

Paternity Issues In Dependency Appeals

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Presented on May 4, 2011

OR

*How Fathers Usually Appear In Juvenile Dependency Cases
and What Issue Are Available on Appeal.*

POLICY

Why establishing paternity is important. (Fam. Code, § 7570.)

- financial reasons
- health issues
- child development
- permanency

(Lisa I. v. Superior Court (2005) 133 Cal.App.4th 605, 621.)

STANDING

Minor's Counsel: Child has standing to argue the court erred in failing to determine paternity based on policy concerns.

Any Attorney Not Representing Father: Appellate counsel for mother, grandparents or other paternal relatives are usually barred from arguing paternity issues on appeal because these parties have not been injured by the court's order and, consequently, they do not have standing.

➤ But see *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850 [as issue of first impression, mother had standing to assert claim that second man, who was not a party, was entitled to presumed party status].

I.

PARENTS ARE MARRIED, LIVE TOGETHER, OR FATHER IS INVOLVED AT THE START OF THE DEPENDENCY CASE.

Inquiry About Paternity: The agency and the juvenile court are required to ask about paternity at the earliest possible time starting at detention. (Welf. & Inst. Code,¹ § 316.2; Cal. Rules of Court, rule 5.635(a).)

How To Be A Presumed Father:

- Conclusive marital presumption (Fam. Code § 7540.)

¹All statutory references are to Welfare & Institutions Code unless otherwise specified.

- Can be rebutted within 2 years of child's birth with genetic testing. (Fam. Code, § 7541.)
- Rebuttable marital presumption (Fam. Code, § 7611, subds. (a)-(c).)
- Voluntary declaration of paternity (Fam. Code, § 7570; see *In re Liam L.* (2000) 84 Cal.App.4th 739, 745.)
 - Can be rebutted with genetic testing within 2 years. (Fam. Code, § 7575; but see *In re Nicholas H.* (2002) 28 Cal.4th 56, 62.)
- Presumption based on conduct (Fam. Code, § 7611, subd. (d); see *In re E.O.* (2010) 182 Cal.App.4th 722; *In re Jesusa V.* (2004) 32 Cal.4th 588.)

Presumed Father: Considered a parent with the same rights as mother and entitled to the following:

- appointed counsel (§ 317);
- reunification services (§ 361.5, subd. (a));
- immediate custody as non-custodial parent (§ 361.2, subd. (a));
- visitation (§ 361.5, subd. (a)); and
- preferential consideration of relative placement (§§ 319, subd. (d)(2); 361.3, subds. (a), (c)(2)).

Duties of Trial Counsel: Possible issues exist when father otherwise qualified as a presumed or biological father. Investigate when no motion was made in trial court for a genetic test or for a finding of presumed father.

- Parents entitled to be represented by competent counsel in juvenile court. (§§ 317, 317.5.) For fathers, this almost always includes trying to have father found presumed in order to obtain the most rights for him. (See *In re O.S.* (2002) 102 Cal.App.4th 1402, 1408 [re: notice], 1410, 1412 [re: parental status].)

- Presumed status is the only way a father can become *entitled* to placement or reunification services. It is almost always important to change father's status as soon as possible to protect his rights.

- Appellate counsel *must always* discuss with the trial attorney her/his strategy before filing ineffective assistance of counsel (IAC) because reasons may exist outside the record for why father did not want presumed father status. Panel attorneys must also consult with ADI before filing this issue on appeal.

Genetic Testing: Available when father is unsure of a biological relationship.

- Father must be given *Statement Regarding Parentage* (form JV-505) by the agency as soon as he is contacted. (Cal. Rules of Court, rule 5.635(e); *In re Paul H.* (2003) 111 Cal.App.4th 753, 760.)

- Any alleged father is entitled to request a genetic test. (*In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1118.)

- The juvenile court may, on its own motion, order a genetic test. (Fam. Code, § 7551; Cal. Rules of Court, rule 5.635(e)(2); *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850 .)

➤ If testing shows father is the bio-dad, he can request to be a biological or natural father – a parent defined as biologically-related to child, but who does not otherwise qualify as a presumed father. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.)

➤ Biology is not determinative for a father to become presumed. (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 724.)

Delay In Obtaining Results: Often the results of a genetic test are delayed by months. Any significant delay seriously limits father’s ability to participate in the case and his chances to reunify or for custody.

➤ If the delay in obtaining test results is caused by the agency, may be error by the trial court to proceed without genetic test results. (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 196.)

