STATE OF MICHIGAN

COURT OF APPEALS

BILLIE MICHELLE ROSE,

Plaintiff,

and

COUNTY OF CALHOUN,

Appellant,

v

ROBERT JOHN STOKELY,

Defendant-Appellee.

FOR PUBLICATION
August 28, 2003
9:10 a.m.

No. 241029
Calhoun Circuit Court
Family Division
LC No. 00-001802-DP

Updated Copy
October 24, 2003

Before: Whitbeck, C.J., and Griffin, Neff, White, Markey, Meter, and Cooper, JJ.

WHITBECK, C.J.

This case involves an equal protection challenge, on gender-based grounds, to the constitutionality of certain provisions of the Paternity Act[1] that allocate the "confinement expenses" of a child born out of wedlock entirely to the father of that child. The circuit court did not directly address the constitutional challenge, relying primarily on the decision of this Court in *Thompson v Merritt*.[2] The prosecutor filed for leave to appeal, which this Court initially denied.[3] The prosecutor then sought leave to appeal to the Michigan Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted, stating:

[1] MCL 722.711 *et seq*.

[2] *Thompson v Merritt*, 192 Mich App 412; 481 NW2d 735 (1991).

[3] *Rose v Stokely*, unpublished order of the Court of Appeals, entered June 28, 2001 (Docket No. 234392) (*Stokely I*).

> The Court of Appeals is directed to determine the proper level of scrutiny to be applied to plaintiff 's [sic, defendant's] equal protection claim, and whether MCL 722.712(1) violates that standard. *Crego v Coleman*, 463 Mich 248 (2000); *Geduldig v Aiello*, 417 US 484 [94 S Ct 2485; 41 L Ed 2d 256] (1974).[4]

On remand, this Court stated that, but for *Thompson v Merritt*, it would find the challenged provisions to be unconstitutional.[5] This finding set in motion the conflict provisions of MCR 7.215(I)(2), now MCR 7.215(J)(2), and this conflict panel was convened by order of the Court. 253 Mich App 801 (2002). We reverse and remand.

I. Summary Of The Issue

The *Stokely II* opinion concisely sets out the constitutional issue in this case: Do the Paternity Act's confinement expense allocation provisions constitute impermissible gender-based discrimination, in violation of the Equal Protection Clause of both the Michigan and the federal constitutions?[6]

II. Basic Facts And Procedural History

A. The Statutory Provisions

The challenged provisions of the Paternity Act are contained in subsection 2(1),[7] dealing with the liabilities of the parents of a child born out of wedlock,[8] and subsection 7(2),[9] dealing with orders of filiation.[10] Subsection 2(1) provides:

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[4] *Rose v Stokely*, order of the Supreme Court, entered April 30, 2002 (Docket No. 119733).

[5] *Rose v Stokely*, 253 Mich App 236; 655 NW2d 770 (2002) (*Stokely II*).

[6] *Stokely II*, *supra* at 245.

[7] MCL 722.712(1).

[8] At the time of the enactment of the Paternity Act in 1956, the act defined a "child born out of wedlock" as "a child begotten and born to any woman who was unmarried from the conception to the date of birth of the child." See 1956 PA 205, subsection 1(a). Currently, the act defines a "child born out of wedlock" as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." See MCL 722.711(a).

[9] MCL 722.717(2).

[10] At the time of the enactment of the Paternity Act in 1956, an "order of filiation" was used for "declaring paternity and for the support and education of the child" when there was a finding of the court or a verdict against the defendant, or if the defendant acknowledged paternity orally or

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> The parents of a child born out of wedlock are liable for the necessary support and education of the child. They are also liable for the child's funeral expenses. *The father is liable to pay the expenses of the mother's confinement, and is also liable to pay expenses in connection with her pregnancy as the court in its discretion may deem proper.* The court shall admit in proceedings under this act a bill for funeral expenses, expenses of the mother's confinement, or expenses in connection with the mother's pregnancy, which bill constitutes prima facie evidence of the amount of those expenses, without third party foundation testimony.[11]

Subsection 7(2) provides, in pertinent part:

> An order of filiation entered under subsection (1) shall specify the sum to be paid weekly or otherwise, as prescribed in section 5 of the support and parenting time enforcement act, until the child reaches the age of 18. Subject to section 5b of the support and parenting time enforcement act, the court may also order support for a child after he or she reaches 18 years of age. *In addition to providing for the support of the child, the order shall also provide for the payment of the necessary expenses incurred by or for the mother in connection with her confinement, for the funeral expenses if the child has died, for the support of the child before the entry of the order of filiation, and for the expenses in connection with the pregnancy of the mother or of the proceedings as the court considers proper.*[12]

B. The Circuit Court Paternity Action

In this case, on June 12, 1996, plaintiff Billie Rose gave birth to a daughter who, under the provisions of the Paternity Act, was a "child born out of wedlock." According to the Calhoun County prosecutor, Rose received Medicaid and the state of Michigan, through the Michigan Family Independence Agency (FIA), paid the necessary birth expenses, in the total amount of $2,908.41. Accordingly, on May 4, 2000, the prosecutor filed a paternity complaint against defendant Robert Stokely, alleging that Rose received public assistance through the FIA, that the

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in writing, or if the defendant was served a summons or warrant and a default was taken against him. See 1956 PA 205, § 7. Currently, an "order of filiation" is used for "declaring paternity and providing for the support of the child" when there is a finding of the court or the verdict determines the man is the father, or where the defendant acknowledges paternity either orally to the court or by a filing with the court of a written acknowledgment of paternity, or the defendant is served with summons and a default judgment is entered against him or her. See MCL 722.717(1).

[11] Emphasis supplied.

[12] Citations omitted; emphasis supplied.

FIA had paid the expenses relating to the minor child's birth, that Stokely was not supporting the minor child, and that he was able-bodied and capable of providing support.

The circuit court entered an order of filiation and an order resolving child support and parenting time issues. However, when the prosecutor requested entry of an order requiring Stokely to repay the FIA for all of Rose's confinement expenses, Stokely objected. He argued that the confinement expenses should be apportioned between the mother and father of a child born out of wedlock, according to each parent's ability to pay because, if interpreted to impose liability for confinement expenses on the father alone, the Paternity Act would violate the Equal Protection Clause of both the Michigan and the federal constitutions. The prosecutor responded by arguing that the Paternity Act imposed the sole liability for confinement expenses on the father of a child born out of wedlock and that this provision did not violate constitutional protections.

In a written opinion dated November 30, 2000, the circuit court noted that this Court had previously decided in *Thompson v Merritt* that the statutory language allows for the apportionment of confinement costs. The circuit court opined that this interpretation was not only proper, it was also necessary to maintain the constitutionality of the statute:

> An interpretation that the father must always be required to pay all of the costs of confinement in an Order of Filiation would constitute a gender-based classification. A gender-based classification is subject to so-called "intermediate scrutiny": to survive an equal protection challenge, the classification must serve an important governmental objective and must be substantially related to achievement of that objective. *In the Matter of RFF, Minor. LAF, Appellant, v BJF, Appellee*, 242 Mich App 188, 209-210; 617 NW2d 745 (2000), *Lehr v Robertson*, 463 US 266; 103 S. Ct. 2985 [77 L Ed 2d 614 (1983)]. "Gender-based classifications will be upheld when men and women are not similarly situated in the area covered by the legislation in question and the statutory classification is realistically based upon differences in their situations." *Parham v Hughes*, 441 U.S. 347, 354, 99 S. Ct. 1741, 60 L. Ed. 2d 269 (1979), cited in *RFF*, *supra*.
>
> While it is true that unwed mothers and fathers are not always similarly situated with respect to their abilities to pay expenses associated with the birth of their children, that society has [and perhaps still does] imposed some measure of discrimination based on gender which has separated men from women with respect to their ability to pay expenses associated with children, there is simply no basis upon which to find that, as a rigid rule, differences in their situations are always based on their gender and are always such that the mother has no ability to pay any of the costs of her confinement and that the father should pay 100% of those costs in every case in which an Order of Filiation is entered.
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> Indeed, such a conclusion is contrary to the language of the rest of the statutes in question. MCL 722.712 opens with the proposition that both parents are liable for the support and education of their children, and for the childrens'

> [sic] funeral expenses. And in the last portion of the pertinent statutes, the Legislature clearly recognized the discretion of the court to apportion costs of pregnancy between the mother and father. It is not conceivable, given this recognition, that the Legislature would have intended to impose a rigid requirement that, without exception, the father would always and in all circumstances bear the full weight of the entire confinement expense.

The circuit court therefore ordered that Rose's confinement expenses be apportioned between her and Stokely, according to their respective abilities to pay. After an investigation, the friend of the court recommended that Rose assume forty-one percent and that Stokely assume fifty-nine percent of the liability for the confinement expenses. This allocation was based on a determination of each party's income and an application of the Michigan Child Support Formula Manual. The circuit court's order subsequently adopted that recommendation.

C. *Stokely II*

1. Section II

After the Supreme Court remand, this Court considered two aspects of the circuit court's decision.[13] In section II of its opinion, the *Stokely II* panel concluded that §§ 2 and 7 of the Paternity Act did not grant a circuit court the discretion to apportion the confinement expenses of a mother of a child born out of wedlock between the mother and the father of that child.[14] The *Stokely II* panel noted that the circuit court had concluded that the phrase "as the court in its discretion may deem proper" in subsection 2(1) applied to the phrase the "expenses in connection with her pregnancy" and to the phrase "the expenses of the mother's confinement." With regard to subsection 7(2), the *Stokely II* panel similarly noted that the circuit court had concluded that the phrase "as the court considers proper" applied to the phrase "the expenses in connection with the pregnancy of the mother" and to the phrase "the necessary expenses incurred by or for the mother in connection with her confinement."[15] The *Stokely II* panel concluded that the statutory language regarding the circuit court's discretion relates to *only* those expenses incurred in connection with the mother's pregnancy, not to the expenses of the mother's confinement.[16]

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[13] *Stokely II*, *supra*.

[14] *Id.* at 240.

[15] *Id.* at 241.

[16] *Id.* at 242-243. In a footnote, the *Stokely II* panel, *id.* at 242 n 8, read subsections 2(1) and 7(2) of the Paternity Act in pari materia to mean that the father is liable only for those confinement expenses that were necessarily incurred. In a separate footnote, the *Stokely II* panel noted that OAR, 1957-1958, No. 3030, p 200 (July 19, 1958), concluded that the Paternity Act requires the father of a child born out of wedlock to pay all necessary confinement expenses, rather than only a portion of those expenses. *Stokely II*, *supra* at 243 n 9.

