



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 557 (Substitute S-2 as passed by the Senate)  
Senate Bills 558, 559, and 560 (as passed by the Senate)  
Sponsor: Senator Steven Bieda (S.B. 557 & 558)  
Senator Rick Jones (S.B. 559 & 560)  
Committee: Judiciary

Date Completed: 12-1-11

### **RATIONALE**

Under Michigan law, a man who claims to be a child's father--sometimes called a putative or alleged father--typically may not bring a paternity action if the child's mother was married to another man--the "presumed" father--between the time the child was conceived and the time he or she was born. The only exception applies to situations in which there has been a prior court determination, such as in a divorce judgment, that the mother's husband is not the child's father. Many people believe that alleged fathers should be able to establish their legal paternity under additional circumstances. In some situations, for example, a child is conceived during an extramarital relationship after the woman has left her husband, but she then returns to him. In other cases, a child is conceived by a man and an unmarried woman and the woman marries another man before the child is born. Sometimes, under either scenario, the mother allows the biological father to establish a relationship with the child, and then terminates that relationship. In these and similar situations, the biological father cannot bring a paternity action even if he and the child's mother acknowledge his paternity or DNA testing shows that he is the father, and even if the mother's marriage ends in divorce--unless the divorce judgment includes a determination, based on clear and convincing evidence, that the husband is not the child's father. In addition, although a presumed father can contest his paternity in a divorce proceeding, he may or may not be able to do so at another time, depending on the court and the judge. It has been suggested

that Michigan law should allow these types of actions under certain circumstances.

### **CONTENT**

**Senate Bill 557 (S-2) would enact the "Revocation of Paternity Act" to establish procedures for actions to determine that a presumed father was not a child's father and for actions to set aside an acknowledgment of parentage or an order of filiation. The bill would do the following:**

- **Allow a child's mother, presumed father, or alleged father, or the Department of Human Services, to file an action to determine that the child was born out of wedlock for the purpose of establishing paternity, under various sets of criteria.**
- **Allow an action to revoke an acknowledgment of parentage to be brought by the child's mother, the acknowledged father, an alleged father, or a prosecuting attorney.**
- **Allow an action to set aside an order of filiation to be brought by the affiliated father, the mother, or an alleged father, if the affiliated father had failed to participate in the court proceedings that determined filiation.**
- **Allow a court to deny an order if it would not be in the child's best interests, and specify factors the court could consider.**

- **Require the court to order the parties to participate in and pay for blood or tissue typing or DNA identification profiling, and provide that the results would not be binding on the court.**
- **Set deadlines for filing an action under the Act and allow the court to extend a deadline under certain circumstances.**

**Senate Bill 558 would amend the Acknowledgment of Parentage Act to require an acknowledgment form to indicate that a claim to revoke an acknowledgment would have to be filed under the Revocation of Paternity Act. The bill also would repeal a section of the current Act that provides for a claim of revocation of an acknowledgment.**

**Senate Bill 559 would amend the Paternity Act to provide that a court would have continuing jurisdiction over proceedings to determine an action to set aside an order of filiation under the Revocation of Paternity Act.**

**Senate Bill 560 would amend the Estates and Protected Individuals Code to provide that a man would be considered a child's natural father for purposes of intestate succession if he were determined to be the father in an action under the Revocation of Paternity Act, in the case of a child who was born out of wedlock or born or conceived during a marriage but not the issue of that marriage.**

Senate Bills 558, 559, and 560 are tie-barred to Senate Bill 557.

Senate Bill 557 (S-2) is described in detail below.

#### Action to Establish Paternity

The following provisions would govern an action to determine that a presumed father was not a child's father. ("Presumed father" would mean a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth.) An action under these provisions could be brought by a complaint filed in an original action or by a motion filed in an existing action, as appropriate under

the proposed Act and rules adopted by the Supreme Court.

Action by Child's Mother. A court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the child's mother filed an action; the mother identified the alleged father (a man who by his actions could have fathered the child) by name in the complaint or motion commencing the action; and both of the following applied:

- The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
- The action was filed within three years after the child's birth (unless the action were filed within one year after the bill's effective date).

Alternatively, a court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the child's mother filed an action; the mother identified the alleged father by name in the complaint or motion commencing the action; and either of the following applied:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless the action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, under either set of circumstances, if the child were determined to be born out of wedlock, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction.

