

SUBJECT: Genetic paternity testing and vacating a paternity or child support order

COMMITTEE: Juvenile Justice and Family Issues — committee substitute recommended

VOTE: 5 ayes — Dutton, Eiland, Farrar, Gonzalez Toureilles, Hernandez

0 nays

4 absent — Bolton, Farias, Strama, Vaught

WITNESSES: For — Roy Getting, Texas Fathers Alliance; Robert Green, Texas Parents Alliance; Reynaldo Valdez; (*Registered, but did not testify*: Sudhir Joshi; Dean Metusalem; Chris Mire; Courtney Valdez)

Against — None

On — Geraldine Harris, DSHS; Sally Emerson, Texas Family Law Foundation; (*Registered, but did not testify*: Doug Woodburn, Texas Family Law Foundation)

DIGEST: CSHB 782 would add and amend provisions in the Family Code governing the rights of a putative father to exclude paternity through genetic testing and legal remedies by which a scientifically excluded father could vacate paternity and child support responsibilities.

**Required notices.** CSHB 782 would amend Family Code, sec. 102.008 to require that petitions for paternity include notice to the alleged father of the right to request paternity testing. The notice would have to mention that any presumed father who did not request genetic testing would be barred from bringing an action to vacate an order of parentage or child support.

CSHB 782 would amend sec. Family Code, 233.028 to require, in child support cases where the parentage of a child had not been established, that the notice of child support review delivered to the parties include notice to the alleged father of the right to request genetic testing of a child whose parentage had not been established. The notice also would have to mention that the state would pay for the costs of the genetic testing, but if the test results identified the alleged father as the child's biological father, the father could be required to reimburse the state for those costs. If the

parties agreed to the child's parentage, the agreed child support order would have to include a statement signed by the parties entitled to genetic testing that the parties had waived their rights to request genetic testing.

**Paternity test required.** CSHB 782 would add Family Code, sec. 105.0035 to require, in an original suit affecting the parent-child relationship, the court to order genetic testing upon the alleged father's request. An alleged father who received notice of his right to genetic testing and did not request genetic testing before the entry of a final order could not bring an action to vacate a child support order or a parentage under Family Code, ch. 160, subch. J, which regulates proceedings to vacate court orders establishing parentage or child support. The parties, other than the state, would bear the cost of genetic testing.

**Suit to vacate court order of parentage or child support.** CSHB 782 would add Family Code, sec. 160.801 to allow a person identified in a court order as the father of a child to file a petition, not later than the child's 18th birthday, requesting the court to vacate either an order establishing parentage or an order that required the person identified as the father to pay child support. The petition to vacate the order would have to be filed with a copy of the order to be vacated and an affidavit stating either facts showing that the court order was obtained by fraud or material mistake of fact, or that the person identified as the father did not receive notice of his right to request genetic testing.

The court would not be able to vacate the order if the person identified as the father of the child:

- was the child's adoptive father,
- consented to assisted reproduction by his wife;
- was an intended father under a gestational agreement; or
- filed the petition more than 180 days after the date the person received the results of a genetic test.

**Required genetic testing to vacate a court order.** CSHB 782 would add Family Code, sec. 160.802 to direct a court, following its finding that the affidavit filed with the petition to vacate an order establishing parentage or child support established a prima facie case that the court order was obtained by fraud or material mistake of fact, to order the child and the person identified as the father to submit to genetic testing within 30 days after the order requiring genetic testing was rendered.

A person would establish a prima facie case that a court order was obtained by fraud or material mistake of fact if the person's affidavit stated that the person:

- was the presumed father of the child or was induced by representations made by the child's mother to believe that he was the child's father;
- did not know, at the time the court order was rendered, that he was not the child's father; and
- took a genetic test after the date the court order sought to be vacated was rendered establishing that the person was not rebuttably identified as the father.

This genetic testing would be governed by Family Code, ch. 160, subch. F. If the affidavit filed with the petition did not establish a prima facie case, the court would, on a motion by the respondent, dismiss the petition.

**Failure to submit to genetic testing.** CSHB 782 would add Family Code, sec. 160.803 to allow a court to 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 was genetically tested if the person who had been awarded the exclusive right to designate the child's primary residence failed to allow the child to be genetically tested when required to do so as part of a motion to vacate a court order of paternity or child support.

CSHB 782 would direct a court to dismiss with prejudice a petition to vacate a court order establishing paternity or child support by a person who had been identified in a court order as the father of the child if that person failed to submit to a genetic test ordered as part of the process to vacate the court order.

