

STATE OF MICHIGAN
COURT OF APPEALS

KARI LYNN LIPNEVICIUS,

Plaintiff-Appellee,

and

JASON BRISTOL,

Intervening Plaintiff-Appellee,

v

GEOFFREY MICHAEL LIPNEVICIUS,

Defendant-Appellant.

UNPUBLISHED

August 14, 2012

No. 304520

Genesee Circuit Court

Family Division

LC No. 06-270914-DM

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and order holding that defendant is not the minor child, NL's,¹ equitable parent. We affirm.

I. BASIC FACTS AND PROCEDURE

This case has had a long and, at times, tortuous journey through our Court system. The parties are no doubt very familiar with this procedural history, and we will refrain from reciting it in full. The basic facts are simple. Plaintiff filed for divorce from defendant in 2006. During the proceedings, plaintiff sought, and was granted, a determination of NL's parentage.

¹ This Court refers to a minor child by the child's initials. In doing so here, we recognize that the last name of the minor child in this case has been changed. However, we nonetheless will refer to the child as "NL" throughout this opinion in order to avoid confusion and retain consistency with the prior opinions of this Court.

Intervening plaintiff was permitted to intervene, and he asserted that he was NL's biological father.² A DNA test confirmed that intervening plaintiff was NL's biological father. The trial court determined that plaintiff had successfully rebutted the presumption of legitimacy, and issued an order holding that (1) the child was born out of wedlock,³ (2) NL was not the issue of the marriage, and (3) intervening plaintiff was NL's father.

Defendant then asked the trial court to declare him the "equitable parent" of NL. The trial court initially denied defendant's motion and, based on its prior rulings, declined to consider application of the "equitable parent" doctrine. Eventually, after the case traveled to this Court and our Supreme Court, and back, the case was remanded to the trial court with instructions to allow defendant to assert the "equitable parent" doctrine and for determination of whether defendant satisfied that doctrine. The trial court determined that defendant was not the equitable parent of NL. From that holding, defendant now appeals.

II. STANDARD OF REVIEW

Whether a person is an equitable parent is a question of law that this Court reviews *de novo*. *Killingbeck v Killingbeck*, 269 Mich App 132, 141; 711 NW2d 759 (2005).

III. DEFENDANT IS NOT THE EQUITABLE PARENT OF NL

Defendant argues that the trial court erred by determining that he is not NL's equitable parent. For the reasons stated below, we disagree.

The "equitable parent" doctrine is a judicially-created doctrine that was adopted in Michigan in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). *Atkinson* involved a child born during the parties' marriage. During the divorce action, it was determined that the husband was not the biological father of the child. The trial court awarded custody to the mother and denied visitation, ruling that the husband was not the child's parent but instead was a third party. This Court reversed, adopting the "equitable parent" doctrine. This Court stated that

a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband

² A previous panel of this Court determined that the trial court legally erred in allowing this intervention. *Lipnevicius v Lipnevicius*, unpublished opinion per curiam of the Court of Appeals, decided August 26, 2010 (Docket No. 289073), unpub op at 1; see also *Lipnevicius*, unpub op at 8 (Jansen, J., concurring in part and dissenting in part). However, plaintiff filed a nearly identical motion to intervening plaintiff's motion, seeking a determination of NL's parentage. As plaintiff did have standing to raise the issue, any error in the trial court's grant of intervention is harmless. See *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997).

³ Although the common usage of the phrase "born out of wedlock" often may be limited to a child born to an unmarried woman, MCL 722.711(a) provides that a "child born out of wedlock" may also be "a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

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. [*Id.*]

In *York v Morofsky*, 225 Mich App 333, 337; 571 NW2d 524 (1997), this Court stated that the equitable parent doctrine is applicable when “a putative equitable parent meets or has met the *Atkinson* requirements at some point in time.” This Court added that the *Atkinson* factors “require[] consideration of whether they have *ever* been established,” and whether they exist over a reasonable period of time. *Id.* (Emphasis added.) “For example, regarding the first criterion, having a parent-child relationship for a few weeks after a child’s birth would probably not suffice to satisfy this criterion, but maintaining such a relationship over some period of years clearly would.” *Id.*

