House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

PATERNITY PACKAGE

House Bill 4634 (Substitute H-4)
Sponsor: Rep. Andrew Richner

House Bill 4635 (Substitute H-1)
Sponsor: Rep. James Koetje

House Bill 4636 (Substitute H-1)
Sponsor: Rep. Doug Hart

House Bill 4637 (Substitute H-1)
Sponsor: Rep. Sue Tabor

House Bill 4638 (Substitute H-2)
Sponsor: Rep. Andrew Raczkowski

Committee: Civil Law and the Judiciary

House Bill 4639 with committee amendment
Sponsor: Rep. Alexander Lipsey
Committee: Criminal Justice

First Analysis (5-22-01)

THE APPARENT PROBLEM:

The advent of genetic testing that can accurately establish paternity, the high modern rates of divorce, and the vigorous state and federal efforts in recent years to enforce child support payment, have challenged 500 years of common law that presumes that all children born within marriage are fathered by the husband and have angered divorced husbands (and other men subject to child support orders) who discover that they are paying child support for children from their former marriages (or sexual liaisons) to whom they are not biologically related.

In addition, there have been biological fathers whose parental rights to their out-of-wedlock biological children have been terminated because their ability to provide the requisite support under current Michigan law was thwarted or impaired because they did not know of the pregnancy or birth resulting from their sexual activity. Most notably, in Michigan, a 1999 appeals court decision held that a trial court was right in terminating the paternal rights of a minor father, primarily because his situation was not covered in the current Adoption Code. The Michigan Supreme Court affirmed the appeals court decision (*In re RFF*, No. 117555; 242 Mich App 188) and refused to grant leave to appeal, though Justice Corrigan wrote a dissenting opinion. The appellate court said that the case was troubling, but the legislature was the appropriate form for making policy choices such as what to do in cases where fathers are deceived about a pregnancy.

In response to the appellate court decision and the Michigan Supreme Court's refusal to hear the appeal, legislation has been introduced to address how a deceived father should be treated under the Adoption Code.

THE CONTENT OF THE BILLS:

The bills would make it harder to terminate the parental rights of unwed biological fathers; allow courts to order genetic testing under the Adoption Code in out of wedlock adoption proceedings; allow courts to vacate paternity determinations, terminate child support orders, and cancel child support

arrearages under certain circumstances; allow the transfer of Friend of the Court documents under certain circumstances; and make it a misdemeanor punishable by imprisonment for not more than two years or a fine of up to $1,000 to knowingly misidentify a man as a biological father with the intent to deceive certain parties in an adoption proceeding. If enacted, the bills would take effect on October 1, 2001.

House Bill 4634 would amend the adoption code (MCL 710.39) to revise the code's current division of putative fathers into "do nothing" and "do something" fathers, and instead replace it with a distinction between unwed "putative" biological fathers and all other putative fathers. (The term "do nothing" father refers to a father who has not established a custodial relationship nor provided support.) Putative fathers who had not been determined to be biological fathers would include not only the current code's category of "do something" putative fathers, but two new categories of "do nothing" putative fathers: those who had been deceived about certain specified issues, and those who had been somehow hindered from being "do something" putative fathers.

More specifically, the bill would revise the current provisions regarding so-called "do nothing" putative fathers in subsection (1) of section 39. Currently, subsection (1) of section 39 of the Adoption Code allows the court to terminate the rights of a putative father to his alleged child based on the child's best interests if the putative father has neither established a custodial relationship with the child nor provided substantial and regular support and care during the 90 days before the hearing. Under subsection (2) of section 39, so-called "do something" putative fathers – who *have* established a custodial relationship with the child or have provided substantial and regular support in the 90 days before the hearing – cannot have their parental rights terminated except (like mothers) for abuse or neglect.

The bill would revise subsection (1) of section 39 to create a rebuttable presumption that the best interests of a child would be served by awarding custody to a putative father whom the court had determined was the child's biological father, unless the mother was asking for custody (that is, was not relinquishing her rights to the child for purposes of adoption). The bill would allow the court to order the child, the child's mother, and the putative father to submit to genetic testing (subject to the same procedures as genetic testing ordered under the Paternity Act) in order to verify whether a putative father were the child's biological father. The bill also would require a court that terminated a biological putative father's rights to state on the record the reasons for the termination of rights.

