CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES
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July 17, 2006

Reason for this Transmittal

[ ] State Law or Regulation Change
[ ] Federal Law or Regulation Change
[ ] Court Order or Settlement Change
[ ] Clarification requested by One or More Counties
[x] Initiated by DCSS

CSS LETTER: 06-16

ALL IV-D DIRECTORS
ALL COUNTY ADMINISTRATIVE OFFICERS
ALL BOARDS OF SUPERVISORS

SUBJECT: QUESTIONS AND ANSWERS ON ASSEMBLY BILL 252 PATERNITY DISESTABLISHMENT – SET ASIDE/VACATE PATERNITY JUDGMENTS

REFERENCE: CSS LETTER 04-30

This letter is to forward a compilation of the most frequently asked questions and answers (Q&A) related to Assembly Bill (AB) 252 which established procedures to set aside/vacate certain paternity judgments. The questions are presented as submitted by local child support agencies (LCSAs).

Background

California law provides that genetic testing is permitted only when paternity is at issue. Where a voluntary declaration of paternity has been filed with the Department of Child Support Services (DCSS), the court may order genetic testing prior to setting aside the voluntary declaration; and the LCSA may issue an administrative order for genetic testing only where paternity is a relevant fact and is at issue. AB 252 provides additional authority for the LCSA to administratively pursue genetic testing absent an order of the court to set aside a paternity judgment or declaration of paternity, pursuant to Family Code (FC) Section 7646 as follows:

> *"(a) Notwithstanding any other provision of law, a judgment establishing paternity may be set aside or vacated upon a motion by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons if genetic testing indicates that the previously established father of a child is not the biological father of the child. The motion shall be brought within one of the following time periods:*

(1) Within a two-year period commencing with the date on which the previously established father knew or should have known of a judgment that established him as the father of the child or commencing with the date the previously established father knew or should have known of the existence of an action to adjudicate the issue of paternity, whichever is first, except as provided in paragraph (2) or (3) of this subdivision.
(2) Within a two-year period commencing with the date of the child's birth if paternity was established by a voluntary declaration of paternity. Nothing in this paragraph shall bar any rights under subdivision (c) of Section 7575.
(3) In the case of any previously established father who is the legal father as a result of a default judgment as of the effective date of this section, within a two-year period commencing with the enactment of this section.
(b) Subdivision (a) does not apply if the child is presumed to be a child of a marriage pursuant to Section 7540."

<u>Exclusions to Paternity Set Aside/Vacate</u>

A court is precluded by law from granting a motion to set aside when:

- the paternity judgment was entered in a marital dissolution, legal separation, or nullity action [See FC Section 7645(b)];
- the child is presumed to be a child of the marriage under FC Section 7540 [See FC Section 7646(b)];
- the paternity judgment was made or entered by another state even if the enforcement of that judgment is sought in California [See FC Section 7648.3(a)];
- the paternity judgment was made or entered in California and genetic tests were conducted prior to entry of the judgment which did not exclude the previously established father as the biological father of the child [See FC Section 7648.3(b)];
- the child was conceived by artificial insemination as described in FC Section 7613 or pursuant to a surrogacy agreement (See FC Section 7648.9);
- the motion to set aside was not timely filed as required by FC Section 7646; or
- the conditions specified in FC Section 7647 cannot be met; and finally,
- AB 252 does not apply to adoptive parents, but may apply to a previously established father where his parental rights have been terminated and the child has been adopted (See FC Section 7648.8).

Questions and Answers on AB 252

General

Question 1: *"What does previously established mother mean within the meaning of AB 252? Does the term refer to the mother named in the Judicial Council judgment form which provides 'the mother and father are the parents of the child(ren) listed below?"*

Answer 1: Family Code (FC) Section 7645(d) defines "previously established mother" as, "a person identified as the mother of a child in a judgment that is the subject of a motion brought pursuant to this article."