Atkinson and *York* both emphasized the importance of the best interest of the child, noting that “[t]he best interest of the child is the major concern of any custody determination.” *York*, 225 Mich App at 338, quoting *Atkinson*, 160 Mich App at 611. *York* specifically applied this “best interest of the child” consideration to the determination of whether a person is an equitable parent, stating, “[w]e believe that the child’s best interests are also of major concern in determining whether a party is an equitable parent as well.” *York*, 225 Mich App at 338. In *Atkinson*, the plaintiff father had remained close to the child after he separated from the child’s mother. *Atkinson*, 160 Mich App at 611-612. This Court determined that it would be in the child’s best interest to continue that close relationship. *Id.* In *York*, 225 Mich App at 338, this Court similarly noted that “for [the child] to suddenly be deprived of the only father that he has ever known might well be emotionally traumatizing,” and it then applied the equitable parent doctrine to avoid traumatizing the child.

“While this Court’s decision has led to the adoption of the equitable parent doctrine in other states, very few jurisdictions have embraced the equitable-parent doctrine adopted in *Atkinson*.” *Van v Zhorik*, 227 Mich App 90, 94; 575 NW2d 566 (1997) (quotation marks and citations omitted). “A typical criticism of the doctrine is not so much that such persons should have no rights, but that the existence and extent of those rights should be crafted legislatively, not judicially.” *Id.* We share that concern, as did the prior panel of this Court that considered this case. *Lipnevicius*, unpub op at 2-3. This is especially true because our Legislature has in fact spoken on the procedures and prerequisites required for third parties to seek custody of a child. See MCL 722.26c. MCL 722.26c was enacted in 1993, subsequent to *Atkinson*, yet none of the “equitable parent” cases address whether the enactment conflicts with the common-law equitable parent doctrine. Because we determine, as stated below, that application of this doctrine would not be in NL’s best interests, we do not address this issue in light of the fact that a previous panel of this Court has already done so. *Lipnevicius*, unpub op at 2-3; see also *Sinicropi v Mazurek*, 279 Mich App 455, 465; 760 NW2d 520, 525 (2008) (“The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue.”)

On remand, the trial court found that defendant did not satisfy the first *Atkinson* factor⁴, because NL was “not of a sufficient age to acknowledge a bond between himself and defendant.” The trial court additionally found this conclusion supported by evidence that defendant worked long hours and travelled for business. This Court has refused to establish a “bright-line minimum period” for which the parent-child relationship must have been established to satisfy this factor. *York*, 225 Mich App at 337. Substantial evidence was presented to the trial court that defendant, although he worked long hours, participated in the rearing of both of his children. Witnesses described defendant as a “hands-on dad.” The trial court was presented with a great many photographs of NL and defendant at various events.

There is no disputing the fact that defendant has acknowledged his relationship with NL. Plaintiff testified that she believed that defendant loved NL. Defendant also believed that NL was his biological son until March of 2007. It is unclear, however, if NL has “acknowledged” a father-child relationship with defendant. Evidence from the best interest hearing indeed showed that NL at one time called defendant “dad,” looked to for him for support and comfort, and did a variety of activities together. NL was three years old when the court stopped defendant’s visitation with NL. At that point, NL may have been old enough to acknowledge a relationship.

Yet NL has not seen defendant in four and half years. NL is now over seven and a half years old. Defendant admitted that NL likely would not even recognize him today. In contrast, intervening plaintiff, NL’s natural father, currently has a strong relationship with NL. NL has a stable and loving family that consists of plaintiff, intervening plaintiff, and NL’s brother. NL identifies intervening plaintiff as his father. Dr. Maxwell Taylor, a child psychologist, testified that to introduce defendant as a father figure at this stage could be emotionally damaging and confusing to NL. Dr. Taylor also opined that NL’s relationship with his brother would be upset if defendant was introduced to the children as NL’s father.

