

Uniform Parentage Act Work Group

ESTABLISHING, DISESTABLISHING AND CHALLENGING LEGAL PATERNITY

HB 2382
(-1 Amendments)

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I. Introduction

Oregon's paternity law is based on the 1973 Uniform Parentage Act, which was promulgated a short time after the Supreme Court first held in *Stanley v. Illinois*, 405 U.S. 645 (1972), that at least some unmarried fathers have constitutionally protected rights regarding the custody and rearing of their children. The Oregon laws have been amended over the years, but the legislature has not comprehensively reexamined the paternity issue for more than 30 years.

Laws and social practices affected by the law of paternity have changed significantly since the 1970s. Among the most important forces of change are the availability of genetic testing that can identify a child's parents with certainty and the development of a sophisticated and complex federal-state program for establishing paternity and collecting child support. Perhaps of greatest significance in the long-run are major changes in family forms and mores. Compared to 30 years ago, many more children are born to unmarried women, and many more children spend portions of their lives living in households with a parent and the parent's partner who is not the child's biological parent but who may function as a parent and to whom the parent may or may not be married.

These changes are not confined to Oregon, but are occurring across the country. The laws from the mid-twentieth century regarding legal parentage sometimes deal inadequately with new problems that arise because of these changes or do not address them at all. The most prominent issues concern the circumstances under which legal paternity can be challenged on the basis that the legal father is not the child's biological father. This report proposes how Oregon law should be revised in light of these social and technical changes.

II. History of the project

In 2004, the Oregon Child Support Program asked the Oregon Law Commission to convene a work group to examine the law of paternity, particularly but not exclusively the circumstances in which paternity may be challenged or disestablished. The Program asked the Commission to undertake this project because of the potentially far-reaching impact of amending paternity laws and the large number of stakeholders with an interest in these issues. The Program identified as a possible model for reform the 2002 Uniform Parentage Act (UPA), promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the ABA in 2003. Seven states, including Washington, have revised their parentage statutes based on the 2002 UPA.

The Commission agreed to the Child Support Program's proposal and appointed a work group charged with examining all provisions of the UPA except Articles 7 and 8 (related to assisted reproduction and gestational agreements) in relation to current Oregon law and determining whether the UPA should be adopted in whole or in part. The group was not limited to making recommendations about the UPA but was instructed to propose law reforms in this area.

The work group was large because the paternity law potentially affects so many areas, including private custody and child support, adoption, the federal-state child support enforcement program, and juvenile court dependency proceedings. Its members, who were the voting members when formal votes were taken, were Karen Berkowitz, Oregon Law Center;

Paula Brownhill, Clatsop County Circuit Court Judge;¹ Emily Cohen, Oregon State Bar (OSB) Juvenile Law Section; Gil Feibleman, OSB Family Law Section; Summer Gleason, Clackamas County District Attorney; Lawrence Gorin, OSB Family Law Section; Professor Kathy Graham, Willamette School of Law; Sandra Hansberger, Executive Director Campaign for Equal Justice; Professor Leslie Harris, University of Oregon School of Law; Russell Lipetzky, OSB Family Law Section; Matt Minahan, D.A.D.S. of America; Maureen McKnight, Multnomah County Circuit Court Judge; Robin Pope, OSB Family Law Section; Mickey Serice, Deputy Director Department of Human Services (DHS) Children, Adults, and Families; Ronelle Shankle, Department of Justice (DOJ) Policy, Projects, & Legislative Coordinator; BeaLisa Sydlik, Oregon Judicial Department (OJD) Court Programs and Services Division; and Angelica Vega, Marion-Polk Legal Aid Service. The chair of the work group was Oregon Law Commission member Sandra Hansberger. Staff attorney assistance was provided by Samuel Sears, Oregon Law Commission; Susan Grabe, OSB; and Doug McKean, Legislative Counsel. Leslie Harris was the reporter.

Advisors to the work group, who participated in meetings, were Scott Adams, OSB Family Law Section; Kevin Anselm, Office of Administrative Hearings; Tim Brewer, OSB Family Law Section; John Chally, OSB Family Law Section; Stacey Daeschner, DHS Children, Adults, and Families; David Gannett, OSB Family Law Section; Carmen Brady-Wright, DOJ Family Law Section; Sybil Hebb, Oregon Law Center; David Koch, Multnomah County Juvenile Services Division; Shari Levine, Executive Director Open Adoption & Family Services; Vicki Tungate, DOJ Division of Child Support; and Jennifer Woodward, DHS Center for Health Statistics.

Interested persons who were advised of the group's activities and some of whom participated in work group sessions included Deb Carnaghi, DHS Children, Adults, and Families; Jean Fogarty, DOJ General Counsel; Thomas Hedberg, DOJ Division of Child Support; Audrey Hirsch, DOJ Family Law Section; Nancy Keeling, DHS Children, Adults, and Families; Tim Loewen, Yamhill County Juvenile Department; Kim Mosier, DOJ Family Law; Gail Schelle, DHS Children, Adults, and Families; Amy Sevdy, DHS Children, Adults, and Families; Catherine Stelzer, DHS Foster Care; Kathie Stocker, Holt International Children Services; Ingrid Swenson, Office of Public Defense Services; William Taylor, Staff Counsel Judiciary Committee; and Patrick Teague, DOJ Division of Child Support.

To prepare for this project, the work group familiarized itself with the following materials in addition to the 2002 UPA:

- 1) Cases from the United States Supreme Court on the rights of unwed biological fathers;
- 2) Oregon statutes and cases from the Oregon Supreme Court and Court of Appeals concerning the establishment of legal paternity;
- 3) Provisions of federal law with which Oregon must comply as a condition of participating in the federal-state child support enforcement program; and
- 4) Newspaper and legal journal articles and technical reports about trends in the law regarding paternity disestablishment across the country and specific provisions of several states' laws.

In fashioning this proposed legislation, the work group also reviewed the work of the 2005 OLC Putative Fathers Work Group, which drafted amendments to Chapters 109 and 419B that were enacted as SB 234 in 2005.

¹ Judge Brownhill had to resign from the work group in the fall of 2006.

III. The problems that this proposal addresses

In the 1970s, about 90 per cent of all children were born to married women, and their paternity was resolved by the legal presumption that a married woman's husband is the father of her children.² In a number of states, including Oregon, legal rules prohibited the admission of evidence to rebut the presumption³ or precluded parents from testifying so as to "bastardize" their child. Even in states where the presumption could be rebutted, blood tests then available were so primitive that they were unlikely to exclude a man as the biological father even if he were not.⁴ As a result of these conditions, the legal father of most children was also the social father, the man who functioned as their father – their mother's husband. This man was usually also their biological father, but even when he was not, few people were likely to know for sure. Children born to unmarried mothers typically did not have a social father, but they also did not have legal fathers because paternity was often not legally established. In these circumstances, the law simply did not need to choose between children's biological and social fathers for purposes of determining their legal fathers. For all practical purposes, social fathers were legal fathers.

Legal and social changes have brought sharp challenges to this approach to legal paternity. The most important issue, the one that underlies most of the problems that this proposal deals with, is the relative importance of social and biological paternity in determining legal paternity when a child's legal father and biological father are not the same. This issue arises both for legal fathers who are not and have never been married to the children's mothers and for husbands who are presumed to be the legal fathers of their wives' children.

Changes in the number and legal position of children born to unmarried women make it much more likely today that men will have the legal responsibilities of fatherhood without being the children's social fathers. Today about a third of all children are born to unmarried women, about a quarter to a half of whom live with the child's father at birth.⁵ All states, including Oregon, now aggressively seek to determine the biological paternity of children born to unmarried mothers for purposes of imposing child support obligations on these men. The result is that many unmarried legal fathers have never functioned as their children's social father.

In addition, the legal methods for establishing paternity create risks that the men identified as fathers may not actually be biological fathers. The federal-state child support enforcement program encourages unmarried mothers and men believed to be fathers to establish legal paternity voluntarily; all states, including Oregon, allow mothers and alleged fathers to do this by signing a voluntary acknowledgment identifying the man as the legal father and filing it with the state.⁶ This has become the most common way that legal paternity of children born to

² Center for Disease Control and Prevention, 48 (16) *National Center for Health Statistics Report* 17 (table 1) (Oct. 18, 2000).

³ ORS 109.070 creates a conclusive presumption that a married woman's husband is the legal father of her children if he is not impotent or sterile and was living with the mother at the time of conception.

