

PATERNITY INFORMATION FOR PARENTS



**Child Support Enforcement Division
3075 N. Montana Ave., Suite 112
PO Box 202943
Helena, Montana 59620-2943
Phone: 1-800-346-KIDS (5437)
(406) 444-9855 (Helena and out-of-state)
<http://www.dphhs.state.mt.us>**

November 2004

WHAT IS PATERNITY?

“Paternity” means fatherhood. Paternity may be presumed by law or determined by a court if it is disputed.

WHY IS PATERNITY DETERMINATION IMPORTANT?

Parents have the right to know their child and to contribute to that child’s future success. Children need and are entitled to:

Financial Support. The law requires **both** parents to support their child, even if the pregnancy was unplanned or if the parents are not married to each other. Children who are supported by only one parent often do not have enough money to meet their basic needs.

Benefits. Children have the right to receive benefits from both parents if they are available. Benefits may include but are not limited to: Social Security, insurance, inheritance, and the Veterans’ Administration. If paternity has not been presumed or determined by a court, a child might not be able to claim benefits from the father.

Identity. Children have the right to know their parents. Children have the right to enjoy the sense of belonging that comes from knowing both parents.

Medical History. Children have the right to know if they have inherited any special health problems.

WHAT IS A PRESUMPTION OF PATERNITY?

A presumption of paternity is an assumption the law makes that a particular man is the father of a particular child. The paternity of a child is presumed under the following circumstances of birth:

1. If the child’s mother is married, the mother’s husband is presumed to be the father of the child.

2. If the mother is married but separated from her husband, and a court has issued a decree of separation within 10 months before the birth, the mother's husband is presumed to be the father of the child.
3. If the child's mother is not married, but she was married within 10 months before the birth, her latest husband before the birth is presumed to be the father of the child.
4. If the child's mother is not married, there are several ways a particular man can be presumed to be the father of the child. Most require that the man sign an acknowledgment and that the mother consent. Two of the situations where a man is presumed to be the father of a child even when he has not acknowledged or claimed paternity in writing are:
 - a. A man may be presumed to be the father of a child if he receives the child into his home during the child's minority and openly says the child is his.
 - b. A man may be presumed to be the father of a child on the basis of genetic tests. Tissue samples (usually cheek cells, taken by cotton swab) are taken from the child, the child's mother, and the man alleged to be the child's father. If the results of tests on these samples establish, by currently accepted scientific standards, that it is at least 95 percent probable that the man is the father of the child, he is presumed to be the father.
5. A man may be presumed to be the natural father of a child under the laws of the state or Indian territory in which the child is born.

CAN A PRESUMPTION OF PATERNITY BE CHALLENGED?

A rebuttable presumption of paternity can be challenged in court. A court can consider evidence that may contradict the presumption, including, for example, scientific evidence from genetic tests, or testimony about the whereabouts of the presumed father at the time of conception. In the law, a rebuttable presumption is not the same as a final court decision. Most rebuttable presumptions, including (in Montana) those on paternity, can be challenged, or rebutted. But a court decision on paternity can be final, as it can be altered only by that court or through review by a higher court.

An irrebuttable presumption is created if the parents sign an acknowledgment of paternity and do not withdraw it within 60 days or before a support order is entered, whichever comes first. Either parent can withdraw the acknowledgment. An irrebuttable presumption has the same force and effect as a final district court order of paternity. An irrebuttable presumption can be challenged only if a party to the acknowledgment can prove fraud, duress, or material mistake of fact.

WHAT ABOUT COMMON LAW MARRIAGE?

Montana recognizes common law marriage, though not all states do. A common law marriage is as legally binding as a marriage performed by a minister or a justice of the peace—a “solemnized” marriage. Marriage at common law would have the same effect on determining paternity as that of a solemnized marriage. A common law marriage must be dissolved by a court before the parties are legally free to marry again. There is no such thing as a common law divorce.

Parties may be married by common law if:

1. Both parties are competent to marry (“competent to marry” means that the parties are of legal age to marry, that they are not already married to someone else, and that they are not closely related to each other—they are not brother and sister or first cousins);
AND
2. both parties agree to be married to each other;
AND
3. the parties live together as husband and wife;
AND
4. the parties tell other people, such as their friends, family, neighbors, or business people in their community, that they are married.