⁴ The trial court did not address the second and third *Atkinson* factors. But defendant clearly “desires to have the rights afforded to a parent.” *Atkinson*, 160 Mich App at 608-609. Plaintiff argues that defendant delayed appealing the issue, and is driven by anger rather than a desire to be NL’s father. However, as plaintiff acknowledges, there are many things that can delay an appeal. Furthermore, plaintiff also acknowledged that defendant loved NL. Defendant is also willing to take on NL’s support. Plaintiff claims that defendant is unwilling to provide for the NL’s support because defendant closed the marital bank accounts and cancelled the credit cards after plaintiff filed for divorce and refused to pay child support until January of 2007. However, a court must not focus “only on defendant’s actions *after* the filing of the divorce action.” *York*, 225 Mich App at 336. Defendant expressed his current desire to assume financial responsibility for NL. Defendant has the means to support NL. He has engaged in a prolonged legal battle to establish parental rights and responsibilities, which shows his commitment to winning custody and support obligations. He is current on his child support for NL’s brother, his biological son. Finally, plaintiff acknowledged that defendant was an excellent provider during their marriage.

In weighing this evidence, we must keep in mind that a person should be declared to be an equitable parent only if it is in the best interest of the child. *York*, 225 Mich App at 338; *Atkinson*, 160 Mich App at 611-612. We are unable to make that finding here. In reaching that conclusion, we do not find defendant, the sole provider for a family of four, deficient in any respect for working hard to provide for what he believed was his family. Accordingly, we do not adopt the portion of the trial court's reasoning that relies on defendant's long work hours and business trips as detracting from the formation of a mutual parent-child relationship between defendant and NL. Nor do we now adopt a bright-line rule for a minimum age at which a child may "acknowledge" such a relationship.

However, "the best interest of the child is the major concern" before us, *Atkinson*, 160 Mich App at 611. Under the totality of the circumstances, we conclude that the trial court did not abuse its discretion by concluding that it is not in NL's best interest to declare defendant to be the equitable parent of NL.

We further note that none of the "equitable parent" cases decided since *Atkinson* have dealt with a situation where, as here, the child's natural father is also a willing and able father to the child. See *Lipnevicius v Lipnevicius*, 485 Mich 872, 874-875; 771 NW2d 802 (Marilyn J. Kelly, C.J. dissenting). It is undisputed that a natural parent has a fundamental liberty interest in the care and custody of his child. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). In custody situations, the presumption that the best interests of the child would be served by granting custody to the natural parent "remains a presumption of the highest order and it must be seriously considered and heavily weighted in favor of the parent." *Heltzel v Heltzel*, 248 Mich App 1, 25; 638 NW2d 123 (2001), quoting *Deel v Deel*, 113 Mich App 556, 561-562; 317 NW2d 685 (1982). As stated above, we find that the best interests of NL in fact favor custody with his natural parents.

Beyond that, to declare defendant the equitable parent of NL would be to in effect terminate the parental rights of the natural father, intervening plaintiff. "A child cannot, by nature or by law, have two fathers." *Lipnevicius*, unpub op at 1 fn 2; citing *Michael H v Gerald D*, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (Scalia, J.); *Sinicropi*, 273 Mich App at 185. Our Legislature has established a comprehensive scheme for the termination of parental rights.⁵ See MCL 712A.19b(3). Here none of the procedures set out in the Juvenile Code have been followed. Were this Court to effect a *de facto* termination of a natural father's parental rights when that father has asserted his rights and is acting as a father to the minor child, without

⁵ The previous panel of this Court determined that the trial court's order did not terminate defendant's parental rights because, although defendant was the beneficiary of the presumption that he was NL's natural father at the time of the divorce, "[a]ny parental rights bestowed upon defendant as a result of this presumption were duly extinguished by the court's findings in the judgment of divorce that defendant was not the biological father of the child and that the child was not the issue of the marriage." *Lipnevicius*, unpub op at 10 (Jansen, J.). Prior to the trial court's ruling, defendant was *presumed* to be NL's natural father; when that presumption was rebutted, he no longer possessed a fundamental liberty interest in NL's care and custody.

allegations of abuse or neglect, and without adherence to the Juvenile Code procedures, we would have cause to, at a minimum, doubt the Constitutional legitimacy of such an action. In any event, we decline to do so for the reason that it is not in NL's best interests, as the trial court properly found.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

/s/ Mark T. Boonstra