

# THE IMPACT OF THE 2007 AMENDMENTS TO OREGON'S PATERNITY LAW ON DEPENDENCY PROCEEDINGS IN JUVENILE COURT

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Best practices in dependency cases require that juvenile courts resolve any disputes about a child's legal paternity as early as possible for several reasons. First, fathers, like mothers, are entitled to the rights of parties in cases, which include procedural due process protections and rights to claim custody and to reasonable efforts to make it possible for them to have custody. See ORS 419B.875, 419B.819. Second, even if a child's legal father is not willing or able to raise his child, identifying him can help implement two practices that promote involvement of the child's extended family, both maternal and paternal, in the case – a preference for kinship foster care and efforts to involve family members in decision-making about the child's placement and treatment plans through family group conferences or family meetings. Finally, if the ultimate permanent plan for a child is adoption, failure to identify the child's father early and to establish the factual basis for termination can delay or even derail this plan. See, e.g., *State ex rel. DHS v. Rardin*, 340 Or 436, 444-445, 134 P3d 940 (2006).

For these reasons, the 2005 legislature enacted a statute, now codified at ORS 419B.395, that explicitly authorizes juvenile courts to determine issues of legal paternity that arise in the course of dependency and termination of parental rights proceedings. Before entering a judgment, the juvenile judge must find that adequate notice and an opportunity to be heard were provided to the parties, to any man alleged to be the child's father, and to the Division of Child Support.

As it turns out, some of the most complex fact patterns that raise issues of legal paternity arise reasonably often in dependency cases. For example, a married woman may give birth to a child but say that another man is the biological father. She may even sign a voluntary acknowledgment of paternity with that other man. Or the child support enforcement agency may determine that one man is the father of a child born to an unmarried woman, who later signs and files a voluntary acknowledgment with another man. The juvenile code does not contain substantive rules for determining how these complicated cases should be resolved but instead refers the courts to ORS chapter 109 and its generally applicable provisions regarding paternity. During the interim between the 2005 and 2005 legislatures, a group convened by the Oregon Law Commission worked to update the paternity provisions of chapter 109, which had not been reconsidered as a whole for 30 years. The 2007 legislature enacted the group's proposal with some changes. This article explains those changes.

ORS 109.070(1) sets out the bases for a finding of legal paternity. The three most important means are presumptions of paternity based on marriage, judicial or administrative orders, and voluntary acknowledgments of paternity. ORS 109.070(1)(a), (b), (c), (d), (e), (f).<sup>1</sup> The next sections discuss how legal paternity is established on these bases and explain changes made by the 2007 legislation.

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<sup>1</sup> ORS 109.070(1)(g) is a catchall provision saying that paternity may be established or declared by other provision of law. The Oregon Supreme Court held in *Thom v. Bailey*, 257 Or. 572, 481 P.2d 355 (Or. 1971), that suits for declaratory judgments and heirship proceedings in probate court are examples of such other provisions of law.

## **Paternity presumptions based on marriage**

About two-thirds of all children born in the U.S. today are born to married women, and their husbands are presumed to be the legal fathers. Until 2005, ORS 109.070(1)(a) provided that if a married woman and her husband were cohabiting when a child was conceived and the husband was not infertile, he was conclusively presumed to be the father of children born to her. Oregon was one of only two states with a conclusive presumption, and the only one with a conclusive presumption that applied to the husband and wife in all circumstances. The 2005 legislature temporarily repealed the conclusive presumption. Laws of 2005 c.160 §11. The 2007 legislation repealed the conclusive presumption permanently. A recent Court of Appeals decision addresses which law governs litigation brought in 2007 over the legal paternity of a child born in 2002 -- the law in effect in 2002 or 2007. In *State ex rel. Juvenile Dept. of Lane County v. G.W.*, --- P.3d --- (Or. App. 2008), the court held that the legislation in effect at the time of the litigation governed, and the court's reasoning supports the conclusion that the same should be true for litigation arising under the 2007 legislation.

The 2007 legislation retained and amended the other presumption based on marriage that has long been part of ORS 109.070(1) – that a married woman's husband is rebuttably presumed to be the father of children born to her during the marriage. ORS 109.070(1)(a). However, the 2007 legislation imposed new limits on standing to rebut the presumption. It provides that either the husband or the wife may challenge the presumption under any circumstances, but third parties, including DHS and the child, may not challenge it if the spouses are living together unless the spouses consent. ORS 109.070(2). The purpose of this limitation, which was borrowed from California law, is to protect the privacy and integrity of the intact family.

