Juvenile Code Revision Work Group:

PUTATIVE FATHERS SUB-WORK GROUP

THE RIGHTS OF PUTATIVE FATHERS IN JUVENILE COURT REPORT

SB 234
with proposed amendments

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I. Introduction

In a substantial number of juvenile court proceedings, the paternity of the child who is the subject of the case has not been established, or there is uncertainty about paternity. Since both a child's parents may have custodial rights that may be affected by the proceeding and because either or both parents may be important resources for the child, it is critical to identify the child's parents early and provide them with constitutionally adequate notice. The sections of the Oregon juvenile code that provide for notice to and protection of the custodial rights of unmarried biological fathers whose paternity has not been established are not consistent with requirements of the United States Constitution. Further, it is not clear that Oregon juvenile courts have the authority to resolve disputes regarding a child's paternity, and, even if it can be argued that they have this authority, the Oregon juvenile code does not provide procedures for resolving these disputes. The results are that the rights of putative fathers in juvenile court are not always adequately protected, and the interests of children may also be adversely affected.

This bill seeks to remedy these problems by 1) providing for notice to and protection of the substantive rights of all putative fathers whose rights are constitutionally protected and 2) creating authority for the juvenile court to resolve disputes regarding the paternity of a child who comes before it. The bill also authorizes a child and the Department of Human Services to challenge a voluntary acknowledgment of paternity of a child within the care and custody of the department under some circumstances.

II. History of the project

This project was proposed by the Oregon Law Commission Juvenile Code Revision Work Group in 2003. Because the project had implications for child support enforcement and adoption practice, the putative fathers was large. The members appointed by the Commission were Emily Cohen, OSB Family Law Section; Esther Cronin, DHS/CAF Adoptions; Deanne Darling, Clackamas County Circuit Court Judge; Michele DesBrisay, Multnomah County Deputy District Attorney; Shani Fuller, DOJ Division of Child Support; David Gannett, OSB Family Law Section; KayT Garrett, DOJ Family Law Section; Linda Guss, DOJ Human Services Section; Leslie Harris, UO School of Law; Amy Holmes-Hehn, Multnomah County Deputy District Attorney; Linda Hughes, Multnomah County Juvenile Court Referee; Terry Leggert, Marion County Circuit Court Judge; Julie McFarlane, Juvenile Rights Project; Daniel Murphy, Linn County Circuit Court Judge; Robin Pope, OSB Family Law Section; Michael Serice, Deputy Director DHS Children, Adults and Families; Ronelle Shankle, DOJ Policy, Projects, & Legislative Coordinator; Catherine Stelzer, DHS/CAF Foster Care Unit; and Timothy Travis, OJD Juvenile Court Improvement Project.

The chair of the sub-work group was KayT Garrett, and the chair pro tem was Linda Guss. Leslie Harris was the reporter.

Interested persons who also participated in work group sessions included Sen. Kate Brown; Deborah Carnaghi, DHS/CAF Child Protective Services Unit; Anna Joyce, DOJ Family Law Section; Lisa Kay, Juvenile Rights Project; Maureen McKnight; Multnomah County Circuit Court Judge; Susan Moffet, OSB Family Law Section; and David Nebel, Oregon State Bar. Jason Janzen, Oregon Law Commission Legal Assistant, provided research support.

To prepare for this project, the work group familiarized itself with the major United States Supreme Court cases on the rights of unwed biological fathers, as well as cases from the Oregon Supreme Court and Court of Appeals. The group also analyzed the requirements of the federal Indian Child Welfare Act and the state plan requirements of the Social Security Act, to insure that the proposals would comply with the federal acts.

In fashioning this proposed legislation, the work group reviewed proposed amendments to the juvenile code drafted by the Word Usage sub-group of the 2001-2003 Interim Juvenile Code Work Group, selected sections of the 2000 Uniform Parentage Act, the 1988 Uniform Putative and Unknown Fathers Act, sections of a benchbook from Michigan dealing with absent parents and putative fathers, and information about putative father registries (including a research memo written by a law student and information from the National Conference of State Legislatures). Some members of the committee also looked at information from the ABA Center on Children and the Law and from other states, including California, Florida, Georgia, New Hampshire, New York, Texas and Utah.