⁴ Ira Mark Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?* 54 N.Y.U. L. REV. 1131, 1135 (1970).

⁵ Mary Parke, *Who are "Fragile Families" and What Do We Know About Them?* (Center for Law & Social Policy Policy Brief Jan. 2004); Larry Bumpass et al, *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, DEMOGRAPHY 425, 436 (1995); Jason Fields & Lynne Casper, *America's Families and Living Arrangements*, *Current Population Reports P20-537* at 12-14 (2001).

⁶ The federal requirements are set out in 42 U.S.C. § 666(a)(5). The state statutes are discussed in this report.

unmarried mothers is established.⁷ Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility. A voluntary acknowledgment can be signed without genetic testing having been done; indeed, federal law provides that states may not require blood testing as a precondition to signing a voluntary acknowledgment of paternity.⁸ The second most common way that paternity of children born to unmarried mothers in Oregon is through an administrative process that establishes legal judgments of paternity.⁹ Blood testing is available, but orders are not infrequently entered when testing has not been done because the man alleged to be the father does not contest the action, believing that he is the father, or because he does not respond and a default order is entered.

Today when someone becomes suspicious that a child's legal father may not be the biological father, genetic testing can readily resolve the question. In the last 30 years, tests have been developed that can identify a child's biological parents with certainty in most cases. These tests are not prohibitively expensive for most individuals and are easy to administer, and they are being used with increasing frequency.

Recent studies show that almost always the man identified as a child's legal father is the biological father. The most comprehensive data analysis concluded that in the U.S., 98 percent of the men raising children they believe to be their biological children are correct and that only 30 percent of the men who seek blood tests to confirm paternity are not the biological father.¹⁰ Data from the Vital Records section of the Oregon Health Division and the Child Support Program show that in less than one per cent of all cases in which paternity was established by voluntary acknowledgment were judicial orders later entered finding that the man was not the biological father. In fiscal years 2004, 2005 and through March of 2006, of the 27,536 cases in which paternity was established by voluntary acknowledgment, a party filed a request with the state to reopen the paternity findings in 79 cases. In 22 percent of these 79 cases, the man identified as the legal father was found not to be the biological father.¹¹

Nevertheless, when genetic testing does show that a child's legal father is not the biological father, someone – most often the mother or the legal father – may want to obtain a legal order that the man is not the legal father. Oregon law addresses the possibility of such challenges, but the results it provides have come under criticism. Each of the ways that paternity can be established – by presumption, by voluntary acknowledgment, and by administrative or court order – has come under scrutiny.

A. Presumptions that husbands are the legal fathers of their wives' children

ORS 109.070(1)(a) provides that a husband is conclusively presumed to be the father of

⁷ According to data from the Oregon Vital Records office and Child Support Program, in fiscal years 2004, 2005 and through March of 2006, paternity was established for 31,866 children in the state; of these, 27,536 or more than 86 per cent of the total, were by voluntary acknowledgment. These figures were provided to the work group by representatives from the Vital Records Office and Child Support Program who participated in the group.

⁸ 45 CFR 302.70(a)(5)(vii).

⁹ See ORS 416.400 to 416.465.

¹⁰ Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Results from Worldwide Nonpaternity Rates*, 48 (3) CURRENT ANTHROPOLOGY 511 (2006), discussed at *Nearly All Paternity Tests Back Dad's Biological Claim*, FORBES MAGAZINE, (Apr. 17, 2006), www.forbes.com/forbeslife/health/feeds/hscout/2006/04/17/hscout532176.html and U. S. D.H.H.S. HEALTHDAY REPORTER (Apr. 17, 2006), <http://www.healthfinder.gov/news/newsstory.asp?docID=532176>.

¹¹ These figures were provided to the work group by representatives from the Vital Records Office and Child Support Program who participated in the group.

his wife's children if he is not impotent or sterile and the couple was cohabiting at the time of conception.¹² The effect of the conclusive presumption is to define the husband as the legal father of his wife's children, regardless of biological reality, if the facts of cohabitation and fertility are proven. *See Matter of Marriage of Hodge*, 301 Or. 433, 722 P.2d 1235 (1986). The only other state with a conclusive presumption allows husbands and wives to challenge it under some circumstances. Cal. Fam, Code §§ 7540, 7541.

The conclusive presumption is no longer justified by lack of reliable evidence about biological parentage, but it does protect married couples who are raising children who are not the husband's biological offspring from outsiders to the marriage who want to establish the husband's nonpaternity. The most common challenge would be from the biological father of a child who wanted to establish a legal relationship with the child over the objection of the mother and her husband. The conclusive presumption of paternity can constitutionally be invoked to preclude a biological father from establishing his own paternity in such a case. *Michael H. v. Gerald D.*, 499 U.S. 937 (1989).

The problem, then, is determining whether to retain the conclusive presumption and, if it is abolished, whether to allow third parties to challenge a husband's paternity when he and the mother object.

B. Rescinding and challenging voluntary acknowledgments of paternity

The federal child support enforcement laws require state law to create a voluntary acknowledgment of paternity process and to provide that a valid, unrescinded voluntary acknowledgment is legally equivalent to a judgment of paternity. State law may permit a voluntary acknowledgment to be challenged only on the basis of fraud, duress or material mistake of fact. 42 U.S.C. § 666(a)(5).

Oregon statutes comply with these requirements. Under ORS 109.070(2), a party to a voluntary acknowledgment of paternity may rescind it within the earlier of 1) sixty days after the acknowledgment was filed or 2) the date an order in a proceeding relating to the child, including a proceeding to establish a support order, was entered. Under ORS 109.070(3), a voluntary acknowledgment may be challenged in circuit court on the basis of fraud, duress or material mistake of fact at any time by a party to the acknowledgment, the child or the Department of Human Services or the administrator of the child support enforcement program if the child is in the care and custody of DHS as a dependent child under ORS 419B and the department or the administrator reasonably believes that the acknowledgment was obtained through fraud, duress or a material mistake of fact. Subsection (3) also allows a challenge to be brought in circuit court for up to one year, unless ORS 109.070(4)(a). Subsection (4)(a), in turn, allows a party or the state, if child support enforcement services are being provided and if blood testing has not been done, to apply to the child support administrator or the court for an order for blood testing for up to one year after the acknowledgment was signed. If the blood tests exclude the man as the child's biological father, a party or the state may apply to the court for a judgment of nonpaternity. The paternity that receives this judgment must send it to the state office of vital records so that the child's birth records can be corrected.

The principal problems with this section are 1) the lack of a clear procedure for exercising the rights to rescind or challenge a voluntary acknowledgment, 2) whether a court should have discretion to refuse to set aside a voluntary acknowledgment to achieve justice and

¹² SB 234, which was passed by the legislature in 2005, removed the conclusive presumption from Oregon law. That provision, however, sunsets effective January 2, 2008.

equity for the parties and the child, and 3) whether blood test evidence showing that the man who signed the voluntary acknowledgment is not the biological father should automatically result in an order setting aside the acknowledgment on the basis of fraud or mistake if either of the parties was unaware that the man was not the biological father.

A fourth problem, particularly important in adoption cases, is that mothers and alleged fathers may sign acknowledgments of paternity at any time, even after the mother has relinquished a child for adoption after identifying another man as the father. If this happens, the adoption may not go forward or may be delayed until the man's parental rights are terminated.

C. Challenging administrative orders of paternity

ORS 416.443 provides that if paternity was established administratively through the Child Support Program, a party may petition to reopen the matter for up to one year if no genetic tests were done before the finding of paternity was made. This section does not fully set out the procedure for handling such petitions, and it does not make the process available when paternity is established by voluntary acknowledgment because it was enacted before the statutes establishing the voluntary acknowledgment process. However, ORS 109.070(4), as discussed above, does allow a party and, in some cases the state child support enforcement agency, to use this process for up to one year when paternity was established by acknowledgment and blood testing was not done.

D. Challenging judicial orders of paternity

The Oregon statutes do not establish a specific process for challenging a judicial order of paternity. The main issues presented to the work group were whether the Oregon statutes should set out a process for challenging orders of paternity or leave the process to be governed by ORCP 71, and whether the case law that has developed regarding challenges to orders of legal paternity on the basis that the legal father is not the biological father applies rules that are consistent with current policy.

