

An Act

Legislative Act 11-05

AN ACT RELATING TO AND AMENDING TITLE 10 OF THE CHEROKEE NATION CODE ANNOTATED TO ADD CHAPTER 3, SECTIONS 100 THROUGH 123, WHICH ESTABLISH CHEROKEE NATION PROCEDURE FOR THE DETERMINATION OF PATERNITY

BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This act shall be known as the "Paternity Act of 2005" and codified as Title 10, Chapter 3, § 100-123 of the Cherokee Nation Code Annotated.

Section 2. Purpose

The purpose of this Act is to establish the procedure by which the courts of the Cherokee Nation are to determine paternity.

Section 3. Amendments

Title 10 of the Cherokee Nation Code Annotated is hereby amended to read as follows:

Chapter 3 PATERNITY

§ 100 Presumption that Man Is the Natural Father.

A. Except as otherwise provided by Section 100.1 of this title, a man is presumed to be the natural father of a child for all intents and purposes if:

- 1 He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within ten (10) months after the termination of the marriage by death, annulment, declaration of invalidity, divorce or dissolution, or after a decree of separation is entered by a court. A child born before wedlock becomes legitimate by the subsequent marriage of his parents even if the marriage is, was or could be declared invalid. Any child born within the ten-month period specified in this subsection which is born during a subsequent marriage to another person shall be presumed to be the legitimate child of that subsequent marriage;
2. Before the child's birth, he and the child's natural mother have cohabitated and the child is born within ten (10) months after the termination of cohabitation. As used in this paragraph, the term cohabitation means the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage according to law;
3. While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child for a period of at least two (2) years;
4. The United States Immigration and Naturalization Service made or accepted a determination that he was the father of the child at the time of the child's entry into the United States and he had the opportunity at the time of the child's entry into the United States to admit or deny the paternal relationship; or
5. Statistical probability of paternity is established at ninety-five percent (95%) or more by scientifically reliable genetic tests, including but not limited to blood tests.

B. The presumption of paternity created pursuant to this section may be disputed pursuant to Section 101 of this title.

§100.1 Additional Presumption of Paternity

A child shall be presumed to be the offspring of the putative father if: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

§101 Persons Entitled to Dispute Presumption - Proof of Illegitimacy - Time Limit.

A. The presumption of paternity created pursuant to Section 100 of this title may be disputed only by the husband or wife, the putative father or their descendants. Paternity may be established pursuant to Section 104 of this title.

B. If a child is born during the course of the marriage and is reared by the husband and wife as a member of their family without disputing the child's legitimacy for a period of at least two (2) years, the presumption cannot be disputed by anyone.

§102 Support and Education.

The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the parent having custody is able to give are inadequate, the other parent must assist to the extent of his or her ability.

§103 Death of Custodial Parent - Custody of Child.

The question of custody of a minor child upon the death of the custodial parent shall always be based upon what is in the best interests of the minor child.

§ 104 Natural Mother of Child - Establishment of Paternity

A. Except as otherwise provided by law, a woman who gives birth to a child is the natural mother of the child.

B. Paternity may be established by:

1 Completion of the Affidavit Acknowledging Paternity, provided by the Division of Child Support Enforcement, by the father and mother. A statement acknowledging paternity shall have the same legal effect as an order of paternity entered in a court or administrative proceeding.

a. The statement may be rescinded by the mother or acknowledging father within the earlier of:

(1) sixty (60) days after the statement is signed by making a motion to the district court requesting an order rescinding the affidavit on the same grounds as subsection (B)1(a)(2) of this section, or

(2) the date of an administrative or judicial proceeding relating to the child, including but not limited to a proceeding to establish a support order, in which the signatory is a party.

After the sixty-day period referred to in division (1) of this subparagraph, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger. Legal responsibilities, including but not limited to child support obligations, of any signatory arising from the

acknowledgment shall not be suspended during the challenge, except for good cause shown.

This subparagraph shall not be interpreted to authorize the rescission of an acknowledgement of paternity if such rescission would be prohibited under applicable federal law.

- b. (1) If the mother was married at the time of conception or birth, and her husband is not the natural father of the child, the husband may sign a husband's denial of paternity form, which must be filed along with the affidavit acknowledging paternity.