Action by Presumed Father. A court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the presumed father raised the issue in a divorce action between himself and the mother or if he filed an

action within three years after the child's birth. The requirement to file within three years after the child's birth would not apply to an action filed within one year after the bill's effective date.

Action by Alleged Father. A court could determine that a child was born out of wedlock for the purpose of establishing the child's paternity in an action filed by an alleged father, under three sets of criteria.

Under the first set of criteria, all of the following would have to apply:

- The alleged father did not know or have reason to know that the mother was married at the time of conception.
- The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
- The action was filed within three years after the child's birth (unless it were filed within one year after the bill's effective date).

Under the second set of circumstances, the alleged father could not have known or have had reason to know that the mother was married at the time of conception, and either of the following would have to apply:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless an action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, under each of the first two sets of criteria, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction if the child were determined to be born out of wedlock.

Under the third set of criteria, a court could determine that a child was born out of wedlock for the purpose of establishing the

child's paternity if an alleged father filed an action and both of the following applied:

- The mother was not married at the time of conception.
- The action was filed within three years after the child's birth (or within one year after the bill's effective date).

Action by the DHS. If a child were being supported in whole or in part by public assistance, a court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the Department of Human Services (DHS) filed an action and either of following applied:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless the action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction if the child were determined to be born out of wedlock.

#### Revocation of Acknowledgment of Parentage

The following provisions apply to an action to set aside an acknowledgment of parentage.

The bill would allow the mother, the acknowledged father (the man who executed the acknowledgment of parentage), an alleged father, or a prosecuting attorney to file an action for revocation of an acknowledgment of parentage. The action would have to be filed within three years after the child's birth or within one year after the date the acknowledgment was signed, whichever was later. This requirement would not apply to an action filed within one year after the bill's effective date.

The action would have to be supported by an affidavit signed by the person who filed the action, stating facts that constituted one of the following:

- Mistake of fact.
- Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
- Fraud.
- Misrepresentation or misconduct.
- Duress in signing the acknowledgment.

If the court found that the affidavit was sufficient, the court would have to order blood or tissue typing or DNA identification profiling, as required under the bill.

The person filing the action would have the burden of proving, by clear and convincing evidence, that the acknowledged father was not the father of the child.

The court clerk would have to send a copy of an order of revocation to the State Registrar, who would have to vacate the acknowledgment of parentage and could amend the birth certificate as prescribed by the order.

Whether an action for revocation was brought by a complaint in an original action or by a motion in an existing action, the prosecuting attorney, an attorney appointed by the county, or an attorney appointed by the court would not be required to represent any party regarding the action for revocation.

(These provisions are similar to the section of the Acknowledgment of Parentage Act that Senate Bill 558 would repeal (MCL 722.1011). Currently, a claim for revocation of an acknowledgment may be brought only by the mother or the man who signed it, the child, or a prosecuting attorney. The proposed requirements for an affidavit are the same as the existing requirements. Currently, however, if the affidavit is sufficient, the court is permitted, but not required, to order blood or genetic tests at the expense of the claimant. The provisions in Senate Bill 557 (S-2) regarding the burden of proof, the State Registrar, and representation of a party are generally the same as current law.)

### Revocation of Order of Filiation

The following provisions would apply to an action in which a child had an affiliated father (a man who had been determined in a court to be the child's father).

If paternity had been determined based on an affiliated father's failure to participate in the court proceedings, the mother, an alleged father, or the affiliated father could file a motion with the court that made the determination, to set aside the determination. The motion would have to be filed within three years after the child's birth or within one year after the date of the order of filiation, whichever was later. This requirement would not apply to an action filed within one year after the bill's effective date.

If the court determined that the motion to set aside the order of filiation should be denied, the court would have to order the person who filed the motion to pay the reasonable attorney fees and costs incurred by any other party because of the motion.

### Authority of the Court

In an action filed under the proposed Act, the court could do any of the following:

- Revoke an acknowledgment of parentage.
- Set aside an order of filiation or a paternity order.
- Determine that a child was born out of wedlock.
- Make a determination of paternity and enter an order of filiation as provided in the Paternity Act.