III. The problems that this proposal addresses

Putative fathers are alleged biological fathers whose paternity has not been legally established in Oregon or elsewhere. In several respects the Oregon juvenile code does not deal

adequately with the role of putative fathers. First, the sections of the code defining which putative fathers are entitled to notice of proceedings and to substantive rights does not include all such fathers who are likely to provide important resources for their children; in addition, the definition is not consistent with decisions of the U.S. Supreme Court. Second, these provisions of the juvenile code are not consistent with similar provisions in ORS Chapter 109, which creates confusion and the risk that similarly situated families will be treated differently simply because cases concerning them are brought under different chapters of the Oregon code. Third, the juvenile code does not clearly provide authority to juvenile court judges to resolve disputes regarding paternity, even though such disputes arise fairly often.

A. The juvenile code and protection for the rights of putative fathers

The Oregon juvenile code currently provides that a putative father must be summoned and is entitled to the rights of a party if he has "provided or offered to provide for the physical, emotional, custodial or financial needs of the child or ward in the previous six months or was prevented from doing so by the mother of the child or ward." ORS 419B.839(1)(c); 419B.875(1)(c). The work group concluded that these provisions should be changed for two reasons. First, as a matter of policy, the juvenile code emphasizes the protection of a child's relationship with his or her parent or parents where the parent is able to provide adequately for the child. The provisions regarding participation of putative fathers may exclude some men who are committed to their children's well-being and whose rights should be protected for the sake of furthering the child's best interests. Second, the juvenile code provisions are inconsistent with decisions of the U.S. Supreme Court regarding the rights of unwed biological fathers.

A fundamental premise of the Oregon juvenile code, one that informs every aspect of the provisions regarding dependency proceedings, is that ordinarily children are best served by protecting their relationships with their families. See, e.g., ORS 419B.090(4). When a child's custodial parent is abusive or neglectful, it may well be in the best interests of the child to live instead with the other parent. The work group determined that at the beginning of a dependency case, this policy suggests that searches should be made for absent parents, including putative fathers, who have assumed or are willing to assume the responsibilities of parenthood. If such parents are found, they should be included in the proceedings and encouraged to establish relationships with their children. The work group was guided by the decisions from the U.S. Supreme Court in fashioning definitions of which putative fathers should be given notice and the opportunity to participate in the proceedings, even if they have not established legal paternity by one of the means set out in ORS 109.070.

The U.S. Supreme Court has held that unwed biological fathers who have demonstrated a commitment to the responsibilities of parenthood are entitled to notice of proceedings involving the custody of their children and to the same protections for their substantive parental rights that other parents enjoy.[1] Stanley v. Illinois, 405 U.S. 645 (1972), Quilloin v. Walcott, 434 U.S. 246

[1] ORS 109.094, a statute of general applicability, provides that once a man's paternity has been established, he has full parental rights, that is, the same procedural and substantive rights that a married father has. Thus, a man whose paternity has been established or declared under ORS

(1978), Caban v. Mohammed, 441 U.S. 380 (1979), and Lehr v. Robertson, 463 U.S. 248 (1983). The provisions of the Oregon juvenile code discussed above are underclusive because they exclude fathers who have had substantial relationships with their children if they have not provided for the children within the most recent six months. Two opinions by the Oregon Court of Appeals might be interpreted as protecting the juvenile court statutes against successful constitutional challenges, but the work group concluded to the contrary for several reasons.

In P and P v. Children's Services Division, 66 Or. App. 66, 673 P.2d 864 (1983), the court held that on the facts of the case, the Oregon statutes pertaining to adoption without a putative father's consent satisfy due process and equal protection. The court held that it was constitutional to permit the adoption of a newborn infant without the putative father's consent, based on ORS 109.096. The putative father had not come forward, and the mother signed an affidavit to the effect that she had not had contact with him since the brief sexual encounter in which she became pregnant, and that she did not know his whereabouts. The court held that on these facts, due process did not require notice by publication. The second case, Burns v. Crenshaw, 84 Or. App. 257, 733 P.2d 922, *rev. den.*, 303 Or. 590, 739 P.2d 570 (1987), also involved the adoption of an infant without the putative father's consent. ORS 109.096(3) provides that a putative father who is not otherwise entitled to notice of proceedings regarding his child's custody is entitled to reasonable notice if he has filed notice of the initiation of filiation proceedings with the Center for Health Statistics before the initiation of the custody proceeding. The father in that case had not filed such a notice, and so did not receive notice of the adoption proceedings, and the court rejected his constitutional objection. Because ORS 109.096 applies to juvenile court as well as other judicial proceedings involving custody, it might be argued that it solves any constitutional problem with the juvenile court provisions. However, the work group rejected this conclusion.

