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BILL



ANALYSIS

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Senate Bills 557 and 560 (as enacted)
House Bills 5328 and 5329 (as enacted)
Sponsor: Senator Steven Bieda (S.B. 557)
Senator Rick Jones (S.B. 560)
Representative Matt Lori (H.B. 5328)
Representative Pat Somerville (H.B. 5329)

Senate Committee: Judiciary
House Committee: Judiciary

Date Completed: 6-15-12

PUBLIC ACTS 159 & 160 of 2012
PUBLIC ACTS 161 & 162 of 2012

RATIONALE

Traditionally, under Michigan law, a man who claimed to be a child's father--sometimes called a putative or alleged father--could 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 applied to situations in which there was a prior court determination, such as in a divorce judgment, that the mother's husband was not the child's father. Many people believed, however, that alleged fathers should be given the opportunity 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 could not bring a paternity action even if he and the child's mother acknowledged his paternity or DNA testing showed that he was the father, and even if the mother's marriage ended in divorce--unless the divorce judgment included a determination, based on clear and convincing evidence, that the husband was not the child's father. In addition, although a presumed father could contest his paternity in a divorce proceeding, he

may or may not have been able to do so at another time, depending on the court and the judge. Many people recommended that Michigan law allow these types of actions under certain circumstances.

CONTENT

Senate Bill 557 enacted the "Revocation of Paternity Act" to allow various parties to bring an action to determine that a presumed father is not a child's father or an action to set aside an acknowledgment of parentage or an order of filiation. The bill does the following:

- Allows 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.
- Allows 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.
- Allows 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 failed to participate in the court proceedings that determined filiation.

- **Allows a court to deny an order if it would not be in the child's best interests; and specifies factors the court may consider.**
- **Requires the court to order the parties to participate in and pay for blood or tissue typing or DNA identification profiling; and provides that the results are not binding on the court.**
- **Requires an action to be brought before a child is three years old (or within one year after the Act took effect); and allows the court to extend the deadline under certain circumstances.**

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

House Bill 5328 amended the Acknowledgment of Parentage Act to require an acknowledgment form to indicate that a claim to revoke an acknowledgment must be filed under the Revocation of Paternity Act. The bill also repealed Section 11 of the Acknowledgment of Parentage Act, which provided for a claim of revocation of an acknowledgment.

House Bill 5329 amended the Paternity Act to provide that a court has continuing jurisdiction over proceedings to determine an action to set aside an order of filiation under the Revocation of Paternity Act.

Senate Bill 560 and House Bills 5328 and 5329 were tie-barred to Senate Bill 557.

All of the bills took effect on June 12, 2012.

Senate Bill 557 is described in detail below.

Action to Establish Paternity

The following provisions of the Revocation of Paternity Act govern an action to determine that a presumed father is not a child's father. (The Act defines "presumed father"

as 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 may be brought by a complaint filed in an original action or by a motion filed in an existing action, as appropriate under the Act and rules adopted by the Supreme Court.

Action by Child's Mother. A court may determine that a child was born out of wedlock for the purpose of establishing his or her paternity if the child's mother files an action; the mother identifies 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 apply:

- 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 is filed within three years after the child's birth (or within one year after the Act's effective date).

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

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

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

Action by Presumed Father. A court may determine that a child was born out of

wedlock for the purpose of establishing his or her paternity if the presumed father if he files an action within three years after the child's birth or if he raises the issue in an action for divorce or separate maintenance between himself and the mother. The requirement to file within three years after the child's birth does not apply to an action filed within one year after the Act's effective date.

Action by Alleged Father. A court may 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 must 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 is filed within three years after the child's birth (or within one year after the Act's effective date).

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

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

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

Under the third set of criteria, a court may determine that a child was born out of wedlock for the purpose of establishing the child's paternity if an alleged father files an action and both of the following apply:

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

Action by the DHS. If a child is being supported in whole or in part by public assistance, a court may 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) files an action and either of following applies:

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

In addition, the court must determine the child's paternity or paternity must be established under the law of Michigan or another jurisdiction if the child is 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. (Under the Acknowledgment of Parentage Act, if a child is born out of wedlock, a man is considered to the child's natural father if the man and the child's mother sign an acknowledgment of parentage form. Their signatures must be notarized, and the form must be filed with the State Registrar.)

The Revocation of Paternity Act allows 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 must be filed within three years after the child's birth or within one year after the date the acknowledgment was signed, whichever is later. This requirement does not apply to an action filed within one year after the Act's effective date.

The action must be supported by an affidavit signed by the person who files the action, stating facts that constitute 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 finds that the affidavit is sufficient, the court must order blood or tissue typing or DNA identification profiling, as required under the Act.

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

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

Whether an action for revocation is 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 is not required to represent any party regarding the action for revocation.