The bill also would revise subsection (2) of section 39 to add two new categories of "do nothing" fathers whose parental rights, like those of the subsection (2) "do something" putative fathers, could not be terminated except for abuse or neglect. The first new category of putative father under subsection (2) would be a putative father who had proved that he had been deceived either (a) as to the pregnancy of the mother or the birth of his [alleged] child, or (b) as to his status as the child's father. The second new category of putative father would be one who proved that he was "thwarted or prevented in some manner" from fulfilling the responsibilities that would have made him a "do something" putative father (namely, establish a relationship with the child or provide "substantial and regular support and care" in the 90 days before the hearing).

House Bills 4635 and 4636 would amend the Support and Parenting Time Enforcement Act to allow men to file motions to have paternity determinations vacated and child support orders terminated under certain circumstances, as well as have child support arrearages cancelled ("retroactively corrected") under certain circumstances. More specifically, the bills would do the following:

House Bill 4635 would add a new section to the Support and Parenting Time Enforcement Act (MCL 710.5) to allow a man to file a motion for relief from a court order that stated that he was a child's father or that required him to pay child support, and the court would have to order the child, the child's mother, and the man filing the motion to submit to genetic testing. The order for genetic testing could be made by or on behalf of either party, and the man, woman, and child would have to submit to genetic testing (blood or tissue typing, or DNA identification profiling, as described in, and subject to the same procedures as genetic testing ordered under, the Paternity Act) within 30 days after the order were issued. An individual filing a motion under the bill would have to file with the court that issued the order from which he sought relief.

Motion granted. Except as otherwise provided in the bill (see below), a court would be required to vacate an order stating that a man were a child's father or to terminate a child support order if the court found both that the man was not the child's adoptive father and genetic testing results were admitted into evidence

excluding the man as the child's father. If the court granted a motion under the bill to vacate paternity or terminate a child support order, and if the man filing the motion and the child also were the subjects of a parenting time order, the court would determine if the parenting time order were terminated, modified, or continued based on the best interests of the child. If a court granted a motion to terminate a child support order and a child support arrearage existed under the order, the court could retroactively "correct" the arrearage.

Motion denied. The bill would prohibit a court from granting a motion filed under the bill if it found either that:

- The individual filing the motion knew of genetic or blood test results that excluded him as the child's father more than six months before the motion was filed and he could not show good cause why he had not filed the motion within six months after getting the test results; or

- After a man knew that he was not a child's biological father, any of five things had occurred: (1) the man acknowledged paternity of the child in writing; (2) he consented to his name being entered as the child's biological father on the child's birth certificate; (3) he had been determined to be the child's father in an action under the Paternity Act; (4) the state registrar filed an acknowledgement of parentage in which the man declared himself to be the child's biological father; or (5) he otherwise admitted that he was, or acknowledged himself as, the child's biological father.

If a motion made under the bill were to terminate a child support order and the court did not grant the motion, the court would be required to order the moving party to pay the costs of the action and each opposing party's reasonable attorney fees.

[Note: The bill rather confusingly also says that the provisions prohibiting a court from granting a motion under the bill if the court finds any of a number of things occurred after a man knew he wasn't a child's biological parent would not apply "if the court [found] that an event listed . . . occurred before the individual knew that he [was] not the child's biological father."]

House Bill 4636 would amend the Support and Parenting Time Enforcement Act (MCL 710.603) to specify that a "retroactive correction" of child support arrearages as a result of the termination of a support order under the provisions of House Bill 4635 (above) would be considered to be a retroactive correction of a mistake and not a retroactive modification of the order. (The act does not allow retroactive modifications of court orders.) House Bill 4636 could not be enacted unless House Bill 4635 were enacted.

House Bill 4637 would add a new section to the Friend of the Court Act (MCL 552.517f) to require a court to transfer a domestic relations matter to a different county office under certain circumstances, and to require the transferring office to send to the receiving office all records related to the transferred domestic relations matter.