First, after *Burns*, the Court of Appeals decided two cases which held that the rights of a putative father who did not receive notice of a custody case involving his child had been violated, even though he had not filed a notice of filiation proceedings with the Center for Health Statistics. In these cases the adoptive parents had reason to know the father's identify and that he had attempted to provide support to the child, but suppressed this information from the court. In each case, the Court of Appeals held that the proceedings were invalid because of this conduct. Vanlue v. Collins, 99 Or.App. 469, 782 P.2d 951 (1989), *rev. den.*, 309 Or. 334, 787 P.2d 888 (1990); Gruett v. Nesbitt, 173 Or.App. 225, 21 P.3d 168, (2001). It is likely that a juvenile court proceeding similarly could involve a putative father who had not filed a notice of filiation proceedings but who had played a significant role in his child's life outside the six-month time limit of ORS 419B.839 and that the child's mother, a DHS worker, or others involved in the case would have knowledge of this. This father would be entitled to notice and substantive rights, even though the existing statutes would not require that he be given this protection.

The work group was also unwilling to rely on *Burns* because more recently, the U.S. Supreme Court has affirmed the constitutional significance of parents' custodial rights (*see* Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)), and Oregon cases

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109.070 or 416.400 – 416.470 must be served with summons in a juvenile court proceeding, and he has the rights of a party. ORS 419B.839(1)(a); 419B.875(1)(b); 419B.819.

following *Troxel* strongly protect parental rights. *See, e.g*., In re Marriage of O'Donnell-Lamont, 337 Or. 86, 91 P.3d 721 (2004). While no Oregon Supreme Court case addresses the constitutionality of denying putative fathers procedural and substantive rights, a number of well-reasoned cases from highly regarded state Supreme Courts have held that due process requires greater protection than the Oregon statutes would provide in some circumstances. *See, e.g.,* Matter of Raquel Marie X, 559 N.E.2d 418 (N.Y. 1990), appeal following remand, 570 N.Y.S.2d 605 (A.D. 1991); Adoption of Kelsey S, 823 P.2d 1216 (Cal. 1992); In the Matter of the Appeal in Pima County juvenile Severance Action No. S-114487, 876 P.2d 1121 (Ariz. 1994 (en banc)).

B. Inconsistencies between the juvenile code and ORS Chapter 109

Provisions of the Oregon juvenile code referring to "parents" and "fathers" are not always consistent with each other, and in places it uses terms that are not defined in the code. Provisions of the juvenile code regarding the rights of putative fathers are not consistent with parallel provisions in ORS Chapter 109. The results are that the rights of putative fathers in juvenile court are not clear, and that similarly situated individuals may be treated differently, depending on whether they are involved in proceedings brought under Chapter 109 or under the juvenile code.

C. The juvenile court's authority to resolve disputes regarding paternity

It is not clear that Oregon juvenile courts have the authority to resolve disputes regarding a child's paternity. ORS 109.098 provides limited authority. However, this section only applies to putative fathers who are entitled to notice under ORS 109.096, which does not include all putative fathers who may be constitutionally protected.[2]

In addition, juvenile court cases sometimes involve paternity disputes that go beyond or do not even involve unwed fathers who have done nothing to establish paternity. This is so because it is possible for more than one man to have a claim to legal paternity under ORS 109.070, the basic statute on paternity that is applicable to all proceedings, including those in juvenile court. No provision of the juvenile code explicitly authorizes the court to resolve disputes that arise under conflicting provisions of ORS 109.070. Even if it can be argued that juvenile courts have authority to resolve paternity disputes, the Oregon juvenile code does not provide procedures for doing so.

[2] ORS 109.096 currently includes juvenile court proceedings. In addition to putative fathers who have filed notice of the initiation of filiation proceedings, it requires that notice be given to a putative father who has resided with the child "during the 60 days immediately preceding the initiation of the proceedings, or at any time since the child's birth is the child is less than 60 days old when the proceeding is initiated," or who **"**repeatedly has contributed or tried to contribute to the support of the child during the year immediately preceding the initiation of the proceeding, or during the period since the child's birth if the child is less than one year old when the proceeding is initiated."

IV. The objectives of the proposal

The proposed legislation addresses the three problems identified above.

Note: The proposed legislation was filed during the pre-session as SB 234 with the Joint Interim Judiciary Committee. Thereafter, the Sub-Work Group on Putative Fathers presented additional amendments to SB 234 to the Oregon Law Commission and the Commission approved the proposed amendments. In the Senate, SB 234 was amended to include the Commission-approved amendments and others. This discussion incorporates only the amendments approved by the Oregon Law Commission.

A. Revisions to provide constitutional protection for putative fathers

The work group quickly came to consensus on this issue. The proposal recommends amendments to existing statutes governing notice and substantive rights of putative fathers that bring the definitions of those entitled to protection into compliance with the constitutional rules and are more consistent with the policy of protecting children's relationships with parents who are willing and able to provide for them. This change requires abandonment of the bright-line rule that only requires examination of the putative father's conduct in the six months preceding the action.