Question 2: *"Pursuant to FC Section 7645(b), are dissolution type cases excluded from the definition of 'judgment, order or decree' for purposes of the law?"*

Answer 2: Pursuant to FC Section 7645(b) "Judgment" means a judgment, order or decree entered in a court of this state that establishes paternity, including a determination of paternity. For purposes of this article, "judgment" does not include a judgment in any action for marital dissolution, legal separation or nullity.

Out-of-State Noncustodial Parents

Question 3: *"What is the LCSA's role in assisting out-of-state noncustodial parents (NCP's)?"*

Answer 3: The LCSA must provide the necessary forms, help facilitate genetic testing, when appropriate, and assist in arranging telephone hearings as needed.

Genetic Testing

Question 4: *"Can genetic testing be completed prior to the filing of a motion?"*

Answer 4: The LCSA may use its discretion to provide for genetic testing prior to the filing of a motion.

Question 5: *"Does FC Section 7648.2(c), which states that the LCSA will pay for all genetic tests ordered in cases where Title IV-D services are being provided, include court ordered reimbursement for the genetic testing costs if the NCP is included?"*

Answer 5: Under no circumstances should the LCSA request that the court order a non-custodial parent to reimburse the cost of genetic tests. However, if the LCSA enforces an existing court order for the reimbursement of genetic tests, the LCSA must report this information to the state via the Administrative Expense Claim (AEC) CS 356 as it is not a reimbursable expense. The most recent instructions for completing the AEC CS 356 are outlined in LCSA Letter 05-23, *Revision to the CS 356 – Administrative Expense Claim*.

Default Judgments

Question 6: *"Currently FC Section 7646(a)(3) refers to 'default judgment'. Does this term mean those cases where the defaulted party never filed an answer?"*

Answer 6: Yes, a filed answer or signed stipulation agreement would preclude a default judgment. Therefore, when a party against whom a judgment is sought failed to file an answer or otherwise defend, that party is in default and a judgment by default may be entered by the court. Additionally, "default judgment," as defined in the Child Support Program Glossary, is a "judgment entered against a party who has failed to defend against a claim that has been brought by another party within 30 days of service thereof."

Question 7: *"Under this new legislation does a previous motion to set aside a default judgment, adjudicated in 2000, qualify to be heard again? Within the last six months, genetic tests have revealed the previously established father is not the biological father."*

Answer 7: A prior motion to set aside a default judgment of paternity filed pursuant to Code of Civil Procedure, Section 473 does not preclude a motion filed pursuant to AB 252 to be heard when the motion is filed within two years of the effective date of this legislation, i.e. by October 28, 2006.

Question 8: *"Under Article 1.5, Setting Aside or Vacating Judgment of Paternity, FC Section 7646(a)(3) allows previously established fathers to file motions to set aside default judgments of paternity 'within a two-year period commencing with the enactment of this action'. There is no restriction as to the age of the child so this is in essence a two-year 'amnesty' for default paternity judgments set-asides. However, in the code section addressing voluntary declarations of paternity (which do not fall under Article 1.5) there appears to be no amnesty period. FC Section 7575(b)(3)(A) still only gives the parties two years from the date of the child's birth to file a motion for genetic testing."*

Answer 8: The new law provides a window of opportunity for paternity default judgments to be set-aside with genetic testing; however, voluntary declarations are not considered default judgments.

Question 9: *"Do any of the provisions of AB 252 speak to older cases where the judgment was entered after a contested hearing, but before the use of DNA testing, and where the legal father owes child support arrears?"*

Answer 9: No. The provision which allows relief in older cases, FC Section 7646(a)(3) is specific to default judgments.

Fees

Question 10: *"Are there any fee waivers for the costs of genetic testing for a moving party?"*

Answer 10: There is no need for a fee waiver regarding genetic testing since the LCSA will provide genetic testing at no cost for cases in which it is providing services. See Answer 5, above.

Guardian Ad Litem

Question 11: *"Will the LCSA be required to pay for the guardian ad litem referenced in FC Section 7647.5?"*

Answer 11: There is no requirement that the LCSA pay for the guardian ad litem. In addition, Federal financial participation is not provided for this activity as specified in Title 45 Code of Federal Regulations, Section 304.23(k).

Administrative Orders

Question 12: *"What is the specific statute that authorizes the LCSA to issue an Administrative Order for genetic testing?"*

Answer 12: FC Section 7648.2 authorizes the LCSA to issue an Administrative Order when the LCSA is providing Title IV-D services.

Question 13: *"If the custodial parent (CP) refuses to comply with an Administrative Order for genetic testing, should the LCSA remain neutral as to whether the court should grant or deny the motion?"*

Answer 13: The LCSA should proceed to secure genetic testing prior to a ruling on the court order or administrative order for genetic testing. Eligibility for assistance is conditional upon cooperation from the CP. Pursuant to Welfare and Institutions Code (W&IC) Section 11477(b)(1), the CP is required to "cooperate with the county welfare department and the local child support agency in establishing the paternity of a child…unless the applicant or recipient qualifies for a good cause exception as provided in W&IC Section 11477.04." Further, W&IC Section 11477(b)(2)(C) provides cooperation includes, if paternity is at issue, submitting to genetic tests, including genetic testing of the child, if necessary. The LCSA shall make the determination of cooperation.

In addition, the LCSA shall make a finding regarding whether the individual could reasonably be expected to provide information necessary to identify the alleged father or obligor before the LCSA determines whether the individual is cooperating. Therefore, the LCSA may use its discretion regarding the motion before the court.

Filing a Motion

Question 14: *"In those cases where it is clear that a motion filed pursuant to FC Section 7646 will be granted, as a policy matter will the LCSA stop the wage assignment for current support (even though not required to and not liable for money collected under the judgment, once the motion is granted)? What enforcement actions should the LCSA take or not take while the motion is pending?"*

Answer 14: There is no authority to cease enforcement of a judgment until the judgment is actually set aside. The LCSA is required to continue to take all mandatory enforcement actions as specified in statutes and regulations.

Question 15: *"Pursuant to FC Section 7647(b)(3), if an LCSA is enforcing a county arrears only case (i.e., aid closed and the CP requested their portion of the case be closed), is the LCSA 'providing services' within the meaning of AB 252?"*

Answer 15: The LCSA is considered to be providing services.

Question 16: *"What is the LCSA's responsibility if the motion is filed in a non-welfare case where Title IV-D services are no longer being provided?"*

Answer 16: If the LCSA is no longer providing services, the LCSA no longer has standing to participate in the pending motion.

Question 17: *"What steps should an LCSA take in the case where the NCP has filed a motion seeking to vacate a judgment, the CP refuses to cooperate, but based on information contained in the LCSA's file, the NCP/previously established father may not be entitled to relief he seeks (i.e., father spent time with child or lived with family)? In other words, how much effort must the LCSA put into having the Custodial Party (CP) cooperate if the LCSA has information which the court could use to deny the motion?"*

Answer 17: The LCSA should assist the court by providing all relevant information available that would aid the courts in its decision.

Question 18: *"Can the LCSA file the motion contemplated by AB 252? If so, under what circumstances? For example, there are many cases that have good information indicating that a man who has been defaulted is not the biological father, but he is so indifferent that we know he will not take legal action to deal with the issue. Frequently the mother in these cases is similarly indifferent."*

Answer 18: A motion to set aside may be filed by the previously established mother, the previously established father, the child, or the legal representative of any of these persons [See FC Section 7646(a)]. A motion to set aside under FC Section 7646 may also be filed by the LCSA [See FC Sections 7634, 17400(k), and 17404(a)]. The LCSA may only file a motion pursuant to AB 252 when requested to do so by one of the parties.

