STATE OF MICHIGAN

COURT OF APPEALS

VINCENT S. WELCH,

Plaintiff-Appellee,

v

DENISE A. WELCH,

Defendant-Appellant.

UNPUBLISHED
April 30, 2002

No. 235158
Macomb Circuit Court
LC No. 99-005529-DM

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a divorce judgment granting equitable parent rights in favor of plaintiff. We reverse.

Plaintiff and defendant had been married five years when defendant began an affair with James Preston. Shortly thereafter defendant became pregnant. Although it was uncertain whether the child's biological father was plaintiff or Preston, plaintiff assumed the role of father. Ten months after the baby was born, plaintiff moved out of the marital home at defendant's request. During the next year defendant encouraged a relationship with plaintiff and the baby, Courtney, giving plaintiff visitation almost every weekend and sometimes during the week. Defendant also encouraged a relationship with Courtney and Preston during this time period. After plaintiff filed for divorce, defendant filed a counterclaim alleging that plaintiff was not the biological father of Courtney. After a DNA test established that Preston is Courtney's biological father, the trial court held an evidentiary hearing and determined that plaintiff had parental rights to Courtney under the equitable parent doctrine.

When reviewing orders of child custody, an appellate court must affirm the orders unless the findings of fact were against the great weight of the evidence, the discretionary rulings constituted an abuse of discretion, or the legal rulings constituted clear legal error. MCL 722.28; *Soumis v Soumis*, 218 Mich App 27, 33; 553 NW2d 619 (1996); *Hayes v Hayes*, 209 Mich App 385, 389; 532 NW2d 190 (1995).

On appeal, defendant argues: (1) that the trial court erred in applying the equitable parent doctrine to this case because plaintiff knew that he was not Courtney's biological father before she was born into the marriage; (2) that the trial court erred in finding that the third prong of the

Atkinson[1] test was satisfied; and (3) that the equitable parent doctrine is unconstitutional as violative of equal protection and due process.[2] We find defendant's second issue on appeal to be dispositive. Assuming without deciding that the equitable parent doctrine applies to this case, we conclude that the trial court erred in finding that plaintiff satisfied the third prong of the *Atkinson* test. Plaintiff failed to demonstrate a willingness to assume financial responsibility for the child over a period of time.

The equitable parent doctrine allows a husband who is not the biological father of a child born or conceived during the marital relationship to be considered the natural father of the child. *Atkinson v Atkinson,* 160 Mich App 601, 608-609; 408 NW2d 516 (1987). Three factors must be present in order for the non-biological father to be considered the natural father: "(1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support." *Atkinson, supra* at 608-609. A "willingness" to provide child support is demonstrated by an "actual, sincere effort" to provide support. *York v Morofsky*, 225 Mich App 333, 336; 571 NW2d 524 (1997). Further, the willingness to provide support should be viewed as a whole, rather than just focusing on a person's actions after the filing of divorce. *Id.*.

Based on our review of the record, the great weight of the evidence indicates that plaintiff has not demonstrated a willingness to take on the responsibility of supporting Courtney. The record shows that plaintiff provided some support for Courtney and defendant during the first ten months of Courtney's life. Although plaintiff assumed the responsibility for paying the household bills, it was undisputed that when plaintiff moved out of the marital home, the mortgage and utility bills were at least two months delinquent. Both parties acknowledge that during the first six months after moving out, plaintiff provided defendant with some food and diapers, and plaintiff further testified that during this time he bought Courtney clothes and toys. Plaintiff also paid the telephone, cable, and internet bills on occasion. However, plaintiff admitted that he never gave cash for Courtney's support. Although plaintiff testified that defendant refused to accept the Friend of the Court recommended $139 per week in child support that he tried to give her, he also admitted that he did not create an escrow account with the money for Courtney's benefit. Moreover, the evidence showed that during the first year after plaintiff moved out of the home, defendant and Courtney were supported by defendant's mother and by Preston. Defendant's mother bought defendant a car, paid her bills, and bought her groceries every week. Eventually Preston began supporting defendant and Courtney. Viewing

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[1] *Atkinson v Atkinson,* 160 Mich App 601; 408 NW2d 516 (1987).

[2] Defendant failed to raise the constitutionality of the equitable parent doctrine in the lower court, and thus, this issue was not preserved for appeal. *Booth Newspapers, Inc v Univ of Michigan Bd Of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993); *Russell v Dep't of Corrections,* 234 Mich App 135, 139; 592 NW2d 125 (1999). Accordingly, we decline to address this issue. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 719-720; 614 NW2d 607 (2000); *Kent County Aeronautics Bd v Dep't of State Police,* 239 Mich App 563, 580; 609 NW2d 593 (2000), aff'd *Byrne v State,* 463 Mich 652; 624 NW2d 906 (2001).

the evidence of plaintiff's willingness to support Courtney as a whole, it is clear that although plaintiff may have contributed to the household bills and paid for some groceries, plaintiff's actions fall short of showing an "actual and sincere effort" to support Courtney. Accordingly, we conclude that the trial court erred in finding that the third prong of *Atkinson* was satisfied.

Reversed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot