

Overcoming Barriers to Establishing  
Legal Paternity and Legal Visitation  
Rights for the Low-income Father.



# Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

## INTRODUCTION

The South Carolina Center for Fathers and Families provides oversight, monitoring and funding for seven fatherhood programs with offices in 13 sites throughout South Carolina. The majority of fathers who enter into these 13 fatherhood program sites are **low-income, never married and non-custodial fathers.**

Low-income fathers, especially non-custodial fathers, have a particularly difficult time attaining both legal paternity and legal visitation rights. The necessary connection between legal paternity and legal visitation rights is often misunderstood, not only by fatherhood participants, but also by the public in general.

This handout defines legal paternity and legal visitation rights; explains the necessary connection between paternity and visitation rights and provides helpful guidance for both the father and those offering assistance to the father to attain his legal paternal and visitation rights.

## WHAT IS LEGAL PATERNITY?

**Legal Paternity** is the legal connection between father and child. It is the premise for every parental right that a parent has including the right to seek visitation and/or custodial rights.

When a child is born out of wedlock in South Carolina, and in most states throughout the country, the biological father has no legal connection to his child until certain steps are taken to establish that legal connection.

To emphasize and reiterate the above point, at the moment of delivery (absent any legal processes being initiated) the doctor performing the delivery has the same legal rights to the child as the biological father who is not married to the mother at the time of the birth. Simply put – unlike the unmarried mother, the unmarried father has no automatic legal right or connection to his child.

However, when a child is born within a marriage, the male spouse of the mother



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

automatically has legal paternity without any other action being taken by either party regardless of whether or not he is the biological father.

Therefore, marital status at the time of the birth of a child is an important factor to consider when determining whether or not legal paternity has been established.

### **HOW CAN LEGAL PATERNITY BE ESTABLISHED BY THE UNMARRIED FATHER?**

There are several ways that a father can establish legal paternity and different points in time that legal paternity can be established. The methods of establishing legal paternity are as follows:

#### **In-hospital Paternity Establishment**

Prior to the child being born or while the mother is still in the hospital giving birth, the unmarried father can sign a Paternity Acknowledgement Affidavit. By signing the Affidavit (mother must sign as well) the father is acknowledging that he is the biological father. At the point where the signatures of mother and father are notarized, legal paternity exist. The father's name will appear on the birth certificate and the father must consent to the name of the child before the child's name appears on the birth certificate. However, the father signing the birth certificate alone without signing a Paternity Acknowledgement Affidavit does not constitute paternity. The father is only allowed 60 days to rescind the Affidavit through the Department of Vital Records after the Affidavit is signed.

#### **Department of Health and Environmental Control (DHEC)**

If the parents do not complete the Paternity Acknowledgement Affidavit at the hospital and they later wish to voluntarily establish paternity and place the father's name on the birth certificate, they will need to complete the Affidavit at either the State DHEC Office or the county health department in the county where the child was born. Trained staff is available to answer the parents' questions and notarize parents' signatures. There is a \$15.00 fee for completion of the Affidavit at these locations.



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

### **Department of Social Services/Child Support Enforcement Division**

Fathers may apply to DSS/CSE to establish legal paternity and conduct DNA testing. The father must fill out a Non-Custodial Parent Application for Services (available at all DSS child support offices) and pay a \$25.00 fee for the processing of the Application to DSS/CSE.

This method is useful in those situations where the mother has been unwilling to complete the Paternity Acknowledgement Affidavit. The DNA test costs the father absolutely nothing up front. The father should be made aware that if the DNA test should come back positive, DSS will most likely encourage the mother to seek child support if the parents do not reside together. In addition, if the DNA test does come back positive, the father will be asked to repay the cost of the test (\$125.00) over a period of time. However, these payments are often broken down into small reasonable payments and should not preclude any father seeking to go this route. If the DNA test is negative, the father does not have to pay the DNA test fee and child support will not be pursued.

### **DSS/Child Support Administrative Hearing**

If the father never established legal paternity through any of the above methods and the mother has applied to DSS/CSE to establish a child support order, DSS/CSE must first establish legal paternity prior to establishing the child support order. The majority of fatherhood participants have established legal paternity through this method. Unfortunately, many of these same fathers are unaware that legal paternity was established at this hearing, and they are also unaware of the significance of legal paternity. Often at these administrative hearings, DSS/CSE caseworkers will simply ask the father if he is the biological father of the child and offer no further explanation as to the significance of the response. A father may respond in the affirmative, even though doubts exist; thus a father may be completely unaware that by saying yes, legal paternity is forever established.