Under existing Oregon law, a judgment of paternity is *res judicata* as to parties to the proceeding. ORCP 71 provides that a judgment procured by fraud is an exception, but if the father does not contest the proceeding, he cannot successfully claim that he was defrauded if later blood testing shows that he is not the biological father. *Watson v. State*, 71 Or. App. 734, 694 P.2d 560 (1985). If a husband does not contest that he is the father of a child during a divorce proceeding, and he later learns that the mother lied to him about this, he does not have a claim to set aside the judgment under ORCP 71. *McClain v. McClain*, 155 Or. App. 258, 958 P.2d 909 (1998).

E. Rights of putative fathers in proceedings under ORS Chapter 109

SB 234, proposed by the Law Commission and enacted by the 2005 legislature, redefined which putative fathers (alleged fathers whose paternity has not been resolved) are entitled to procedural and substantive protection in juvenile court proceedings regarding the custody of their children to bring the law into line with constitutional requirements and express sound policy. ORS 419B.875. The work group that proposed this legislation recognized that ORS 109.096 deals with the same issue of putative fathers' rights when adoption or custody proceedings are brought under Chapter 109. However, the work group did not recommend amendments to ORS 109.096 because its members believed that all the groups with an interest in actions under Chapter 109 were not adequately represented on the group. This issue was referred to the UPA

work group. However, this proposal does not address this contested issue because the work group simply ran out of time to do so.

IV. The objectives of the proposal

The proposed legislation addresses the problem areas identified above as well as an issue that is common to all methods of establishing paternity.

A. Amendments regarding the presumption that the husband is the child's father

1) Abolish the conclusive presumption of paternity but retain a rebuttable presumption

The work group unanimously concluded that, given the availability of relatively inexpensive, reliable genetic testing, the absolute rule that a husband is father of his wife's children no longer expresses sound public policy and that only the rebuttable presumption should continue to be part of Oregon law. The work group considered a proposal to impose a time limit on challenges by the parents, as does California law. Cal. Fam. Code §7541. The Uniform Parentage Act also requires that challenges to a presumption that a man is the father of a child be brought within two years of the child's birth. UPA § 607(a). While the work group was divided on this issue, those who favored a time limit agreed not to impose one in the spirit of compromise with those who believed strongly that a husband should be able to challenge the presumption at any time.

2) Create a presumption regarding the paternity of children born soon after the end of a marriage

The work group also decided to recommend enactment of a new rebuttable presumption – that a child born to a formerly married woman within 300 days of the ending of the marriage is the child of the former husband. This presumption derives from UPA § 204(a)(2). Without this provision, a child born to a woman after her husband dies, they divorce, or the marriage is otherwise terminated has no presumptive father, even though it may be very likely that the former husband is the father. The work group was informed that, when a child is born under these circumstances and the parties have no reason to doubt the husband's paternity, Oregon practitioners sometimes proceed as if this presumption existed.

The provision produced some controversy in the work group because it requires that a former husband (or a former wife who objects to her former husband being the legal father) take steps to rebut the presumption. One member of the group was particularly concerned about the difficulties of rebutting the presumption if the marriage ended by death. A majority of the work group voted 8-2 to create the presumption, concluding that it codifies current practice in many situations and expresses sound policy. Members of the work group observed that in the situation where the husband of the child has died and his paternity is challenged, if it is not possible to do genetic testing, the presumption can be rebutted by other evidence. It is also possible in such a situation that no one would invoke the rebuttable presumption in the first place.

3) Limit the ability of third parties to challenge a husband's paternity

The work group unanimously concluded that public policy favors protecting married couples raising children from challenges to paternity by outsiders to the family for so long as a couple wishes to remain together and raise the children together. Allowing a third party to raise a paternity challenge would violate the parents' right to family and marital privacy and would not

serve the interests of the children. However, if the parents are no longer married and living together, their claim to privacy and the assumption that the interests of the children are served by allowing the parents to raise them without interference are not so strong. Therefore, the work group recommends that for so long as the mother and her husband are married and living together, only one of them may introduce evidence in any legal proceeding to challenge the husband's paternity. This provision is similar to California Family Code §§ 7540, 7541. The group discussed what term properly describes the family that is protected and decided to use "married and cohabiting" with the understanding that the term is not to be interpreted narrowly but covers all intact families. Thus, a family in which one spouse was away for an extended period, but the husband and wife were still together as a couple would be protected by the provision.

B. Procedures and standing for challenges to voluntary acknowledgments of paternity

1) Failure to give adequate advice about the legal effect of acknowledgments

The work group discussed whether hospitals are following recommendations from the Department of Justice to give information about the legal effects of voluntary acknowledgments to mothers and putative fathers before they sign these documents. Work group members expressed concern that often hospital staff do not show videos or give adequate warnings regarding the consequences of signing an acknowledgment and recommended greater efforts to educate attorneys, the public, and hospital staff about signing and challenging voluntary acknowledgments.

2) Create a process for challenging voluntary acknowledgments

The work group voted 9 to 1 to establish an explicit statutory process to challenge voluntary acknowledgments, with 2 abstentions. The limited resistance to this proposal was based on the belief that a detailed procedure was not necessary. The majority of the work group accepted arguments from the Child Support Program that a significant number of people who want to rescind or challenge voluntary acknowledgments are proceeding *pro se* and need statutory guidance.

3) Challenges to voluntary acknowledgments based on blood test evidence

The work group discussed at length whether the law should explicitly provide that a person who is not a biological parent may not sign a voluntary acknowledgment and whether a purported acknowledgment from such a person should be *per se* invalid. Ultimately the group decided not to impose these requirements. Federal legislation and the history of the federal legislation indicate that there is not a federal requirement that the man who signed the voluntary acknowledgment be the biological father. Moreover, the federal and state laws that allow an acknowledgment to be challenged after 60 days for fraud, duress or material mistake of fact is inconsistent with the idea that a voluntary acknowledgment should automatically be set aside upon submission of blood test evidence showing that the man who signed the acknowledgment is not the biological father. Cases from other states reach inconsistent conclusions about whether lack of biological parentage is enough to support a finding of material mistake of fact, and the group decided not to propose legislation on this issue but to leave it for judicial development.

4) Define fraud for purposes of this statute

The group rejected a proposal to define "fraud" for purposes of this section. The group

concludes that fraud is adequately described in case law and that further definition might create confusion rather than clarity.

5) Prohibit parents whose rights have been eliminated from filing acknowledgments

The group also agreed to prohibit parents who have already relinquished children for adoption or whose parental rights had been terminated from signing voluntary acknowledgments that would have the effect of delaying the adoption or other permanent placement of the children. This provision was not controversial.

C. Allow petitions for blood testing when a voluntary acknowledgment was signed without testing having been done and clarify the process when a petition is filed

Under existing law, if blood tests were not performed before an administrative order of paternity is entered, a party to the proceeding may file an administrative petition to reopen the issue for up to one year. ORS 416.443. A party to a voluntary acknowledgment or the state, if child support enforcement services are being provided, may seek an order from the court or from the administrator for blood testing for up to one year after the acknowledgment was signed if blood tests were not done. ORS 109.070(4)(a). The work group agreed to extend this option to the state if the child is in state custody under the dependency provisions of ORS Chapter 418B.

ORS 416.443 implicitly contemplates that if blood testing shows that the legal father is not the biological father, the administrator may seek a court order of nonpaternity, but the section does not state this clearly. The work group agreed to propose language that will make this explicit.

D. Create an explicit process for challenging judicial orders of legal paternity on the basis that the legal father is not the biological father

The work group was divided about whether the Oregon statutes should be amended to create a specific process for challenging orders of paternity. Several lawyers argued that this was unnecessary because ORCP 71, governing motions to set aside judgments, is entirely sufficient for the purpose. However, representatives from the Child Support Program argued that a statutory process is needed because a number of people who wish to make challenges proceed *pro se* and do not understand how the rules of civil procedure could relate to their problem. The work group agreed to set out a procedure that is as parallel as possible to ORCP 71. The group also agreed that the substantive rules here should be the same as the substantive rules applicable to challenges to voluntary acknowledgments unless an explicit reason for treating the two kinds of paternity findings differently exists.

