Connecticut Department of Social Services
Making a Difference

Written Testimony before the Judiciary Committee
Submitted by the Department of Social Services
March 6, 2019

S.B. 938 (RAISED) - AN ACT CONCERNING STATE AGENCY COMPLIANCE WITH PROBATE COURT ORDERS.

The Department of Social Services (DSS) opposes Senate Bill No. 938, *An Act Concerning State Agency Compliance with Probate Court Orders*, because the bill is vague, conflicts with federal and state law, and has significant fiscal implications.

This bill would require DSS and other state agencies that are parties to a probate court proceeding to follow any order, denial or decree of a Probate Court that is related to a determination made by the applicable state agency. Additionally, this bill clarifies a state agency's right to appeal to the Superior Court any such order, denial or decree that is related to their agency's determination.

Section 1 of the proposed legislation provides that "[e]ach state agency that is a party to a Probate Court proceeding shall recognize, apply and enforce any order, denial or decree of a Probate Court that is applicable to any determination made by the state agency in a contested case." The term "a party to a Probate Court proceeding" is not defined. Unlike in Superior Court, there are no formal pleadings in Probate Court, and it can therefore be difficult to ascertain who is a party to a Probate Court proceeding. Probate Courts typically determine who is interested in a proceeding before it, and provide notice to the interested parties. Conceivably, Probate Courts could name a state agency as an interested party, forcing the state agency and the Attorney General's Office to appear in Probate Courts around the state to litigate the threshold issue of whether the state agency is a party that will ultimately be bound by the Probate Court's rulings. As discussed below, this would cause a significant cost to the State.

According to the bill's statement of purpose, the bill also serves to "clarify that a state agency has standing to appeal any such order, denial or decree to the Superior Court with respect to such order's applicability to the state agency's determination." Such clarification is not necessary because, if a state agency is a party to a Probate Court proceeding, then **the agency would have an existing statutory right to appeal if aggrieved by an order, denial or decree of a Probate Court.**

Additionally, DSS holds over a thousand fair hearings each year, which are contested cases. The proposed legislation, if adopted, would bind DSS to probate decrees issued in connection with matters raised at a fair hearing in contravention of federal law and state law.

Federal law requires that the Medicaid State plan must "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan." 42 USC 1396a (a)(5). DSS is the single state agency designated as "the sole agency to determine eligibility for assistance and services under programs operated and administered by [the] department." Conn. Gen. Stat. § 17b-261b (a).

Federal law provides that DSS must treat the inability of an individual to access funds as a result of a court order made at the individual's request as a transfer. 42 USC 1396p(c)(1); 42 USC 1396p(h)(1)(C). The proposed bill appears to violate the federal requirement that DSS impose a transfer of assets penalty in such a case by requiring that DSS appeal the probate court approval of a transfer.

Similarly, state law provides that "[a] disposition of property ordered by a court shall be evaluated [by DSS] in accordance with the standards applied to any other such disposition for the purpose of determining eligibility." Conn. Gen. Stat. § 17b-261 (a). Subsection (c) of section 17b-261 provides, in relevant part, that "[f]or purposes of determining eligibility for the Medicaid program, an available asset is one that is actually available to the applicant or one that the applicant has the legal right, authority or power to obtain or to have applied for the applicant's general or medical support. That same subsection also provides that "the availability of funds in a trust or similar instrument funded in whole or in part by the applicant or the applicant's spouse shall be determined pursuant to the Omnibus Budget Reconciliation Act of 1993, 42 USC 1396p."

Applicants for public assistance frequently attempt to circumvent DSS' eligibility requirements by going to probate court, before or during the application process, and obtaining decrees that, for example, a trust is not "available" to the beneficiary, or that "fair consideration" was provided in return for the transfer of an asset, or that the applicant retained sufficient funds to meet foreseeable needs, or that a family member lived with and provided services that avoided institutionalization. These are examples of just a few of the types of determinations that DSS is required to make in determining eligibility for assistance. Both state and federal law provide that DSS is the sole state agency to make such decisions in accordance with federal and state law. The proposed bill, however, conflicts with such laws by requiring that DSS recognize, apply and enforce probate court orders, denials, or decrees that effectively make determinations regarding eligibility for public assistance.

Next, the proposed bill would substantially increase the caseload of the court system, as well as the Attorney General's Office and DSS staff. Either an Assistant Attorney General or a DSS representative would be required to attend any probate hearing in which DSS was identified as a party even if the subject of the hearing is not an applicant for, or recipient of, public assistance. The Attorney General's Office would incur significant cost in appealing probate court orders deemed contrary to public assistance laws. Probate courts will see an increase in the number of applications filed to obtain favorable decisions in advance of an application for public assistance and the number of appeals filed will significantly increase.

