STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE CHILDERS,

Plaintiff-Appellee,

v

JAMES CHILDERS,

Defendant,

and

SCOTT A. HORIE,

Appellant.

UNPUBLISHED
March 14, 2000

No. 215756
Wayne Circuit Court
LC No. 91-132888-DM

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Appellant appeals as of right from a November 13, 1998 order dismissing his motion to set aside an April 10, 1996 order determining the paternity of plaintiff's child and amending plaintiff's judgment of divorce. We affirm.

Plaintiff and defendant were divorced December 4, 1992. Since plaintiff did not know that she was pregnant at the time of the divorce, the divorce judgment did not mention the child in question, Brandon, who was born September 12, 1993. Defendant died April 12, 1995. Following defendant's death, plaintiff petitioned the Wayne Circuit Court to amend the judgment of divorce, to determine that Brandon was conceived during the marriage, and to rule that defendant was Brandon's father. On April 10, 1996, a Wayne Circuit judge entered an order amending the judgment of divorce to provide that Brandon was the biological child of defendant. On March 13, 1997, appellant filed a complaint for paternity in the Oakland Circuit Court, which was dismissed because the court would not permit appellant to collaterally attack the existing paternity determination of the Wayne Circuit Court. Appellant then petitioned the Wayne Circuit Court to vacate its order of April 10, 1996, and requested that the court enter an order for blood testing to determine paternity of Brandon. The circuit judge

dismissed the petition because Brandon's paternity had previously been decided when the court issued its April 10 order.

Appellant contends that the trial court erred in dismissing his motion to set aside the April 10, 1996 order. Appellant argues that he is entitled to a determination of the child's paternity, notwithstanding the judicial determination that the child was conceived in wedlock, because he has an established relationship with the child, citing *Hauser v Reilly*, 212 Mich App 184; 536 NW2d 865 (1995). We disagree.

We review de novo the trial court's determination that defendant lacked standing to proceed with his complaint. *Terry v Affum*, 233 Mich App 498, 501; 592 NW2d 791 (1999), aff'd in part and vac'd on other grounds 460 Mich 855 (1999).

Appellant does not have standing to bring a motion to set aside the order determining the paternity of plaintiff's child and amending plaintiff's judgment of divorce to include the child as the biological son of defendant because appellant was not a party to the original divorce action. MCR 2.612 provides for relief from a judgment or order in three circumstances. The first ground, involving clerical errors, is inapplicable in this case. MCR 2.612(A). The second ground provides for relief when a defendant is not personally notified of the pendency of the action and is inapplicable because appellant was not a party to the divorce action and therefore had no right to notice of the pendency of the action. MCR 2.612(B). The third ground provides that "the court may relieve a party or the legal representative of a party from a final judgment [or] order" on various grounds and is also inapplicable because appellant was not a party to the divorce action. MCR 2.612(C).

Additionally, appellant does not having standing to seek a determination of paternity because the Paternity Act applies only to "cases arising out of birth out of wedlock . . . ." MCL 722.726; MSA 25.506. "Child born out of wedlock" is defined in the statute 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 the marriage but not the issue of that marriage." MCL 722.711(a); MSA 25.491(a). The circuit court determined that the child was conceived while plaintiff was married to defendant. Therefore, Brandon is not a "child born out of wedlock" and appellant has no standing to bring this action under the Paternity Act.

Appellant argues, however, that under the authority of *Hauser*, *supra*, he has a protected liberty interest in his relationship with Brandon since he has an established relationship with the child. We note that in *Hauser*, *supra*, this Court recognized that our Supreme Court had determined in *Girard v Wagenmaker*, 437 Mich 231, 252; 470 NW2d 372 (1991) that "neither the Paternity Act nor the Child Custody Act supports the standing of a putative father to bring an action to determine the paternity of child born while the mother was married to another man."[1] Since the child in *Hauser* was born while her mother was married to another man, this Court affirmed the lower court's denial of the putative father's paternity action for lack of standing.

However, this Court went on to say that it believed that "if plaintiff in this case had an established relationship with his child, we *would* hold that he had a protected liberty interest in that

relationship that entitled him to due process of law. However, because plaintiff has no such relationship, we hold that the Paternity Act did not deny him his right to due process." *Hauser*, *supra* at 188 (emphasis supplied). This statement, being dicta, does not establish a constitutional right of a putative father who has an established relationship with a child born in wedlock to file a paternity action concerning the child. In fact, appellant's counsel conceded during oral argument that there was no authority for that proposition other than the dicta cited above, and that she was requesting this court, as a matter of first impression, to hold that a putative father has a protected liberty interest that entitles him to due process of law if he has an established relationship with a child who was born in wedlock. We decline to so hold.

Shortly after argument in this case, a different panel of this Court issued a decision in *McHone v Sosnowski*, ___ Mich App ___; ___ NW2d ___ (Docket No. 209672, issued 2/15/2000), a case in which the plaintiff sought an order of filiation recognizing him as the father of a child born to the defendant mother during her marriage to the defendant father. This Court held that the plaintiff lacked standing under the Paternity Act and *Girard*, *supra*. Concluding that statements in *Hauser* that were relied on by the plaintiff were dicta, this Court further rejected the plaintiff's claim that *Hauser* provided authority for a finding that by precluding him from obtaining standing, the Paternity Act deprived him of his right to due process. *McHone*, *supra*, slip op at 3. We are bound by our decision in *McHone*, MCR 7.215(H)(1), which, in any event, tracks the analysis we have applied above.

Therefore, the trial court did not err in dismissing appellant's motion to set aside the order determining the paternity of plaintiff's son and amending plaintiff's judgment of divorce to include him as the biological son of defendant.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] Although the decisions in *Hauser* and *Girard* dealt specifically with children who were born while their mothers were married to men other than the putative fathers, the statute, MCL 722.711(a); MSA 25.491(a), clearly applies to both *births* and *conceptions* that occur during marriage.