(2) The husband's denial of paternity form shall be prescribed by the Division of Child Support Enforcement and made available at the same locations as the affidavit acknowledging paternity;

2. Scientifically reliable genetic tests, including but not limited to blood tests;

3. District or administrative court order; or

4. As otherwise provided by law.

C. 1. If the person signing the acknowledgment of paternity is determined in an administrative or judicial proceeding not to be the father of the child, on the basis of fraud, duress or material mistake of fact pursuant to subsection B of this section, the Division of Child Support Enforcement or the court shall dismiss any pending court or administrative collection proceedings against the father and the father will be released from any court-ordered or Division-ordered payments for the support and maintenance of the child.

2. The State Registrar of Vital Statistics shall remove the name of the person listed as the father from the birth certificate upon notice from the Division that such person has been judicially or administratively determined not to be the father. Once paternity is established, the State Registrar of Vital Statistics shall correct its records and amend the birth certificate to reflect the father's name.

D. Proceedings to establish paternity must be brought in the district court. Proceedings may be brought by the mother, father, guardian, or custodian of the child, the Division, the prosecutor, a public or private agency or authority chargeable with the support of the child, or by the child. The court, after determining paternity in a civil action, shall enter an order providing for the support and maintenance of the child. The social security numbers of both parents and the child shall be included on the summary of support order form provided for in Section 515 of Title 43 of the Cherokee Nation Statutes which shall be submitted to the Central Case Registry as provided for in Section 502 of Title 43 of the Cherokee Nation Statutes. The district court may further make provision for custody and visitation based upon the best interests of the child.

E. An action to establish paternity shall be available to a child if commenced prior to the child attaining the age of 18 years or within one (1) year after the child reaches the age of eighteen (18).

§ 105 Complaint - Verification - Jurisdiction - Title - Death of mother.

If a woman, who is a citizen of the Cherokee Nation, is delivered of a child, or is pregnant with a child, and the paternity of said child is not determined, complaint may be made, in writing duly verified by any person, to the district court stating that fact and charging the proper person with being the father thereof if that person is a citizen of the Cherokee Nation or in the case of a non-member Indian or a non-Indian, if that person resides within the territorial boundaries of the Cherokee Nation. The proceeding shall be entitled in the name of the Cherokee Nation against the accused as defendant and shall be brought by the Child Support Enforcement Division. The death of the mother shall not abate an action which is brought under this section, and it will not prevent the bringing of an action for the support of the child.

§ 106 Trial of Issues of Paternity, Support, Custody and Visitation - Burden of Proof and Procedure.

The issues of paternity, support, custody and visitation shall be tried before a judge of the district court and the petitioning party shall bear the burden of proof. The court shall not make a determination of paternity unless the preponderance of the evidence supports said determination.

§ 107 Court Order Determining Paternity.

When the paternity petition is filed, the court shall order the defendant to appear and show cause why the court should not determine him to be the father. If the defendant fails to appear, the court shall upon the findings of the judge enter an order determining paternity. If the defendant appears and does not admit paternity, then the court shall enter at that time an order directing genetic testing to determine paternity. No finding of paternity shall be made by the court unless service has been made upon the named defendant(s) in accordance with the laws of the Cherokee Nation.

§ 108 Court May Enlarge, Diminish or Vacate Order or Judgment.

If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court shall direct, and with the costs of the suit and execution may issue, immediately, and afterwards from time to time for the collection of any sum or sums ordered to be paid, and in addition thereto the court shall require the defendant to secure the performance of the order of the court, in such manner as the court shall direct, and the court shall have power to punish, as for contempt, any disobedience by the defendant of an order of the court issued under this section.

§ 109 Appeals.

Appeals may be taken in cases brought under the provisions of this Article, in the same manner and with like effect as in other actions in the district court.

§ 110 Father's Liability to support and educate child.

A. An individual who has been legally determined to be the father of a child pursuant to Section 104 of this title, or an individual who has been judicially determined to be the father of a child is liable for the support and education of the child to the same extent as the father of a child born in wedlock.

- B.
1. An action to enforce the obligation of support and education may be brought by the mother or custodian or guardian of the child, by the public authority chargeable with the support of the child, or by the child.
 2. An action to determine paternity and to enforce this obligation may be brought any time before the eighteenth birthday of the child.
 3. If paternity has been legally determined pursuant to Section 104 of this title, or judicially determined, court ordered child support is not subject to any statute of limitations and an action to enforce the obligation may be brought at any time and the support in question is owed until paid.
 4. The father's obligation to support is terminated if the child is adopted.
 5. The court may order the payments made to the mother or custodian or guardian of the child, or to some other person, corporation or agency to administer under the supervision of the court.
- C.
1. An individual who has been legally determined to be the father of a child pursuant to Section 104 of this title, or an individual who has been judicially or administratively determined to be the father of a child shall be ordered to pay all or a portion of the costs of the birth and the reasonable expenses of providing for the child, provided that liability for support provided before the determination of paternity shall be imposed for five (5) years preceding the filing of the action.
 2. Copies of bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for genetic testing on behalf of the child.