B. Reconciling provisions of the juvenile code and ORS Chapter 109

The proposed legislation makes substantial progress toward achieving this goal, but does not accomplish it fully. The reason is that the aims of the juvenile court process, child support enforcement, and the adoption system, all of which may be affected by changes in these statutes, are not fully reconcilable, and, most critically, the work group realized that it was not charged with nor configured to resolve all of these conflicts.

The proposal reconciles several basic aspects of the relationship between the juvenile code and Chapter 109. First, it recommends that the juvenile code incorporate by reference some definitions and procedures in Chapter 109, rather than restating them in the juvenile code. The reason is that when these restatements are made, they are not always entirely consistent with the original provisions of Chapter 109 and therefore create unnecessary differences. Further, referring to provisions in Chapter 109 rather than restating them in Chapter 419B creates fewer problems when provisions of Chapter 109 are amended.

Second, the proposal recommends that the substantive rules for establishing paternity continue to be located ORS 109.070, and, to that end, proposes an amendment to that statute regarding voluntary acknowledgments of paternity that will only have an impact in juvenile court proceedings. The work group considered making this provision a part of the juvenile code but concluded that it should be made part of 109.070 to further the goal of consolidating all the substantive rules regarding paternity in one place. ORS 109.070(2)(b) currently allows a voluntary acknowledgment of paternity to be challenged under specific circumstances by a party to the acknowledgment or by the state if child support enforcement services are being provided.

This proposal expands the group allowed to challenge voluntary acknowledgments. Under the proposal the child or DHS, if the child is in the care and custody of DHS, may challenge a voluntary acknowledgment at any time after the first 60 days on the basis of fraud, duress or material mistake of fact, and the child may request genetic testing within the first year after the voluntary acknowledgment. While some members of the work group do not support expanding the opportunities for third parties to challenge voluntary acknowledgments of paternity because they believe that the intrusion by the state into private decisions by the family is unjustified, the majority of the group endorses it in the limited circumstances allowed by the proposal. The proposal also clarifies the procedures and allocation of costs for challenges.

If the changes described above are enacted, significant substantive and procedural differences between the juvenile code and Chapter 109 will continue to exist. The most significant differences concern notice to and procedural rights of putative fathers in adoption and other private cases, compared to the rules in juvenile court. The work group explored possible solutions but concluded that it was not charged with recommending such extensive changes to Chapter 109 and was not properly constituted to make such recommendations. The Oregon Law Commission has approved a proposal to establish a work group to consider whether Oregon should enact the Uniform Parentage Act during the 2005-2007 interim; this group probably will address the issues that are left unresolved here.

C. The juvenile court's authority to resolve disputes regarding paternity

The work group agreed that the juvenile code needs to authorize the court to resolve conflicts regarding a child's paternity, to provide for constitutionally adequate notice to all affected parties, and to provide procedures for resolving the dispute. The group considered drafting detailed statutes that would accomplish these goals, but concluded that general provisions, which give judges authority to tailor proceedings to the needs of a particular case, are more suitable at this time.

V. Review of legal solutions existing or proposed elsewhere

The most comprehensive solution that the work group considered was the Uniform Parentage Act, which on its face does not apply to juvenile court but which deals with all of the issues that are before the work group and more. However, as noted above, taking on the question of whether to recommend enactment of part or all of the act was far beyond the scope of the work group's charge.

The ABA Center on Children and the Law recommends that the petition be served on every man who has a potential claim to paternity under state law if the mother was not married to the biological father at the time of the child's birth and that the juvenile court take affirmative steps to resolve paternity including genetic testing and, if necessary, a hearing in the juvenile proceedings to determine paternity formally. E-mail from Mark Hardin to Leslie Harris, March 10, 2004, and conversations between KayT Garrett and Mark Hardin.

A common way of protecting putative fathers is to create a putative fathers registry, which allows a man who believes he may be the father of a child born to someone not his wife to

send in a postcard to a state-run list. Men on the list are entitled to notice of proceedings involving the children of whom they claim paternity. Since legislation creating a putative father registry would have impacts far beyond the juvenile court and since it is likely that the work group on the Uniform Parentage Act will consider such legislation, this work group considered but did not pursue the idea.