If a recipient or payer of child support filed a postjudgment motion to transfer a domestic relations matter to a different county office, the court would be required to transfer the matter if the court found all of the following:

- The transfer would serve the convenience of the parties and be consistent with the child's best interests;

- Neither party resided in the county of current jurisdiction for at least six months before the motion were filed;

- At least one party had resided in the county to which the transfer were requested for at least six months before the motion was filed; and

- The county to which the transfer was requested were not contiguous to the county of current jurisdiction.

If the court transferred a domestic relations matter, the transferring office would be required to send to the receiving office all of the records related to the domestic relations matter according to the procedure established by the Michigan Supreme Court. The court could charge a $20 fee for a motion filed under the bill, but would have to waive the filing fee for an indigent individual as provided in the Michigan Court Rules.

However, a court would not be required to transfer a domestic relations matter more than once in a 12-month period, though it would be allowed to do so under the conditions set forth in the bill.

House Bill 4638 would add a new section (MCL 710.69a) to the Michigan Adoption Code (chapter 10 of the Probate Code) to prohibit knowingly misidentifying someone, with the intent to deceive certain parties, as the biological father of a child

undergoing adoption and to add misdemeanor penalties for such violations.

More specifically, when placing a child for adoption, an individual would be prohibited from knowingly misidentifying someone as the child's biological father, intending to deceive one or more of the following:

- A court, or one of its employees or agents;
- The Family Independence Agency;
- A child placing agency;
- An interested party.

Someone who knowingly misidentified a man as the biological father of a child undergoing adoption with the intent to deceive the above parties the would be guilty of a misdemeanor punishable by imprisonment for up to two years or a fine of up to $1,000, or both. A criminal penalty allowed by the bill could be imposed in addition to any penalty that might be imposed for any other criminal offense arising from the same conduct.

House Bill 4639 would amend Chapter XVII of the Code of the Criminal Procedure (MCL 777.15) to specify that fraudulent misidentification of a biological parent would be a Class G misdemeanor against a person, with a two-year statutory maximum sentence of imprisonment. The bill is tie-barred to House Bill 4638.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The package of bills would address not only the issue of "deceived fathers", it also would give unwed biological fathers custody when a child's mother offered to relinquish her parental rights in an adoption proceeding by making it a rebuttable presumption that the best interests of the child would be served by awarding custody to the unwed biological father. The package also would protect the parental rights of unwed biological fathers by prohibiting courts from terminating their custody to their children born out of wedlock except by finding the father unfit (in addition to the "best interests of the child" finding currently required to terminate the paternal rights of "do nothing" putative fathers). And the package would allow men who had proven that they were not the biological fathers of children for whom they were paying child support to legally request that the order of paternity be vacated, child support be terminated, and any past child support arrearages be cancelled.

The bill would address the problem of deceived fathers, whether unwed or formerly wed. For a woman to deceive a man about the paternity of her children is fraud, plain and simple, and should be treated like the crime it is. This is true whether the deception involves an ex-husband (or ex-lover) and children born in a former marriage (or sexual relationship) that are not biologically related to the former husband or whether it involves the unwed biological father of a child put up for adoption by the mother. An unwed father should be given some legal recourse when a child results from sexual activity with a woman and she does not tell him about the pregnancy or birth. Equally, a man should not be required to pay child support for a child born during marriage or cohabitation with a woman when that child is not biologically related to him. This not only defrauds him of money that rightfully is his, but also lets the true biological father off the hook for child support payments for his biological offspring. The innocent party in such fraud cases – whether the biological father who is unaware that he has biological offspring or the ex-husband or ex–lover who is not the biological father of children born in a former marriage or sexual relationship – needs to have his rights protected in such cases. And in the case of child support for non-biologically related children, the man also must have some recourse to relief from child support payments for those children. The bills would do this.

House Bill 4634 would protect the rights of deceived unwed biological fathers and of deceived, or thwarted "do nothing," putative fathers, while House Bills 4635 and 4636 would allow men who had been deceived as to their fathering of children born during the man's former marriage or cohabitation legal recourse to request that paternity determinations be vacated and child support orders terminated (and child support arrearages cancelled). And House Bill 4638 would put teeth in the other bills by making it a misdemeanor, punishable by imprisonment and a fine, to knowingly misidentify a man as the biological father of a child born out of wedlock and put up for adoption with the intent to deceive a court, the Family Independence Agency, an adoption agency, or any other interested party.