Finally, the proposed bill will significantly increase the amount of public assistance paid by the state. Beneficiaries of multi-million dollar general support trusts will have an incentive to obtain

a probate court ruling, in advance of applying for public assistance, construing or amending the trust to be a supplemental support trust (which we have seen happen) and then apply for assistance. DSS, if identified as a party, would be forced to appear at the hearing and contest the matter and, if the Probate Court rules against DSS, appeal the decision, rather than determining eligibility without considering the probate decree and requiring the applicant to go through the administrative hearing process if the applicant felt aggrieved by the department's eligibility determination. Ultimately, the state may end up paying for public assistance that, but for the probate court decree or order, the individual would have been determined ineligible for assistance.

For these reasons, the Department must oppose Senate Bill 938.

S.B. 942 (RAISED) – AN ACT CONCERNING THE OPENING OR SETTING ASIDE OF A PATERNITY JUDGMENT.

When a child is born out of wedlock, the Connecticut General Statutes set forth various methods for establishing the child's paternity. One option is for the child's mother to obtain a judgment of paternity from the Superior Court or a family support magistrate pursuant to sections 46b-160 to 46b-171, inclusive, of the General Statutes. Another option is for the putative father of the child to obtain a judgment of paternity in his favor from a Probate Court, as described in section 46b-172a of the General Statutes. Alternatively, section 46b-172 of the General Statutes authorizes a written acknowledgement of paternity that may be used by the mother and putative father to establish the child's paternity, and provides that, when executed, the acknowledgment has the same force and effect as a judgment of the Superior Court.

Unfortunately, even when paternity is established by one of these methods, it is not uncommon for the mother, the man previously established as the father, or another interested party to subsequently contest the earlier paternity determination. Currently, only section 46b-172, concerning acknowledgments of paternity, addresses the circumstances under which the previous paternity determination may be challenged. It provides for a limited rescission period, after which time the acknowledgment may only be challenged on the basis of fraud, duress or material mistake of fact. When faced with a motion to open and set aside a judgment of paternity entered by a court or family support magistrate, courts have generally applied the provisions of General Statutes § 52-212a and Practice Book § 17-4, concerning the opening of civil judgments. *See, e.g., State v. Dansby*, Superior Court, judicial district of Waterbury, Docket No. FA-89-92582 (June 24, 2005, *Wihbey*, F.S.M.) (29 Conn. L. Rptr. 768) (2005 WL 2129161 at *2).

Beyond this, our paternity statutes do not speak to how a court or magistrate presented with an attempt to open a previous judgment or acknowledgment of paternity should proceed. In the absence of clear direction, a number of courts have considered, to one extent or another, whether it would be in the best interest of the child to open and set aside the previous paternity determination. *See, e.g., Colonghi v. Arcarese*, Superior Court, judicial district of Middlesex at Middletown, Docket No. FA-13-4016846 (Jan. 10, 2014, *Quinn, J.T.R.*) (2014 WL 341888 at *6-7).

As Connecticut's designated Title IV-D agency, the Department of Social Services (DSS) agrees that the best interests of a child should be considered when determining whether it is appropriate to open and set aside a final judgment or acknowledgement of paternity. DSS is concerned, however, that the State's paternity statutes do not explicitly speak to a court's or magistrate's authority to weigh the child's best interests when faced with these difficult decisions. Other states, for instance, have codified some form of this analysis to guide their courts. *See, e.g.,* Cal. Fam. Code § 7575 (West).

This bill would codify a uniform process for courts and family support magistrates to follow when faced with an attempt to open and set aside a judgment or acknowledgment of paternity that has become final. It establishes a two-part test in all such cases. First, the court or family support magistrate must determine whether the judgment or acknowledgment was due to fraud, duress, or a material mistake of fact. If the court or magistrate finds fraud, duress or a material mistake of fact occurred, it next must determine that setting aside the previous judgment or acknowledgment would be in the best interest of the child. A number of factors are listed for the court or magistrate to consider, but the language of the proposal provides the court or magistrate with broad discretion when engaging in this analysis.

In addition, the legislative proposal codifies a jurisdictional rule established by the Appellate Court in *Cardona v. Negron*, 53 Conn. App. 152, 727 A.2d 1150 (1999), which held that, absent a showing of fraud, duress, or material mistake of fact, courts and family support magistrates have no authority to order genetic testing in a case where an acknowledgment or judgment of paternity has become final.

DSS urges passage of this bill so that it is clear that courts and family support magistrates must consider the best interests of the child when considering a motion to open and set aside a final judgment or acknowledgment of paternity.