



## **Paternity Establishment**

4/23/20

In **In re J.G.**, 149 N.E.3d 1192 (Ind. Ct. App. 2020) *trans. rqst. pending*, the Court held that: (1) the trial court did not err when it dismissed Husband as a party to the proceeding; (2) the trial court did not err in dismissing Mother's motion for summary judgment, which was based on the paternity action not being timely filed; and (3) the requirement for a man to register with the putative father registry prior to paternity being established only applies in the context of the child being subject to adoption proceedings.

Mother and Husband were married in 2009 and Mother gave birth to Child in 2013. In 2018, the State filed a petition as Child's next friend to establish paternity in Putative Father. Mother filed a motion to dismiss the petition on the grounds that it had not been filed within two years of Child's birth, that the State failed to name Husband as a party, and that Putative Father had not registered with the putative father registry. Without having ruled on Mother's motion the trial court ordered the parties to submit to DNA tests, which indicated that Putative Father was the father. The trial court held a review hearing in January 2019 where Putative Father asserted he was Child's father, and Mother reiterated her arguments for dismissal. The trial court informed the parties there would be an evidentiary hearing in May 2019. At the May 2019 evidentiary hearing, Mother and Husband did not testify or present evidence. Putative Father did not testify but did present evidence showing that Husband had filed a petition for dissolution of marriage, and in that petition, Husband indicated that Child was not a child of the marriage. The trial court entered an order on July 19, 2019, noting that it was treating Mother's motions to dismiss as motions for summary judgment. The trial court indicated that it found little evidence had been presented and the parties offered no testimony; as such, Mother failed to carry her burden and denied her motion for summary judgment. The trial court relied on the DNA results and on Husband's dissolution of marriage petition and found by clear and convincing evidence that Putative Father was Child's father. Putative Father then filed a motion to dismiss Husband as a party to the proceedings on August 2, 2019, which was immediately granted. Mother and Husband appealed.

**Mother and Husband failed to carry their burden on appeal in demonstrating that the trial court erred in dismissing Husband as a party from the case before Husband's opportunity for appeal had passed. Id. at 1195.** Mother and Husband argued that the trial court abused its discretion when it granted Putative Father's motion to dismiss Husband from the proceeding, specifically alleging that the trial court erred in dismissing Husband from the case before his chance to appeal the paternity determination passed. Id. at 1195. The Court noted that Indiana appellate rules require appellants to include an argument section that contains the arguments presented along with support from reasoning. Id. The Court noted that Mother and Husband have not provided any argument as to why the trial court was required to wait until Husband's

opportunity to appeal had passed before dismissing Husband as a party from the case. Id. Mother and Husband also did not cite any legal authority in support of their arguments. Id.

**The trial court did not err in by not allowing Mother a reasonable chance to present relevant materials after converting her motion to dismiss into a motion for summary judgment; Mother had ample time to prepare and present evidence. Id. at 1196.** Mother argued that the trial court erred in not allowing her to present relevant materials after converting her motion to dismiss into a motion for summary judgment. Id. at 1196. Ind. Trial R. 12(b) provides that when a court treats a motion to dismiss as a motion for summary judgment, all parties must be given a reasonable opportunity to present relevant materials. While the trial court did not notify the parties in advance of its intention to treat the motion to dismiss as a motion for summary judgment, a trial court's failure to give explicit notice of doing so is only reversible error if a party is not given a chance to respond and is thereby prejudiced. Id. (internal citations omitted). Mother alleged that if she had been given explicit notice, should would have submitted extra documentation; however, the Court noted that the parties were on notice that there was an evidentiary hearing in May and the parties were required to submit witness and exhibit lists. Id. The trial court held the evidentiary hearing, and Mother did not introduce any evidence that was relevant to either filing; the Court determined that Mother had several months' notice that the trial court would hear evidence and did not avail herself of that opportunity. Id.