VI. The proposal

Note: The proposed legislation was filed during the pre-session as SB 234 with the Joint Interim Judiciary Committee. Thereafter, the Sub-Work Group on Putative Fathers presented additional amendments to SB 234 to the Oregon Law Commission and the Commission approved the proposed amendments. In the Senate, SB 234 was amended to include the Commission-approved amendments and others. This discussion incorporates only the amendments approved by the Oregon Law Commission.

A. Amendments to bring the definition of putative fathers entitled to notice and substantive rights into line with the policy goals of the Oregon juvenile code and with constitutional requirements.

1. **ORS 419A.004.** As used in this chapter and ORS chapters 419B and 419C, unless the context requires otherwise:

*** * ***

(16) "Parent" means the biological or adoptive mother and the legal [*or adoptive*] father of the child, ward, youth or youth offender. **As used in this subsection, 'legal father' means:** [*includes:*]

[*(a) A nonimpotent, nonsterile man who was cohabiting with his wife, who is the mother of the child, ward, youth or youth offender, at the time of conception;*]

[*(b) A man married to the mother of the child, ward, youth or youth offender at the time of birth, when there is no judgment of separation and the presumption of paternity has not been disputed;*]

[*(c) A biological father who marries the mother of the child, ward, youth or youth offender after the birth of the child, ward, youth or youth offender;*]

[*(d) A biological father who has established or declared paternity through filiation proceedings or under ORS 416.400 to 416.470; and*]

[*(e) A biological father who has, with the mother, established paternity through a voluntary acknowledgment of paternity under ORS 109.070.*]

(a) A man who has adopted the child, ward, youth or youth offender, or whose paternity has been established or declared under ORS 109.070, ORS 416.400 to 416.470 or by a juvenile court; and

(b) In cases in which the Indian Child Welfare Act applies, a man who is a father under applicable tribal law.

COMMENT: ORS 419A defines critical terms that are used throughout the Oregon juvenile code, ORS 419A, 419B, and 419C. The existing definition of "parent" includes all mothers and all legally recognized fathers. It implicitly treats adoptive fathers as having a different status than "legal" fathers and paraphrases the criteria for establishing paternity under 109.070. However, the definitions are not identical, creating the possibility that a putative father might be recognized as a legal father under ORS 109.070 but not under the juvenile code, for no reason. This section amends the definition of "parent" to mean all mothers and all legally recognized fathers. In turn, legally recognized fathers are adoptive fathers and biological fathers whose paternity has been established under ORS 109.070, which applies generally, or under ORS 416.400 to 416.470, which creates an administrative procedure for establishing paternity in child support cases. The amendment further says that in cases governed by the Indian Child Welfare Act, if a man is a legal father under applicable tribal law but not under other provisions of Oregon law, he will be treated as a legal father under the juvenile code, as ICWA requires.

2. **ORS 419B.819.** (1) A court may make an order establishing permanent guardianship under ORS 419B.365 or terminating parental rights under ORS 419B.500, 419B.502, 419B.504, 419B.506 or 419B.508 only after service of summons and a true copy of the petition on the parent, as provided in ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830 and 419B.833. **A putative father who satisfies the criteria set out in ORS 419B.839(1)(d) or 419B.875(1)(c) also must be served with summons and a true copy of the petition, unless a court of competent jurisdiction has found him not to be the child or ward's legal father or he has filed a petition for filiation that was dismissed.**

COMMENT: ORS 419B.819, the statute that defines who must receive a summons to a permanent guardianship or termination of parental rights proceeding, does not include putative fathers whose rights are constitutionally protected. This provision adds such a requirement. Ideally, putative fathers' claims will have been resolved before a permanent guardianship or termination of parental rights petition is filed, but this language is needed for those cases in which this issue is still open.

3. **ORS 419B.839.** (1) Summons in proceedings to establish jurisdiction under ORS 419B.100 must be served on:

(a) The [*legal*] parents of the child without regard to who has legal or physical custody of the child;

(b) The legal guardian of the child;

(c) A putative father of the child *[if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child in the previous six months or was prevented from doing so by the mother of the child;*] **who satisfies the criteria set out in ORS 419B.875(1)(c), except as provided in subsection (4) of this section;**

(d) A putative father of the child if notice of the initiation of filiation or paternity proceedings was on file with the Center for Health Statistics of the Department of Human Services prior to the initiation of the juvenile court proceedings, except as provided in subsection (4) of this section;

[*(d)*] **(e)** The person who has physical custody of the child, if the child is not in the physical custody of a parent; and

[(*e)*] **(f)** The child, if the child is 12 years of age or older.

(2) If it appears to the court that the welfare of the child or of the public requires that the child immediately be taken into custody, the court may indorse an order on the summons directing the officer serving it to take the child into custody.

