FLORIDA'S DEPENDENCY BENCHBOOK - PATERNITY IN DEPENDENCY CASES

General information. "For a court to perform its duties in a dependency proceeding, it must, if possible, determine the identity of the minor child's father." B.B. v. P.J.M., 933 So. 2d 57, 60 (Fla. 1st DCA 2006). The Florida Legislature also makes several references to the necessity of having both parents involved in the dependency process, such as § 39.013, which requires both parents to be advised of their right to counsel at each stage of the dependency proceeding, and § 39.502, which requires all parents to be notified of every proceeding or hearing involving the child. DCF is also required to obtain the names of all parents and prospective parents when it takes custody of a child. § 39.401(4). When a dependency petition is filed and the identity of a parent is unknown, the court is required to make its own inquiry to discover the parent's identity. § 39.503. If DCF discovers the identity of a parent, but his or her whereabouts are unknown, DCF is required to conduct a diligent search to determine the parent's location. § 39.503(5). Finally, when determining permanency, the dependency court must determine when the child will achieve the permanency goal or whether the current goal is in the best interest of the child. § 39.621(1). Therefore, the identity of a child's father is essential in a dependency proceeding.

Legal father. Although not defined in the Florida Statutes, the term "legal father" has been recognized in case law as the man who enjoys all the rights, privileges, duties, and obligations of fatherhood for a specific child. Department of HRS v. Privette, 617 So. 2d 305, 307 (Fla. 1993). Chapter39 is gender neutral and does not define "father" or "legal father." However, § 39.01 defines what it means to be a "parent" and includes "a man whose consent to the adoption of the child would be required under § 63.062(1). Section 63.062(1) requires consent from the "father" only if:

- the child was conceived or born while the father was married to the mother. In re S.M.A.L., 902 So. 2d 328, (Fla. 2nd DCA 2005). (The "legal father" was married to the mother at the time of the child's birth, and another man was labeled the child's putative biological father); Department of Health & Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla.1993) (The court recognized that children have a presumption of legitimacy if they are born during a marriage which is based on the public policy of protecting the welfare of the child);
- the child is his by adoption;
- the child has been adjudicated to be his child by the date a petition is filed for TPR. (Whenever a court makes a factual determination as to the identity of a minor child's father and the determination is material in the proceeding before the court, that proceeding qualifies as a court proceeding. B.B. v. P.J.M., 933 So. 2d 57 (Fla. 1st DCA 2006));
- the father has signed an affidavit of paternity pursuant to §382.013(2) by a date a petition for TPR is filed; or

- the father is the unmarried biological father who has acknowledged in writing that he is the father of the child and has complied with the other requirements set forth in § 63.062(2). *See also* §§ 742.11, 382.013(2)(a).
- Note: If a parent is using an out-of-state birth certificate to establish paternity, verify that the parent has also acknowledged paternity through a signed affidavit or final judgment.

Pursuant to §§ 39.01(49) and (51), the father is a party to the case in a dependency proceeding. Section 39.502(1) requires that all parents be given notice of all proceedings and hearings involving the child unless parental rights have been terminated.

Prospective father. Although the term "putative father" is used elsewhere in Florida Statutes, Chapter 39 refers to the "prospective" parent and defines that person in § 39.01(61) as a person who claims to be or has been identified as a person who may be a mother or father to the child. When a prospective father is named in a dependency case, he is entitled to notice of hearings but is not recognized as the father of the child or as a party in the dependency action unless he files a sworn affidavit of parenthood without objection by the mother or successfully pursues paternity under a chapter 742 proceeding. The prospective father is entitled to receive notice of hearings as a participant in a dependency case pending the results of the paternity action. § 39.503(8).

A prospective father generally does not have standing to establish paternity of a child if the child was born into an intact marriage and the married woman and her husband object to the paternity action. Tijerino v. Estrella, 843 So. 2d 984 (Fla. 3rd DCA 2003). *See also* Bellomo v. Gagliano, 815 So. 2d 721 (Fla. 5th DCA 2002) (A man had no right to seek to establish paternity of child born into an intact marriage when both mother and husband objected, even though the man claimed that he had regularly visited the child for 12 months and had tried to contribute financially to the child's care).The power of the dependency court to resolve disputed issues of paternity is discussed below (*see* What can the court do?).