If there is any doubt in the father's mind regarding whether or not the child is his, a DNA test should be requested by the father at the initial DSS/CSE administrative hearing. Recent statistics from DSS/CSE indicate that in over 45% of the cases where a DNA test was requested by the father, the DNA test came back negative. Therefore, it is important that the test be requested if the father has any doubt. A doubtful father



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

inevitably becomes a more reluctant payor once the child support order has been established.

### **Private lawsuits and private genetic testing**

The last two methods are rarely seen in fatherhood programs geared to low-income fathers because both are relatively expensive methods for establishing legal paternity. However, the father may not involve DSS and instead pursue legal paternity by hiring an attorney to bring suit. The lawsuit, although identical to the lawsuit brought by DSS/CSE, will be considerably more expensive.

In addition, the father may avoid going through DSS/CSE by utilizing a private lab. However, the cost for the genetic test through most private labs is approximately \$600.00 or more, and the money must be paid up front before the test is conducted.

### **WHAT IS THE CONNECTION BETWEEN LEGAL PATERNITY AND LEGAL VISITATION RIGHTS?**

Legal visitation rights cannot be established without first establishing legal paternity. Often the biological father will form a relationship with his child without legal paternity or legal visitation rights. However, this relationship rests solely on the discretion of the mother. If the mother decides to terminate his visits, the biological father who has not established both legal paternity and legal visitation rights has no legal recourse.

### **HOW DOES A FATHER ESTABLISH LEGAL VISITATION RIGHTS?**

Once legal paternity is established, the father may seek legal visitation rights. As previously stated, the majority of fatherhood program participants establish legal paternity through a DSS/CSE administration hearing. However, very misunderstood is the role that state agencies in general and specifically DSS/CSE play in assisting the father with establishing legal visitation rights.

Although DSS/CSE can establish legal paternity and establish a child support order, DSS/CSE receives no federal funds to establish legal visitation rights for the father. In fact, DSS/CSE is not permitted to utilize any of their current funding for visitation issues



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

without first receiving a written waiver from the federal government. In fact, there are no state agencies that assist the father with establishing legal visitation rights in South Carolina.

Legal aid assistance is also unavailable to any father who exceeds the minimal income guidelines that have been mandated. Generally speaking, if the father works a full-time job at minimum wage, then he exceeds these very minimal guidelines. For these fathers, the fact that they are working to consistently pay child support ironically, disqualifies them from any legal assistance to establish their legal visitation rights.

The end result is that a low-income father must hire a private attorney to establish his legal visitation rights. Since this process is beyond the financial means of many low-income fathers, most continue to rely solely on the goodwill of the custodial parent for contact with their children. Without a legal visitation order, low-income fathers have no recourse if the custodial parent decides to terminate the visitation schedule.

Unfortunately, many fathers attempt to take matters in their own hands and withhold child support payments in retaliation. However, this action only worsens the father's legal problems.

### **USE OF THE PRO SE VISITATION COMPLAINT**

The term **Pro Se** simply refers to the filing of legal paperwork by a party to the action. In other words, the father is not represented by an attorney, but files the legal paperwork himself to establish legal visitation rights. In the past, most Family Court judges were unwilling to entertain pro se complaints for legal visitation in their courtrooms because they did not fully understand the few choices that low-income fathers had available to them. As a result of awareness and education of the judiciary on this issue, more Family Court judges throughout the state are allowing pro se complaints for visitation to be filed and heard in their courtrooms. In addition, under the leadership of our State Supreme Court, Family Court judges have been reminded that pro se petitioners who correctly file their legal paperwork have every legal right to a court hearing on the issue before the court. Attached is a Pro Se Packet for Visitation that can be used by a father for establishing his legal visitation rights as a pro se litigant.



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

### **WHERE DOES THE FATHER FILE HIS PRO SE VISITATION COMPLAINT?**

Complaints for visitation, in general, must be filed in the county/state in which the child resides. Under most scenarios, this means that the father will file the visitation complaint in the same county where the child support action was commenced. However, for the unfortunate father whose child has moved out of state, this father will have to file the legal paperwork in the county and state where the child is currently living.

#### **“Parenting Time” Guidelines**

Prior to filing the pro se complaint, the father seeking visitation should consider what he is looking for from the Family Court in terms of a visitation schedule. The visitation schedule should be a practical schedule that takes into account the age and needs of the child, along with the expected work hours of the father.

