

STATE OF MICHIGAN
COURT OF APPEALS

JONATHAN J. FULLER,

Plaintiff-Appellant,

v

BREAN E. HOWE and DEPARTMENT OF
HUMAN SERVICES,

Defendants-Appellees.

UNPUBLISHED
November 27, 2012

No. 309379
Grand Traverse Circuit Court
LC No. 11-008885-DP

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition to defendants in this paternity action. We affirm.

On December 17, 2010, defendant Brean Howe¹ gave birth to a daughter who is the subject of this action. Howe was married at the time, but was separated from her husband and was living with plaintiff. Shortly after the child's birth, the trial court granted defendant Department of Human Services' (DHS) petition to take the child into protective custody. The attendant orders recognized Howe's husband as the child's legal father.

Howe filed a complaint for divorce on March 6, 2011, in which she alleged that plaintiff is the biological father of the child. The consent judgment of divorce between Howe and her former husband, however, makes no mention that Howe's husband was not the biological father of the child.

A petition to terminate Howe's husband's parental rights was filed on July 29, 2011. Howe's husband admitted to failing to provide proper care or custody for the child and that there was no reasonable expectation that he would be able to do so. See MCL 712A.19b(3)(g).

¹ Though Howe is named as a defendant, she did not participate in the proceedings below or on appeal.

Consequently, the trial court terminated his paternal rights and no other testimony pertaining to paternity was presented. Howe's parental rights were terminated on November 8, 2011.

On November 28, 2011, plaintiff filed a complaint to establish paternity and, subsequently, a motion for genetic testing. DHS filed a motion to dismiss the complaint. At the hearing on the motions the trial court concluded that, because there was no prior judicial determination that Howe's husband was not the child's biological father, plaintiff lacked standing to bring the paternity action.

"Whether a party has standing to bring an action involves a question of law that is reviewed de novo." *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of law. Statutory interpretation is a question of law reviewed de novo." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

The Paternity 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." MCL 722.711(a). Standing for establishing paternity under the act is limited to a mother, father, or the appropriate state agency. MCL 722.714(1).

There is a strong presumption that a child born during a marriage is the issue of the marriage, a presumption "deeply rooted in our statutes and case law." *In re KH*, 469 Mich at 634. "By requiring a previous determination that a child is born out of wedlock, the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue in a prior proceeding—the mother and the legal father." *Id.* at 635. Additionally, "to rebut the presumption, clear and convincing evidence must be given." *Serafin v Serafin*, 401 Mich 629, 636; 285 NW2d 461 (1977).

Plaintiff asserts that the trial court erred in finding that he did not have standing. According to plaintiff, even though the trial court never made an explicit determination rebutting the paternity of Howe's husband, the totality of the circumstances nonetheless show that the court did in fact make such a determination. See, e.g., *In re KH*, 469 Mich 621. We disagree.

As the DHS points out, and plaintiff fails to refute, no prior judicial determination in which the presumption of legitimacy was rebutted exists. Indeed, during no prior proceeding did the court inquire into the paternity of the child or receive testimony from Howe or from her husband regarding the paternity of the child.² Thus, this case is distinguishable from *In re KH*. The presumption of legitimacy was not rebutted and Howe's husband—despite having had his legal parental rights terminated—remains the presumed biological father of the child. The child

² Although Howe's husband offered to admit at the hearing regarding termination of his parental rights that he was not the child's biological father, in the end he did not admit to these allegations. Rather, he admitted to failing to provide proper care or custody for the child and that there was no reasonable expectation that he would be able to do so.

was not born out of wedlock for purposes of MCL 722.711(a). Consequently, plaintiff lacked standing under the Paternity Act.³ See MCL 722.714(1).

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

³ Although not raised by plaintiff, we note that under the newly enacted Revocation of Paternity Act, MCL 722.1441 *et seq.*, which went into effect on June 12, 2012, plaintiff would not have standing to bring a paternity action because he knew that Howe was married at the time of the child's conception. MCL 722.1441(3)(a)(i). *Id.*