All of these requirements must be met before a common law marriage exists. A common law marriage cannot happen unless the parties act as if and say they are married. Simply living in the same household does not of itself create a common law marriage. Like a solemnized marriage, a common law marriage creates a legally binding change in status.



ESTABLISHING PATERNITY — AFTER A CHILD IS BORN

A man who believes he is the father of a child can create a presumption that he is the father by completing a form that is called a “paternity acknowledgment.” A man can acknowledge paternity even if he is not yet eighteen years old. If a minor chooses to sign, the minor's parent(s) should sign the acknowledgment below the minor's signature. Acknowledgments are available at hospitals, because the law requires a hospital to provide an unmarried mother and the alleged father an opportunity to complete one. Acknowledgments are also available from the Montana Department of Public Health and Human Services. An acknowledgment of paternity can allow the state to name the man as the child's natural father on the birth certificate and can create the same obligations and rights toward a child as those created when a child is born to married parents.

A man may file an acknowledgment of paternity signed by him and the mother. What happens after that depends upon whether there is already a presumed father:

1. If there is no presumed father, the acknowledgment creates an immediate presumption of paternity under law.
2. If there is already a presumed father, the acknowledgment can still be effective. In this situation, the written consent of the already-presumed father must be obtained, or the presumption that already exists must be successfully challenged or rebutted in a court proceeding.

A completed acknowledgment is sent to the Office of Vital Statistics of the Montana Department of Public Health and Human Services and becomes an irrebuttable presumption of paternity. An irrebuttable presumption has the same force and effect as a district court order and may be set aside only for fraud, duress or material mistake of fact.

Legal responsibilities created by signing the paternity acknowledgment may not be stopped while an action to set aside a presumption is pending.

An acknowledgment of paternity may be withdrawn by either the mother or the father within 60 days after it was signed, or before a support order is entered, whichever comes first. The parent withdrawing the acknowledgment must file a "Notice of Withdrawal of Paternity Acknowledgment" with the Department of Public Health and Human Services. A "Notice of Withdrawal of Paternity Acknowledgment" form is provided to both parents at the same time as the opportunity to sign the paternity acknowledgment. Additional forms are also available at any regional Child Support Office.

WHAT IF THE IDENTITY OF THE FATHER IS NOT CERTAIN?

If a mother is uncertain about the identity of her child's father, she should not agree to sign a paternity acknowledgment naming the father. Instead, she should contact the Department of Public Health and Human Services, Child Support Enforcement Division (CSED) for help. The CSED can help the mother determine what steps are necessary to determine paternity for her child. A CSED worker will ask questions about men who may be the father. The mother's information is confidential, though it can be used in a closed administrative or judicial hearing to help establish paternity.

A man who is uncertain about whether he is the father of a child may choose to undergo genetic testing. Genetic tests compare characteristics of the man's body tissue with the mother's and child's. Either the man or the mother may choose to have the tests done at his or her expense. Or, the parties may agree to share the costs of the testing.

If the CSED begins an action to determine paternity, the CSED may ask the parent who denies a particular man's paternity to pay for testing. If the CSED begins an action and the parent cannot afford the costs of testing, the CSED may initially pay for the tests. However, the state may later ask the parent (either the mother or the alleged father) who denies paternity to repay the state for the costs of the genetic tests.

Current medical studies show that genetic tests to establish paternity are very accurate. Usually tissue for the tests is taken at sites throughout the state, and it is then sent to an out-of-state laboratory. The test results are usually received several weeks after the tissue is taken.

Under Montana law, a presumption of paternity may be created by the test results. If the laboratory results show that the tested man's probability of paternity is 95 percent or more, then that man is presumed to be the father.

The presumption of paternity that is created by genetic test results may be challenged in court. To successfully rebut the presumption, the person challenging it must produce evidence that would disprove paternity. For example, a man may offer evidence that during the time the child would have been conceived, it would not have been possible for him to have been with the mother.



WHO PAYS CHILD SUPPORT?

Under Montana law, **both** parents are responsible for the support of their child. If the parents do not live together with the child, either parent may seek to have a support order established.

A support order can be set by either a Montana district court or the CSED. The amount of support, whether set by a court or the CSED, will be determined by using the Montana Child Support Guidelines; it is based on the income and earning ability of each parent.

State law requires that child support payments be made by mandatory deduction from a parent's pay check unless the order permits another method of payment.