1) Standing to file a petition

Standing to file a petition to challenge an order of paternity is extended to the same persons and entities that can file a challenge to a voluntary acknowledgment: the parties, DHS if the child is in the custody of DHS as a dependent child under ORS Chapter 419B, and the Division of Child Support if support rights have been assigned to the state. However, the estate of a legal father who has died may not bring an action under this statute. The work group intentionally decided to limit access to this procedure to those most likely to raise challenges, while recognizing that it is possible that others may have interests that are affected by a finding of legal paternity and wish to challenge it. Such actions would be governed by the rules of civil

procedure and generally applicable Oregon statutes.

2) Time limits on challenges

Challenges based on mistake, inadvertence, surprise or excusable neglect must be filed within one year. This provision is parallel to ORCP 71. A challenge based on fraud, misrepresentation or other misconduct must be brought within one year from the date of discovery.

3) Specifics of the petition

The work group agreed that the petition must state “the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested” to avoid having petitioners plead the language of the statute in conclusory terms.

The petitioner must designate as parties everyone who was a party to the original paternity proceeding, the child if he or she is “a child attending school” under Oregon law, DHS if the child is in DHS custody under the dependency provisions of ORS Chapter 419B, and the Division of Child Support if child support rights have been assigned to the state. Others may have interests that are affected by the proceeding, but in the interests of simplicity, the work group decided not to require that they be made parties. However, a proceeding under this section does not bar anyone who has an interest affected by a finding regarding the child’s legal paternity from bringing an action based on that interest. For example, a child may not bring an action under these amendments, and minor children are not parties to actions brought by others, but children’s interests are obviously affected by orders under this section. If a child wishes to bring an action regarding his or her paternity at a later date, due process would require that he or she be permitted to do so.

4) Representation of children’s interests

If the child is older than 18 and is a “child attending school” under Oregon law, he or she must be made a party. The work group decided that minor children should not be made parties, but the court on its own motion or the motion of a party may appoint counsel for the child and must appoint counsel on the child’s request. This provision parallels the requirements of ORS 107.425(2).

5) Effect of finding of nonpaternity on past and future child support

If a judge enters an order vacating or setting aside a finding that the man was the child’s legal father, he or she must enter an order that future support is not due and may enter an order providing that unpaid child support is excused or satisfied in whole or in part. The judge may not order the state to repay any child support that it collected before the finding of nonpaternity was made. These provisions are consistent with existing law regarding findings of nonpaternity when paternity was based on a voluntary acknowledgment.

6) Technical provisions

Even if blood tests have not been done, a judge may enter an order if a party defaults or if the parties agree. After a court sets aside or vacates a paternity determination, the petitioner must send a copy of the order to the state vital records office so that the child’s birth records can be corrected. The court may award reasonable attorney fees and costs to the prevailing party.

NOTE: Attorney members of the work group observed that under current law, family law

practitioners may not consider that a divorce decree that identifies children as “children of the marriage” is a judicial order establishing paternity because the conclusive presumption of paternity did not allow this issue to be contested. Since the conclusive presumption is being abolished, divorce is a logical time that the rebuttable presumption would be challenged. Practitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law.

E. Allow judges discretion to deny requests for blood tests and challenges to paternity based on justice and equity

Under current Oregon law, a court may refuse to allow the presumption of paternity to be challenged or to set aside the order because the petitioner is equitably estopped from denying paternity. *Johns v. Johns*, 42 Or App 439, 601 P.2d 475 (1979); *Hodge and Hodge*, 84 Or App 62, 733 P.2d 458 (1987). The work group discussed at great length whether to retain this discretion.

A minority of the work group believed that the biological fact of paternity should always determine legal paternity and objected to giving judges any discretion that could result in a finding that a husband, former husband, or other man identified as a legal father was still the legal father even though evidence showed him not to be a child’s biological father. The people taking this view framed the issue as one of fairness between the mother and the man and particularly focused on child support obligations. They argue that a man who can establish his biological nonpaternity has been defrauded by the mother’s unfaithfulness and simply should not be obliged to pay support under any circumstances. Some of this group would support allowing the judge to deny a challenge to paternity based upon a showing that the party making the challenge should be estopped from denying paternity because he knew the child was not his and still assumed the paternal role (or because she had represented that the child was the husband’s) and the other party had relied on this representation. However, these members of the group opposed allowing the judge to consider the child’s best interests in making the decision, believing that the matter should simply be an issue of equity between the adults.

A majority of the work group believe that the circumstances in which a presumption or rule establishing legal paternity might be challenged are so variable that judges should have discretion to determine whether the facts of a particular case are sufficiently unusual that justice to the parties and the child require that the legal relationship between the man and the child not be severed. For example, the presumption might be challenged by a mother who wanted to cut off the relationship between the child and her soon-to-be-former husband even though the husband and the child had a loving relationship and the husband wished to continue to act as a father to the child. If the rule were that biological paternity was absolutely determinative, the judge could not act to preserve the legal parent-child relationship, even if the judge found that the mother should be estopped from denying her husband’s paternity or that maintaining the parent-child relationship was in the child’s best interests. Similarly, a husband or man who has had both a social and legal relationship to the child for many years may seek to terminate the relationship because of the results of paternity tests and a desire not to pay child support. In this case, a judge would consider the emotional ties between the legal father and the child, as well as

the legal father's conduct toward the child. In other circumstances, especially where the child is very young, disestablishment is very likely to be the appropriate result.¹³

The majority concluded that society has a legitimate interest in protecting children from harm, especially in situations where the legal father has also had a social relationship with the child. Although we cannot legislate that fathers have continuing social relationships with their children, social policy does not and law should not condone severing these relationships. The work group decided that it would not be feasible to draft a statute that would be flexible enough to appropriately respond to the variety of fact scenarios that are likely to arise and that judicial discretion is an appropriate solution.

Some of the opponents who wanted biology to control argued that the judge could protect the husband and child with a developed relationship under the psychological parent statute, ORS 109.119. However, the conditions under which a nonparent can be awarded custody or visitation under ORS 109.119 are very limited, and as a constitutional matter, the position of a nonparent with rights under ORS 109.119 is far more tenuous than that of a legal parent. *See Troxel v. Granville*, 530 U.S. 57 (2000).

The work group voted 10-2 (with one abstention) to grant judges discretion to deny a motion to set aside a judgment of paternity when the evidence shows that the man is not the child's biological father and later voted to extend this discretion to situations where paternity was established by voluntary acknowledgment or marital presumption. Some of the work group wanted the statute to state explicitly that the judge could consider the child's best interests in making the determination because they fear that if the "best interests" language is omitted, judges will believe that they may consider only the interests of the parties and not the interests of the child. Opponents of this view argued that if the "best interests" language were included, some judges would take it as a signal to deny most petitions on the theory the best interests of the child is not usually served by disestablishing paternity. The work group settled on the language "just and equitable to the parties and the child" as best expressing that judges should consider both the conduct of the parties and the interest of the child in exercising this discretion.¹⁴

By way of comparison, The Uniform Parentage Act allows judges to deny a motion for genetic testing, the first step in rebutting a presumption of paternity under that Act, when the facts show that the party offering the evidence should be estopped from denying the father-child relationship or when the best interests of the child are served by denying the motion. UPA § 608. The UPA includes a list of factors to guide the judge in exercising the discretion granted under the "best interests" provision, and some of the members of the work group favored including such a list in the Oregon statute, but a majority did not support this approach.

The vote on whether to extend judicial discretion to paternity established by voluntary acknowledgment was 4-3 in favor of granting discretion, with a number of members absent. Some of those voting against judicial discretion believed that the federal law which allows challenges to voluntary acknowledgments only on the basis of fraud, duress or material mistake of fact, does not allow judicial discretion. The majority believed that judicial discretion was

¹³ As previously noted, the UPA allows challenges only during the first two years of the child's life. The work group recommends that challenges be permitted beyond this time, provided that courts retain discretion to consider all of the facts of the case.

¹⁴ The majority concluded that the same standard of judicial discretion should apply to disestablishing paternity where paternity was established by presumption, voluntary acknowledgment or judgment because legal rules should not vary simply because the decision-making forum differs.

allowed.¹⁵

F. Clean-up provisions

The work group recommends amendments to other statutory sections to make them consistent with the substantive changes made by the bill, and, as a courtesy, recommend amendments to correct omissions and mistakes from last year's SB 234. The specific changes are discussed in the section-by-section analysis below.