The *Stokely II* panel also concluded that the circuit court misinterpreted this Court's decision in *Thompson*, *supra*,[17] stating:

> The *Thompson* Court's reference to apportioning the financial burdens of parenthood does not support a conclusion that a circuit court possesses discretion to apportion confinement expenses between the mother and the father of a child born out of wedlock.[18]

2. Section III

In section III of its opinion, the *Stokely II* panel dealt with the issue whether the Paternity Act's confinement expense allocation provision constitutes impermissible gender-based discrimination, in violation of the Equal Protection Clause of both the Michigan and the federal constitutions. The *Stokely II* panel, citing *Crego v Coleman*[19] which in turn cites *Clark v Jeter*,[20] noted that an intermediate level of review, referred to as "heightened scrutiny," applies where the law results in classifications based on factors such as illegitimacy and gender.[21] The *Stokely II* panel stated that, were it not compelled by MCR 7.215(I), now MCR 7.215(J), to follow the rule of law established in *Thompson*, *supra*, it would hold that the statutory language does create a classification based on gender.[22]

The *Stokely II* panel then turned to the prosecutor's argument that the Paternity Act's confinement cost allocation provision is substantially related to the achievement of an important governmental objective. Specifically, the prosecutor had contended that unwed mothers might forgo needed medical care unless they were assured that they are not responsible for the expenses of such care. Relying on *Orr v Orr*, 440 US 268; 99 S Ct 1102; 59 L E 2d 306 (1979), the *Stokely II* panel concluded that, because individualized hearings could determine which unwed mothers are in need of financial assistance from the child's father the statutory purpose advanced by the prosecutor could be effectuated without placing the burden of confinement costs solely on fathers.[23]

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[17] *Id.* at 243.

[18] *Id.* at 245. In a footnote, the *Stokely II* panel noted that the portion of *Thompson* discussing the Paternity Act's confinement expense allocation provision is obiter dictum. *Id.* at 245 n 10.

[19] *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000).

[20] *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988).

[21] *Stokely II*, *supra* at 246-247.

[22] *Id.* at 247.

[23] *Id.* at 251.

The *Stokely II* panel also examined the common-law "necessaries" doctrine that required a husband to pay for his wife's necessary medical services, noted that the Michigan Supreme Court had abrogated the common-law necessaries doctrine in *North Ottawa Community Hosp v Kieft*,[24] and concluded that "the abrogation of the common-law necessaries doctrine removed any legitimate basis for the Paternity Act's allocation of confinement costs on the basis of gender."[25]

Finally, the *Stokely II* panel addressed the prosecutor's argument that, because the FIA pays the confinement expenses of unwed mothers who receive state Medicaid benefits, the Legislature intended to permit recoupment of those expenses from the children's fathers. The *Stokely II* panel rejected this argument on two grounds[26] and ended section III of its opinion by stating:

> We would conclude that the Paternity Act's confinement cost allocation provision constitutes a gender-based classification that violates the Equal Protection Clauses of the Michigan and federal constitutions. However, we are constrained to follow *Thompson*, *supra* at 425, and hold that the statutory provision does not violate equal protection guarantees.[27]

D. MCR 7.215(J)

Under MCR 7.215(J)(2), when a panel of this Court follows a prior published decision only because it must do so under MCR 7.215(J)(1), which gives precedential effect to opinions of the Court published on or after November 1, 1990, that panel must articulate in the text of its opinion that it is doing so, cite the rule, and explain its disagreement with the prior decision. Section III of the opinion in *Stokely II* met this requirement. After polling the judges of this Court, the majority of whom voted that the question was outcome determinative and that it warranted convening a special conflict panel, this Court ordered that a special conflict panel be convened, vacated the portion of the *Stokely II* opinion concerning the conflict addressed in section III of the *Stokely II* opinion, and allowed the parties to submit supplemental briefs.[28]

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[24] *North Ottawa Community Hosp v Kieft*, 457 Mich 394; 578 NW2d 267 (1998).

[25] *Stokely II*, *supra* at 252.

[26] *Id.* at 253-254. In a footnote, the *Stokely II* panel noted the prosecutor's statement in his appellate brief that the grantee of public assistance does not have to repay government benefits absent misconduct. *Id.* at 253 n 19.

[27] *Id.* at 254.

[28] 253 Mich App 801 (2002). A subsequent order invited amici curiae briefs from the Family Law Section of the State Bar of Michigan and other interested parties. *Rose v Stokely*, unpublished order of the Court of Appeals, entered February 19, 2003 (Docket No. 241029). The Family Law Section and the Center on Fathers, Families, and Public Policy filed amicus curiae

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III. The Process Of Constitutional Review

A. Standard Of Review

The constitutionality of a statute is a question of law that this Court reviews de novo.[29]

B. Applicability of The Equal Protection Guarantees At The Threshold

The equal protection clauses of the Michigan and the federal constitutions require that no person be denied the equal protection of the law.[30] The Michigan Supreme Court has found Michigan's equal protection provision coextensive with the Equal Protection Clause of the federal constitution.[31] This constitutional guarantee requires that persons similarly situated be treated alike.[32] Stated negatively, the essence of the equal protection clauses is that the government not treat persons differently on account of characteristics that do not justify such disparate treatment.[33]

Nevertheless, the guarantee of equal protection under the law does not require things that are different in fact or opinion to be treated as though they were the same.[34] The courts have not applied the requirement of equal protection as mandating "absolute equality."[35] Similarly, it is well established that the equal protection guarantee is not a source of substantive rights or

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briefs. This Court very much appreciates the time and effort invested in these briefs, as well as in the supplemental briefs of the parties, and wishes to express its thanks to all those who participated in the filing of briefs and oral argument.

[29] *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 461; 639 NW2d 332 (2001). See also *McDougall v Scans*, 461 Mich 15, 24; 597 NW2d 148 (1999) (court's ruling whether a statute violates equal protection guarantees is a question of law).

[30] See Const 1963, art 1, § 2; US Const, Am XIV. See also *Frame v Knells*, 452 Mich 171, 183; 550 NW2d 739 (1996); *Spade v Pauley*, 149 Mich App 196, 203; 385 NW2d 746 (1986).

[31] *Crego*, *supra* at 258, citing *Frame*, *supra* at 183, and *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992).

[32] *F S Royster Guano Co v Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 989 (1920); *El Sour v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987).

[33] *Crego*, *supra* at 258, citing *Miller v Johnson*, 515 US 900, 919; 115 S Ct 2475; 132 L Ed 2d 762 (1995), and *El Sour*, *supra* at 207.

