration that is confidential may be fined \$1,000 and imprisoned for not more than 90 days.

TPR PROCEEDINGS

Notice and Summons

Current Law

Under current law, if a TPR proceeding relates to a child who is a nonmarital child, the person or agency filing the TPR petition must cause the summons and petition to be served upon the following:

- a. A person who has filed a declaration of a paternal interest.
- b. A person or persons alleged to the court to be the father of the child or who may, based upon the statements of the mother or other information presented to the court, be the father of the child unless that person has waived the right to notice.
- c. A person who has lived in a familial relationship with the child and who may be the father of the child.

[s. 48.42 (2) (b), Stats.]

Current law also provides that certain persons are not entitled to notice of a TPR proceeding. Notice is not required to be given to a person who may be the father of a child conceived as a result of a sexual assault if a physician attests to his or her belief that a sexual assault has occurred or if the person who may be the father has been convicted of sexual assault for conduct which may have led to the child's conception. Current law specifies that a person who is not given notice under this provision does not have standing to appear and contest a petition for the termination of his parental rights. This provision does not apply, however, to a person who may be the father of a child conceived as a result of sexual assault of a child (i.e., a child under age 16 years) if that person was less than 18 years of age at the time of the sexual assault. [s. 48.42 (2m), Stats.]

The Bill

Under the bill, a person who may be the father of a nonmarital child, by virtue of the fact that he has engaged in sexual intercourse with the mother of the child, is considered to be on notice that a pregnancy and a TPR proceeding concerning the child may occur, and has the duty to protect his own rights and interests if paternity has not been established. The summons and petition must be served upon a person who may be the father only if he meets one of the following conditions:

- a. He has filed an unrevoked declaration of a paternal interest before the birth of the child or within 14 days after the birth of the child.

- b. He is openly living with the child or the child's mother and is holding himself out to be the father of the child at the time the TPR petition is filed or at the time that the child was removed from the home.
- c. He has established a substantial parental relationship.* Under the bill, in the case of a child who is six months of age or older on the date the petition is filed, a person who openly lived with the child and held himself out to be the child's father for a period of six months within the year immediately preceding the date on which the petition is filed or the date on which the child was removed from the home is presumed to have a substantial parental relationship with the child.

The bill also provides that notice need not be given to a person who may be the father of a nonmarital child unless he meets one of the conditions described above and is, therefore, entitled to notice.

Right to Participate in TPR Proceeding

Current Law

Current law specifies that a person who is not entitled to notice because the child was conceived as a result of sexual assault does not have standing to appear and contest a petition for the termination of his parental rights. [s. 48.42 (2m), Stats.]

The Bill

Under the bill, a person who is not given notice does not have standing to appear and contest a petition for the termination of his parental rights, to present evidence relevant to the issue of disposition (i.e., whether parental rights will be terminated), or to make alternative dispositional recommendations.

The bill creates rights to participate for certain out-of-state fathers, however. Under the bill, a person who may be the father of a nonmarital child whose paternity has not been established may contest the petition, present evidence relevant to the issue of disposition, and make alternative dispositional recommendations if the person appears at the hearing, establishes paternity by clear and convincing evidence, and proves all of the following by a preponderance of the evidence:

- a. That the person resides or has resided in another state where the mother of the child resided or was located at the time of or after the conception of the child.
- b. That the mother left the state without notifying or informing that person that she could be located in this state.

*"Substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors including whether the person has ever expressed concern for or interest in the support, care, or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy. [s. 48.415 (6) (b), Stats.]

c. That the person attempted to locate the mother through every reasonable means, but did not know or have reason to know that the mother was residing or located in this state.

d. That the person has complied with the requirements of the state where the mother previously resided or was located to protect and preserve his paternal interests in matters affecting the child.

Rights of Persons Alleging Paternity

Current Law

Under current law, if a man who alleges that he is the father of the child appears at the hearing and wishes to contest the termination of his parental rights, the court must set a date for a hearing on the issue of paternity or, if the parties all agree, the court may immediately commence hearing testimony concerning the issue of paternity. The man must prove paternity by clear and convincing evidence. [s. 48.423, Stats.]

The Bill

Under the bill, a person who establishes his paternity, as provided under current law, may further participate in the TPR proceeding only if the person meets a condition that entitles him to notice of TPR proceedings.

Appeals

Current Law

Under current law, a parent who has consented to a TPR or a parent who did not contest a petition for an involuntary TPR and whose rights were terminated may file a motion with the court for relief from judgment. The motion must be based on specified grounds such as mistake, newly discovered evidence, or fraud. Such a motion must generally be filed within 30 days after the entry of the TPR judgment. A person may also appeal to the court of appeals. [s. 48.46, Stats.]

Current law does not address the appeal rights of a person who was not a party in the TPR proceeding.

The Bill Draft

The bill draft provides that in no event may a person, for any reason, collaterally attack a TPR judgment more than one year after the date on which the judgment was entered.

ADOPTION PROCEEDINGS

Current Law

Under current law, a parent who has custody of a child and the proposed adoptive parent or parents of the child may petition the court for placement of the child for adoption in the adoptive parent or parents' home if the home is licensed as a foster home. The petition for placement must be filed with a TPR petition for voluntary consent for the termination of any existing rights of the petitioning parent or parents.

Before holding a hearing on the placement and TPR petitions, the court must ascertain whether the child's paternity has been acknowledged or adjudicated (hereinafter, "established"). If any person has filed a declaration of paternal interest, the court must determine the rights of that person. If the child's paternity has not been established and if no person has filed a declaration, the court must attempt to ascertain the paternity of the child. The court may not proceed with the hearing on a placement or TPR petition unless the parental rights of the nonpetitioning parent, whether known or unknown, have been terminated.

At the final adoption hearing, the court must establish whether the rights of any persons who have filed declarations of paternal interest have been determined or whether the child's paternity has been established. If the court finds that no such determination has been made, the court must proceed to attempt to ascertain the paternity of the child and the rights of any person who has filed a declaration before it may take any action on the petition for adoption. [s. 48.837, Stats.]

The Bill

Under the bill, before holding a hearing on placement and TPR petitions filed by the child's parent and the proposed adoptive parent or parents, the court must ascertain whether the paternity of a nonmarital child has been established. If the child's paternity has not been established, the court must attempt to ascertain the paternity of the child and must determine the rights of any person who may be the father of the child. These rights are the rights that are set forth regarding alleged fathers' participation in TPR proceedings, as described above. As under current law, the court may not proceed with the hearing on the petitions unless the parental rights of the nonpetitioning parent have been terminated.

At the final adoption hearing, the court must determine whether a nonmarital child's paternity has been established. If the child's paternity has not been established, the court must attempt to ascertain the paternity of the child and must determine the rights of any person who may be the father of the child. The bill draft specifies that the court may not proceed with the hearing on the petition for adoption unless the parental rights of the nonpetitioning parent have been terminated.

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