If a parent is subject to the jurisdiction of a tribal court, that court may set or enforce child support.

WHAT IF A PARENT GETS BEHIND IN SUPPORT PAYMENTS?

If a parent falls behind in paying child support, steps may be taken to enforce the order. If the CSED is enforcing the order, it will require that an employer withhold the support from the parent's paycheck. Payments can also be withheld from a parent's unemployment compensation or workers' compensation benefits. Federal and state income tax refunds can also be taken to pay past-due child support, and other property can be seized and sold.

If a parent who owes or should pay child support lives in another state, there are agreements between the states to help collect and set the amount of child support, locate absent parents, and establish paternity. A parent who needs these services should contact the CSED for help.

DOES CHILD SUPPORT STOP WHEN A PARENT MARRIES SOMEONE ELSE?

No. Unless a child is adopted, child support does not change automatically if one or both parents enter into other families or have other children.

HOW IS THE AMOUNT OF CHILD SUPPORT DETERMINED?

Montana, like all states, has Child Support Guidelines, which are rules for setting a standard amount of child support based on the child's needs and the parents' ability to pay. Some of the things that determine the amount of child support are the number of children included in the support order calculation, who the children reside with, and the amount of income earned by each parent. If there are child care expenses or health insurance expenses, those will also be taken into consideration. A complete list of the items that are used to determine the amount of child support may be found in the Administrative Rules of Montana, or other reference materials published by the Department of Public Health and Human Services.

DOES THE AMOUNT OF CHILD SUPPORT EVER CHANGE?

When a parent's income and expenses change, it may be possible for a court or the CSED to change the amount of child support. A parent who is concerned about that should consult an attorney or contact the CSED, or examine the Guidelines found in the Administrative Rules of Montana. The Guidelines are available on the internet at the site listed on the front cover (select Services). Also, parents can obtain copies of the Guidelines, and of the financial affidavit and guidelines worksheet used to determine the support amount, by calling the CSED at the numbers on the front cover.

WHAT ABOUT CUSTODY AND VISITATION?



Detailed information about custody and visitation is beyond the scope of this booklet, but establishing paternity is a necessary first step toward gaining custody or visitation rights. Montana law does not automatically grant custody to either parent.

Parents may wish to consult an attorney for help regarding custody or visitation, though any person has a right to represent himself or herself before a court.

WHAT ABOUT HEALTH INSURANCE FOR A CHILD?

In addition to monetary support, parents also have an obligation to provide health insurance for their child(ren). A health insurance obligation will usually be established at the same time a parent's child support obligation is established. Both parents are responsible for health insurance coverage, just as both are responsible for child support.

Parents who have insurance available to them at a reasonable cost will be ordered to obtain coverage for the children. Parents who do not have reasonably-priced coverage available to them will be ordered to obtain coverage whenever it becomes available to them in the future.

The costs of insurance coverage are considered when calculating the child support obligation only if the insurance is actually in place.

LEGAL REFERENCES

Birth certificates and acknowledgment of paternity: Montana Code Annotated, starting at Section 50-15-201; Administrative Rules of Montana, Title 37, Chapter 8.

Creation and enforcement of child support: Montana Code Annotated, Sections 17-4-105 and 40-4-204, and Title 40, Chapter 5; Administrative Rules of Montana, Title 37, Chapter 62.

Assignment of child support rights to the state: Montana Code Annotated, Sections 40-5-403 and 53-2-613.

Paternity: Montana Code Annotated, Sections 40-5-231 through 238, and Uniform Parentage Act starting at Section 40-6-101. Presumptions of paternity can be found at Montana Code Annotated, Section 40-6-105.

Custody and visitation: Montana Code Annotated, Title 40, Chapters 4, 6, and 7.

PLEASE NOTE: REFERENCES TO MONTANA LAW IN THIS PAMPHLET ARE NOT INTENDED TO BE A COMPLETE LIST OF ALL APPLICABLE LAWS, ADMINISTRATIVE RULES, AND COURT DECISIONS. RELY ONLY ON YOUR OWN RESEARCH OR ON THE ADVICE OF AN ATTORNEY.



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1,000 copies of this public document were published at an estimated cost of 28¢ per copy, for a total cost of \$280.00, which includes \$280.00 for printing and \$0.00 for distribution.