The 2007 legislation also enacted a new rebuttable presumption, derived from the 2002 Uniform Parentage Act, that woman's former husband is rebuttably presumed to be the father of any child born within 300 days of the termination of the marriage by any means. ORS 109.070(1)(b). This provision codifies prior practice. It could clash with the rebuttable presumption that a woman's husband is the father, as when a married woman becomes pregnant, divorces, and remarries within 300 days of the divorce. In the rare cases of clashing presumptions, courts generally give effect to the one supported by the more important policy considerations and facts of the particular case.

Finally, the new legislation significantly reduces the effect of a section of ORS 109.070 that previously provided that the biological father of a child born outside marriage became the legal father automatically if he married the mother. As amended, ORS 109.070(1)(c) now requires that the spouses also file a voluntary acknowledgment of paternity form with the state office of vital statistics. As discussed below, filing such a form is in itself sufficient to determine paternity; the man and woman's marriage is, therefore, irrelevant to the legal paternity determination. However, this section is still important because the rule permitting only the spouses to challenge paternity while they are cohabiting, discussed above, also applies here.

The 2007 legislation does not impose a statute of limitations on bringing challenges to the marital presumption, but it does give judges discretion about whether to admit evidence to rebut the presumption. ORS 109.070(3) provides that the judge should admit such evidence only upon a finding that it is "just and equitable, giving consideration to the interests of the parties and the child." In several cases decided before the 2005 and 2007 paternity legislation, the Oregon Court of Appeals held that a trial court may refuse to allow the presumption of paternity to be rebutted

because the petitioner is equitably estopped from denying paternity. Marriage of Johns and Johns, 42 Or. App. 39, 601 P.2d 475 (1979); Marriage of Hodge and Hodge, 84 Or. App. 62, 733 P.2d 458, rev. den. 303 Or. 370, 738 P.2d 1999 (1987); Marriage of Sleeper and Sleeper, 145 Or.App. 165, 929 P.2d 1028 (1996), aff'd on other grounds, 328 Or. 504, 982 P.2d 1126 (1999). These cases remain good law, though a judge's authority under the "just and equitable" standard to exclude evidence to rebut a marital presumption is not limited to facts giving rise to estoppel.

### **Paternity based on an adjudication**

The traditional way of determining the paternity of a child born outside marriage is by litigation – a filiation suit, as the Oregon statutes call it. ORS 109.124 – ORS 109.237. ORS chapter 416 also allows legal paternity to be established by administrative proceedings conducted by the office of child support enforcement. ORS 416.400 to 416.470. The 2007 legislation amended the filiation statutes to prevent courts from entering findings of paternity that are inconsistent with each other, but it did not enact similar provisions for the administrative proceedings under Chapter 416.

The amendments to the filiation statutes complement ORS 109.326, which provides that a court may make a determination that a married woman's husband is not the father of a child born during the marriage only if the husband has been served with a summons and a true copy of a motion and order to show cause, provided that the child has lived with the husband at some point or the husband has repeatedly contributed or tried to contribute to the child's support. As amended, ORS 109.125, which governs filiation proceedings, is even more protective of the rights of and other men who have the status of legal father. It requires that a petition to establish paternity identify the mother's husband if she is married and provides that a man whose paternity is presumed or has been previously established is a necessary party to the proceedings unless his paternity has been legally disestablished. ORS 109.155(7) precludes a court from entering a judgment of paternity in a filiation suit if another man's paternity is presumed or established under ORS 109.070(1) unless paternity has been disestablished. Chapter 416 does not include parallel provisions, and it is, therefore, still possible for administrative child support proceedings to result in paternity findings that conflict with paternity presumptions or preexisting determinations of paternity.