**The prosecuting attorney timely filed a petition to establish paternity under IC 31-14-5-3(b). Id. at 1198.** Mother argued that the State had not timely filed a petition to establish paternity. Id. at 1197. IC 31-14-5-3(b) provides that a paternity action filed by a mother, an alleged father, or DCS (and its agents) must be filed within two years of the child's birth. However, IC 31-14-5-3(b)(3) provides for several exceptions; one of those exceptions if that paternity must be established within two years of the child's birth unless the mother, the mother, the department, or a prosecuting attorney operating under an agreement or contract described in [IC 31-25-4-13.1] files a petition after the alleged father has acknowledged in writing that he is the child's biological father." The prosecuting attorney filed the petition and was duly contracted to do so, and the Court did not read a two-year time limitation on the prosecuting attorney. Id. at 1197-98. **Practice note:** The Court did not address the part of the statute regarding the alleged father acknowledging in writing that he was the child biological father.

**Paternity is not legally established by virtue of being married when a child is born; rather there is a presumption of fatherhood which may be rebutted, and which does not prevent another man or a prosecutor from filing to establish paternity. Id. at 1198.** Although Mother acknowledged that the two-year time limitation did not apply to the prosecuting attorney, Mother argued that IC 31-14-4-1(7) provides that a prosecuting attorney can only file to establish paternity if paternity had not already been established. Id. at 1198. Mother argued that since the child was born during her marriage to Husband, paternity was established in Husband. Id. IC 31-14-7-1(1) provides that a man is presumed to be a child's father if the child is born while the man is married to mother. The Court opined that Mother was trying to use presumed as a synonym for established but presumed in fact communicates a different legal concept from established. Id. The presumption of fatherhood created by IC 31-14-7-1-(1) is not conclusive and can be rebutted. Id. citing Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990); T.M. v. L.D., 39 N.E.3d 1184, 1188 (Ind. Ct. App. 2015). Because a presumption of paternity based on a man's marriage

to a woman and a child being born during that marriage can be rebutted, the Court held that paternity is not established simply by virtue of being married. Id. at 1198. Husband had not actually established his paternity; his paternity had been presumed by virtue of his marriage. had been presumed by virtue of his marriage. Id. Because paternity had not already been established, the prosecutor was entitled to establish paternity. Id.

**Since a child may file to establish paternity until age twenty, and paternity can be established through a petition from a next friend, the prosecutor, acting as the child's next friend, filed a timely petition to establish paternity for the five-year-old child. Id. at 1199.**

Lastly, the Court noted that IC 31-14-5-2(a) provides that a person who is less than eighteen years old may file to establish paternity, or a next friend may file on their behalf, and that a child may file to establish paternity until that child reaches age twenty. Id. The prosecuting attorney filed the petition to establish paternity as the child's next friend. Id. at 1199. Because the prosecuting attorney did so, the petition was timely. Id.

**The requirement for a man to register with the putative father registry prior to paternity being established only applies in the context of the child being subject to adoption proceedings. Id. at 1200.** IC 31-14-5-7 provides that a man who files or is a party to a paternity action must register with the putative father registry; IC 31-19-5-12 provides that in order to be entitled to notice of an adoption, a putative father must register no later than thirty days of the child's birth, or the earlier of the dates where a termination petition is filed regarding the mother's parental rights or an adoption petition is filed. IC 31-19-5-9 further provides that a man who is barred from establishing paternity under IC 31-19 may not establish paternity by requesting a prosecuting attorney to file an action. Mother argued that based on these statutes, Putative Father was required to register with the putative father registry and his failure to do so meant that the State could not file to establish paternity. Id. Mother relied on In re G.W., 983 N.E.2d 1193 (Ind. Ct. App. 2013) (holding that the putative father had not timely registered with the registry, resulting in his implied consent to the adoption and his bar from establishing paternity; the Court, in reaching its decision, said "the requirement that the putative father registers within a certain time limit[] is not solely mandated in adoption proceedings but carries its mirror consequences into the paternity proceedings," with the "mirror consequences" referencing how a man who has failed to register with the putative father registry is also barred from establishing paternity via any method). J.G. at 1199. The Court opined that G.W. did not apply here, and that the language in that opinion simply applied to putative father's attempts to circumvent the putative father registry requirements in the context of an adoption by filing to establish paternity. Id. at 1199-1200. The child in this case was not subject to an adoption proceeding, and no statutes or case law provide that every putative father must register with the registry before they can file to establish paternity or ask a prosecutor to do so as a next friend. Id. The putative father registry specifically applies in the context of adoption cases. Id.