CALIFORNIA Family Law Monthly

AB 1349

We saw preliminary comments on AB 1349 as "Proposed Legislation" in the April 2011 issue of the California Family Law Monthly. It has now been approved by the Governor and filed with the Secretary of State as of August 5, 2011, and will become effective January 1, 2012. The new legislation amends *Family Code* Section 7612 by adding Section 7612(d) to permit a presumed father under Section 7611 to set aside a voluntary declaration of paternity within two years and adds *Family Code* Section 7612(e) to provide that a voluntary declaration of paternity is invalid under certain specified circumstances.

The former law provided that if a man signed a voluntary declaration of paternity, it had the force and effect of a judgment of paternity, subject to certain exceptions. Newly enacted AB 1349 now provides that a voluntary declaration of paternity is invalid if, at the time the declaration was signed, the child already had a presumed parent, as specified in *Family Code* Section 7611, or the man signing the declaration was a sperm donor. A person who claims the status of a presumed parent has the right to bring a Motion to set aside a voluntary declaration of paternity. The Court must then consider enumerated factors, including the nature, duration and quality of the moving party's relationship with the child in deciding whether to set aside the voluntary declaration of paternity. The new legislation also provides that, in the event of a conflict between a rebuttable presumption of paternity and the voluntary declaration of paternity, the weightier consideration of policy and logic must control [see, with respect to judicial resolution of conflicting presumptions of paternity, *In re P. A.*, page ___ of this issue of the California Family Law Monthly].

Comments from the April 2011 issue can be revisited and echoed now that the proposed legislation has become law. Operating under the Elkins mandate and *Family Code* Section 217, questions arise as to how these set aside hearings will be conducted? Will Section 217 evidentiary hearings and trials be honored, or perhaps circumvented by over-burdened trial courts by admission of testimony by declaration? And there are timing concerns, given that a person who is a presumed father has a period of two years from and after the execution of a voluntary declaration of paternity to petition the court to file a set aside motion. The time gap could result in children having visits during that time period with a parent who may later be eliminated from the child's life, thereby creating potential separation anxiety and adverse emotional impact on the child, perhaps unanticipated by the drafters of the legislation. Judicial gloss on the legislative mandate, which require trial courts to resolve competing parentage claims by assessing the "weightier considerations of policy and logic" will engender, we can be certain, litigation as to the meaning of this amorphous language. The trial court is required to consider set-aside factors, including the nature, duration and quality of the moving party's relationship with the child and the benefit or detriment to the child of continuing that relationship. The new statutory amendments have, without doubt, a laudatory intent...their practical implementation remains to be seen.

Family Code Section 7613(b) is also amended by adding a provision that permits a sperm donor and the woman (other than the donor's wife) who receives the sperm to sign a written agreement prior to conception that the donor will be considered the child's natural father.

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