(3) Summons may be issued requiring the appearance of any person whose presence the court deems necessary**.**

(4) Summons under subsection (1) of this section is not required to be given to a putative father whom a court of competent jurisdiction has found not to be the child's legal father or who has filed a petition for filiation that was dismissed."

COMMENT: ORS 419B.839 defines who is entitled to be served with a summons in dependency proceedings brought under ORS Chapter 419B. Subsection (1)(b) currently provides for summons to be served on a child's "legal" parents. The term "legal parent" is not defined in the juvenile code; ORS 419A.004(16), above, defines the term "parent," and that is the term properly used here.

ORS 419B.839 currently provides for notice to some putative fathers, but the qualifying language of subsection (1)(c) does not accurately describe the fathers whose rights are constitutionally protected and who should, as a policy matter, be included in dependency proceedings, as discussed above in Part III.A of this report. This amendment deletes the inaccurate language and adds language that requires notice to all putative fathers who have the rights of a party, as defined in ORS 419B.875(1)(c) and to putative fathers who have filed a notice of filiation or paternity proceedings with the Center for Health Statistics. This notice would most often be filed by the putative father or, if administrative proceedings to determine paternity are pending in Oregon, by the Division of Child Support. This language is derived from ORS 109.096 and is added because a later section of this proposal recommends deleting references to the juvenile court in ORS 109.096 (see below).

Subsection (4) provides that a putative father who could make a claim under section (1) does not have to be summoned if he was previously a party to proceedings that resulted in a finding that he was not the father or if he filed filiation proceedings and then dismissed them voluntarily. This is a standard application of *res judicata* principles.

4. **ORS 419B.875.** (1) Parties to proceedings in the juvenile court under ORS 419B.100 and, except as provided in paragraph (h) of this subsection, under ORS 419B.500 are:

(a) The child or ward;

(b) The [*legal*] parents or guardian of the child or ward;

(c) A putative father of the child or ward [*if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child or ward in the previous six months or was prevented from doing so by the mother of the child or ward;]* **who has demonstrated a direct and significant commitment to the child or ward by assuming or attempting to assume responsibilities normally associated with parenthood, including but not limited to:**

(A) Residing with the child or ward;

(B) Contributing to the financial support of the child or ward; or

(C) Establishing psychological ties with the child or ward.

* * *

(4) A putative father who satisfies the criteria set out in subsection (1)(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 father of the child or ward.

(5) A putative father whom a court of competent jurisdiction has found not to be the child or ward's legal father or who has filed a petition for filiation that was dismissed is not a party under subsection (1) of this section.

COMMENT: ORS 419B.875 identifies the parties to a dependency proceeding under ORS Chapter 419B and defines the rights of a party.

The proposal recommends changing section (1)(b) to refer to a child's "parents" instead of "legal parents" and is needed for consistency with the proposed changes in ORS 419A.004(16), discussed above.

The proposal suggests that paragraph (1)(c) be amended to include putative fathers who are constitutionally entitled to participate in proceedings regarding their children – those who have "demonstrated a direct and significant commitment to the child by assuming or attempting to assume responsibilities normally associated with parenthood." This amendment also adds a nonexclusive list of conduct that may support a finding that a man had made the necessary demonstration.

Section (4) is a new provision which provides that a putative father who makes a claim under ORS 109.875(1)(c) is to be treated as a party until his claim is resolved by a court.

Section (5) is a new section that makes clear that a putative father who could make a claim under section (1) is not a party if he was previously a party to filiation proceedings that he initiated that were later dismissed or any proceeding that resulted in a finding that he was not the father. This is a standard application of *res judicata* principles.

B. Amendments to coordinate the juvenile code and Chapter 109.

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

* * *

(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 [*subsection (2)*] **subsections (2) to (4)** of this section, this filing establishes paternity for all purposes.

* * *

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

[*(A)*] **(a)** Sixty days after filing the voluntary acknowledgment [*of paternity*]; 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 **voluntary** acknowledgment is also a party to the proceeding. For the purposes of this *[subparagraph]* **paragraph**, the date of a proceeding is the date on which an order is entered in the proceeding.

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

[*(i)*] **(A)** At any time after the 60-day period on the basis of fraud, duress or material mistake of fact[. *The party bringing the challenge has the burden of proof.*] **by:**

(i) A party to the voluntary acknowledgment;

(ii) The child named in the voluntary acknowledgment; or

(iii) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the voluntary acknowledgment is in the care and custody of the department pursuant to ORS chapter 419B and the department or administrator has a reasonable belief that the voluntary acknowledgment was the result of fraud, duress or material mistake of fact.