**Grounds for vacating order.** CSHB 782 would add Family Code, sec. 160.804 to direct a court — except under certain circumstances outlined in Family Code, ch. 160 — to vacate an order establishing paternity or child support if the court found that the court order was obtained by fraud or material mistake of fact, or that the person identified as the father in the court order did not receive required notice of his right to genetic testing and the person identified in the court order as the father of the child:

- was the presumed father of the child or was induced by representations made by the child's mother to believe that he was the child's father;
- did not know, at the time the court order was rendered, that he was not the child's father;
- based on genetic testing, was not rebuttably identified as the father of the child in accordance with Family Code, sec. 160.505, which outlines the required scientific standards for genetic paternity testing;
- was not the child's adoptive parent;
- was not the intended father of the child under a gestational agreement confirmed by a court; and
- did not consent to assisted reproduction by his wife.

CSHB 782 would not allow a court to vacate an order establishing paternity or child support if the court found at any time that the person identified in the court order as the father of the child knew that 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;
- was determined to be the child's father in a proceeding to determine parentage; or
- filed an acknowledgment of paternity with the bureau of vital statistics.

**Possession order and child support arrearage.** CSHB 782 would add Family Code, sec. 160.805 to direct a court to determine whether the possession order should be terminated, modified, or continued based on the best interest of the child if the court vacated a parentage or child support order under Family Code, ch. 160, subch. J, and the person identified in the court order as the father of the child also was entitled under an order to the possession of or access to the child who was the subject of the vacated order.

If the court modified or continued the possession order, the person identified in the court order as the father of the child would have the rights and duties of care, support, direction of medical treatment, and religious and moral formation during the period that he had possession of the child.

If the court vacated a child support order and an arrearage existed under that child support order, the court would be allowed to reduce the amount of the arrearage to zero. If the court eliminated an arrearage, the court would be directed to issue an order stating that the child support obligation, including any arrearage, was terminated.

Under CSHB 782, the elimination of an arrearage under a child support order that was vacated would be for purposes of correcting an act induced by fraud, duress, or material mistake of fact and would not be a retroactive modification.

Under the bill, if the court vacated a parentage order in a proceeding, the court would be allowed to order:

- the child or any party to participate in counseling with a licensed mental health professional who had a background in family therapy; and
- any party to pay the cost of counseling.

**Attorney's fees and court costs.** CSHB 782 would add Family Code, sec. 160.806 to allow for the awarding of attorney's fees and court costs to the petitioner if the court vacated a parentage order or a child support order in a proceeding. If the court did not grant the petition to vacate a parentage order or a child support order, it would be directed to order the petitioner to pay the costs of the action and each opposing party's reasonable attorney's fees.

CSHB 782 would allow a delay in implementation of any of its provisions by a state agency in charge of the child support programs under Title IV-D of the Social Security Act of 1975 if that agency determined that a waiver of authorization from a federal agency was necessary for implementation of the change in law. The agency would be directed to request the waiver or authorization and could delay implementing that provision until the waiver or authorization was granted.

The bill would take effect September 1, 2007, and would apply only to a suit affecting the parent-child relationship filed on or after that date.

SUPPORTERS  
SAY:

CSHB 782 would protect men who can prove they have been falsely identified as fathers. Studies of blood banks in other states show that up to 30 percent of men who are identified in court orders as the father of a child

are not, in fact, the child's biological father. CSHB 782 would enable courts to act on genetic testing that disproves claims of paternity by allowing the testing to form the basis of a motion to vacate a court order of paternity or child support. Under current law, men who are proven not to be biological fathers still can be forced at times to continue paying child support because it is deemed to be in the best interest of the child. CSHB 782 would create a mechanism for these men to do something about their plight. In addition, it would provide notice to men of their right to genetic testing in paternity suits.

OPPONENTS  
SAY:

Family Code, sec. 160.804, which the bill would create, would specify the grounds a court would use to vacate a court order of paternity or child support. It would not, however, establish a burden of proof. While the bill would require a man who had been identified as a father to prove that the court order was obtained by fraud or material mistake of fact, it does not specify whether the burden of proof would have to be clear and convincing, by a preponderance of the evidence, or beyond reasonable doubt. This could create confusion in the courts.

OTHER  
OPPONENTS  
SAY:

CSHB 782 does not go far enough. A great deal of litigation and investigation would be saved if the state mandated paternity testing at birth. If this practice were adopted, the system of establishing child support would be greatly simplified.

NOTES:

HB 782 as introduced would have required a genetic paternity test before a court could order child support unless the party being ordered to provide child support was an adoptive parent and would have required the mother to be tested as well, under certain conditions.

HB 782 as introduced did not contain provisions to :

- prevent an alleged father from bringing a motion to vacate a court order for paternity or child support if he did not bring the motion within six months of receiving notice of the right to genetic testing;
- require a prima facie showing of fraud or material mistake of fact concerning claims of paternity; or
- award attorney's fees.