D. The amount of child support and other support including amounts provided for in subsection 110 (C) of this section shall be ordered and reviewed in accordance with the child support guidelines provided in Section 514 of Title 43 of the Cherokee Nation Statutes.

E. 1. When a civil or administrative action is filed to determine paternity of a minor child, an interested party may request the court to enter a temporary order for support of the child pending a final determination of paternity. The application for temporary support shall set forth facts supporting the application and shall be verified by the party or entity seeking the order. The application and notice of hearing shall be served as in other civil cases.

2. After service of the application and opportunity for hearing, the court shall enter a temporary order for support if the court finds there is clear and convincing evidence of paternity, including, but not limited to:

- a. a genetic test which establishes a rebuttable or conclusive presumption of paternity pursuant to Section 121 of Title 10 of the Cherokee Nation Statutes,
- b. a notarized written statement acknowledging paternity of the child executed by the putative father,
- c. a presumption of paternity pursuant to Section 100 of this title, or
- d. other evidence which establishes a high probability of paternity.

3. Temporary orders for support shall be established in accordance with the child support guidelines pursuant to Section 514 of Title 43 of the Cherokee Nation Statutes. A temporary support order terminates when a final judgment is entered which establishes support or when the action is dismissed. A temporary support order shall not be retroactively modified, but it may be modified prospectively before final judgment upon motion of an interested party and a showing of facts supporting a modification.

§ 111 Father's Liability for Expenses of Mother.

The father of a child born out of wedlock is liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, whether or not the child is born alive. This liability may only be enforced within three (3) years after the birth of the child and, where the child is born alive, it must be enforced in an action for the support of the child.

§ 112 Persons Eligible to bring Paternity Actions.

A. The mother, putative father, guardian or custodian of the child, the Division of Child Support Enforcement, a public or private agency or authority chargeable with the support of the child, or the child may bring an action in a civil proceeding in district court or by an administrative action through the Division of Child Support Enforcement, to determine paternity and the amount of child support due and owing for the maintenance of the child.

B. Venue of an action to determine the paternity of a child pursuant to this section shall be, at the option of the plaintiff, in either the district court in Tahlequah or the closest site of a Cherokee Nation child support enforcement court docket.

C. A court may exercise personal jurisdiction over a person, whether or not a resident of the Cherokee Nation, who is the subject of a paternity action. When a person who is subject to the jurisdiction of the court is outside the Cherokee Nation, the person may be served outside of the Cherokee Nation by any method that is authorized by the statutes of this Nation.

D. The petition shall be verified as true by the affidavit of the plaintiff. A summons may be issued thereon and shall be served or publication made as in other civil cases.

E. The practice, pleading, and proceedings in such action shall conform to the rules prescribed by the Judicial Branch of the Cherokee Nation.

F. If the defendant fails to answer the petition of the plaintiff or appear for show cause hearing, then the court shall proceed to determine issues of paternity, support, custody and visitation if service on the defendant was made pursuant to the Cherokee Nation Statutes.

G. Attorneys for the Division of Child Support Enforcement may appear or initiate an action brought under this section on behalf of:

A recipient of Temporary Assistance for Needy Families; or

2. A person not receiving Temporary Assistance for Needy Families, including but not limited to the putative father, upon the request of such person and proper application pursuant to rules and regulations adopted by the Division.

H. In a proceeding brought under subsection G of this section by the Division of Child Support Enforcement, the court may, and unless it is not in the best interests of the child, shall, limit the issues in that proceeding to issues of paternity and support, unless issues of custody and visitation are specifically and affirmatively pled by the father. All contested issues of custody and visitation shall be addressed by the district court.

§ 113 Joinder of sexual partners as defendants—Genetic testing—Determination of paternity

A. All persons who have had sexual intercourse with a woman during the possible time of conception of a child for whom paternity is not determined may be joined as defendants in an action to determine the paternity of the child.

B. When more than one defendant is named or joined in a paternity action, the court shall order all defendants to appear. The court shall order genetic testing of all defendants who are duly served, including defendants who fail to answer or appear. The court may order the mother, the child, or other individuals necessary to make a determination of paternity to submit to genetic testing.

C. 1. When genetic testing indicates a probability of paternity greater than ninety-eight percent (98%) for a specific defendant pursuant to Section 121 of Title 10 of the Cherokee Nation Statutes, the court shall enter an order establishing that defendant as the father.

2. If a duly served defendant fails to answer, or to appear for hearing or genetic testing after being ordered to appear, and all other duly served defendants have been excluded as possible fathers by genetic testing, the court shall enter an order establishing the defendant who failed to answer or appear as the father.

3. If one or more defendants fail to appear for genetic testing after being ordered to appear for testing, the court may proceed to determine paternity and related issues based upon competent testimony and genetic test results, if any.

D. The court has the authority to enforce a subpoena or order to appear or to submit to genetic testing, or any other order entered pursuant to this section.

E. After paternity is determined by the court, the court shall dismiss the paternity action against the other defendants.

F. No judgment shall be entered against the defendant who has not been properly served.

§ 114 Costs and Attorney fees.

In an action to determine paternity brought pursuant to Section 100 et. seq. of this title, the court may award and tax fees and costs, and apportion them between the parties as justice dictates.

§ 115 Changing Child's Name to Paternal Surname

A. At any time after a determination of paternity, the mother, father, custodian or guardian of the child may file a motion requesting the court to order that the surname of the child be changed to the surname of its father. The court shall thereafter set a hearing on said motion. Notice of the filing of the motion and the date of the hearing shall be served by process on all parties.

B. If, after said hearing, the judge finds that it is in the best interest of the child to bear the paternal surname, the court shall enter an order to that effect which shall include findings of fact as to each issue raised by the parties.

C. The practice, pleading, and proceedings as set forth in this section shall conform to the applicable rules prescribed by Judicial Branch of the Cherokee Nation.

§ 116 Authority of District Courts.

In all cases of paternity and for arrearage of child support, the district court shall make inquiry to determine if the noncustodial parent has been denied reasonable visitation. If reasonable visitation has been denied by the custodial parent to the noncustodial parent, the district court shall include visitation provisions in the support order.

§ 117 Preparation of Birth Certificate - Acknowledgement of Paternity.

A. Unless an adoption decree has been presented, and consent to adoption has been given as otherwise provided by law, upon the birth of a child to an unmarried woman, the person required by the State of Oklahoma, under Title 63, Section 1-311 of the Oklahoma Statutes, to prepare and file an Oklahoma birth certificate shall:

Provide written materials and an oral, audio, or video presentation to the child's mother and/or natural father including an affidavit acknowledging paternity on a form prescribed by the Division of Child Support Enforcement. The completed affidavit shall be filed with the District Court. The affidavit shall contain:

- a. a statement by the mother consenting to the assertion of paternity and stating the name of the father,
 - b. a statement by the father that he is the natural father of the child,
 - c. the social security numbers of both parents, and
 - d. other information as the Secretary of Health and Human Services may require;
2. Provide written information, furnished by the Division of Child Support Enforcement, along with an oral, audio, or video presentation to the mother:
 - a. explaining that the completed, notarized affidavit shall be filed with the District Court,
 - b. regarding the benefits of having her child's paternity established and of the availability of paternity establishment services, including a request for support enforcement services, and
 - c. explaining the implications of signing, including parental rights and responsibilities; and
 3. Provide the original affidavit acknowledging paternity to the Office of the State Registrar of Vital Statistics. Copies of the original affidavit acknowledging paternity shall be provided to the Division of Child Support Enforcement and to the mother and acknowledged father of the child.

B. The Division of Child Support Enforcement shall make the affidavits acknowledging paternity and the husband's denial of paternity forms available at each office of the Division.

§ 118 Authority for Test.

In a civil action in which paternity is a relevant fact and at issue, the court shall order the mother, child and putative father to submit to genetic testing. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require unless such individual is found to have good cause for refusing to cooperate.

§ 119 Selection of Experts.

The tests shall be made by experts qualified as examiners of genetic markers in the human body. Except as otherwise provided in this act, the experts may be called by the court or by a party as witnesses to testify as to their findings and shall be subject to cross-examination by the parties. Any party may request that additional experts qualified as examiners of genetic markers in the human body perform independent tests subject to order of court, the results of which may be offered in evidence. The number and qualifications of the experts shall be determined by the court. A party requesting additional testing shall be responsible for the costs of the additional testing.

§ 120 Compensation of Expert Witnesses.

The compensation of each expert witness appointed by the court or called by a party and costs of tests required shall be fixed at reasonable amounts by the court. Said compensation and costs shall be paid as the court shall order. The court may order that said compensation and costs be paid by the

parties in such proportions and at such times as it shall prescribe. All additional testing must be paid for in advance by the party requesting the additional test. The court may order that, after payment by the parties, said compensation and costs may be taxed as costs in the action.

B. The court shall not assess costs against the Office of Child Support Enforcement.

§ 121 Effect of Test Results.

A. Evidence which shows a statistical probability of paternity is admissible and shall be weighed in addition to other evidence of the paternity of the child. Evidence which shows a statistical probability of paternity may include but is not limited to medical, scientific, or genetic evidence relating to the paternity of the child based on tests performed by said experts.

B. If the court finds that the evidence based upon the medical, scientific, and genetic tests, shows that the defendant is not the parent of the child, said evidence shall be conclusive proof of nonpaternity and the court shall dismiss the action.

C. Evidence of statistical probability of paternity established at ninety-five percent (95%) or more creates a presumption of paternity. Said presumption is rebuttable by clear and convincing evidence admitted on behalf of the defendant.

D. Evidence of statistical probability of paternity established at ninety-eight percent (98%) or more creates a conclusive presumption of paternity.

D. The party receiving the copy of the genetic test results from the court-appointed expert shall send all parties a copy of the genetic test results by certificate of mailing to the last-known address of the parties.

F. Any objection to genetic testing results must be made in writing within fifteen (15) days from the date of mailing of the genetic test results, and any hearing on the issue of paternity may not be held any sooner than fifteen (15) days after filing of objection to genetic test. If no objection is filed within the specified time, the genetic testing results will be admitted as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy.

§ 122 Effect on Presumption of Legitimacy.

Except as otherwise provided by law, presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

§ 123 Applicability to Criminal Actions.

The genetic testing provisions shall also apply to criminal cases, subject to the following limitations and provisions:

1. An order for the tests shall be made on the application of a defendant or the Nation;
2. The compensation of the experts appointed by the court shall be paid from the court fund;
3. The court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 121 of this title, but otherwise the case shall be submitted for determination upon all the evidence.

Section 4. Provisions as cumulative

The provisions of this act shall be cumulative to existing law

Section 5. Severability

The provisions of this act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

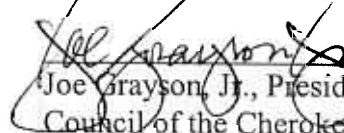
Section 6. Emergency declared

It being immediately necessary for the welfare of the Cherokee Nation, the Council hereby declares that an emergency exists, by reason whereof this act shall take effect and be in full force after its passage and approval.

Section 7. Self-Help Contributions


To the extent that this Act involves programs or services to citizens of the Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.

Enacted by the Council of the Cherokee Nation on the 14th day of March, 2005.



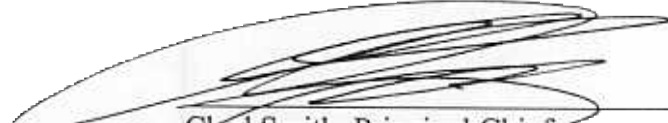
Joe Grayson, Jr., President
Council of the Cherokee Nation

ATTEST:



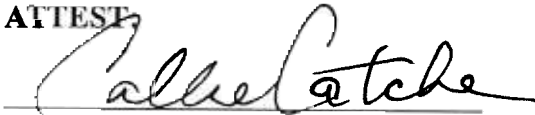
Audra Smoke-Conner, Secretary
Council of the Cherokee Nation

Approved and signed by the Principal Chief this 21st day of MARCH, 2005.



Chad Smith, Principal Chief
Cherokee Nation

ATTEST:



Callie Catcher, Secretary/Treasurer
Cherokee Nation

YEAS AND NAYS AS RECORDED:

Audra Smoke-Conner	<u>Absent</u>	Melvina Shotpouch	<u>YEA</u>
Bill John Baker	<u>YEA</u>	Meredith A. Frailey	<u>YEA</u>
Joe Crittenden	<u>YEA</u>	John F. Keener	<u>YEA</u>
Jackie Bob Martin	<u>YEA</u>	Cara Cowan	<u>YEA</u>
Phyllis Yargee	<u>YEA</u>	Buel Anglen	<u>YEA</u>
David W. Thornton, Sr.	<u>YEA</u>	William G. Johnson	<u>YEA</u>
Don Garvin	<u>YEA</u>	Charles "Chuck" Hoskin	<u>YEA</u>
Linda Hughes-O'Leary	<u>Absent</u>		