[*(ii)*]**(B)** Within one year after the voluntary acknowledgment has been filed, unless *[the provisions* of *paragraph (c) of this subsection apply*] **subsection (4) of this section applies.** No challenge to the voluntary acknowledgment may be allowed more than one year after the voluntary acknowledgment has been filed, unless *[the provisions of sub-subparagraph (i) of this subparagraph apply]* **subparagraph (A) of this paragraph applies.**

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

(c) The party bringing a challenge under this subsection has the burden of proof.

[*(c)*] **(4) (a)** No later than one year after a voluntary acknowledgment of paternity form is filed in this state [*and if genetic parentage tests have not been previously completed*], a party to the **voluntary** acknowledgment**, the child named in the voluntary 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 parties and the child submit to genetic parentage tests. **The state Child Support Program shall pay the costs for genetic parentage tests performed under this paragraph subject to recovery from the party who requested the tests.**

[*(d)*] **(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 **or the court determines under subsection (3) of this section that the male party is not the father of the child,** a party **to the challenge** or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court for [*an order*] **a judgment** of nonpaternity. **The party submitting the application for a judgment of nonpaternity to the court 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 [*an order*] **a judgment** of nonpaternity, the *[Director of Human Services]* **State Registrar of the Center for Health Statistics** shall correct any records [*maintained by the State Registrar of the Center for Health Statistics*] **it maintains** that indicate that the male party is the parent of the child.

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

(c) Support paid prior to a judgment of nonpaternity under paragraph (b) of this subsection shall not be returned to the payer.

COMMENT: A voluntary acknowledgment of paternity signed by both the mother and an alleged father and filed with the State Registrar of the Center for Health Statistics "establishes paternity for all purposes." ORS 109.070(1)(e). *See also* ORS 432.287. ORS 109.070(2)(a) provides that a

voluntary acknowledgment can be rescinded by a party no later than 60 days after filing the voluntary acknowledgment of paternity or 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 to the proceeding, if that proceeding occurs sooner than 60 days after the acknowledgment was filed. The provision is unchanged by this bill.

ORS 109.070 (2)(b) provides that a voluntary acknowledgment can be challenged under two circumstances outside this 60-day rescission period. The proposed amendment expands the group of interested parties who can bring challenges to voluntary acknowledgments. ORS 109.070(2) currently allows a voluntary acknowledgment to be challenged by the following persons under the following circumstances:

1) Within a year after the voluntary acknowledgment form is filed by a party to the acknowledgment or by the state in cases in which the state is providing child support enforcement services, provided that genetic parentage tests have not been completed previously. The person or agency contemplating a challenge under this provision may apply to the state for an order requiring that the parties and the child submit to genetic testing. If the tests exclude the man who signed the acknowledgment as the child's father, a party or the state agency may apply for an order of nonpaternity, and the records in the Center for Health Statistics are to be corrected. The state Child Support Program pays for the test, subject to recovery from the party who requested the tests.

2) At any time on the basis of fraud, duress or material mistake of fact. Though the section does not explicitly say so, its provisions appear to be limited to challenges by a party to the acknowledgment.

The proposed amendment would clarify that challenges on the basis of fraud, duress or material mistake of fact may be brought by a party, and, more importantly, it allows additional challenges to voluntary acknowledgments. In particular, the proposal would permit but not require a child (or, as a practical matter, the child's attorney) or the Department of Human Services if the child were in the department's care and custody under ORS chapter 419B to challenge paternity on the basis of fraud, duress or material mistake of fact; the department would have to have a reasonable factual foundation for the challenge. A child could also ask the court to order genetic testing within a year of the acknowledgment's signing.

Under the proposal, the state Child Support Program would continue to pay for genetic tests, subject to recovery from the party that sought the testing. If the tests excluded the man as the child's biological father, a party to the challenge could apply for a judgment of nonpaternity. When the judgment issued, state vital statistics records would be corrected. If the man had paid any child support pursuant to the voluntary acknowledgment, he would not be entitled to a refund.

All of the proposed changes to the existing statute, except those allowing children and DHS to challenge acknowledgments of paternity, are technical and intended to clarify existing law.

Allowing children and DHS to challenge voluntary acknowledgments would have the greatest impact in juvenile court dependency cases. If enacted, this amendment would create a simple and expeditious way for a child or DHS to exclude from parental status a man acknowledged as the father by the child's mother who was not in fact the child's biological father. Absent this provision, such a man would be entitled to the procedural and substantive

rights of legal parents in dependency cases, unless and until his parental rights were legally relinquished or terminated involuntarily.