Parenting Time Guidelines are available which can assist the father with determining an age appropriate visitation schedule. These guidelines highlight that the needs of the child must be first and foremost in the mind of the father. In essence, this means that a visitation schedule requested for an infant will likely look different than a visitation schedule for a school aged child. Attached are sample Parenting Time Guidelines which can be used by a father when determining what visitation schedule he will request from the court.

#### **Final Visitation Order**

Finally, it is important that the language in the final visitation order be specific as to the visitation schedule. If it is not, the court is powerless to enforce a vague Visitation Order. For example, the following words in a Visitation Order, “father is entitled to reasonable and liberal visitation rights” sounds great, but it is an unenforceable order since no specific visitation schedule has been outlined. Since the father may not have the skills to prepare the order as detailed as needed, he can offer the guidelines to the court as an attachment to the Final Order. The judge can then reference the parenting time guidelines and relevant sections that were decided upon in the Final Order.

#### **Connection between Child Support and Visitation**

The current law views child support and visitation as two totally separate issues.



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

Therefore, the payment history of the father should not be an issue at the visitation hearing. Likewise, the Court will not entertain the father's complaints regarding his lack of visitation at child support hearings. Many fathers feel that the Court is uncaring about the lack of visitation when this is brought up by the father at a child support hearing. However, this is not necessarily true. The reality is that the issue of visitation is not before the Court on that day.

However, if the father has a legal visitation order in which the child spends more than 109 overnights with the father (30% of the child's time), the father may request to have his child support obligation calculated differently using the Shared Parenting Worksheet. The use of this worksheet will result in a lower child support obligation each month because it takes into account the time spent with the father. A copy of the Shared Parenting Worksheet may be obtained at any regional DSS/CSE office. For the father, it is yet another incentive to formalize the visitation schedule through a legal visitation order.

### **WHAT IF THE FATHER HAS A LEGAL VISITATION ORDER BUT IS BEING DENIED HIS VISITATION RIGHTS BY THE MOTHER?**

The current law in South Carolina permits a father to file a Pro Se Affidavit stating that his visitation rights are being denied. This form affidavit is available at every Family Court clerk's office in the state. The Court will schedule a Rule to Show Cause hearing asking the mother to show cause why the father is being denied visitation. If she is found in contempt, the penalties are up to one year in jail and/or a \$1500.00 fine.

The availability of a similar affidavit will vary from state to state. However, most states do have a process that is similar in place. The father must simply contact the Family Court where the original visitation order was issued and inquire as to what the process would be for that particular county.





## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

### **BRIEF NOTE ABOUT CHILD CUSTODY AND ADOPTION ISSUES**

Occasionally, a father will come into a fatherhood program and state that he fears his child is being either neglected or abused or that he believes that he could be a more responsible custodial parent for the child than the person currently caring for the child.

The father is advised to contact DSS's abuse and neglect division in the county where the child resides if he fears that the situation is indeed abusive or neglectful. The father should not be encouraged to use this agency as a tool to strike back at the mother over unresolved issues between the two of them. If, however, the father believes that it would be in the child's best interest to reside with him, he will have to hire a private attorney to file the lawsuit. Custody lawsuits are expensive and often complicated and are generally not appropriately filed by anyone other than a Family Court attorney.

Adoption issues arise most often when a father has remarried a woman with existing children whom the father has raised and grown to love as his own. Like child custody, the fatherhood participant is advised that he will have to hire a private attorney to file the adoption lawsuit. Adoption of children requires first the termination of the absent biological parent's parental rights, and can be a very complicated lawsuit. For this reason, adoption lawsuits are generally not appropriately filed by anyone other than a Family Court attorney.

### **CONCLUSION**

Most people agree that it is very important for every child that they have an active and engaged father in their life. However, for the typical fatherhood participant, establishing legal paternity and legal visitation rights can seem daunting without the assistance of trained staff to help guide them to the agencies and services that are available to them. In addition, most fathers need support while they are following through on the steps to attain legal parenting time with their children. Fatherhood programs serve this purpose. For the father who wants to take an active role, but has real hurdles that he needs to jump, fatherhood program staff help identify those hurdles and assist him, where possible, in getting over each hump.



## Overcoming Barriers to Establishing Legal Paternity and Legal Visitation Rights for the Low-income Father.

### **ATTACHMENTS**

**Pro Se Complaint for Visitation**

**Sample Parenting Time Guidelines**

**Legal Evaluation Tool on Paternity and Visitation Issues**