### Denial of Order; Child's Best Interests

A court could refuse to enter an order setting aside a paternity determination or determining that a child was born out of wedlock if the court found by clear and convincing evidence that the order would not be in the child's best interests. The court could consider the following factors:

- Whether the presumed father was estopped from denying parentage because of his conduct.
- The length of time the presumed father was on notice that he might not be the child's father.

- The facts surrounding the presumed father's discovery that he might not be the child's father.
- The nature of the relationship between the child and the presumed or alleged father.
- The child's age.
- The harm that could result to the child.
- Other factors that could affect the equities arising from the disruption of the father-child relationship.
- Any other factor that the court determined appropriate to consider.

The court would have to state on the record its reasons for refusing to enter an order.

#### Blood or Tissue Typing; DNA Profiling

The court would have to order the parties to an action or motion under the proposed Act to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination. Blood or tissue typing or DNA ID profiling would have to be conducted in accordance with a section of the Paternity Act. The results would not be binding on the court.

#### Extension of Time for Filing

A court could extend the time for filing an action or motion under the proposed Act. A request for extension would have to be supported by an affidavit signed by the person requesting the extension, stating facts that he or she satisfied all of the requirements for filing an action or motion but did not file within the time allowed because of one of the following:

- Mistake of fact.
- Newly discovered evidence that by due diligence could not have been found earlier.
- Fraud.
- Misrepresentation or misconduct.
- Duress.

If the court found that the affidavit was sufficient, the court could allow the action or motion to be filed and take other action it considered appropriate. The party filing the request would have the burden of proving, by clear and convincing evidence, that granting relief under the Act would not be against the best interests of the child considering the equities of the case.

#### Other Provisions

An alleged father could not bring an action under the proposed Act if the child were conceived as a result of acts for which the alleged father was convicted of criminal sexual conduct.

An original action under the proposed Act would have to be filed in the circuit court for the county where the mother or the child resided or, if neither the mother nor the child resided in Michigan, in the circuit court for the county where the child was born. If an action for the support, custody, or parenting time of the child existed at any stage of the proceedings in a circuit court of Michigan, an action under the Act would have to be brought by motion in the existing case under Supreme Court rules.

If an action were brought by an alleged father who proved by clear and convincing evidence that he was the child's father, the court could make a determination of paternity and enter an order of filiation as provided in the Paternity Act.

A judgment entered under the proposed Act would not relieve a man from a child support obligation for the child or the child's mother that was incurred before the action was filed, or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment.

A court could not issue an order under the Act that set aside a judgment or determination of a court or administrative agency of another state, even if the judgment or determination were being enforced in Michigan.

If a case were a Title IV-D case, the court could appoint an attorney approved by the Office of Child Support to represent the State's interests with respect to an action or motion under the proposed Act. The court also could appoint a guardian ad litem to represent the child's interests. ("Title IV-D case" would mean an action in which services are provided under Part D of the Title IV of the Social Security Act, which provides for Temporary Assistance for Needy Families.)

The proposed Act would not establish a basis for termination of an adoption or affect any

obligation of an adoptive parent to an adoptive child.

The Act would not establish a basis for vacating a judgment establishing paternity of a child conceived under a surrogate parentage contract.

A common law action that was available before the Act's effective date to set aside a paternity determination or to determine that a child was born out of wedlock would remain available until two years after that date but then would not be available.

In its discretion, a court could order a person who filed an action or motion under the Act to post an amount of money with the court, obtain a surety, or provide other assurance that in the court's determination would secure the costs of the action and attorney fees if the person did not prevail. The court also could order a nonprevailing party to pay the attorney fees and costs of a prevailing party.

MCL 722.1007 (S.B. 558)  
722.720 (S.B. 559)  
700.2114 (S.B. 560)

## **BACKGROUND**

The Paternity Act authorizes the circuit court to determine the paternity of a child born out of wedlock, in an action filed by the child's mother or father, or, if the child is receiving public assistance, by the Department of Human Services. A child is considered to be born out of wedlock if he or she is born to a woman who was not married at the time of conception or birth, or if the court has made a determination that the child was born or conceived during a marriage but is not the issue of the marriage.

Historically, under what is known as Lord Mansfield's Rule, if a child was born or conceived during a marriage, neither the mother nor the father could present evidence that the child was not legitimate. ("[T]he declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage...".) In effect, there was an irrebuttable presumption that the mother's husband was the legal father. The rule was overturned by the Michigan Supreme Court in a 1977 decision, *Seraphin v Seraphin* (401 Mich 629), which found that

the reasons for the rule either no longer applied or were not valid. While the Court allowed the question of a child's legitimacy to be raised during divorce proceedings, it concluded that there still was a strong presumption of legitimacy that could be rebutted only by clear and convincing evidence.