The bill also would use the same standard for terminating the rights of putative fathers as that for terminating the parental rights of biological mothers, namely, abuse or neglect rather than the child's best interests. The Adoption Code distinguishes between two kinds of putative fathers, and has two different standards for terminating their parental rights in an adoption hearing. The so-called "do something" putative fathers' parental rights, like those of mothers, cannot be terminated except for abuse or neglect. So-called "do nothing" putative fathers' rights can be terminated by the court on the basis of the best interests of the child in question. House Bill 4634 would change this existing schema that divides putative fathers into two kinds and instead would distinguish between unwed *biological* "putative" fathers (who would be awarded custody of a child put up for adoption unless they were unfit and it were not in the best interests of the child) and "putative fathers," whose rights could not be terminated except for abuse or neglect. Under House Bill 4634, a putative father could be a "do something" putative father, a "deceived" putative father, or a "do nothing" putative father who had been thwarted or prevented from being a "do something" putative father." In all cases, the bill would prohibit courts from terminating their parental rights except for cases involving abuse and neglect.

Finally, House Bill 4634 would protect the rights of unwed biological fathers to their children. When a single woman who has given birth to a child wishes to relinquish her maternal rights to the child and put the child up for adoption, the Adoption Code requires a hearing to, among other things, determine or terminate the rights of the child's father. Currently, if a putative father has neither established a custodial relationship with the child nor provided "substantial and regular" support during the 90 days before the notice of the hearing (sometimes referred to as a "do nothing" [putative] father), but appears at the hearing and requests custody of the child, the court is required to determine his fitness and ability to properly care for the child and determine whether the child's best interests would be served by granting custody to the "do nothing" putative father. Based on the child's best interests, the court may terminate the putative father's rights to the child. The bill would change this section of the Adoption Code so that if the child's mother were not requesting custody of the child (that is, if she wished to give her child up for adoption) and if the court found that the putative father were the child's biological father, then House Bill 4634 would establish a rebuttable presumption that the best interests of the child would served by awarding custody to the putative father.

For:

House Bill 4634 would recognize a father's fundamental right to raise his biological offspring, a right that no law should contravene. Current law deprives some fathers of this right, in the name of "the best interests of the child" as determined by a court. Surely, a biological father's right to his children should not be overridden by – or somehow seen as being contrary to – the bests interests of his child. When and if these interests clash, the father's rights should prevail, which is what House Bill 4634 would establish under certain circumstances. In fact, the bill would virtually define the best interests of a child born out of wedlock to be identical to the biological father's rights to that child's custody if the mother proposed to relinquish her rights in an attempt to give the child up for adoption.

Response:

Some people believe that putting a biological father's right to custody over the best interests of a child in an out of wedlock adoption proceeding is to return to a discredited view of children as their father's property. Just because a biological father wants custody in an out of wedlock adoption proceeding does not mean that that would be in the child's best interests. Yet House Bill 4634 as written would make it virtually impossible for courts to continue to consider the best interests of the child by imposing a rebuttable presumption that the two were identical, and would allow termination of custody in such cases only if the almost unprovable standard of the biological father's unfitness were met. Moreover, in the U.S. Supreme Court decision in *Lehr v Robertson*, as referenced by the 1999 Michigan appeals court decision *In re RFF*, "[w]here a father has never established a 'custodial, personal, or financial relationship' with a child, or has abandoned a child, he does not possess the fundamental right of parenthood."

For:

House Bill 4634, in addition to protecting the rights of unwed biological fathers (and formerly wed nonbiological fathers), could be a boon to the grandparents' rights movement. There has been much debate over the role and standing of grandparents in child custody disputes, and the bill could potentially benefit the biological grandparents of a child born out of wedlock to their son's sexual partner. By granting custody, through a rebuttable presumption that it would be in the best interests of the child, to the biological father of a child born out of wedlock, in some cases the grandparents could wind up raising their son's child, thereby giving them access to the child that they might otherwise never have.