Venue

Question 19: *"What is meant by a 'court of proper venue'. The LCSA where the motion was originated or registered?"*

Answer 19: A court of proper venue is the court where the child support order is currently registered. However, this does not preclude a judge in any court to appropriately decide which court should be utilized.

Case Scenarios:

Question 20: *"Does the following case fall under AB 252?"*

> Example: POP declaration-based in-court support judgment entered February 2002. Child born January 2002.

Answer 20: No, under FC section 7575(b)(3)(A) and FC Section 7646(a)(2), the motion must be filed within two years of the child's birth.

Question 21: *"Does the following case fall under AB 252?"*

> Example: Child born August 2003, POP declaration-based in-court support judgment entered February 2004.

Answer 21: Yes, under FC Section 7575(b)(3)(A) and FC Section 7646(a)(2), the motion must be filed within two years of the child's birth. However, FC 7575(c)(1) provides in relevant part, "if a motion to set aside a judgment is required to be filed within a specified time period under Section 473, Code of Civil Procedure, the time period within which the motion must be filed shall commence on the date that the court makes an initial order for custody, visitation, or child support based upon a voluntary declaration of paternity." In this scenario the specified time period to file a motion commences February 2004, the date the court entered a judgment for child support.

Question 22: *"Does the following case fall under AB 252?"*

> Example: Child born 1996, NCP served May 2002, stipulation (without testing) August 2002.

Answer 22: No, under FC Section 7646(a)(1), the motion must be filed within two years of the date the previously established father knew or should have known of a judgment to establish paternity.

Question 23: *"Does the following case fall under AB 252?"*

Example: Child born August 1999, default paternity judgment entered April 2000.

Answer 23: Yes, under Family Code Section 7646(a)(3), the motion may be filed within two years of the effective date of the legislation, i.e. by October 28, 2006.

Question 24: *"In the case of a 12 year old minor child, wherein the father files an AB252 motion, the father's parental rights have been terminated, (some years ago, pending an adoption that presumably fell through). The LCSA no longer has a current order, is enforcing Federal Foster Care arrears from the past, Department of Health Services (DHS) is still paying out Foster Care assistance, with, we believe, a new adoption effort pending, and the court granted genetic testing. The LCSA will get the obligor's sample, with no problem."*

"Do we have any role in getting the contact information for the child? The LCSA is uncertain about interrupting a pending adoption, especially since there is no current order for child support. The LCSA is not the custodian of the record of the child's whereabouts. The actual custodian of records (DHS or the Dependency Court) should have a right to object to the release of their confidential records, as it may not be in the best interests of the child to have his/her contact info released. The LCSA is concerned that the court commissioner will want to order the LCSA to find the child and get the genetic testing; however, the LCSA is unclear as to its responsibility to locate the child, under the circumstances. Would the answer be any different if the child had, in fact, been adopted, and there was no longer any expenditure of Foster Care assistance?"

Answer 24: AB 252 has no limitation on the age or circumstance of the child to prevent a parent from filing a motion seeking genetic testing. The LCSA will have a role in the case if it is continuing to enforce an arrears judgment against an obligor even if the parental rights have been terminated or the child has been adopted, or if it is continuing to enforce child support arrears. Under the law, however, the LCSA is not required to produce the child for genetic testing or to locate the child.
The court may, however, make orders requiring the LCSA to locate the child for the purpose of conducting the testing. This information would not be released to the obligor and this information may not ultimately be available to the LCSA if the information is confidential. The circumstance of the locate information is going to be on a case by case basis depending on what is available.

If additional questions arise, please submit them through your LCSA designated Policy or Financial Management Coordinator to the Policy Branch as outlined in LCSA Letter 05-07, Policy Interpretation Request Form and Instructions.

For any questions or concerns regarding this letter, please contact Crystal Blount at (916) 464-5055.

Sincerely,

/s/

KAREN ECHEVERRIA
Deputy Director
Child Support Services Division