In 1991, in *Girard v Wagenmaker* (437 Mich 231), the Court addressed the issue of whether a putative father may bring a suit for a determination of the paternity of a child born while the mother was legally married to another man. The Paternity Act's definition of "child born out of wedlock" includes "a child that *the court has determined* to be born or conceived during a marriage but not the issue of that marriage" (emphasis added). The *Girard* Court interpreted this language and held that a putative father does not have standing to bring a paternity suit unless there has been a *prior* court determination that the mother's husband is not the father.

Although *Girard* interpreted the Paternity Act as it was written in 1985, the definition of "child born out of wedlock" is virtually the same, and the *Girard* holding remains current law. As the Court of Appeals stated in a January 2011 opinion (*Pecoraro v Rostagno-Wallat*, 291 Mich App 303), "In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage and the mother's husband is the child's father as a matter of law. A third party may not rebut this legal presumption unless there first exists a judicial determination arising from a proceeding between the husband and wife that declares the child is not the product of the marriage."

## **ARGUMENTS**

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

### **Supporting Argument**

It is not unusual for a man and a woman to conceive a child when she is married to another man. In many cases, a married couple is separated when the woman and another man have a relationship, and she then returns to her husband, or the married couple's relationship ends but they never divorce because they cannot afford to, the

man has disappeared, or both. At other times, a man and an unmarried woman conceive a child and she then marries someone else before the child is born. While some situations involve deception, others simply involve a change of heart or mind

In any case, the child's biological father cannot bring a paternity suit unless a court has determined in a prior action (usually a divorce) that the mother's husband is not the child's father; the child then is legally considered born out of wedlock. Without such a determination, an alleged father does not have standing to bring a paternity action even if the mother acknowledges that he is the child's father, he has begun to raise the child as his own, and he has DNA test results showing a 99.9% probability that he is the biological father.

While there still may be reasons of policy and practicality to presume that a child was fathered by the mother's husband, that presumption has been rebuttable in Michigan since 1977. Requiring a *prior* court determination of illegitimacy before a putative father can bring a paternity action, however, has closed the courtroom door to many men who have fathered children and want the opportunity to raise them or be part of their lives. In some cases, these men are the only father their child knows until the mother terminates their relationship, often severing the child's relationship with extended family members as well.

The bills would address multiple types of scenarios and relationships by allowing legal proceedings if specified criteria were met. An action could be brought by a child's mother, a man who claimed to be a child's father, a man who was married to a child's mother when the child was conceived or born, a man who had signed an acknowledgment of parentage, or a man whom a court had determined to be a child's father. Depending on the circumstances, any of these individuals might have a legitimate reason to challenge a presumption or legal finding of paternity or to obtain a judicial determination that a man is a child's father.

Under current law, as discussed above, if a child has a presumed father, an alleged father has no standing unless a court has determined that the presumed father is not

that child's father. Although a presumed father or a child's mother may contest that presumption in a divorce proceeding, whether he or she can do so otherwise depends on the court and the judge. An acknowledged father currently may bring an action to revoke the acknowledgment of parentage; the legislation would retain these provisions but also allow an alleged father to bring such an action. In addition, an affiliated father currently may bring an action to set aside the order of filiation under court rules for setting aside a judgment. In this and the other situations, the proposed Act would create separate legal proceedings, identify who would have standing, and set specific new limits.

In addition to the individual parties, the State has an interest in ensuring that the actual father of a child is responsible for the payment of child support and medical expenses. This legislation could help families avoid or end government assistance and become self-sufficient.

In short, the bills would bring fairness, compassion, and modernity to the law, while ensuring that the child's best interests were the primary consideration.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The bills would have an indeterminate fiscal impact on State and local government. To the extent that the bills led to an increase in the caseloads of the various circuit courts, the State and local units of government could incur some increase in administrative costs. Any increase in costs, however, would be offset to some degree by a corresponding increase in relevant filing fees, motion fees, and other court-imposed fees or payments.

Fiscal Analyst: Matthew Grabowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.