

STATE OF MICHIGAN
COURT OF APPEALS

DINA M. JOHNSON,

Plaintiff-Appellee,

v

HOLLIS SMITH, JR.,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 270906

Wayne Circuit Court

Family Division

LC No. 98-824061-DC

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals on delayed leave granted¹ the trial court's order denying his motion to revoke the acknowledgment of parentage. We affirm.

I. Facts and Proceedings

Plaintiff and defendant were involved in an "on again, off again" relationship in the late 1980's, but never married. On January 24, 1990, plaintiff gave birth to a son, Hollis DeAngelo Smith III, and on the very next day defendant signed an acknowledgment of parentage. Subsequent orders regarding child support, custody and visitation were entered.

For most of his life, the child lived with plaintiff. However, from 1995 through 1998, and from April 2001 through Christmas 2001, the child lived with defendant. It was at Christmastime 2001 that the parties started to have some visitation disputes, with plaintiff allegedly telling defendant that he was not the biological father. After that alleged disclosure, defendant apparently could not locate plaintiff (and hence the child) for almost two years.

Toward the end of 2003, defendant filed a motion to revoke the acknowledgment of paternity. Plaintiff opposed the motion, as well as other motions filed by defendant relating to child support. While these motions were pending, in December 2003 defendant took the child

¹ *Johnson v Smith*, unpublished order of the Court of Appeals, entered December 11, 2006 (Docket No. 270906).

(now 13) and, instead of taking him shopping as represented, took him for unauthorized DNA testing. The test results revealed defendant not to be the child's biological father.

Based on this new fact and an additional affidavit of his own, defendant re-filed his motion to revoke the acknowledgment. Concurrently, defendant filed motions to vacate the child support orders entered at various times since 1990. In denying defendant's motion to revoke, the trial court held that defendant had not shown, by clear and convincing evidence, that the "equities of the case" required setting aside the acknowledgment:

And the reason that I don't think it meets a clear and convincing standard is because there has been a long history of this child's involvement with Mr. Smith and with his family, having resided with them on and off for a period of nearly six years. You just can't turn off that type of a relationship.

The child also has emotional and psychological problems. Whether those are related to his current knowledge or related to other issues is really not relevant. What's relevant is the fact that this young man has issues that he's struggling with. And it certainly is not going to help him to know that – and it didn't help him, however he found out, to know that Mr. Smith was not his father.

I know that Mr. Smith is in the military which has been part of the reason that this has taken such a long time to – to get heard; but from everything that I understand, Mr. Smith, and I think I told you this in a previous hearing, you are an ideal man for a young child to look up to as a – as a father figure. And having your name as, you know, Hollis Smith the Third, someone who has been serving this country in a – in a time of war that is so much a part of the teenagers that are growing up today. This is the war that they're going to remember. And, you know, you're a hero. And I don't think taking that away from him is in any way in his best interest.

And, again, it's not about the parents. It's not about what the two of you did to each other 14, 15 years ago. Whether she lied. Whether she didn't lie. Whether she – whether she was irresponsible. That – the fact is, it's 14 years later and we have a young man that's had a relationship with you, Mr. Smith, for those years and who – who prob – well has been harmed by the knowledge that that relationship no longer exists.

For all of these reasons I – I simply do not believe that the clear and convincing standard has been met. I think the equities weigh in favor of – of keeping the acknowledgment of parentage in place. [12/13/05 Tr, pp 46-51.]

An order embodying the trial court's ruling was subsequently entered, from which we have granted defendant's delayed appeal.

II. Analysis

We review a trial court's conclusions of law de novo, MCR 2.613(C); *GlenLake-Crystal River Watershed Riparians v GlenLake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004),

which, of course, also includes any issues of statutory construction. *Williams v City of Troy*, 269 Mich App 670, 675; 713 NW2d 805 (2005).

An acknowledgment of parentage “is a stipulation by a woman of a man’s paternity under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*” *Barnes v Jeudevine*, 475 Mich 696, 706; 718 NW2d 311 (2006). A man and a woman may enter into such a stipulation, without resorting to adjudication, if the child is born out of wedlock. Once the acknowledgment is executed, the man is considered to be the child’s natural father and the child has the same rights as any other child born within wedlock. *Sinicropi v Mazurek*, 273 Mich App 149, 157-158; 729 NW2d 256 (2006), quoting MCL 722.1003(1) and MCL 722.1004; *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003); *Eldred v Ziny*, 246 Mich App 142, 148; 631 NW2d 748 (2001). An acknowledgment of parentage establishes the child’s paternity and may be used to seek child support, child custody, and parenting time. *Sinicropi, supra* at 158, quoting MCL 722.1004.

MCL 722.1011 governs the revocation of an acknowledgment of parentage, and provides, in relevant part, as follows:

(1) The . . . man who signed the acknowledgment . . . may file a claim for revocation of an acknowledgment of parentage A claim for revocation may be filed as a motion in an existing action for child support, custody, or parenting time in the county where the action is and all provisions in this act apply as if it were an original action.

(2) A claim for revocation shall be supported by an affidavit signed by the claimant setting forth facts that constitute 1 of the following:

(a) Mistake of fact.

(b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.

(c) Fraud.