[34] *Jefferson v Hackney*, 406 US 535, 549; 92 S Ct 1724; 32 L Ed 2d 285 (1972); *Reed v Reed*, 404 US 71, 75; 92 S Ct 251; 30 L Ed 2d 225 (1971); *Tiger v Texas*, 310 US 141, 147; 60 S Ct 879; 84 L Ed 1124 (1940).

[35] *Doe*, *supra* at 661, citing *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 24; 93 S Ct 1278; 36 L Ed 2d 16 (1973).

liberties; rather, it is a measure of our constitutions' tolerance of government classification schemes.[36] As the Michigan Supreme Court has said:

> Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics. *Puget Sound Power & Light Co v City of Seattle*, 291 US 619; 54 S Ct 542; 78 L Ed 1025 (1934). Moreover, even where the Equal Protection Clauses are implicated, they do not go so far as to prohibit the state from distinguishing between persons, but merely require that "the distinctions that are made not be arbitrary or invidious." *Avery v Midland Co, Texas*, 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968).[37]

At the threshold, the question is whether the provisions of the Paternity Act that allocate all the necessary confinement expenses of the mother of a child born out of wedlock to the father of that child require an application of the equal protection guarantees of the Michigan and the federal constitutions. This is a difficult question. Clearly, the mother and the father of a child born out of wedlock are not similarly situated in a purely physical sense. In the context of pregnancy, the father's physical role is limited to the conception of the child. He has no physical role, after conception, in carrying the child to term or in the delivery of the child. The mother is *the* only necessary actor at all stages of the process, from conception through pregnancy and delivery, including all the physical and medical implications of each stage. Moreover, the mother is usually the child's primary caregiver during the infant's first weeks of life. These are genuinely differentiating characteristics. Arguably, then, the challenged provisions of the Paternity Act are in direct response to the immutable difference between men and women: the biological ability to bear children.[38]

There are, however, factors that favor the opposite conclusion. First, as the *Stokely II* opinion noted, subsection 2(1) of the Paternity Act clearly provides that the father of a child born out of wedlock is liable for the mother's confinement expenses; the statute does not make the mother and the father jointly liable for these expenses and does not grant a circuit court discretion to allocate these expenses on the basis of the parties' respective ability to pay. Thus, Stokely bears a burden he would not bear were he female.[39] Secondly, and more practically, the Supreme Court's remand order requires this Court to determine the proper "level of scrutiny" applicable to the equal protection claim, thereby perhaps implicitly assuming that subsection 2(1)

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[36] *Id.*, citing *San Antonio Independent School Dist, supra* at 58 [sic, p 59] (Stewart, J., concurring).

[37] *Crego, supra* at 258-259.

[38] See *Crego, supra* at 273, citing *Geduldig, supra* at 496 n 20, and *Roster v Goldberg*, 453 US 57; 101 S Ct 2646; 69 L Ed 2d 478 (1981).

[39] *Stokely II, supra* at 248, citing *Orr, supra* at 278-279.

of the Paternity Act contains a gender-based differentiation. Finally, the prosecutor conceded before the circuit court, conceded before the *Stokely II* panel,[40] and argued in the alternative before this panel that if the statute is a gender-based classification, it forwards a compelling governmental interest.[41]

Fortunately, it is not necessary to decide this issue at the threshold. As the Michigan Supreme Court has pointed out, implicit within the very existence of an "intermediate" or "heightened scrutiny" level of review—that is, a standard of review more respectful of legislative distinctions than that which is applied to the most highly suspect categories of race, nationality, and ethnicity—is an acknowledgment that "there are some immutable distinctions between various classes of persons, and that it is sometimes within the Legislature's prerogative to address those distinctions, even where the result is dissimilarity of treatment."[42] Therefore, the issue whether the challenged provisions of the Paternity Act contain a gender-based differentiation will be considered again, hereinafter, in the context of applying the appropriate level of review.

C. The Levels Of Review

1. The Equal Protection Spectrum: Strict Scrutiny Review, Rational Basis Review, and Heightened Scrutiny Review

As the Michigan Supreme Court has said:

> When a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification. The highest level of review, or "strict scrutiny," is invoked where the law results in classifications based on "suspect" factors such as race, national origin, or ethnicity, none of which are implicated in this case. *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Absent the implication of these highly suspect categories, an equal protection challenge requires either rational-basis review or an intermediate, "heightened scrutiny" review.[43]

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[40] *Stokely II*, *supra* at 248, n 13.

[41] We do note, however, that here the prosecutor, in his supplemental brief to this Court, did advance the proposition that the Paternity Act "while acknowledging the unique circumstances of parties in a pregnancy and delivery situation, does not create a gender-based classification. . . ."

[42] *Crego*, *supra* at 272-273.

[43] *Id.* at 259. See also *Harvey v Michigan*, 469 Mich 1, 6-7; 664 NW2d 767 (2003).

2. Strict Scrutiny Review

Strict scrutiny review stands at one end of the equal protection spectrum. When state legislation creates a classification scheme that is based on suspect factors, such as race,[44] national origin,[45] ethnicity, or alienage,[46] or that affects a fundamental interest,[47] courts apply strict scrutiny review.[48] When courts review statutes under this strict standard, they uphold the statutes only "if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest."[49] Rarely have courts sustained legislation under this standard of review.[50]

3. Rational Basis Review

Rational basis review represents the other end of the equal protection spectrum. As the Michigan Supreme Court has stated:

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978). Rational-basis

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[44] See *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 592-594; 560 NW2d 644 (1996). See also *Yuck Woo v Hopkins*, 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886); *Strider v West Virginia*, 100 US 303; 25 L Ed 664 (1879); Bickel, *The original understanding and the segregation decision*, 69 Hard L R 1 (1955).