➤ If delay is caused by father’s inaction, it is generally not error by the agency or the court. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

Biological Father: MAY be entitled to:

- reunification services, but only if it will benefit the child (§ 361.5, subd. (a));
- placement, but only if he qualifies as a non-custodial parent (§ 361.2, subd. (a));
- immediate placement, if father is non-custodial AND requests custody, except when clear and convincing evidence shows detriment (§ 361.2, subd. (a); *In re John M.* (2006) 141 Cal.App.4th 1564; *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820); and
- relative placement preference consideration (§§ 319; 361, subd. (a), (c)(2); 361.3, subd. (a)).

II. FATHER IS ABSENT FROM HOME, BUT IS IDENTIFIED BY MOTHER.

Alleged Father: A father is named by mother, but he has little contact or no existing relationship with the child.

➤ Only entitled to notice and an opportunity to appear at hearings in order to establish a superior status as biological or presumed father. (See *In re Christopher M.* (2003) 113 Cal.App.4th 155, 160.)

➤ An alleged father is not entitled to any other rights including notice per the Indian Child Welfare Act (ICWA). He must affirmatively pursue his parental rights in order to be eligible for anything other than notice.

➤ Unless father has become a party by appearing in the case and asserting a position, he has no standing to appeal the termination of parental rights because he is not a parent per section 317. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 716; but see *In re Paul H.* (2003) 111 Cal.App.4th 753.)

Notice To Father: sole issue for an alleged father is notice. (§ 290.1, subd. (a).)

➤ If father did little or nothing to act as a parent prior to the dependency, court unlikely to find father anything other than alleged.

➤ Failure to treat father as anything other than alleged can only be error if father requested genetic testing or presumed father status. Father *must act* affirmatively.

➤ If father's contact with or support of child is absent or limited, the agency's actions or inaction to give notice to father becomes almost a non-issue. (But see, *In re O.S.* (2002) 102 Cal.App.4th 1402. 1408.)

Father's Actions Are Determinative Of His Parental Status: In order to become something other than an alleged father, father must show he has an interest in becoming a parent sufficient to become a biological or presumed father. This burden is unfairly high and difficult to overcome. Father's actions both before and after the dependency become the focal point of the court's analysis. The analysis is designed to determine whether father is willing to be this child's father:

➤ Did he know about the pregnancy? If not, why not?

➤ Did he have contact with child?

➤ Has he told family and friends he is the child's father?

➤ Did he have a relationship with the child, but has been absent more recently?

➤ Why is he no longer caring for child?

➤ What has he done to help raise child?

➤ What are the reasons for his absence?

➤ Has mother prevented contact between the father & child?

➤ A delay in taking any action can be fatal to father's claims. (*In re Joshua R.* (2002) 104 Cal.App.4th 1020.)

Duties Of Trial Counsel: When father's actions show he is more than just alleged, it may be error for the trial attorney to fail to request a different status for father. (*In re O.S.* (2002) 102 Cal.App.4th 1402.)

➤ Trial strategy must always be discussed with trial attorney.

➤ Father's absence from the case relieves the trial attorney of most of the responsibility to advocate for father.

III.

FATHER IS KNOWN, BUT IS INCARCERATED.

Presumed Father: A father may qualify as a presumed parent based on his actions prior to incarceration.

➤ If presumed, father is *entitled* to immediate custody, relative placement preference, and reunification services while in custody.

➤ He is entitled to custody if he is able to arrange for someone to care for child while he is in custody. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 693.)

➤ If father has relatives available to care for child while he is in custody, his status as a presumed father becomes important.

➤ If presumed, the agency's failure to ask questions re: placement and available services in prison may be error. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996.)

➤ Even where father is presumed, his lack of action to reunify with his child will likely lead to termination based on a standard of review of harmless beyond a reasonable doubt. (*In re J.H.* (2007) 158 Cal.App.4th 174, 184-185.)

Biological Father: A father may be a biological father prior to his incarceration. A pre-existing genetic test or a voluntary declaration of paternity may exist.

Alleged Father: If father was in jail when the child was born, he can only be alleged unless he is married to mother.

Length Of Prison Sentence: The decisive factor for how the court will address paternity is the term of imprisonment. The court is assessing whether father is willing and able to quickly assume parental responsibilities. The decision to engage in criminal activity, and the resultant unavailability, is considered a voluntary act. In general, the length of the prison term is decisive:

➤ Short sentence [less than 12 months], but otherwise qualifies as presumed father: may be entitled to immediate placement if previously arranged for childcare and reunification services while in custody.

➤ Short sentence, but not presumed: juvenile court may order a genetic test.

➤ An existing prior relationship with child, but a long sentence [more than 12 months]: court may order a genetic test.

➤ No relationship with child & a long sentence, court unlikely to find father is anything other than alleged.

➤ The difference between a sentence of less or more than 12 months is based on the standard maximum time allowed for reunification. A longer term will usually prevent father from reuniting with his child before the dependency case must be terminated.

Right To Be Present At Hearing: At any hearing where the child can be adjudicated a dependent or where parental rights can be terminated, father has a right to be present. (Pen. Code, § 2625, subd. (b).)

➤ The statute does not specify that the prisoner must be a "parent" so it is arguable that even an alleged father is included at the statute. (Pen. Code, § 2625, subd. (b).)

➤ A prisoner must be allowed to be present at the disposition and section 366.26 hearings if he has indicated a desire to be at the hearing. (Pen. Code, § 2625, subds. (a) & (d).) The court may proceed in parent's absence with a signed waiver. Again, father must act affirmatively to obtain his rights. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 599.)

➤ The parent must be offered videoconferencing if available. (Pen. Code, § 2625, subd. (g).) This technology is being offered in order to preserve a prisoner's placement

opportunities and earned privileges. (Pen. Code, § 2625, subd. (h).)

➤ Even when father has requested to be present, the court has often found that the participation of father's attorney is sufficient to fulfill statute.

Duties Of Trial Counsel: If father has expressed an interest in custody of the child or reunification, his trial attorney should make the appropriate motions.

➤ Must always consult with trial attorney re: why no action was taken if the appellate record indicates father attempted to be involved in the case.

IV. FATHER IS LOST IN MEXICO OR OUT-OF-STATE.

Due Diligence: agency required to use due diligence to search for named parent.

➤ Agency often searches for a missing father only two times during a case – at the beginning and just prior to the section 366.26 hearing. Searches are designed to find fathers located in California. (But see *In re Megan P.* (2002) 102 Cal.App.4th 480.)

➤ When father is not in California, the case law indicates the agency can conduct the same search. The knowledge that father may be in another state or another country does not affect the agency's search. (See *In re Justice P.* (2004) 123 Cal.App.4th 181, 192.)

Father Must Enforce His Parental Rights: The case law suggests the juvenile court expects father to be involved with his child wherever he is located.

➤ Even if father was never contacted by the agency, if he knows or should have known about the child, he is expected to locate and to act as a parent to the child.

➤ Father is expected to locate the child even if mother has absconded with the child and he does not know where she is located. No cases which state father may be precluded from locating his child even when mother is a homeless, drug user.

Late, Late Notice To Father: Common to find that father was not notified about the case until just before section 366.26 hearing. In order to show error, the father is required to show he did everything possible to find the child. Even if the agency knew father was not in California, the burden remains on father to pursue his parental rights. The agency's lack of effort to actually find the father is not usually sufficient for error. (See *In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-599.)

Due Process Right: All fathers are entitled to notice about a pending dependency case. A due process argument can be made when father is never noticed because parents have a fundamental liberty interest in the care, custody and management of their child. (*Santosky v. Kramer* (1982) 455 U.S. 745, [102 S.Ct. 1388, 71 L.Ed.2d 599].)

Duties Of Counsel: When father cannot be located, the trial attorney's options are limited.

► If trial attorney is appointed to represent father and his location is unknown, trial attorney should not submit on notice. (*In re Wilford J.* (2005) 131 Cal.App.4th 742.) In addition, trial attorney should attempt to contact father.

► If father was absent at the beginning of the case, but he is located within the first 6 months, the court is required to offer reunification services to father if he was otherwise eligible. (§ 361.5, subd. (d).)

V.

FATHER IS A QUASI-PRESUMED OR KELSEY S. FATHER.

Father Wants To Be A Parent: Father has done everything he can to assume parental responsibilities but he was thwarted by the mother from receiving the child into his home and openly holding out the child as his natural child. (Fam. Code, § 7611, subd. (d).)

Origin Of The Exception: Prior to this case law exception, a father could be precluded from becoming a presumed father if he was kept away from the child by mother's action. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) The leading case holds that father's "constitutional rights to due process prohibits the termination of his parental rights absent a showing of his unfitness as a parent." (*Id.* at p. 849.)

Father's Actions Are Decisive: Recent interpretations of this exception suggest the analysis focuses almost exclusively on whether father did all he could to demonstrate a full commitment to his parental relationship. (*In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1117.) The court has characterized this analysis as an effort to determine whether an alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded the right to reunification services and possible custody of the child. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 804.)