V. Review of legal solutions existing or proposed elsewhere

The work group spent much of the summer of 2006 working through the UPA to determine whether it should be enacted in Oregon. The group quickly agreed not to recommend that the UPA be enacted without changes because of disagreement over some policy issues. The group then considered whether to propose that the UPA be enacted with amendments to reflect these differences. However, the UPA is structured differently from existing Oregon law and does not address a number of issues that are covered in Chapter 109, making it quite difficult to fit the UPA and existing law together. Therefore, the group decided to consider the issues and policy choices expressed in the UPA but not to use it directly as the basis for proposed amendments.

The 2005 legislature amended SB 234, the bill regarding paternity in juvenile court that was developed by the OLC, to include changes regarding paternity disestablishment. These changes are effective only through January 2, 2008, because the legislature knew that this work group was going to reexamine the issues. The work group considered simply recommending that the changes be made permanent but decided to rethink the issues instead.

VI. The proposal

A. Provisions relating to the presumption that a husband is the father of children born to his wife

SECTION 1. ORS 109.070, as amended by section 17, chapter 160, Oregon Laws 2005, is amended to read:

¹⁵ It appears that states may limit the ability of parties to raise challenges, at least so long as the challenges are the kind that the state permits to be made to judgments. The Uniform Parentage Act, which was drafted by a team of experts from around the country, allows courts to disallow a challenge to a voluntary acknowledgment based on principles of estoppel. UPA § 609(c). *See also* State ex rel. W. Va. Dep't of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669, 677 (W. Va. 2000) (challenge to voluntary acknowledgment after the sixty-day period based on fraud, duress, or material mistake of fact is simply a threshold matter which does not require that the affidavit be set aside. Rather, once the threshold is met, the court must determine whether setting the affidavit aside is in the child's best interest.); *In re Paternity of Cheryl*, 746 N.E.2d 488 (Mass.2001)(where father voluntarily acknowledged child and judgment was entered accordingly and he moved to set aside five and a half years later, motion to vacate was not filed within a reasonable time, father was not entitled to relief from judgment under catchall provision of rule allowing for relief from judgment; and mother's alleged failure to disclose that father was not child's biological father did not constitute fraud upon the court.). The California voluntary acknowledgment statute allows a court to set aside an acknowledgment based on genetic testing showing that the man is not the biological father if in the best interests of the child and lists factors for the court to consider in making this determination. Cal. Fam. Code § 7575(b).

109.070. (1) The paternity of a person may be established as follows:

[(a) The child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child is conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void.]

[(b) A child born in wedlock, there being no judgment of separation from bed or board, is presumed to be the child of the mother's husband, whether or not the marriage of the husband and wife may be void. This is a disputable presumption.]

(a) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other at the time of the child's birth, without a judgment of separation, regardless of whether the marriage is void.

(b) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment or dissolution or after entry of a judgment of separation.

* * *

(2) The paternity of a child established under subsection (1)(a) or (c) of this section may be challenged in an action or proceeding by the husband or wife. The paternity may not be challenged by a person other than the husband or wife as long as the husband and wife are married and cohabiting, unless the husband and wife consent to the challenge.

(3) If the court finds that it is just and equitable to the parties and the child, the court shall admit evidence offered to rebut the presumption of paternity in subsection (1)(a) or (b) of this section.

COMMENT: The proposed amendments to subsections (1) (a) and (b) abolish the conclusive presumption that a husband who is not impotent or sterile and who was living with his wife at the time of conception is the father, retain the rebuttable presumption that a husband is the father of children born to his wife during the marriage, and establish a new presumption that a child born to a woman who is unmarried at the child's birth but who was married within 300 days of the birth is the child of her former husband.

Old subsection (1)(b), which will be renumbered (1)(a) retains the traditional rule that a husband is rebuttably presumed to be the father of children born to his wife during marriage. The language changes in this subsection update terminology to make the rule clearer and do not change substantive law.

New subsection (1)(b) creates a new rebuttable presumption, that a child born to a woman within 300 days after her marriage ended is the child of her former husband.

Subsection (1)(c)

Subsection (2) authorizes the husband or wife to offer evidence to rebut the presumption with no time limit. The subsection also provides that for so long as the husband and wife are married and cohabiting no other person may challenge the presumption without the consent of both the husband and the wife.

Subsection (3) gives the judge discretion to exclude evidence offered to rebut the presumption of paternity established in subsection (1) upon a finding that to do so is "just and equitable to the parties and the child." This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

B. Provisions relating to voluntary acknowledgements of paternity

SECTION 1. ORS 109.070, as amended by section 17, chapter 160, Oregon Laws 2005, is amended to read:

109.070. (1) The paternity of a person may be established as follows:

* * *

(c) By the marriage of the parents of a child after **the birth of the child, and the parents filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.287.**

* * *

(e) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.287. Except as otherwise provided in subsections *[(2) to (4)]* **(4) to (7)** of this section, this filing establishes paternity for all purposes.

[(2)] **(4)(a)** A party to a voluntary acknowledgment of paternity may rescind the acknowledgment within the earlier of:

[(a)] **(A)** Sixty days after filing the acknowledgment; or

[(b)] **(B)** The date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party. For the purposes of this **subparagraph**, the date of a proceeding is the date on which an order is entered in the proceeding.

(b) To rescind the acknowledgment, the party shall sign and file with the State Registrar of the Center for Health Statistics a written document declaring the rescission.

[(3)(a)] **(5)(a)** A signed voluntary acknowledgment of paternity filed in this state may be challenged **and set aside** in circuit court[:]

[(A)] at any time after the 60-day period **referred to in subsection (4) of this section** on the basis of fraud, duress or a material mistake of fact. *[The party bringing the challenge has the burden of proof.]*

(b) The challenge may be brought by:

(A) A party to the acknowledgment;

(B) The child named in the acknowledgment; or

(C) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B and the department or the administrator reasonably believes that the acknowledgment was obtained through fraud, duress or a material mistake of fact.

(c) The challenge shall be initiated by filing a petition with the circuit court. Unless otherwise specifically provided by law, the challenge shall be conducted pursuant to the Oregon Rules of Civil Procedure.

(d) The party bringing the challenge has the burden of proof.

[(B) Within one year after the acknowledgment has been filed, unless the provisions of subsection (4)(a) of this section apply. A challenge to the acknowledgment is not allowed more than one year after the acknowledgment has been filed, unless the provisions of subparagraph (A) of this paragraph apply.]

[(b)] **(e)** Legal responsibilities arising from the acknowledgment, including child support obligations, may not be suspended during the challenge, except for good cause.

(f) The court may set aside the acknowledgment if the court finds that it is just and

equitable to the parties and the child to do so and finds by a preponderance of the evidence that the acknowledgment was signed because of fraud, duress or a material mistake of fact.

(6) Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been completed, a party to the acknowledgment or the department, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for an order for blood tests in accordance with ORS 416.443.

(7)(a) A voluntary acknowledgment of paternity is not valid if, before the party signed the acknowledgment:

(A) The party signed a document consenting to the adoption of the child by another individual;

(B) The party signed a document relinquishing the child to a public or private child-caring agency;

(C) The party's parental rights were terminated by a court; or

(D) In an adjudication, the party was determined not to be the biological parent of the child.

(b) Notwithstanding any provision of subsection (1)(c) or (e) of this section or ORS 432.287 to the contrary, an acknowledgment signed by a party described in this subsection and filed with the State Registrar of the Center for Health Statistics does not establish paternity and is void.

[(4)(a) Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been previously completed, a party to the acknowledgment or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court or to the administrator, as defined in ORS 25.010, for an order requiring that the mother, the child and the male party submit to blood tests as provided in ORS 109.250 to 109.262.]

[(b) If the results of the tests performed under paragraph (a) of this subsection exclude the male party as a possible father of the child, a party or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court for a judgment of nonpaternity. The party that applied for the judgment shall send a certified true copy of the judgment to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of a judgment of nonpaternity, the state registrar shall correct any records maintained by the state registrar that indicate that the male party is the parent of the child.]

[(c) The state Child Support Program shall pay any costs for blood tests subject to recovery from the party who requested the tests.]

COMMENT: Subsection (1) (e) restates the existing requirements for establishing paternity by voluntary acknowledgment when the mother and alleged father are not married to each other.

Subsection (1)(c) amends former subsection (1)(c) by requiring that parents who marry after a child is born also file a voluntary acknowledgment of paternity to establish the husband's legal paternity. This provision is taken from UPA § 204(a)(4) and clarifies that all stepfathers do not automatically become the legal fathers of their wives'.