[45] See *Yuma v California*, 332 US 633; 68 S Ct 269; 92 L Ed 249 (1948); *American States Ins Co, supra* at 592-594.

[46] See *SyQuest v Amulet*, 432 US 1, 8 n 9; 97 S Ct 2120; 53 L Ed 2d 63 (1977); *El Sour, supra*; *Chan v City of Troy*, 220 Mich App 376; 559 NW2d 374 (1996).

[47] See *Harper v Virginia Bd of Elections*, 383 US 663, 672; 86 S Ct 1079; 16 L Ed 2d 169 (1966); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 717-718; 575 NW2d 68 (1997).

[48] *People v Pitts*, 222 Mich App 260, 273; 564 NW2d 93 (1997).

[49] *Doe, supra* at 662, citing *Plyler, supra* at 216-217.

[50] *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 668; 232 NW2d 636 (1975), rev'd in part on other grounds in *Harvey, supra* at 9-14.

> review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra*.[51]

Indeed, "[f]ew statutes have been found so wanting in 'rationality' as to fail to satisfy the 'essentially arbitrary' test."[52] Presumably, this is so because the rational basis test reflects the judiciary's awareness that "'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.'"[53]

4. Heightened Scrutiny Review

Heightened scrutiny review falls in the middle of the equal protection spectrum. As the Michigan Supreme Court has stated:

> The standard recognizes that, while there may be certain immutable distinctions, for example, between men and women or between legitimate and illegitimate children, that justify differing legislative treatments under some circumstances, the Legislature's authority to invoke those distinctions should not be viewed as an "impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v Perez*, 409 US 535, 538; 93 St Ct 872; 35 L Ed 2d 56 (1973). . . . However, where a challenged statute is substantially related to an important state interest, the statute should be upheld.[54]

Gender-based classification schemes are subject to heightened scrutiny review. In *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*,[55] the Michigan Supreme Court stated:

> Historically, equal protection analysis began at the bottom tier, employing a "minimum rationality" or "rational basis" test in which a classification was required to be "reasonable in light of its purpose . . . ." *McLaughlin v Florida*, 379 US 184, 191; 85 S Ct 283; 13 L Ed 2d 222 (1964). Although the rational basis

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[51] *Crego, supra* at 259-260, and *Harvey, supra* at 7-8.

[52] *Manistee Bank, supra* at 668.

[53] *American States Ins Co, supra* at 597, quoting *Gone v Abrams*, 793 F2d 74, 77 (CA 2, 1986).

[54] *Crego, supra* at 260-261, and *Harvey, supra* at 8-9.

[55] *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173; 387 NW2d 821 (1986).

> test was applied to early gender discrimination cases, see *Goesaert v Cleary*, 335 US 464; 69 S Ct 198; 93 L Ed 163 (1948), *such cases are now analyzed using the "heightened scrutiny" of middle tier, or intermediate level, review.*[56]

Thus, with the caveat that implicit within the heightened scrutiny test is the acknowledgment that it is sometimes within the Legislature's prerogative to address distinctions between various classes of persons—including men and women—even where the result is dissimilarity of treatment,[57] the *Stokely II* panel's selection of heightened scrutiny as the appropriate test stands on solid precedent.

Under heightened scrutiny review there are two determinations that must be made. The first determination is whether the classification serves an *important* governmental interest. The second determination is whether the classification is *substantially* related to the achievement of the important governmental objective.[58] It is the judiciary's task to make each of these determinations.[59]

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[56] *Id.* at 190-191 (emphasis supplied). See also *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976) (the fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny).

[57] *Crego*, *supra* at 272-273.

[58] *Waterford Twp*, *supra* at 191. See also *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730, 741; 592 NW2d 370 (1998). See further *Califano v Webster*, 430 US 313, 316-317; 97 S Ct 1192; 51 L Ed 2d 360 (1977).

[59] But see the acerbic dissent of Justice Rehnquist in *Trimble v Gordon*, 430 US 762, 777; 97 S Ct 1459; 52 L Ed 2d 31 (1977), in which he questioned the entire concept of taking equal protection analysis beyond a rational basis test in cases other than those involving race or national origin:

> The Fourteenth Amendment's prohibition against "any State . . . deny[ing] to any person . . . the equal protection of the laws" is undoubtedly one of the majestic generalities of the Constitution. If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.
>
> Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have instead

(continued…)

D. Judicial Deference[60]

The scope of our judicial responsibility is, however, not unlimited. Granted, there is almost universal agreement that the power of the Legislature is also not without limits and "that those limits may not be mistaken, or forgotten, the Constitution is written."[61] Thus, as the Michigan Supreme Court has stated, "that those limits not be exceeded, the courts are entrusted with the responsibility to review and the power to nullify legislative acts which are repugnant to the constitution."[62]

Nevertheless, courts must use this authority sparingly. "[U]nder established rules of statutory construction, statutes are presumed constitutional, and courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent."[63] The Michigan Supreme Court stated in *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, "When compelled to make a constitutional pronouncement, the court must do so with great circumspection and trepidation, with language carefully tailored to be no broader than that demanded by the particular facts of the case rendering such a pronouncement necessary."[64] Further:

> The court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract.[65]

(…continued)

> produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

[60] See, generally, *Crego v Coleman*, 232 Mich App 284, 315-318; 591 NW2d 277 (1998) (Whitbeck, J., dissenting).

[61] *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

[62] *Manistee Bank, supra* at 666.

[63] *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997).

[64] *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), citing *United States v Raines*, 362 US 17, 21; 80 S Ct 519; 4 L Ed 2d 524 (1960).

[65] *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940).

Indeed, the party challenging the facial constitutionality of an act "'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . .'"[66] Here, neither Stokely nor the trial court specified whether the constitutional challenge to subsections 2(1) and 7(2) of the Paternity Act is a facial challenge or an "as applied" challenge. Because Stokely's challenge to the constitutionality of subsections 2(1) and 7(2) of the Paternity Act is directed to the words of these provisions themselves and because these provisions do not implicate constitutionally protected *conduct*, it is at least reasonably clear that what is involved here is a facial challenge.

Thus, we must presume subsections 2(1) and 7(2) of the Paternity Act to be constitutional unless their unconstitutionality is clearly apparent. Further, in ruling on this constitutional challenge, we must carefully tailor our language to the particular facts of this case. It is not our proper function to test the operation of subsections 2(1) and 7(2) by contriving a conceivable set of circumstances, nor are we to address the constitutional question in the abstract. Rather, it is sufficient that we recognize the fact that subsections 2(1) and 7(2) might operate unconstitutionally under some conceivable set of circumstances.

IV. Applying Heightened Scrutiny Review[67]

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[66] *Council of Orgs, supra* at 568, quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). See also *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *Salerno*. Note that facial challenges are also permitted in certain other contexts. If the law reaches a substantial amount of constitutionally protected conduct—free speech or free association are examples—it may be subject to a facial challenge. See *Kolender v Lawson*, 461 US 352, 358 n 8; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

[67] In its cogent amicus curiae brief, the Family Law Section of the State Bar of Michigan puts forth two arguments. The Family Law Section first argues that subsection 2(1) of the Paternity Act is constitutionally valid under the equal protection clauses of the Michigan and the federal constitutions. Secondly, however, the Family Law Section argues that the allocation to the father of all the confinement expenses of the mother, without any opportunity for a hearing on that issue, violates the Due Process Clause of the federal constitution. While we find the second argument interesting, the due process issue is simply not before us. Stokely did not make a due process argument at the circuit court level. The application for leave to appeal to this Court and the Supreme Court's remand to consider the equal protection claim make no mention of a due process issue, nor did the opinion of the *Stokely II* panel. We conclude that the issue has not been preserved and we decline to consider it. See, for example, *Butcher v Dep't of Treasury*, 425 Mich 262, 276; 389 NW2d 412 (1986).

We also note that section II of the *Stokely II* opinion dealt with the question whether subsections 2(1) and 7(2) of the Paternity Act gave the circuit court the discretion to allocate confinement expenses between the mother and the father of a child born out of wedlock. The *Stokely II* panel concluded that neither the statutory language nor this Court's decision in

(continued…)

A. Determining The Important Governmental Interest

As noted above, the first step in an equal protection analysis under heightened scrutiny review is to identify the important governmental interest involved.[68] The overall governmental interest at stake here is inherent in the first words of the title of the Paternity Act: "AN ACT to confer upon circuit courts jurisdiction over proceedings *to compel and provide support of children born out of wedlock* . . . ."[69] As the Michigan Supreme Court has ruled, "[t]he underlying purpose of the Paternity Act is to ensure that minor children born outside a marriage are provided with support and education."[70] In support of this conclusion, the Court cited *Whybra v Gustafson*.[71] In that case, the Court construed various provisions of the Paternity Act, including the counterpart section to the current subsection 7(2), and stated that "[p]atently, these provisions seek to express society's concern with the support and education of the 'child born out of wedlock.'"[72] Rather clearly, the Legislature addressed this concern when it enacted the comprehensive provisions of the Paternity Act and, equally clearly, the confinement expenses language of subsections 2(1) and 7(2) is part of that comprehensive legislative scheme. Thus, the conclusion is inescapable that subsections 2(1) and 7(2) relate to an important governmental objective. Moreover, in light of the sobering statistics relating to the increased health risks that are specific to the babies of unmarried mothers, the general governmental interest in providing support for these at-risk babies is particularly important at the time of birth. A study by the Centers for Disease Control and Prevention covering births to unmarried mothers in the United States from 1980 to 1992 reported the following increased health risks:

> Unmarried mothers tend to have poorer birth outcomes than married mothers because they are disproportionately young, poorly educated, and are likely to be poor. . . .
>
> . . . Babies born to unmarried mothers of all ages are at greater risk than babies born to married mothers because of higher levels of inadequate prenatal

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Thompson permits a court to enter an order apportioning confinement expenses between the mother, here Rose, and the father, here Stokely. Our order convening a special conflict panel vacated the portion of the opinion concerning the conflict addressed in section III of the *Stokely II* opinion, and that section only. Accordingly, the issue addressed in section II of the *Stokely II* opinion is not before this Court. We consider it the law of the case that neither the statutory language nor this Court's decision in *Thompson* permits a court to enter an order apportioning confinement expenses between the mother and the father of a child born out of wedlock. See *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).

[68] *Waterford Twp, supra* at 191.

[69] 1956 PA 205 (emphasis supplied).

[70] *Crego, supra* at 269.

[71] *Whybra v Gustafson*, 365 Mich 396, 400; 112 NW2d 503 (1961).

[72] *Id.*

care, higher maternal smoking rates, and higher levels of insufficient maternal weight gain. Furthermore, the risk of dying in infancy is greater among nonmarital births, particularly in the postneonatal period. . . .

* * *

. . . Unmarried mothers were much less likely than married mothers to receive adequate [prenatal] care . . . .

Smoking during pregnancy has repeatedly been shown to be linked with an elevated risk of a low-birthrate outcome . . . .

There is a substantial gap in smoking rates between married and unmarried mothers . . . Overall, 26 percent of unmarried mothers smoked during pregnancy in 1992 compared with 13 percent of married mothers. . . .

* * *

. . . Inadequate [maternal] weight gain has been associated with elevated risk of low birthweight and preterm delivery, which are both linked to more compromised prospects for the infant's survival and health.

