



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 256 (as reported without amendment)
Sponsor: Senator Steven Bieda
Committee: Judiciary

Date Completed: 4-20-11

RATIONALE

Under Michigan law, a man who claims to be a child's father--a "putative" 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 putative fathers should be able to bring paternity actions 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. It has been suggested that the Paternity Act should allow an action by a putative father if the child's mother acknowledges his paternity, or if she was legally separated or unmarried at the time of conception, and paternity has been or can be established by a blood, tissue, or DNA test.

CONTENT

The bill would amend the Paternity Act to do the following:

- **Allow a putative father to bring a paternity action.**
- **Provide that a putative father could not bring a paternity action if the mother were married at any time between conception and the child's birth, unless a biological relationship between the child and the putative father was acknowledged or the mother was legally separated or unmarried around the time of conception, and other conditions were met.**
- **Revise the definition of "child born out of wedlock".**
- **Require a putative father to pay for the genetic testing expenses in an action he filed.**
- **Specify that a judgment in an action brought by a putative father would not relieve a presumed father, or an individual named as a father on a birth certificate, from a child support obligation incurred before the judgment.**

The Act defines "child" as a child born out of wedlock. "Child born out of wedlock" means 1) a child born to a woman who was not married from the conception to the date of the child's birth, or 2) a child whom the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.

In the second category, the bill would refer instead to a child whom the court has determined, *before* an action filed under the

Act, to be a child born or conceived during a marriage but not to be the issue of that marriage. The bill also would include in the definition a child whom the court determines, *during* the pendency of a paternity action, to be a child born or conceived during a marriage but not to be the issue of that marriage.

The Act allows a paternity action to be brought in the circuit court by the mother, the father, the Department of Human Services (DHS), or a child who turned 18 years old after August 15, 1984, and before June 2, 1986. The bill would delete that reference to a father, and allow a paternity action to be brought by an individual named as the child's father on a birth certificate or the child's presumed father.

The bill also would allow a putative father to bring a paternity action, unless the child were conceived as a result of acts for which the putative father was convicted of first-, second-, third-, or fourth-degree criminal sexual conduct.

If a child's mother were married at any time from the conception to the date of birth of the child, a putative father could not bring a paternity action unless the action was commenced within one year after the child's birth, a father was not named on the child's birth certificate within one year after the child was born, or the mother's husband refused to be named as the father on the child's birth certificate, and one or more of the following applied:

- The mother and the putative father mutually acknowledged a biological relationship between the putative father and the child.
- The mother was separated from her husband or was not married at or around the time of conception.
- The mother acknowledged in writing a biological relationship between the putative father and the child.

If the mother and the putative father mutually and openly acknowledged a biological relationship between the putative father and the child, they would have to do all of the following:

- File with the court an affidavit stating that the putative father was the child's biological father.

- File with the court the results of blood or tissue typing or DNA identification profiling that established that the probability of paternity by the putative father was 99% or higher.
- Notify the child's presumed father or an individual named as the child's father on a birth certificate that the affidavit and results had been filed.

If the mother were separated from her husband under an order or judgment entered in an action for separate maintenance or not married at or around the time of conception, the putative father would have to do the following:

- File with the court an affidavit stating that he was the child's biological father and that he consented to or a court had ordered DNA identification profiling.
- Notify the child's presumed father or an individual named as the child's father on a birth certificate that the affidavit had been filed.

If the mother acknowledged in writing a biological relationship between the putative father and the child, the putative father would have to meet the two requirements listed above, as well as demonstrate to the court that he had had parenting time with the child by agreement with the mother.

The Act requires a county prosecuting attorney or an attorney employed by a county to initiate and conduct paternity actions if the county DHS office determines that the mother or alleged father has physical possession of the child and is eligible for public assistance or without means to employ an attorney, if the DHS is the complainant, or if the mother, alleged father, or child is receiving services under Part D of Title IV of the Social Security Act (which provides for grants to states for child support enforcement and paternity actions). Under the bill, this requirement would not apply to an action brought by a putative father.

MCL 722.11 et al.

BACKGROUND

As indicated above, 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 *Girard* Court interpreted the words "which the court has determined" in the definition of a "child born out of wedlock", 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*, No. 293445), "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 simply does not divorce him. 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, a putative 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 are reasons of policy and practicality to presume that a child was fathered by the mother's husband, that presumption has been rebuttable 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.

By allowing putative fathers to bring paternity actions under limited sets of circumstances, in cases in which the mother was married any time between the child's conception and birth, the bill would bring

fairness, compassion, and modernity to the law.

Response: The bill could be improved in several ways. First, a child's interests are paramount to those of any other party, and the bill should direct the court to consider the best interests of the child in a paternity action brought by a putative father.

Also, before a putative father could assert paternity, the first step in the process should be to "disestablish" paternity with respect to the husband of the child's mother. This would involve presenting the court with evidence that the husband was not the biological father, and obtaining a judicial determination to that effect.

In addition, the bill should make an exception to the requirement that a putative father file a paternity action within one year after the child's birth. Sometimes, a married couple will separate but never divorce and the woman will live with another man who conceives a child with her; that man may see no reason to file a paternity action until his relationship with the child's mother ends, which might be years after the child was born. Under the language of the bill, the action would be barred.

Furthermore, very few paternity actions would be allowed under the bill due to the language that would preclude an action if a father were named on the child's birth certificate within one year after the child was born. Unless a married woman lies about her marital status when she gives birth, her husband's name will automatically be placed on the child's birth certificate.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Matthew Grabowski

A1112\S256a.

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.