2. **ORS 109.096** (1) When the paternity of a child has not been established under ORS 109.070, the putative father *[shall be]* **is** entitled to reasonable notice in adoption [*, juvenile court,*] or other court proceedings concerning the custody of the child, **except for juvenile court proceedings**, if the petitioner knows, or by the exercise of ordinary diligence should have known:

* * *

(4) Except as otherwise provided in subsection (3) of this section, the putative father [*shall be*] **is** entitled to reasonable notice in [*juvenile court or other*] court proceedings **concerning the custody of the child, other than juvenile court proceedings,** if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Center for Health Statistics prior to the initiation of the [*juvenile court or other court*] proceedings.

* * *

COMMENT: ORS 109.096, which concerns notice to putative fathers of proceedings involving their alleged children, currently applies to juvenile court proceedings. In light of the amendments to the juvenile code discussed above, this section should no longer apply to juvenile proceedings.

3. **ORS 109.098.** (1) If a putative father of a child by due appearance in a proceeding of which he is entitled to notice under ORS 109.096 objects to the relief sought, the court:

(a) May stay the adoption[*, juvenile court*] or other court proceeding to await the outcome of the filiation proceedings only if notice of the initiation of filiation proceedings was on file as required by ORS 109.096 (3) or (4).

* * *

COMMENT: ORS 109.098 concerns the procedure that a court must follow if a putative father appears in a proceeding regarding the custody of his alleged child. The section currently applies to juvenile court proceedings. The reference to juvenile court proceedings should be deleted, consistent with the proposed amendment to ORS 109.096.

4. COMMENT: The amendments to ORS 419A.004(16), 419B.819, and 419B.839, discussed above, serve to improve the coordination between Chapter 109 and the juvenile code, in addition to making needed changes in the definition of which putative fathers are protected in juvenile court. The provision discussed in the next section, regarding juvenile court authority to resolve paternity disputes, was also drafted to facilitate coordination with Chapter 109.

C. Provisions to authorize the juvenile court to resolve paternity disputes.

SECTION 9. (1) If, in any proceeding under ORS 419B.100 or ORS 419B.500, the juvenile court determines that the child or ward has no legal father or that paternity is disputed as allowed in ORS 109.070, the court may enter a judgment of paternity or a judgment of nonpaternity in compliance with the provisions of ORS 109.070, 109.124 to 109.230, 109.250 to 109.262, and 109.326.

(2) Before entering a judgment under subsection (1) of this section, the court must find that adequate notice and an opportunity to be heard was provided to:

(a) The parties to the proceeding;

(b) The man alleged or claiming to be the child or ward's father; and

(c) The Administrator of the Division of Child Support of the Department of Justice or the branch office providing support services to the county in which the court is located.

(3) As used in this section, "legal father" has the meaning given that term in ORS 419A.004(16).

COMMENT: This provision explicitly authorizes the juvenile court to adjudicate paternity disputes involving children who are alleged to be dependent or as to whom a termination of parental rights petition has been filed. Recognizing the wide variety of circumstances under which such disputes may arise, the proposed statute does not set out detailed provisions regarding notice and hearings, but rather leaves to the court's discretion the determination of to whom notice and an opportunity to be heard must be provided. In cases in which the Child Support Program is involved, its representatives must receive notice so that it can participate and insure that its records are consistent with the final judgments of the court. The work group contemplated that "adequate notice" would require the petitioner to serve formal summons on parties who are not before the court and alleged or claimed fathers who are not before the court. Less formal means of notice to parties who are before the court and the Child Support Program would satisfy the "adequate notice" requirement.

VII. Conclusion

The proposed bill should be adopted to make the statutory provisions regarding the participation of putative fathers in juvenile court proceedings more consistent with existing policy and with constitutional requirements, to improve the coordination between the juvenile code and Chapter 109, and to authorize juvenile courts to resolve paternity disputes regarding children who are before them.

VIII. Amendment Note

Commission approved amendments related to the putative father project were among the amendments made in the Senate and passed in the House. Those amendments were incorporated into the report when presented to the Commission.

In addition, amendments were made that were not Commission-endorsed amendments, but fit within the relating clause of the bill. Such amendments included amendments to allow for the disestablishment of paternity in certain cases when blood tests show that a legal father is not the biological father. The bill was also amended to remove the conclusive presumption providing that a co-habitory husband is the father. DHS or CSP was also given authority to challenge voluntary acknowledgement of paternity in certain circumstances. These non-Law Commission endorsements sunset on January 2, 2008. The Commission plans to again address some of these issues for 2007 with its Uniform Parentage Act law reform project.