Subsection (4)(b) establishes a process for a party to rescind a voluntary acknowledgment.

Subsection (5)(b)-(d) creates the process for challenging a voluntary acknowledgment outside the 60-day rescission period, prescribes who may file such a challenge, and allocates the burden of proof. Some of these provisions were part of SB 234, proposed by the Oregon Law

Commission and enacted by the legislature in 2005, and were inadvertently made subject to sunset provisions in that legislation. This provision makes those terms permanent.

Subsection (5)(f) grants the judge discretion to decline to set aside the voluntary acknowledgment upon a finding that to do so is “just and equitable to the parties and the child.” This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

Subsection (6) allows a party or the state if the child is in the custody of DHS pursuant to a dependency proceeding brought under ORS Chapter 419B to use existing administrative procedures to seek blood tests to determine paternity for up to one year after the voluntary acknowledgment was filed if blood tests were not previously done. These administrative proceedings are governed by ORS 416.443, which is described in the next section.

Subsection (7) makes invalid a voluntary acknowledgment signed by a parent or alleged parent after that parent or alleged parent consented to adoption of the child or permanently relinquished the child to a child caring agency, after the parent’s rights were terminated by a court or after a court found that the alleged parent was not the child’s legal parent.

C. Provision related to administrative proceedings to challenge paternity

SECTION 7. ORS 416.443 is amended to read:

416.443. **(1) As used in this section, “blood tests” has the meaning given that term in ORS 109.251.**

[(1)] **(2) No later than one year after an order establishing paternity is entered under ORS 416.440 and if no *[genetic parentage test has]* blood tests have been completed, a party may apply to the administrator to have the issue of paternity reopened and for an order for blood tests.**

(3) No later than one year after a voluntary acknowledgment of paternity is filed in this state and if no blood tests have been completed, a party to the acknowledgment, or the Department of Human Services if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for services under ORS 25.080 and for an order for blood tests.

(4) Upon receipt of a timely application, the administrator shall order:

(a) The mother and the male party to submit to *[parentage]* blood tests; and

(b) The person having physical custody of the child to submit the child to *[a parentage test]* blood tests.

[(2)] **(5) If a party refuses to comply with an order under subsection *[(1)]* (4) of this section, the issue of paternity shall, upon the motion of the administrator, be resolved against that party by an *[appropriate]* order of the court *[upon the motion of the administrator.]* either affirming or setting aside the order establishing paternity or the voluntary acknowledgement of paternity.**

(6) If the results of the blood tests exclude the male party as the biological father of the child, the administrator may file a motion with the court for an order setting aside the order establishing paternity or the voluntary acknowledgment of paternity and for a judgment of nonpaternity.

(7) Support paid before an order *[is vacated]* establishing paternity or a voluntary acknowledgment of paternity is set aside under this section *[shall]* may not be returned to the payer.

(8) The administrator shall send a court certified true copy of a judgment of nonpaternity to the State Registrar of the Center for Health. Upon receipt of the judgment, the state registrar shall correct any records maintained by the state registrar that indicate that the male party is the parent of the child.

(9) The Child Support Program shall pay any state registrar fees and any costs for blood tests ordered under this section, subject to recovery from the party who requested the tests.

COMMENT: ORS 416.443 has been part of the Oregon code since 1979, when the legislature created the administrative process for establishing paternity and child support obligations. As currently written, this section allows a party to an administrative proceeding to petition to reopen the issue of paternity if genetic testing was not done before the paternity order was entered. The petition must be filed within one year after the order was entered. The most important change to this section extends this option to parties who established paternity by signing a voluntary acknowledgment. The other changes are technical.

Administrative reopening of voluntary acknowledgments of paternity Section 3 extends the option of petitioning the agency that administers the child support enforcement program to reopen paternity findings to parties who signed a voluntary acknowledgment if genetic testing was not done before the acknowledgment was signed. The petition to reopen must be filed within a year of filing the acknowledgment. This amendment also allows DHS to file such a petition when the child is in the custody of DHS as a dependent child under ORS 419B. This provision is consistent with other amendments to Chapter 109 enacted in 2005 and proposed by this bill that in some cases allow DHS to challenge the legal paternity of children in its custody.

Technical changes Throughout this section the term “genetic parentage test” is changed to “blood test” because the latter term is defined and used elsewhere in the Oregon Code to refer to blood/genetic testing in disputed paternity cases. Under ORS 109.251, the term “blood tests” includes any accredited test for genetic markers to determine paternity, including HLA and DNA testing.

The amendments in former subsection (2), now subsection (5), make clear that if a party refuses to comply with blood testing as ordered by the administrator, the administrator may ask the court to enter an order against the party. This section is similar to ORS 109.252, which allows a court to enter an order against a party who refuses to comply with a court order for blood testing. However, section 109.252, unlike this section, does not require the court to enter a judgment against the party who fails to comply. It provides, instead, that the court “may resolve the question of paternity against such person or enforce its order if the rights of others and the interests of justice so require.”

Subsection (6) is added to clarify that if blood tests show that the man identified as the legal father is not the biological father, the administrator may seek a court order setting aside the order establishing paternity or the voluntary acknowledgment. This authority has been implicit in this section; this amendment makes it explicit.

Subsection (7) amends the last sentence of former subsection (2) for clarity. The meaning of the section is not changed.

Subsection (8) requires the administrator to send a copy of the judgment of nonpaternity to the state vital records office so that official records regarding the child’s paternity can be corrected.

Subsection (9) provides that the state will pay testing and filing fees for actions undertaken under this section and that it may seek to recoup these costs from the party that requested the tests.

D. Provisions related to judicial proceedings to establish paternity or to challenge orders establishing paternity

SECTION 4. ORS 109.125 is amended to read:

109.125. (1) Any of the following may initiate proceedings under this section:

(a) A mother of a child born out of wedlock or a [~~female~~] **woman** pregnant with a child who may be born out of wedlock;

(b) The duly appointed and acting guardian of the child, conservator of the child's estate or a guardian ad litem, if the guardian or conservator has the physical custody of the child or is providing support for the child;

(c) The administrator, **as defined in ORS 25.010**;

(d) A [~~person~~] **man** claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or

(e) The minor child by a guardian ad litem.

(2) Proceedings shall be initiated by the filing of a duly verified petition of the initiating party. The petition shall contain:

(a) If the initiating party is one of those specified in subsection [(1)(a) to (c)] **(1)(a), (b), (c) or (e)** of this section:

(A) The name of the mother of the child born out of wedlock or the [~~female~~] **woman** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's husband if the child is alleged to be a child born to a married woman by a man other than her husband.

[(B)] (C) Facts showing the petitioner's status to initiate proceedings;

[(C)] (D) A statement that a respondent is the father;

[(D)] (E) The probable time or period of time during which conception took place; and

[(E)] (F) A statement of the specific relief sought.

(b) If the initiating party is a [~~person~~] **man** specified in subsection (1)(d) of this section:

(A) The name of the mother of the child born out of wedlock or the [~~female~~] **woman** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's husband if the child is alleged to be a child born to a married woman by a man other than her husband.

[(B)] (C) A statement that the initiating party is the father of the child and accepts the same responsibility for the support and education of the child and for all pregnancy-related expenses that he would have if the child were born to him in lawful wedlock;

[(C)] (D) The probable time or period of time during which conception took place; and

[(D)] (E) A statement of the specific relief sought.

(3) When proceedings are initiated by the administrator, **as defined in ORS 25.010**, the state and the child's mother and putative father are parties.

(4) When a proceeding is initiated under this section and the child support rights of one of the parties or of the child at issue have been assigned to the state, a true copy of the petition shall be served by mail or personal delivery on the Administrator of the Division of Child Support of the Department of Justice or on the branch office providing support services to the county in which the suit is filed.

(5) A man whose paternity of a child has been established under ORS 109.070 is a necessary party to proceedings initiated under this section unless the paternity has been disestablished before the proceedings are initiated.

COMMENT: ORS 109.125 sets out the initial procedures for filiation (also known as paternity) suits. The changes to this section clean up problems with the existing statute. If the mother has a husband, Subsection (2) requires that the court be apprised of his identity to that it can insure that his interests are protected. This requirement should probably have been in the statute all along but is particularly necessary, given the abolition of the conclusive presumption of paternity. Subsection (5) makes clear that a man whose paternity was previously established by any of the means sets out in ORS 109.070 is a party to the proceedings. Due process requires that he have notice and right to be heard, since his paternity is inherently at stake. This provision also should probably have been in the statute all along.