(d) Misrepresentation or misconduct.

(e) Duress in signing the acknowledgment.

(3) If the court finds that the affidavit is sufficient, the court may order blood or genetic tests at the expense of the claimant, or may take other action the court considers appropriate. The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that, considering the equities of the case, revocation of the acknowledgment is proper.

The first step that a party seeking to revoke the acknowledgment must take is to present an affidavit that outlines a mistake of fact, newly discovered evidence, fraud, misrepresentation, or duress to support the conduct of genetic testing. *Sinicropi, supra* at 160. We find that

defendant's affidavits accompanying his petitions to revoke the acknowledgment were sufficient to support the trial court's order for genetic testing. Specifically, defendant asserted that he and plaintiff were engaged in a long-distance relationship at the time of conception, and plaintiff allegedly informed him that he was not the child's father after Christmas 2001. Additionally, a friend or relative of plaintiff later told defendant's father that plaintiff's family maintained that another individual was the child's father.² Given the allegations made by defendant, the trial court properly ordered genetic testing (even though such testing had already been conducted).

Once the first step is met, the party seeking revocation must establish by clear and convincing evidence that revocation is proper under the "equities of the case." MCL 722.1011(3). Although the Michigan Supreme Court has recognized the accuracy of establishing biological paternity through DNA testing, *Crego v Coleman*, 463 Mich 248, 270-271; 615 NW2d 218 (2000), simply showing that the putative father is not the child's biological father is insufficient alone to support revocation. *Sinicropi, supra* at 161, citing *Killingbeck v Killingbeck*, 269 Mich App 132, 144; 711 NW2d 759 (2005). A man who is not biologically related to a child might remain the child's natural and legal father if the equities allow because the Acknowledgment of Parentage Act takes both biology and equity into consideration. *Sinicropi, supra* at 161, 164-165, 172.

It may well be that the Legislature, which has always been concerned chiefly with the best interests and protection of children as reflected in various legislation, made a policy decision in enacting MCL 722.1011(3), which recognized that, regardless of the lack of biological ties, a child's well-being might be better served by having a male acknowledger continue caring for the child as father, especially if he has done so for many years, rather than traumatically removing the man from the child's life and introducing a new male who is essentially a stranger. [*Sinicropi, supra* at 161 n 4.]

In *Killingbeck*, the plaintiff mother became pregnant outside of wedlock. She and the defendant signed an acknowledgment of parentage and later married. The plaintiff and the defendant later divorced and attested in the divorce proceedings that the defendant was the child's father. *Id.* at 136. The plaintiff subsequently reconnected with her former boyfriend, Tony Rosebrugh. The plaintiff, the child, and Rosebrugh submitted to genetic testing and discovered that Rosebrugh was actually the child's biological father. *Id.* at 136-137. The defendant challenged the plaintiff's attempt to revoke the acknowledgment of parentage, stating that he had financially and physically cared for the child throughout his life and wished to continue his relationship as the child's father. *Id.* at 137. The trial court ultimately revoked the acknowledgment of parentage in order to allow Rosebrugh to seek parenting time. However, the

² As the trial court noted, defendant improperly resorted to self-help methods and forced the 13-year old child to undergo a DNA test without plaintiff's knowledge or permission. As a result of that test, defendant definitively learned that he was not the child's biological father. Unfortunately, that information was also transmitted to the child. That would not have happened – at least at that point in the proceedings – had defendant not taken such unilateral action.

court also ordered that the defendant was entitled to parenting time as the child's "de facto" father. *Id.*

This Court vacated the order revoking the acknowledgment of parentage. *Killingbeck, supra* at 144. This Court found that the trial court only revoked the acknowledgment because it mistakenly assumed that it could award the defendant parenting time under other equitable principles. Had the trial court properly applied the law, it likely would have determined that the defendant should remain the child's legal and natural father under the equities of the case. *Id.* at 144-145.

Killingbeck is distinguishable because plaintiff and defendant never married. However, it is otherwise directly on point, and teaches us that in considering the equities of the case in this context, that the relationship between the child and parent, the child's age and circumstances, are all relevant. Here, defendant believed the child to be his from birth and agreed to name the child after himself and the paternal grandfather. He signed the acknowledgment of parentage and paid child support. Defendant participated in parenting time with the child, and raised the child without plaintiff's support for extensive periods of time between 1995 and 2001. Defendant was an active father who did not shirk his parental role until it was established by genetic testing that the child was not his biological child. By that time, the child was already 13 years old.

As noted in *Sinicropi, supra* at 161 n 4, the child's "well-being" must also be considered. Defendant raised the child for extensive periods of time, and was actively involved in the child's schooling during those periods. It is true that the child had suffered emotional and psychological problems before the dispute over his paternity arose. However, since the time that defendant forced the child to undergo genetic testing, the child has attempted to commit suicide and began questioning his sexual identity. The child has experienced these new troubles without the assistance of his legal father, the man who raised him, who admits that he no longer wanted a relationship with the child. Accordingly, we find that the trial court properly determined, based on the evidence and a clear and convincing standard, that revocation of the acknowledgment of parentage was not supported by the equities of this case.

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray

I concur in result only.

/s/ Helene N. White