* * *

Unmarried mothers were considerably more likely to gain less than 16 pounds, well below the standard for women of any height/weight. . . .

. . . Low [infant] birthweight, in turn, is a major predictor of infant morbidity and mortality. . . .

Low birthrate levels for nonmarital births are considerably elevated compared with marital births, 10.4 percent compared with 5.7 percent in 1992.[73]

B. Determining The Substantial Relationship To The Important Governmental Objective

(1) Overview

It is not sufficient, however, that a classification simply relate to an important governmental interest. Rather, under heightened scrutiny review, the second step is to determine

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[73] United States Dep't of Health and Human Services, *Birth to Unmarried Mothers: United States, 1980-92*, DHHS Publication No. (PHS) 95-1931 (1995), <http://www.cdc.gov/nchs/data/series/sr 21/sr21 053.pdf> (accessed October 5, 2003).

whether the classification is *substantially* related to the achievement of that important governmental objective.[74]

(2) *Orr v Orr*

The *Stokely II* panel relied heavily on the United States Supreme Court case of *Orr v Orr*. As the *Stokely II* panel observed, that case involved an Alabama statute that authorized the Alabama state courts to place an alimony obligation on husbands, but not on wives.[75] The United States Supreme Court did observe that "[t]here is no question but that Mr. Orr bears a burden he would not bear were he female."[76] It is important to note, however, that the Court made this observation when resolving the question of Mr. Orr's *standing.* This was *not,* therefore, the basis that the Court used to find the Alabama statute unconstitutional.

Rather, the Court dealt with two legislative objectives that it gleaned from the opinion of the Alabama Court of Civil Appeals, which stated that the Alabama statutes were "designed" for the "'wife of a broken marriage who needs financial assistance.'"[77] The first purpose was to "provide help for needy spouses, using sex as a proxy for need." The second purpose was to compensate "women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."[78] The Court concluded that neither of these purposes, even if factually supported, would adequately justify the salient features of Alabama's statutory scheme because under the statute "individualized hearings at which the parties' relative financial circumstances are considered *already* occur."[79]

The *Stokely II* panel used this language to reject the prosecutor's argument that the challenged provision of the Paternity Act was "designed to encourage unwed mothers to seek proper medical care."[80] The *Stokely II* panel then stated that it "understood the prosecutor's argument to be that the statute uses gender as a proxy for need, assuming that all unwed mothers are in need of financial assistance from the father of their child, in order to pay for proper medical care." It is here that the *Stokely II* panel missed the mark. The only assumption implicit in the statute is that unmarried mothers will be more likely to seek appropriate medical care at the time of delivery, regardless of their financial situation, if they are not responsible for the cost of that care. The objective of the Paternity Act is, again, to ensure that minor children born outside

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[74] *Waterford Twp, supra* at 191.

[75] *Stokely II, supra* at 250, citing *Orr, supra* at 271.

[76] *Orr, supra* at 273.

[77] *Id.* at 280, quoting *Orr v Orr,* 351 So 2d 904, 905 (Al Ct Civ App, 1977).

[78] *Id.*

[79] *Id.* at 281.

[80] *Stokely II, supra* at 250.

a marriage are supported and educated. In 1956, and now, encouraging mothers to seek proper medical care is a means to that end; self-evidently, proper medical care during the confinement period before, during, and after the child's birth is an essential form of support for that child. Accordingly, in enacting subsections 2(1) and 7(2) of the Paternity Act, the Legislature was concerned with promoting the physical health of the child rather than the financial health of the mother and therefore was not using gender as a proxy for need.

Thus, when viewed from the *child's* perspective, the confinement expenses provisions of the Paternity Act do not use gender as a proxy for need. Rather, these provisions assure that the child will receive proper medical care during the mother's confinement period before, during, and after the child's birth. The fact that the circuit court has the discretion to apportion *other* expenses relating to the child's support and education does not mean that making the father solely liable for necessary confinement expenses is improper gender-based discrimination. Further, the fact that subsections 2(1) and 7(2) of the Paternity Act might operate unconstitutionally were they simply and only to operate as a proxy for need on the part of the mother is insufficient to render these provisions unconstitutional when considered in terms of their substantial relationship to the important governmental objective of ensuring that minor children born outside of marriage are provided with support and education.

(3) The Substantial Relationship

The remaining question in the equal protection analysis is, again, whether there is a substantial relationship between the Legislature's gender classification in subsections 2(1) and 7(2) of the Paternity Act and the important governmental objective of providing support for the children of unmarried parents, particularly at the critical time of birth. At the risk of stating the obvious, there are only two parties between whom the Legislature could logically allocate the cost of supporting a child born out of wedlock: the mother and the father. To encourage unmarried mothers to seek appropriate care by relieving them of the financial burden of confinement expenses, the Legislature allocated this portion of the costs of childbearing to the father. For this reason, the relationship between the gender classification at issue here and the important governmental objective is not only substantial, it is vital. Because the gender classification is substantially related to the important governmental objective of providing support for children born out of wedlock, subsections 2(1) and 7(2) of the Paternity Act do not violate the constitutional guarantee of equal protection.

(4) The "Necessaries" Doctrine

It is possible (although by no means certain), however, that the Paternity Act's confinement cost allocation provisions are a vestige of the common-law "necessaries" doctrine. This doctrine required a husband to pay for the necessary medical services his wife received. Here, Stokely contends that the Legislature adopted the confinement cost allocation provisions in

order to place unmarried women on an equal footing with married women regarding payments for the necessary costs of confinement.[81] As the *Stokely II* panel observed, the Michigan Supreme Court abrogated the common-law necessaries doctrine in *North Ottawa Community Hosp v Kieft, supra,* on equal protection grounds. The *Stokely II* panel then stated:

> We agree with defendant that the abrogation of the common-law necessaries doctrine removed *any* legitimate basis for the Paternity Act's allocation of confinement costs on the basis of gender.[82]

Here again the *Stokely II* panel missed the mark. The fact that the Court abrogated the *common-law* necessaries doctrine does not, *ipso facto*, mean that subsections 2(1) and 7(2) of the Paternity Act are automatically unconstitutional. Statutes are presumed constitutional and changes in circumstances do not, in and of themselves, render them unconstitutional. Certainly, the abolition of the common-law necessaries doctrine did not remove *any* basis for the Paternity Act's allocation of necessary confinement costs to the father; that conclusion is the polar opposite of the "great circumspection and trepidation" with which courts must approach constitutional pronouncements.

Further, it is certainly arguable that the provisions of the Paternity Act at issue here are *not* parallel to the common-law necessaries doctrine. The necessaries doctrine existed to protect married women who were deemed to have surrendered their property rights to their husbands.[83] Unmarried women, by definition, did not face this marital disability. Further, the necessaries doctrine was, at least in part, compensatory in that it was designed to protect *married women* who surrendered their property rights to their husbands, while subsections 2(1) and 7(2) of the Paternity Act exist in order to provide support and education to *children* born out of wedlock. Therefore, while there are similarities between the necessaries doctrine and subsections 2(1) and 7(2) of the Paternity Act, it is not at all clear that these approaches are parallel in nature. Accordingly, the abrogation of the necessaries doctrine does not necessitate a finding that subsections 2(1) and 7(2) are unconstitutional.

(5) FIA Reimbursement

According to the *Stokely II* panel, the prosecutor argued that relieving fathers of the sole responsibility for confinement costs causes an unintended consequence: unwed mothers receiving state Medicaid benefits will be required to repay the FIA for the necessary costs of their confinement. This was not, and is not, precisely the prosecutor's argument. The prosecutor contended that, if faced with potential liability for confinement expenses, expectant mothers may

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[81] *Stokely II*, *supra* at 252.

[82] *Id.* (emphasis supplied).

[83] See *North Ottawa*, *supra* at 407-408.

decide not to obtain those benefits the FIA offers, and thus forgo crucial medical care. Again, this implicates the important governmental objective of ensuring that minor children born outside of marriage are provided with support and education.

The statutory means to this end, requiring the father to pay the mother's necessary confinement expenses, assures that the child will receive proper medical care before, during, and after that child's birth. The fact that *other* means may exist to this end does not render *this* means unconstitutional. The means the Legislature chooses to achieve a given end need not be the only means, the best means, or the perfect means, and they need not be superior to all other means. It is sufficient if these means are substantially related to that end and do not involve arbitrary or invidious distinctions.[84]

In this regard, the statutory scheme here divides liabilities incurred for the support and education of children born out of wedlock between two categories of persons: the fathers, who are responsible for the mothers' necessary confinement expenses, and the parents, who are responsible for all other support and education expenses of the child. While the first group is exclusively male, the second includes members of both sexes. The members of both sexes bear the majority of the expenses relating to the support and education of the child. All the benefits flow to the child. Such a statutory scheme is not constitutionally impermissible.[85]

V. Conclusion

Perhaps the best way to determine whether the allegedly discriminatory provisions in subsections 2(1) and 7(2) of the Paternity Act are arbitrary and invidious is to ask whether the roles that these subsections assign to the mother and father of a child born out of wedlock could be reversed: could the mother be asked to pay the necessary confinement expenses that the father incurs before, during, and after the birth of that child? To ask the question is to answer it; no father will ever bear a child and no father will therefore ever be confined before, during, and after childbirth. This is an indisputable physiological fact that goes deeper than gender stereotypes; it is one of the few immutable differences between men and women. It has nothing to do with ability, merit, status, opportunity or the lack of it, patriarchy, matriarchy, sexism, or egalitarianism.

Consequently, when the Legislature concluded that most expenses for the support and education of a child born out of wedlock could be allocated on the basis of each parent's respective ability to pay, it properly granted the circuit court the discretion to make such an allocation. The Legislature recognized—as far back as 1956 and continuing into the new millennium—that there would be differences in the ability of each parent to pay for the child's

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[84] *Avery*, *supra* at 484.

[85] *Geduldig*, *supra* at 496 n 20.

support and education. It is even conceivable that the Legislature recognized that an unexpected disparity may exist between each parent's ability to pay—that a wealthy woman might give birth to the child of a poor man—and so drafted the other provisions in the Paternity Act regarding the support and education of the child to provide a street that can run in both directions.

However, with respect to the mother's necessary confinement expenses, the Legislature drew the line. It recognized that this is a street that runs in only one direction. Only the mother will bear the physical burden of confinement before, during, and after the birth of the child. This is an immutable difference between the sexes, and the guarantee of equal protection under the law does not require things that are different in fact or opinion to be treated as though they were the same.[86]

Therefore, applying the heightened scrutiny level of review, we conclude that ensuring the support and education of children born out of wedlock is an important governmental objective. Further, we conclude that holding the father liable for the necessary confinement expenses of the mother before, during, and after the birth of a child born out of wedlock is substantially related to that objective in that proper medical care during the confinement period is an essential form of support for that child. Moreover, we conclude that making the father liable for the necessary confinement expenses assures that under all circumstances the child will receive this essential support. We therefore conclude that subsections 2(1) and 7(2) of the Paternity Act are a constitutionally permissible means to an important legislatively established end.

Reversed and remanded. We do not retain jurisdiction.

Neff and Markey, JJ., concurred with Whitbeck, C.J.

/s/ William C. Whitbeck
/s/ Janet T. Neff
/s/ Jane E. Markey

[86] *Jefferson, supra* at 549; *Reed, supra* at 75; *Tigner, supra* at 147.