SECTION 5. ORS 109.155 is amended to read:

109.155. (1) The court, in a private hearing, shall first determine the issue of paternity. If the respondent admits the paternity, *[such]* **the** admission shall be reduced to writing, verified by the respondent and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required.

(2) If the court finds, from a preponderance of the evidence, that the petitioner or the respondent is the father of the child who has been, or who may be born out of wedlock, the court shall then proceed to a determination of the appropriate relief to be granted. The court may approve any settlement agreement reached between the parties and incorporate the *[same]* **agreement** into any judgment rendered, and ~~it~~ **the court** may order such investigation or the production of such evidence as *[it]* **the court** deems appropriate to establish a proper basis for relief.

(3) The court, in its discretion, may postpone the hearing from time to time to facilitate any investigation or the production of such evidence as it deems appropriate.

(4) The court *[shall have the power to]* **may** order either parent to pay such sum as *[it]* **the court** deems appropriate for the past and future support and maintenance of the child during *[its]* **the child's** minority and while the child is attending school, as defined in ORS 107.108, and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, which may include expert witness fees, and reasonable attorney fees at trial and on appeal. The provisions of ORS 107.108 apply to an order entered under this section for the support of a child attending school.

(5) An affidavit certifying the authenticity of documents substantiating expenses set forth in subsection (4) of this section is prima facie evidence to establish the authenticity of *[such]* **the** documents.

(7) If a man's paternity of a child has been established under ORS 109.070 and the paternity has not been disestablished before proceedings are initiated under ORS 109.125, the court may not render a judgment under ORS 109.124 to 109.230 establishing another man's paternity of the child unless the judgment also disestablishes the paternity established under ORS 109.070.

COMMENT: ORS 109.155 establishes the procedures that governing filiation suit hearings, sets

out the relief that a court may order, and creates mechanisms for enforcing orders under this section. All of the amendments to this section except the addition of the last subsection clean up and clarify language and do not change the meaning of the statutes.

The new final subsection makes clear that if under ORS 109.070, a man is or is presumed to be a child's legal father, another man's paternity may not be declared in a filiation proceeding under ORS 109.125 unless the court first enters an order disestablishing the first man's legal paternity. Besides eliminating the possibility that different men could simultaneously claim legal paternity under ORS 109.070 and ORS 109.125, this amendment establishes that claims based on ORS 109.070 have priority over filiation proceeding orders and must be resolved before a filiation order can be entered.

SECTION 9. (1) As used in this section:

- (a) "Blood tests" has the meaning given that term in ORS 109.251.
- (b) "Paternity judgment" means a judgment or administrative order that:
 - (A) Expressly or by inference determines the paternity of a child, or that imposes a child support obligation based on the paternity of a child; and
 - (B) Resulted from a proceeding in which blood tests were not performed and the issue of paternity was not challenged.
- (c) "Petition" means a petition or motion filed under this section.
- (d) "Petitioner" means the person filing a petition or motion under this section.
- (2)(a) The following may file in circuit court a petition to vacate or set aside the paternity determination of a paternity judgment, or any child support obligations established in the paternity judgment, and for a judgment of nonpaternity:
 - (A) A party to the paternity judgment.
 - (B) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B.
 - (C) The Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.
 - (b) The petitioner may file the petition in the circuit court proceeding in which the paternity judgment was entered, in a related proceeding or in a separate action. The petitioner shall attach a copy of the paternity judgment to the petition.
 - (c) If the ground for the petition is that the paternity determination was obtained by or was the result of mistake, inadvertence, surprise or excusable neglect, the petitioner may not file the petition more than one year after entry of the paternity judgment.
 - (d) If the ground for the petition is that the paternity determination was obtained by or was the result of fraud, misrepresentation or other misconduct of an adverse party, the petitioner may not file the petition more than one year after the petitioner discovers the fraud, misrepresentation or other misconduct.
- (3) In the petition, the petitioner shall:
 - (a) Designate as parties:
 - (A) All persons who were parties to the paternity judgment;
 - (B) The child if the child is a child attending school, as defined in ORS 107.108;
 - (C) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B; and

(D) The Administrator of the Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.

(b) Provide the full name and date of birth of the child whose paternity was determined by the paternity judgment.

(c) Allege the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested.

(4) After filing a petition under this section, the petitioner shall serve a summons and a true copy of the petition on all parties as provided in ORCP 7.

(5) The court, on its own motion or on the motion of a party, may appoint counsel for the child. However, if requested to do so by the child, the court shall appoint counsel for the child. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceeding, but may not be charged against funds appropriated for public defense services.

(6) The court may order the mother, the child and the man whose paternity of the child was determined by the paternity judgment to submit to blood tests. In deciding whether to order blood tests, the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, may deny a request for blood tests. If the court orders blood tests under this subsection, the court shall order the petitioner to pay the costs of the blood tests.

(7) The court may vacate or set aside the paternity determination of the paternity judgment, including provisions imposing child support obligations, and enter a judgment of nonpaternity if the court finds that it is just and equitable to the parties and the child to do so and finds by a preponderance of the evidence that:

(a) The paternity determination was obtained by or was the result of:

(A) Mistake, inadvertence, surprise or excusable neglect; or

(B) Fraud, misrepresentation or other misconduct of an adverse party;

(b) The mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct was discovered by the petitioner after the entry of the paternity judgment; and

(c) Blood tests establish that the man is not the biological father of the child.

(8) If the court finds that the paternity determination of a paternity judgment was obtained by or was the result of fraud, the court may vacate or set aside the paternity determination regardless of whether the fraud was intrinsic or extrinsic.

(9) If the court finds, based on blood test evidence, that the man may be the biological father of the child and that the cumulative paternity index based on the blood test evidence is 99 or greater, the court shall deny the petition.

(10) The court may grant the relief authorized by this section upon a party's default, or by consent or stipulation of the parties, without blood test evidence.

(11) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity:

(a) Shall contain the full name and date of birth of the child whose paternity was established or declared by the paternity judgment.

(b) Shall vacate and terminate any ongoing and future child support obligations arising from or based on the paternity judgment.

(c) May vacate or deem as satisfied, in whole or in part, unpaid child support obligations arising from or based on the paternity judgment.

(d) May not order restitution from the state for any sums paid to or collected by the state for the benefit of the child.

(12) If the court vacates or sets aside the paternity determination of a paternity judgment under this section and enters a judgment of nonpaternity, the petitioner shall send a court-certified true copy of the judgment entered under this section to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of the court-certified true copy of the judgment entered under this section, the state registrar shall correct any records maintained by the state registrar that indicate that the male party to the paternity judgment is the father of the child.

(13) The court may award to the prevailing party a judgment for reasonable attorney fees and costs, including the cost of any blood tests ordered by the court and paid by the prevailing party.

(14) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity is not a bar to further proceedings to determine paternity, as otherwise allowed by law.

(15) If a man whose paternity of a child has been determined by a paternity judgment has died, an action under this section may not be initiated by or on behalf of the estate of the man.

(16) This section does not limit the authority of the court to vacate or set aside a judgment under ORCP 71, to modify a judgment within a reasonable period, to entertain an independent action to relieve a party from a judgment, to vacate or set aside a judgment for fraud upon the court or to render a declaratory judgment under ORS chapter 28.

(17) This section shall be liberally construed to the end of achieving substantial justice.

COMMENT: This new section creates a procedure for petitioning to set aside a judicial order establishing paternity, defines the substantive grounds for granting such an order, and prescribes how orders will be implemented.

Subsection (1) defines terms used in the rest of the statute.

Subsection (2) prescribes who has standing to file a petition under this section. While this subsection limits standing to the parties to the challenged judgment and to DHS and DCS under certain circumstances, others may still be able to challenge paternity judgments in other kinds of proceedings, as subsections 14 and 16 explicitly recognize.

Subsection (3) prescribes who must be designated as parties and what the petition must contain.

Subsection (4) provides for service of process according to the usual procedures of ORCP 7.

Subsection (5), which is parallel to ORS 107.425(2), allows the court to appoint counsel for the child on its own motion or the motion of any party and requires appointment on the request of the child. Note that minor children are not parties to actions under this section, which is also the case for custody actions under ORS Chapter 107.

Subsection (6) allows the court to require the mother, child and man whose paternity is at issue to submit to blood tests. However, the judge has discretion to deny a request for blood tests upon a finding that to do so is “just and equitable” to the parties and the child. This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the

child and justice and fairness to the adults will be best served by this ruling.

Subsection (7) allows the judge to vacate or set aside the paternity determination if blood tests establish that the man is not the biological father and the court finds that the paternity judgment was procured by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct of an adverse party that the petitioner discovered after the judgment was entered. However, the judge has discretion to refuse to set aside or vacate the judgment upon a finding that to do so is “just and equitable” to the parties and the child. This language is intended to allow judges to invoke traditional principles of estoppel and laches to preclude challenges when the facts warrant, as well as to conclude that on balance, the best interests of the child and justice and fairness to the adults will be best served by this ruling.

Subsection (8) eliminates the distinction between intrinsic and extrinsic fraud for purposes of this section.

Subsection (9) makes clear that if the blood tests confirm the man’s biological paternity, the court must deny the petition.

Subsection (10) allows the court to grant the relief authorized by this section if a party defaults or if the parties consent, without requiring blood tests.

Subsection (11) requires the court to vacate and terminate future child support obligations if it enters a judgment vacating or setting aside the paternity finding. It grants the judge discretion to excuse the nonpayment of past due child support in whole or in part, and it precludes the court from ordering the state to repay any child support collected before the finding of nonpaternity was entered.

Subsection (12) requires the petitioner to send a copy of the judgment of nonpaternity to the state vital records office so that official records regarding the child’s paternity can be corrected.

Subsection (13) allows the judge to award the prevailing party attorney fees and costs, including the costs of blood tests ordered by the court if the prevailing party previously paid them.

Subsection (15) prevents the estate of a legal father from filing an action under this section to set aside or vacate findings about his paternity.

Section 10 of the Act provides that the amendments in Section 9 apply to all paternity judgments, including those entered before or on the effective date of the Act.

E. Technical provisions to give effect to or clarify effect of provisions discussed above

SECTION 2. ORS 109.103 is amended to read:

109.103. (1) If a child is born *[out of wedlock]* **to an unmarried woman** and paternity has been established **under ORS 109.070, or if a child is born to a married woman by a man other than her husband and the man's paternity has been established under ORS 109.070,** either parent may initiate a civil proceeding to determine the custody or support of, **or parenting time with,** the child. The proceeding shall be brought in the circuit court of the county in which the child resides or is found or in the circuit court of the county in which either parent resides. The parents have the same rights and responsibilities regarding the custody and support of, **and parenting time with,** their child that married or divorced parents would have, and the provisions of ORS 107.093 to 107.425 that relate to *[the custody or support of children]* **custody, support and parenting time** apply to the proceeding.

* * *

COMMENT: The changes in this section are intended to make clear that a man whose paternity is established by any means may bring an action for support, custody or parenting time. The change from “out of wedlock” to “to an unmarried woman” expresses the concept more clearly and does not change the substantive meaning. The addition of references to “parenting time” clarifies that these rules apply when a parent seeks parenting time rather than custody.

SECTION 3. ORS 109.124, as amended by section 20, chapter 160, Oregon Laws 2005, is amended to read:

109.124. As used in ORS 109.124 to 109.230, unless the context requires otherwise:

* * *

(2) “Child born out of wedlock” means a child born to an unmarried woman[⁵] or to a married woman by a man other than her husband[, *if the conclusive presumption in ORS 109.070 (1)(a) does not apply*].

* * *

COMMENT: This is a technical amendment to remove the reference to the conclusive presumption, which is abolished by Section 1.

SECTION 6. ORS 109.326, as amended by section 22, chapter 160, Oregon Laws 2005, is amended to read:

109.326.

* * *

(2) If paternity of the child has not been determined, a determination of nonpaternity may be made by any court having adoption, divorce or juvenile court jurisdiction. The testimony or affidavit of the mother or the husband or another person with knowledge of the facts filed in the proceeding constitutes competent evidence before the court making the determination.

(3) Before making the determination of nonpaternity, the petitioner shall serve on the husband a summons and a true copy of a motion and order to show cause why [*the husband's parental rights should not be terminated*] **a judgment of nonpaternity should not be entered** if:

(a) There has been a determination by any court of competent jurisdiction that the husband is the father of the child;

(b) The child resided with the husband at any time since the child's birth; or

(c) The husband repeatedly has contributed or tried to contribute to the support of the child.

* * *

(5) A summons under subsection (3) of this section must contain:

(a) A statement that if the husband fails to file a written answer to the motion and order to show cause within the time provided, the court, without further notice and in the husband's absence, may take any action that is authorized by law, including but not limited to [*terminating the husband's parental rights and*] entering a judgment of nonpaternity on the date the answer is required or on a future date.

* * *

(b) A statement that:

(A) The husband must file with the court a written answer to the motion and order to show cause within 30 days after the date on which the husband is served with the summons or, if

service is made by publication or posting under ORCP 7 D(6), within 30 days from the date of last publication or posting.

(B) In the answer, the husband must inform the court and the petitioner of the husband's telephone number or contact telephone number and the husband's current residence, mailing or contact address in the same state as the husband's home. The answer may be in substantially the following form:

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF _____

_____)
Petitioner,)
)
) ANSWER
and)
)
)
_____)
Respondent.)

_____ I consent to the *[termination of any parental rights that I may have]* **entry of a judgment of nonpaternity.**

_____ I do not consent to *the [termination of my parental rights. The court should not order the termination of my parental rights]* **entry of a judgment of nonpaternity. The court should not enter a judgment of nonpaternity** for the following reasons

* * *

(8) If the husband files an answer as required under subsection (6) of this section, the court, by oral order made on the record or by written order provided to the husband in person or mailed to the husband at the address provided by the husband, shall:

* * *

(c) Inform the husband that, if the husband fails to appear as ordered for any hearing related to the motion and order to show cause or the adoption petition, the court, without further notice and in the husband's absence, may take any action that is authorized by law, including but not limited to *[terminating the husband's parental rights and]* entering a judgment of nonpaternity on the date specified in the order or on a future date, without the consent of the husband.

(9) If a husband fails to file a written answer as required in subsection (6) of this section or fails to appear for a hearing related to the motion and order to show cause or the petition as directed by court order under this section, the court, without further notice to the husband and in the husband's absence, may take any action that is authorized by law, including but not limited to *[terminating the husband's parental rights and]* entering a judgment of nonpaternity.

* * *

(11) Notwithstanding *[the provision of]* ORS 109.070 [(1)(b)] **(1)(a)**, service of a summons and a motion and order to show cause on the husband under subsection (3) of this section is not required and the husband's consent, authorization or waiver is not required in adoption proceedings concerning the child unless the husband has met the requirements of subsection (3)(a), (b) or (c) of this section.

* * *

(13) Nothing in this section shall be used to set aside an act of a permanent nature, including but not limited to adoption [*or termination of parental rights*], unless the father establishes, within one year after the entry of the order or general judgment, as defined in ORS 18.005, fraud on the part of the petitioner with respect to the matters specified in subsection (10)(a), (b), (c) or (d) of this section.

COMMENT: ORS 109.326 concerns adoption proceedings when the biological mother was married at the time of birth but her husband is not before the court. This amendment makes clear that a court order that a woman's husband is not the father of a child under this section is not properly called a "termination of parental rights," but rather is a judgment of nonpaternity.

F. Clean-up of juvenile code provision amended by SB 234 in 2005

SECTION 11. ORS 419B.875 is amended to read:

419B.875.

* * *

(3) A putative father who satisfies the criteria set out in subsection (1)(a)(C) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his paternity or finds that he is not the legal **or biological** father of the child or ward.

* * *

COMMENT: ORS 419B.875 is the section of the Juvenile Code that defines who the parties to a dependency proceeding are. This section was substantially amended during the 2005 Legislative Session on the recommendation of the Oregon Law Commission (juvenile code putative fathers work group). This amendment adds language that was mistakenly omitted from the 2005 bill. It provides that if a juvenile court finds that a putative father is not the child's biological or legal father, he is not entitled to party status in the dependency proceeding.

VII. Conclusion

The proposed bill should be adopted so that Oregon's law regarding paternity will express sound public policy; be accessible to parties proceeding pro se; and treat similar cases similarly, regardless of whether paternity is established by voluntary acknowledgment or administrative or judicial order.