Biological father. A "biological" father is the man whose sperm fertilized the mother's egg, usually through an act of sexual intercourse. § 742.12(4). In some case law, the terms unmarried biological father and putative father are used interchangeably. In chapter 63 adoption proceedings, the Florida Legislature addressed unmarried biological fathers by stating: "An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during the pregnancy and after the child's birth. The state has a compelling interest in requiring an unmarried biological father to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity rights in accordance with the requirements of this chapter." § 63.022(1)(e). The legislature also addresses this issue in § 63.053(2), which states: "The Legislature finds that the interests of the state, the mother, the child, and the adoptive parents described in this chapter outweigh the interest of an unmarried biological father who does not take action in a timely manner to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter." Accordingly, the Legislature prescribed the actions that an

unmarried biological father must take to establish his right to notice of and consent to an adoption in §§ 63.054, 63.062(2).

If a man discovers that he is not the biological father of a child and wishes to disestablish paternity or terminate a child support obligation, under certain narrow circumstances, he may be able to follow a procedure found in § 742.18 to achieve this goal.

Methods for determining paternity for a child born out of wedlock. (Chapters 742, 382)

- The parent has voluntarily signed a sworn paternity affidavit. § 742.10(4). Other forms of voluntary acknowledgement are permitted under § 742.10(1). Also, paternity may have been established judicially or voluntarily in another state. See § 742.105. The affidavit procedure creates a rebuttable presumption which becomes irrebuttable after 60 days.
- The father is named on the child's birth certificate. The father must have signed a paternity affidavit before his name was put on the birth certificate. § 382.013(2)(c), P.C. v. Department of Children and Families, 805 So. 2d 1072 (Fla. 5th DCA 2002).
- Paternity is established by a court of competent jurisdiction except as provided in Chapters 39 and 63. Chapter 742 provides the primary jurisdiction and procedures for determination of paternity for children born out of wedlock.
- In a judicial proceeding under Chapter 742, if the prospective father is found to be the biological father through genetic testing with a probability of 95% or more, a rebuttable presumption is created.

What can the court do?

- If the prospective father's identity is known: In dependency court, the court must inquire about the name and location of the father at the shelter hearing. § 39.402(8)(b). If a prospective father exists and paternity has not been established, the initial shelter order should:
  - Give the putative father and all other parties notice of the next hearing, at which paternity and child support will be addressed. §§ 409.256(4), 742.021.
  - If personal jurisdiction is established, the court may order a DNA test to establish biological paternity.
  - Section 39.503(8) requires that the prospective parent be given an opportunity to become a party to the dependency case by executing an affidavit of parenthood, which, if not contested by the mother, affords him the status of "parent."
- At the subsequent hearing, the court should:
  - Establish paternity, if not already done, and adjudicate the prospective father as the parent of the child. Once paternity is established, the birth record needs to be updated at the Office of Vital Statistics to appropriately record the establishment of paternity. The CLS attorney should complete the top portion of the Department of Health form DH673 using information from the birth record. Next, a certified copy of the paternity adjudication with the father's name should be provided to the Clerk of the Court, who then submits the record to the Florida Department of Health's Office of Vital Statistics. A separate paternity order should be used for this purpose to ensure

dependency information is kept confidential. The birth record is then updated with the father's name, and the official record shows that paternity is no longer an issue. Supreme Ct. Approved Family Law Form 12.983(g) Final Judgment of Paternity can be used for this purpose.

- If a party still disputes paternity, he must file a Chapter 742 action, in which he may request a jury trial. *See* § 39.503(8); B.J.Y. v. M.A., 617 So. 2d 1061 (Fla. 1993).

NOTE: The 3rd DCA held that the trial court has no jurisdiction to determine a disputed issue of paternity in a dependency proceeding under Chapter 39 in N.D. v DCFS, 961 So.2d 1027 (Fla. 3rd DCA 2007). However, several other districts have established paternity in dependency cases and disagree. *See* T.J. v. Department of Children and Families, 860 So. 2d 517 (Fla. 4th DCA 2003) (Trial court erred in not applying clear and convincing standard to paternity evidence as required in §§742.031, 742.10(1), (Fla. Stat. 2006)); In Interest of J.M., 499 So. 2d 929 (Fla. 1st DCA 1986) (A circuit court has inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare); Department of Revenue v. Yambert, 883 So. 2d 881(Fla. 5th DCA 2004) (DOR was forced to establish paternity and child support obligation when dependency court had ordered DNA testing but failed to issue an order adjudicating paternity); In re S.M., 874 So. 2d 720 (Fla. 2nd DCA 2004) [Also, § 39.521(1)(d)(7) states: "The court may exercise jurisdiction over all child support matters, shall adjudicate the financial obligation, including health insurance, of the child's parents or guardian, and shall enforce the financial obligation as provided in chapter 61."] Note also: personal jurisdiction is required. (Circuit court erred in ordering E.K., an out-of-state resident with absolutely no connections to Florida, to submit to paternity testing before moving forward with the dependency action. The paternity action must occur in the state having personal jurisdiction over the parent.)

➢ If the prospective father's identity is not known:

- Pursuant to § 39.503, the court shall conduct the following inquiry if the identity or location of a prospective father is unknown:
  - Was the mother married at the probable time of conception of the child or at the child's birth?
  - Was the mother cohabitating with a male the probable time of conception?
  - Has the mother received payments or promises of support with respect to the child or because of her pregnancy from a man who claims to be the father?
  - Did the mother name any man as the father on the birth certificate or in connection with applying for or receiving public assistance?
  - Has any man acknowledged or claimed paternity in a jurisdiction in which the mother resided at the time of or since conception of the child, or in which the child has resided or resides?
- If the court cannot identify a prospective father after conducting this inquiry, the court will be unable to provide notice and shall make findings stating this conclusion and may proceed further in the dependency case. § 39.503(4). However, if a

prospective father is identified, then the court shall direct the petitioner to conduct a diligent search for that person before scheduling a disposition hearing, unless the court finds that the best interest of the child requires proceeding without notice to the person whose location is unknown. § 39.503(5). The diligent search must include, at a minimum:

- inquiries of all relatives of the parent or prospective parent made known to the petitioner,
- inquiries of all offices of program areas of the department likely to have information about the parent or prospective parent,
- inquiries of other state and federal agencies likely to have information about the parent or prospective parent,
- inquiries of appropriate utility and postal providers,
- a thorough search of at least one electronic database specifically designed for locating persons, and
- inquiries of appropriate law enforcement agencies. § 39.503(6).

If the diligent search uncovers a prospective father, § 39.503(8) requires that notice of hearing be provided to that person and that the person be given the opportunity to become a party to the proceedings by completing a sworn affidavit of parenthood and filing it with the court unless the other parent contests the determination of parenthood. If the known parent contests, the prospective father shall not be recognized as a parent until proceedings under chapter 742 have been initiated and concluded. However, the prospective father shall continue to receive notice of hearings as a participant pending results of the chapter 742 proceedings.

Paternity inquiry and diligent search. Special procedures if identity or location of parent unknown.

If identity or location of parent is unknown, and petition for shelter or dependency has been filed, the court shall conduct the following inquiry of the parent or legal custodian who is available (or if no parent or legal custodian is available, of any relative or custodian of child present likely to have information):

- if the mother was married at probable time of conception of child or at birth of child;
- if the mother was cohabiting with a male at probable time of conception of child;
- if the mother has received payments or support promises because of pregnancy from man claiming to be the father;
- if the mother has named any man as father on the birth certificate of the child or in connection with applying for or receiving public assistance;
- whether any man has acknowledged or claimed paternity of child in a jurisdiction where mother resided at time of or since conception of child (or where the child resides or has resided).