Setting aside administrative findings of paternity The 2007 legislation also amends existing legislation that governs challenges to administrative determinations of paternity. The amended version of ORS 416.443 allows a party to an administrative proceeding that established paternity to petition to reopen the issue for up to one year after the administrative order was registered with the court, provided that blood tests were not done before the paternity order was issued. In response to such a petition, the agency administrator must order blood tests and, if the blood tests exclude the man as the child's biological father, may file a motion with the court for an order setting aside the order of paternity. If either party refuses to submit to blood tests, the issue of paternity must be resolved against him or her. The child support program must pay for the costs of testing, though it may seek to recover them from the party who requested the tests.

Setting aside judicial findings of paternity Until the 2007 legislation was enacted, the only way to set aside a judicial determination of paternity was to bring an action under ORCP 71. The 2007 law establishes a new method for bringing such an action that is intended to parallel ORCP 71 as much as possible. This method is not exclusive, but was enacted at the urging of the child support enforcement office to help pro se litigants who often do not understand Rule 71 and

its application to paternity findings. The new legislation is found in Section 9 of the 2007 legislation, HB 2382. (At the time this is written, the legislation has not yet been codified into the ORS.)

For purposes of Rule 71 and the new legislation, judicial determinations of paternity are not limited to orders entered in filiation suits. Most importantly, a divorce decree identifying children as children of the marriage (or using equivalent language) probably constitutes a judgment of paternity even if the issue of paternity was not actually contested. Before the conclusive presumption that the husband was the father was abolished, family law practitioners may not have considered such a divorce decree as a judicial order establishing paternity because the issue of paternity could not be contested. Now that the conclusive presumption is abolished, paternity is now contestable in every divorce, and even if it is not contested, *res judicata* (claim or issue preclusion) may prevent a party from raising a challenge later. The report of the Oregon Law Commission committee that wrote the 2007 legislation observes, “Practitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law.”

A petition under the new legislation may be filed by the parties to the original litigation, DHS if the child is in the custody of DHS as a dependent child under ORS Chapter 419B, or the Division of Child Support if support rights have been assigned to the state. If anyone else has interests that are affected by an order determining paternity, he or she may challenge the order only under ORCP 71. Challenges based on mistake, inadvertence, surprise or excusable neglect must be filed within one year. A challenge based on fraud, misrepresentation or other misconduct must be filed within one year from the date of discovery.

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.” Necessary parties include everyone who was a party to the original 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. 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).

The court may order the parties and the child to submit to blood tests; in deciding whether to enter such an order, “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.” This section, granting the court discretion over whether to order blood testing, recognizes that, as a practical matter, this may be the most important decision, more important than how to determine legal paternity once the biological facts are clear. If blood tests show that the man is not the biological father and the petitioner proves the judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, or other misconduct, the court must set aside the determination of paternity unless it finds “giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable.”

A judgment setting aside a paternity finding must terminate future support duties and may vacate or deem satisfied unpaid past due support obligations, but may not order restitution from the state for support paid

### **Paternity based on voluntary acknowledgments**

For the third of all children born outside marriage, the most commonly-used method of determining paternity today is the voluntary acknowledgment. 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. Since 1975 Oregon statutes have allowed the mother and putative father of a child born outside marriage to establish legal paternity by signing and filing a voluntary acknowledgment of paternity. Federal legislation enacted in 1993 and amended in 1996 requires states to have voluntary acknowledgment statutes as a condition of receiving federal funds for the state's child support and child welfare systems. The Oregon legislation has been amended to comply with these requirements, and the 2007 legislation did not change any of the basic features of the law.

Legal paternity may be established by the parents filing a voluntary acknowledgment form with the state office of vital statistics, and the state must recognize voluntary acknowledgments filed in other states. ORS 109.070(1)(e), (f). Most voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility.

The one important change to the statutes regarding establishment of paternity by voluntary acknowledgment protects adoptions and juvenile court placements from being disrupted by late-filed acknowledgments. An acknowledgment is invalid if one of the parties signed it after having consented to the child's adoption or having relinquished the child to a child-caring agency. Similarly, an acknowledgment signed by a party whose parental rights have been terminated or who has previously been adjudicated not to be the child's parent is invalid. ORS 109.070(7).

The principles governing rescission and collateral attacks on voluntary acknowledgments also were not changed by the 2007 legislation; however, the new law spells out the procedure for rescinding or challenging an acknowledgment and explicitly authorizes judges to exercise discretion in deciding judicial challenges.

Rescissions ORS 109.070(4) allows either party to rescind a voluntary acknowledgment within 60 days of its signing. If the party wishing to rescind is a party to a "proceeding relating to the child" which occurs within that 60-day period, he or she must rescind before an order is entered in the proceeding. The rescission must be in writing and filed with the bureau of vital statistics.

Challenges/motions to set aside in court After the 60-day rescission period has expired, a challenge to a voluntary acknowledgment on the basis of fraud, duress, or material mistake of fact may be filed by a party to the acknowledgment, the child, or DHS if the child is in DHS custody pursuant to ORS chapter 419B. ORS 109.070(5). This section was amended to specify that a challenge is initiated by a petition filed in circuit court. The challenger bears the burden of proof by a preponderance of the evidence, and the rules of civil procedure apply. The amendment also gives the judge discretion about whether to set aside the voluntary acknowledgment even if the alleged misconduct is proven. ORS 109.070(5)(f) provides, "the court shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable."

Actions to set aside through the child support agency ORS 109.070(6) reenacts part of the substance of a rule that preexisted the 2007 legislation; it provides that the child support enforcement administrator may order testing to determine the biological paternity of a child whose legal paternity was established by voluntary acknowledgment if blood tests have not been done. The blood tests must be sought within a year of the filing of the acknowledgment and can

be requested only by a party to the acknowledgment or by DHS if the child is in the custody of DHS pursuant to an action brought under ORS Chapter 419B. ORS 416.443, which governs administrative orders for blood tests following an administrative determination of paternity, and which is described above, applies to these requests. Unlike the situation in which a party asks a court to order blood testing after a judicial determination of paternity, the agency administrator has no discretion to deny the petition for a blood test under this section. Until the 2007 legislation, a blood test order could also be obtained from a court. This provision was eliminated because it was rarely used and because the administrative process is simpler.

## **Unresolved issues**

The 2007 legislation clarifies and updates Oregon's paternity law in important ways, but two important issues remain unresolved, both of them intrinsically related to disagreements about the relative importance of biological paternity for determinations of legal paternity.

The first issue is whether a voluntary acknowledgment that is signed by a man who is not the child's biological father is void. Those who believe that it is argue that the statute setting out the requirements for a voluntary acknowledgment, ORS 432.287, provides that paternity is established if the man is the biological father. Those who take this view also argue that for purposes of challenges to voluntary acknowledgments under ORS 109.070(5), proof that the man is not the biological father is sufficient to prove that the acknowledgment was signed "mistakenly" or even "fraudulently." On the other hand, those who disagree say that the language regarding "biological father" in ORS 432.287 is intended to make clear that a voluntary acknowledgment is not an alternative to adoption. They also argue that if proof that the man is not the biological father automatically establishes "mistake" or "fraud," the statute is redundant and some of its language is meaningless. Moreover, this interpretation is inconsistent with federal policy, which provides that voluntary acknowledgments must have the legal status of judgments and can be challenged only on the bases that a judgment could be challenged. The OLC drafting committee could not resolve this issue and left it for judicial development.

The second unresolved issue is how judges should exercise their discretion about whether to grant a petition for blood tests or a challenge to a presumption in favor or finding of paternity. As discussed above,

- The judge may reject evidence to rebut the marital presumption upon a finding that this is "just and equitable, giving consideration to the interests of the parties and the child." Or. Rev. Stat 109.070(3).

- If the court finds that the legal father is not the biological father and a paternity judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct of a party, it must vacate or set aside the judgment unless it finds, "giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable." HB 2382 § 9(7).

- In a suit to set aside a judgment of paternity, the judge must "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. HB 2382 § 9(6).

- If a court finds that a voluntary acknowledgment names a man not the biological father and was procured by fraud, duress or material mistake of fact, the court "shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the

court finds that setting aside the acknowledgment would be substantially inequitable.” ORS 109.070(5)(f).

Some of the OLC drafting committee wanted the statute to state explicitly that the judge could consider the child’s best interests in making the determination and to set out criteria for judges to consider, as similar sections of the Uniform Parentage Act do. Those who opposed including the “best interests” language argued that 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. However, as the language quoted above shows, the legislature amended the language governing motions to set aside judgments and voluntary acknowledgments to require that, before a court denies such a motion, it must find that to do so is necessary to avoid “substantial inequity.”