(These provisions are similar to the section of the Acknowledgment of Parentage Act that House Bill 5328 repealed (MCL 722.1011). Under that section, a claim for revocation of an acknowledgment could be brought only by the mother or the man who signed it, the child, or a prosecuting attorney. The new requirements for an affidavit are the same as the previous requirements. Previously, however, if the affidavit was sufficient, the court was permitted, but not required, to order blood or genetic tests at the expense of the

claimant. The provisions in the Revocation of Paternity Act regarding the burden of proof, the State Registrar, and representation of a party are generally the same as prior law.)

Revocation of Order of Filiation

The following provisions of the Revocation of Paternity Act apply to an action in which a child has an affiliated father (a man who has been determined in a court to be the child's father).

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

If the court determines that the motion to set aside the order of filiation should be denied, the court must 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 Act, the court may 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 may refuse to enter an order setting aside a paternity determination or determining that a child was born out of wedlock if the court finds evidence that the order would not be in the child's best interests. The court may consider the following factors:

- Whether the presumed father is 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 may result to the child.
- Other factors that may affect the equities arising from the disruption of the father-child relationship.
- Any other factor that the court determines appropriate to consider.

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

Blood or Tissue Typing; DNA Profiling

The court must order the parties to an action or motion under the 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 must be conducted in accordance with a section of the Paternity Act. The results will not be binding on the court.

Extension of Time for Filing

A court may extend the time for filing an action or motion under the Revocation of Paternity Act. A request for extension must 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 finds that the affidavit is sufficient, the court may allow the action or motion to be filed and take other action it considers appropriate. The party filing the

request has the burden of proving, by clear and convincing evidence, that granting relief under the Act will not be against the best interests of the child considering the equities of the case.

Other Provisions

An original action under the Act must be filed in the circuit court for the county where the mother or the child reside or, if neither the mother nor the child resides 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 exists at any stage of the proceedings in a circuit court of Michigan, or if an action under Section 2(b) of the juvenile code is pending in a circuit court of this State (e.g., for abuse or neglect), an action under the Act must be brought by motion in the existing case under Supreme Court rules.

A judgment entered under the Act will not relieve a man from a 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 may not issue an order under the Act that sets aside a judgment or determination of a court or administrative agency of another state, even if the judgment or determination is being enforced in Michigan.

If a case is a Title IV-D case, the court may 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 Act. The court also may appoint a guardian ad litem to represent the child's interests. ("Title IV-D case" means 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.)

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

If an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity

and enter an order of filiation as provided in the Paternity Act.

The Act states that it does not establish a basis for termination of an adoption or affect any obligation of an adoptive parent to an adoptive child.

The Act also does 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 will remain available until two years after that date but then will not be available.

In its discretion, a court may order a person who files 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 will secure the costs of the action and attorney fees if the person does not prevail. The court also may order a nonprevailing party to pay the reasonable attorney fees and costs of a prevailing party.

An action may not be brought under the Act if the child is under court jurisdiction under the juvenile code and a petition has been filed to terminate the parental rights to the child, unless the court having jurisdiction under the juvenile code first finds that allowing an action under the Act would be in the child's best interests.

MCL 722.1431-722.1445 (S.B. 557)
700.2114 (S.B. 560)
722.1007 (H.B. 5328)
722.720 (H.B. 5329)

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 could 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). Based on its construction of this language, the *Girard* Court held that a putative father did not have standing to bring a paternity suit unless there had been a *prior* court determination that the mother's husband was not the father.

Although *Girard* interpreted the Paternity Act as it was written in 1985, the present definition of "child born out of wedlock" is virtually the same, and the *Girard* holding remained the 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, until now, the child's biological father could not bring a paternity suit unless a court had determined in a prior action (usually a divorce) that the mother's husband was not the child's father; the child then was legally considered born out of wedlock. Without such a determination, an alleged father did not have standing to bring a paternity action even if the mother acknowledged that he was the child's father, he had begun to raise the child as his own, and he had DNA test results showing a 99.9% probability that he was 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 could bring a paternity action, however, 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 address multiple types of scenarios and relationships by allowing legal proceedings if specified criteria are met. An action may be brought by a child's mother, a man who claims 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 has signed an acknowledgment of parentage, or a man whom a court has 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 prior law, as discussed above, if a child had a presumed father, an alleged father had no standing unless a court had determined that the presumed father was not that child's father. Although a presumed father or a child's mother could contest that presumption in a divorce proceeding, whether he or she could do so otherwise depended on the court and the judge. While an acknowledged father already could bring an action to revoke the acknowledgment of parentage, the legislation also allows an alleged father to bring such an action. In addition, an affiliated father already could 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 new Act creates separate legal proceedings, identifies who has standing, and sets 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 may help families avoid or end government assistance and become self-sufficient.

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

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills will have an indeterminate fiscal impact on State and local government. To the extent that the bills lead to an increase in the caseloads of the various circuit courts, the State and local units of government may

incur some increase in administrative costs. Any increase in costs, however, will be offset to some degree by a corresponding increase in relevant filing fees, motion fees, and other court-imposed fees or payments.

Fiscal Analyst: Dan O'Connor

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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.