When conducting a paternity inquiry, it is important to ask the questions in the most straightforward manner possible and solicit any information available, even if it is only a partial identification (e.g., first name or nickname).

Conduct an inquiry for each child; do not assume that sibling groups were all born to the same parents.

See § 39.503(1); *See also* Rule 8.225(b).

If the paternity inquiry identifies an absent or prospective parent, order notice to that person. § 39.503(3).

- A prospective parent filing a sworn affidavit of parenthood while the child is dependent (but no later than time of or prior to adjudicatory hearing in any TPR proceeding) shall be considered a parent unless parenthood is contested by the other parent. § 39.503(8).

> If a prospective father is present and acknowledges paternity, the court may have the father sign an Affidavit of Parenthood. If the mother does not object, she may sign the Affidavit as well to indicate her agreement or objection.
>
> Judges should be aware of issues arising if the mother is married to a man other than the prospective father and the possibility that other judicial orders may have been entered which operate as res judicata on the issue of paternity (i.e., a prior dissolution of marriage).

- If the known parent contests the parenthood of the prospective parent, the latter shall not be recognized as parent until conclusion of proceedings under Chapter 742. However, he should still continue to receive notice of hearings as a participant, pending the outcome of the 742 proceedings. § 39.503(8).

> The court may wish to advise a prospective parent contesting parenthood of the distinctions between the rights of a party and the rights of a participant in dependency proceedings.

If parental location is unknown, and a permanent address designation has not been filed with the court by that person, then a diligent search (as detailed further below) shall be conducted by the petitioner. Rule 8.225(b). If inquiry identifies a parent or prospective parent but that person's location is unknown, the petitioner shall conduct a diligent search prior to scheduling a disposition hearing, unless the court finds it is in the best interests of the child to proceed without notice to the parent or prospective parent. § 39.503(5).

Information required by law may be submitted to the court in the form of a sworn affidavit. This affidavit must be executed by a person with personal knowledge of the facts. *See* Rule 8.225(b); § 39.503(2).

Diligent search and affidavit of diligent search.

> Judges may wish to consider charting a family tree in the court file.

Diligent search must include, at a minimum, inquiries of:

- all relatives of parents or prospective parents known to petitioner;
- all offices of program areas of DCF likely to have information regarding parent or prospective parent;
- other state and federal agencies likely to have information regarding parent or prospective parent;
- appropriate utility and postal providers;

- a thorough search of at least one electronic database specifically designed for locating persons; and
- appropriate law enforcement agencies.
  See § 39.503(6).

DCF, as state agency administering Titles IV-B and IV-E of the Social Security Act, must be provided access to state and federal parent locator service for diligent search, pursuant to section 453 of the Social Security Act. 42 U.S.C. § 653(c)(4).

Any agency contacted by petitioner with a request for information pursuant to the above stated components of diligent search must release the information requested without court order or subpoena. § 39.503(7).

If parental location is still unknown after completion of diligent search, then an affidavit of diligent search shall be executed and filed with the court by the person who conducted the search and inquiry. Rule 8.225(b)(2).

DCF's continuing duty to search for and attempt service on parent. Until excused by the court, the petitioner and DCF (if required by the court) are under a continuous duty to search for and attempt to serve the parent of unknown location after an affidavit of diligent search has been filed in a dependency or TPR proceeding. Rule 8.225(b)(4).

Effect of paternity inquiry and diligent search.

- Failure of court inquiry to identify any person as parent or prospective parent shall lead the court to so find, at which point, court may proceed without further notice.
  § 39.503(4).
- If inquiry, search, or subsequent search identifies and locates a parent or prospective parent, court shall require notice of hearing to be provided. That individual must be permitted to become a party to the proceedings by completing a sworn affidavit of parenthood. The sworn affidavit must then be filed with the court or DCF.
  §§ 39.503(3), 39.503(8).