Response:

While the issue of grandparents' rights is much debated, in the particular case upon which the current package of bills reportedly is based, the appeals court decision noted that "the trial court emphasized that appellant's custody plan was in effect to award custody to his parents" and that the minor unwed father "was seeking custody to satisfy his parents and fulfill a sense of duty toward them." Whatever the issues around grandparents' rights to their grandchildren are, surely the bills should not encourage putative or unwed biological fathers to seek custody of their alleged or biological children on behalf of other parties who otherwise would be without legal standing in these often complicated cases.

Against:

House Bill 4634 would amend a controversial and complicated section of the Adoption Code with potentially disastrous results for future adoptions in cases where a single mother wished to put her child up for adoption instead of retaining custody. It also would go far beyond the appellate court's request, in the 1999 case of a "do nothing" minor father whom the court denied custody of his out-of-wedlock child. House Bill 4634 would allow a new opportunity for men who were angry, for whatever reasons, with their female former sexual partners to stop adoption proceedings, and to claim custody of their biological child even if they were not serious about wanting to raise the child. It also has the potential for extraordinarily raising the stakes for potential adoptive parents – to the point, perhaps, where few adoptive parents would even consider becoming involved – by not putting a time limit on when a "do nothing" putative father could prove that he had been "deceived" (a term not defined in the bill) or "thwarted" in having been a "do something" father. As the appeals court noted in the 1999 case, the trial court did consider the fact that the appellant was deceived about the pregnancy, but found that it could not assume that if he had known of the pregnancy earlier that he would have supported the mother during her pregnancy. It is easy for someone to *say* that they would have provided "substantial and regular support and care" had they only known about the pregnancy or birth; it's quite another thing to assume that this always would be true.

To avoid such problems, section 39 of the Adoption Code should instead be revised to give deceived putative fathers the opportunity to demonstrate their willingness to become "do something" fathers by actually providing regular and substantial care and support to either the mother or child, as currently is required to protect paternal rights. That is, the code should be amended to allow courts to decide, in cases of "do nothing" putative fathers who claimed that due to deception they had been thwarted or prevented from being "do something" putative fathers during the pregnancy or after the child was born out of wedlock, whether the putative father had been deceived by the child's mother, and, if so, to give the putative father the opportunity to become a "do something" father during the 90-day period that began on the date the court decided the putative father knew about his possible paternity. This approach would fulfill the appellate court's request that the legislature address issues in the 1999 case involving a minor unwed father. Yet it would do so without going so far beyond that one issue to virtually guarantee that any unwed biological father could stop an adoption with no real interest in raising the child himself. Nor would it open a door to considerable mischief by angry "do nothing" putative fathers who would have only to prove that they had been "deceived," or "thwarted" from being a "do something" putative father, in order to receive the same protection from having their parental rights terminated as currently only mothers and "do something" putative fathers have.

At the very least, surely there should be some reasonable time period imposed on a man to come forward with his claims to having been deceived or "thwarted." Otherwise, House Bill 4634 has the potential to virtually stop all out of wedlock adoptions.

Against:

The problem of "deceived fathers" appears, in fact, to be two rather different problems, and would be better dealt with in separate bills or bill packages. The current bill package is presented as a response to a troubling appeals court case regarding an unwed putative father who claimed to have been deceived in some important ways about his sexual partner's pregnancy and the subsequent birth of her child. In this case (*In re RFF*, No. 11755; 242 Mich App 188), the appeals court terminated the putative father's custody on the basis of the best interests of the child (and the supreme court denied leave to appeal), but the appeals court noted that it believed that the legislature should reexamine section 39 of the Adoption Code and evaluate under which of the two existing subsections it would be most appropriate to place a father who had been deceived and whether it would be more appropriate to create a third

subsection to address this specific problem. The appeals court also noted that the legislature was the appropriate forum for making these types of policy choices.

