

BILL ANALYSIS

C.S.H.B. 782
By: Dutton
Juvenile Justice & Family Issues
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Genetic testing has provided another tool in determining paternity. In some instances these tests, have resulted in a Texas parent being scientifically excluded as the father and yet the father has been ordered to pay child support for the child. However, there are limited legal alternatives available to the father to stay the child support or to even have the court respond to his exclusion as the father. Often the mother of the child knows that the child is not the child of either the acknowledged, adjudicated or presumed father who is scientifically excluded. Even in cases where the mother may not know or have some uncertainty about the fatherhood of the child, there is still a limited opportunity for the father to invalidate a prior court order designating him as father of the child and requiring him to pay child support. The refusal to vacate a child support order in the face of scientific evidence of non-paternity places the state in the position of legalizing fraud, at best, and at worst, being a participant in a crime.

C.S.H.B.782 establishes a proceeding to vacate an order of paternity and child support where the scientific evidence determines non-paternity.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Amends Section 102.008 (b), Family Code to provide notice to an alleged or presumed father of his right to request paternity testing. The notice must include the following statement printed in boldfaced type, in capital letters, or underlined:

"YOU HAVE THE RIGHT TO REQUEST GENETIC TESTING TO DETERMINE THE PARENTAGE OF THE CHILD NAMED IN THIS SUIT. YOUR REQUEST FOR GENETIC TESTING MUST BE IN WRITING AND FILED WITH THE CLERK OF THE COURT IN WHICH THIS SUIT IS FILED. ANY ALLEGED OR PRESUMED FATHER WHO DOES NOT REQUEST GENETIC TESTING SHALL BE BARRED FROM BRINGING AN ACTION TO VACATE A CHILD SUPPORT ORDER OR A PARENTAGE ORDER."

SECTION 2. Amends Chapter 105 of the Family Code by adding Section 105.0035 to provide that in an original suit affecting the parent-child relationship, the court shall order genetic testing on the request of an alleged or presumed father. Additionally, provides that if an alleged or presumed father receives notice and does not request genetic testing before the entry of a final order, the alleged or presumed father is barred from bringing an action to vacate a child support order or a parentage order. Moreover, the parties, other than a governmental entity, shall bear the cost of the genetic test equally.

SECTION 3. Amends Chapter 160, of the Family Code by adding Subchapter J., which provides the proceedings for vacating an order. A person identified in a court order as the father of a child may file a petition at any time before the child's eighteenth (18th) birthday requesting the court to vacate a court order that states that the person identified in the order as the father or the child is the father of the

child identified in the motion or requires the person identified in the order as the father of the child to pay child support for the child. Further, the petition to vacate a court order must be accompanied by an affidavit stating facts that show the court order was obtained by fraud or material mistake of fact; or that the person did not receive notice as required by Section 102.008(b)(11) and a certified copy of the court order to be vacated. A petition to vacate under this section may not be granted to a person identified in a court order as the father of a child if the father is an adoptive father, consented to assisted reproduction by his wife, was an intended father under a gestational agreement or filed the petition under this section after the 180th day after the date the person received the results of a genetic test.

In a proceeding under this subchapter, if the court finds that the affidavit filed with the petition establishes a prima facie case that the court order was procured by fraud or material mistake of fact, the court shall order the child and the person identified in the court order as the father of the child to submit to genetic testing not later than the 30th day after the date the order requiring genetic testing is rendered.

A person establishes a prima facie case that a court order was obtained by fraud or material mistake of fact if the person's affidavit states that the person was the presumed father of the child or was induced by representations made by the child's mother to believe that the person was father of the child; and he did not know that he was not the father of the child and he took a genetic test after the date the court order sought to be vacated was rendered that establishes that the person is not rebuttably identified as the father of the child. If the affidavit filed with the petition does not establish a prima facie case, the court shall, on the motion by the respondent, dismiss the petition.

Section 160.803 provides that if the person who has the right to establish the child's legal residence fails to allow the child to be genetically tested, the court may suspend the legal obligation of the person identified in the court order as the father of the child to pay child support until the child is genetically tested. Additionally, if the person identified in the court order as the father of the child fails to submit to a genetic test ordered, the court shall dismiss the person's petition to vacate with prejudice.

Section 160.804 provides that the court shall vacate an order, if the court finds that the court order was obtained by fraud or material mistake of fact, or that the person did not receive the notice required by Section 102.008(b)(11) and the person identified in the court order as the father of the child was the presumed father or was induced by representations made by the child's mother to believe that he was the father; at the time the order was rendered, did not know that he was not the father; based on genetic testing is not rebuttably the father; is not the adoptive father; is not the intended father of the child under a gestational agreement and did not consent to assisted reproduction by his wife.

The court may not vacate an order under this section if the court finds that at any time the person identified in the court order as the father of the child knew he was not the child's biological parent, and consented to his name being entered as the child's biological father on the child's birth certificate; or was determined to be the child's father in a proceeding to determine parentage; or filed an acknowledgement of paternity with the bureau of vital statistics.

Section 160.805 provides that if a court vacates a parentage or support order and the person identified in the court order as the father of the child is also entitled under an order to the possession of or access to the child who is the subject of the vacated order, the court shall determine whether the possession order should be terminated, modified, or continued based on the best interest of the child. Additionally, if the court modifies or continues the possession order the person identified in the court order as the father of the child shall have all rights and

duties referenced under Section 153.074 of the Family Code, during his periods of possession. It also provides that if the court vacates a child support order and an arrearage exists under that child support, order the court may reduce the amount of the arrearage to zero. If the court eliminates an arrearage, the court shall issue an order stating that the child support obligation, including any arrearage, is terminated.

Additionally, provides that the elimination of an arrearage under a child support order that is vacated is for purposes of correcting an act induced by fraud, duress, or material mistake of fact and is not a retroactive modification.

If the court vacates a parentage order, the court may order the child or any party to participate in counseling with a mental health professional who has a background in family therapy and who has a mental health license that requires a minimum of a masters degree and any party to pay the cost of counseling. If there is not a person possessing the requirements of a mental health professional available in the county in which the court presides, the court may appoint a person the court believes is qualified to conduct the counseling.

Section 160.806 provides that if the court vacates a parentage order or a child support order in a proceeding under this subchapter the court may award reasonable attorney's fees to the petitioner. If the court does not grant the petition to vacate a parentage order or a child support order under this subchapter, the court shall order the petitioner to pay the costs of the action and each opposing party's reasonable attorney's fees.

SECTION 4. Amends Section 233.028, of the Family Code by adding Subsection (a-1) and amending Subsection (b) to provide for a notice to a man alleged to be the father of a child, his right to request genetic testing to determine paternity. The notice must include the following statement printed in boldfaced type, in capital letters, or underlined:

"YOU HAVE THE RIGHT TO REQUEST GENETIC TESTING TO DETERMINE THE PARENTAGE OF A CHILD WHOSE PARENTAGE HAS NOT BEEN ESTABLISHED. THE TITLE IV-D AGENCY WILL PAY FOR THE COSTS OF THE GENETIC TESTING, BUT IF THE RESULTS OF THE TESTING IDENTIFY YOU AS THE BIOLOGICAL FATHER OF THE CHILD, YOU MAY BE REQUIRED TO REIMBURSE THE AGENCY FOR THOSE COSTS."

If all parties agree to the child's parentage, and an agreed child support review order is filed, the agreed order must include a statement that is signed by both parties indicating that they have waived their rights to genetic testing.

SECTION 5. Waiver Clause and Prospective Clause.

SECTION 6. This Act takes effect September 1, 2007.

EFFECTIVE DATE

September 1, 2007

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B.782 modifies the original H.B.782 by eliminating the addition of Section 154.015 which required paternity testing. Secondly, C.S.H.B.782 amends Section 102.008 to provide notice to an alleged or presumed father of his right to request paternity testing. Chapter 105.0035 of the Family Code is then added to require paternity testing when an alleged or presumed father requests genetic testing. Additionally C.S.H.B.782 requires in a petition to vacate, an affidavit stating facts that show the court order was obtained by fraud or material mistake of fact; or that

the person did not receive notice as required by Section 102.008(b)(11) and a certified copy of the court order to be vacated.

Moreover, C.S.H.B. 782 requires that a person establishes a prima facie case that a court order was obtained by fraud or material mistake of fact if the person's affidavit states that the person was the presumed father of the child or was induced by representations made by the child's mother to believe that the person was father of the child; and he did not know that he was not the father of the child and he took a genetic test after the date the court order sought to be vacated was rendered that establishes that the person is not rebuttably identified as the father of the child. If the affidavit filed with the petition does not establish a prima facie case, the court shall, on the motion by the respondent, dismiss the petition. Additionally, if the court modifies or continues the possession order the person identified in the court order as the father of the child shall have all rights and duties referenced under Section 153.074 of the Family Code, during his periods of possession. Eliminates Section 160.807.

Finally, if the court vacates a parentage order, the court may order the child or any party to participate in counseling with a mental health professional who has a background in family therapy and who has a mental health license that requires a minimum of a masters degree and any party to pay the cost of counseling. If there is not a person possessing the requirements of a mental health professional available in the county in which the court presides, the court may appoint a person the court believes is qualified to conduct the counseling. Also, Section 160.806 provides that if the court vacates a parentage order or a child support order in a proceeding under this subchapter the court may award reasonable attorney's fees to the petitioner.