Yet testimony before the House Civil Law and the Judiciary Committee on the package of bills also was given on quite a different problem regarding "deceived fathers." This other problem involves the common law doctrine that presumes that any children born during a marriage are the legal progeny of the husband and the fact that some divorced men have discovered that they have been paying child support for children born in their former marriages to whom they aren't biologically related. Even though these divorced men may have been the children's father in every sense – emotional, social, and financial – except genetic, apparently some strongly resent the fact that they have been required to pay child support after the marriage ended. (There also, of course, is the possibility that some of the resentment expressed in these cases also is related having been cuckolded, which is rather a different issue than child support payments).

The issue regarding the keeping or establishing of paternal rights to biologically-related children born out of wedlock who are being put up for adoption properly is addressed by looking at the Adoption Code provisions regarding putative fathers. But should the issue of shedding financial responsibility for nonbiologically-related children presumed by common law to be a divorced man's biologically-related children from a former marriage be addressed under the Adoption Code? At least one state supreme court, in Massachusetts, decided against a father seeking to terminate child support for a seven-year-old child born during his former marriage when he discovered through genetic testing that he was not the child's biological father. The court ruled that it was not in the best interests of the child to stop child support.

Response:

Reportedly, as of October 2000, Ohio, Colorado, Iowa, and Louisiana have passed laws allowing men to sue to end their child support payments if genetic testing proves they are not the father. And the Ohio law, at least, also reportedly allows men to sue a mother for back payments of child support. Some people might argue that the current package of bills does not go far enough, and should also allow men to sue for child support they paid for children who are not biologically related to them.

Against:

House Bills 4635 and 4636 would contravene 500 years of common law doctrine, which presumes that a man is the legal father of any child born to his wife during their marriage, although the law was originally designed to protect children from the lack of rights accorded to "illegitimate" children, it actually also accords with the current view that a man's status as a father is not just, or even primarily, dependent on his genetic contribution to a child. And just as adoptive parents are as "real" as biological parents, so, too, "social" fathers – fathers who have established emotional, affectional, and financial ties to children – are just as "real" and legitimate as fathers whose only contribution to their children's lives is genetic material. In fact, according to the 1999 Michigan appeals court decision upon which the package of bills reportedly is based, the U.S. Supreme Court has recognized that there is a distinction between an established relationship between a parent and a child and the existence of a biological link, and that the biological link is entitled to less constitutional protection than the established relationship (*Lehr v Robertson*, 463 US 248).

Some opponents of House Bills 4635 and 4636 also object to their intrusion into the sanctity of marriage, while others argue that judges still should have the ability to protect a child's interests by requiring child support even if genetic testing disproves biological paternity. At the very least, House Bill 4635 should include a "good cause" requirement for challenging paternity after any significant time or after a paternity order had been entered, or provide for a specific statute of limitations. Delay in raising this issue also often complicates identifying and locating the biological father, which may in fact have been why the Massachusetts supreme court ruled as it did.

Against:

House Bill 4638 would discourage birth mothers from naming all potential fathers, and makes no exceptions to prosecution in cases of domestic violence, incest, or other extenuating circumstances. In such cases, for a mother to even name a potential father may subject her to further abuse, which is why the Family Independence Agency regulations reportedly have an exception for domestic violence survivors to the agency's general requirement that mothers applying for assistance cooperate with the state in seeking child support from putative fathers. Finally, the bill is unnecessary, since under existing law, someone who deliberately lies to the court (including in the course of adoption proceedings) is subject to contempt of court or perjury sanctions.

Against:

Although House Bill 4637 has been presented as part of the package of paternity bills, it is unclear how allowing the transfer of Friend of the Court documents on domestic matters fits in with the package.

POSITIONS:

DADS of Michigan support the bills. (5-15-01)

The Family Law Section of the State Bar of Michigan supports House Bill 4637 (which would allow the transfer of Friend of the Court documents between counties) and 4638 (which would amend the Michigan Penal Code to add criminal penalties for knowingly misidentifying someone as a biological father with the intent to deceive) and opposes House Bills 4634, 4635, and 4636. (5-17-01)

Adoption Associates opposes the bills. (5-16-01)

The Michigan Advocacy Project opposes the bills. (5-21-01)

Analyst: S. Ekstrom

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.