STATE OF MICHIGAN

COURT OF APPEALS

BILLIE MICHELLE ROSE,

Plaintiff,

and

COUNTY OF CALHOUN,

Appellant,

v

ROBERT JOHN STOKELY,

Defendant-Appellee.

FOR PUBLICATION
August 28, 2003
9:10 a.m.

No. 241029
Calhoun Circuit Court
Family Division
LC No. 00-001802-DP

Updated Copy
October 24, 2003

Before: Whitbeck, C.J., and Griffin, Neff, White, Markey, Meter, and Cooper, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. For the reasons stated in *Rose v Stokely*, 253 Mich App 236, 245-254; 655 NW2d 770 (2002), vacated in part 253 Mich App 801 (2002), I would hold that the Paternity Act's confinement cost allocation provisions, MCL 722.712(1) and MCL 722.717(2), constitute a sex-based classification that under a "heightened scrutiny" analysis violates the equal protection guarantees of the United States Constitution, US Const, Am XIV, and the Michigan Constitution, Const 1963, art 1, § 2.

For the benefit of the bench and bar, I incorporate the following portion of Judge Smolenski's well-written and reasoned opinion in *Rose*, *supra*,[1] that I would adopt as my own:

> Next, we must consider whether the Paternity Act's confinement expense allocation provision constitutes impermissible gender-based discrimination, in violation of the Equal Protection Clauses of the Michigan and federal

[1] Judges Saad and Kelly joined the unanimous opinion of the Court.

constitutions. As this Court stated in the case of *In re RFF* [242 Mich App 188, 205; 617 NW2d 745 (2000)]:

"Equal protection of the law is guaranteed by the federal and state constitutions. The Michigan and federal Equal Protection Clauses offer similar protection. Generally, equal protection requires that persons in similar circumstances be treated similarly. '[I]t is well established that even if a law treats groups of people differently, it will not necessarily violate the guarantee of equal protection.' Neither constitution has been interpreted to require absolute equality. When legislation is challenged as violative of the equal protection guarantee under either constitution, it is subjected to judicial scrutiny to determine whether the goals of the legislation justify the differential treatment it authorizes. The level of scrutiny applied depends on the type of classification created by the statute and the nature of the interest affected by the classification." [Citations omitted.]

"When a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification." *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). The most stringent level of review, referred to as "strict scrutiny," is applied "where the law results in classifications based on 'suspect' factors such as race, national origin, or ethnicity . . . ." *Id*., citing *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). An intermediate level of review, referred to as "heightened scrutiny," is applied where the law results in classifications based on factors such as illegitimacy and gender. *Crego, supra* at 260, citing *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988). The most deferential level of review, referred to as "rational basis," is applied where the law does not result in classifications based on impermissible factors. *Crego, supra* at 259, 261.

A. Classification Based on Gender

In order to resolve defendant's equal protection claim, we must first determine whether the confinement expense allocation provisions contained in MCL 722.712(1) and MCL 722.717(2) create a classification based on gender. . . . [W]e would hold that the statutory language does create a classification based on gender.

* * *

. . . Subsection 2(1) clearly provides that the father of a child born out of wedlock is liable for the mother's confinement expenses. The statute does not make the mother and the father jointly liable for these expenses, and does not grant a circuit court discretion to allocate those expenses on the basis of the parties' respective abilities to pay. As in *Orr v Orr*, 440 US 268, 273; 99 S Ct 1102; 59 L Ed 2d 306 (1979), there is no question that defendant "bears a burden

he would not bear were he female." By authorizing the imposition of confinement expenses solely on fathers, but not on mothers, the Paternity Act provides that different treatment be accorded on the basis of gender; it thus establishes a classification subject to intermediate scrutiny under the Equal Protection Clauses of the Michigan and federal constitutions. See *id*. at 278-279.

B. Intermediate Scrutiny

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v Richardson*, 411 US 677, 684; 93 S Ct 1764; 36 L Ed 2d 583 (1973). Legislatively drawn classifications based on gender are often an "accidental byproduct of a traditional way of thinking about females that reflected old notions and archaic and overbroad generalizations about the roles and relative abilities of men and women." *Heckler v Mathews*, 465 US 728, 745; 104 S Ct 1387; 79 L Ed 2d 646 (1984). This traditional way of thinking has changed over time, and females are no longer considered to be "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v Stanton*, 421 US 7, 14-15; 95 S Ct 1373; 43 L Ed 2d 688 (1975). Because "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection," such classifications will be upheld only if they "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Orr*, *supra* at 279, 283.

Here, the prosecutor argues that the Paternity Act's confinement cost allocation provision is substantially related to the achievement of an important governmental objective. Specifically, the prosecutor argues that the statutory provision was designed to encourage unwed mothers to seek proper medical care. The prosecutor contends that unwed mothers might forgo needed medical care unless they are assured that they will not be held liable for the expense of such care. In essence, we understand the prosecutor's argument to be that the statute uses gender as a proxy for need, assuming that all unwed mothers are in need of financial assistance from the father of their child, in order to pay for proper medical care.

The United States Supreme Court rejected a similar argument in *Orr*, *supra*. In *Orr*, the Court examined an Alabama statute that authorized state courts to place an alimony obligation on husbands, but never on wives. *Orr*, *supra* at 271. Alabama's intermediate appellate court concluded that the statute was designed for " 'the wife of a broken marriage who needs financial assistance.' " *Id*. at 280. Thus, the stated legislative purpose for the gender-based classification was to "provide help for needy spouses, using sex as a proxy for need." *Id*. The

United States Supreme Court held in *Orr* that the statute in question violated the Equal Protection Clause because Alabama's statutory scheme already permitted "individualized hearings at which the parties' relative financial circumstances are considered . . . . " *Id*. at 281. Thus, there was no reason to use gender as a proxy for need, and this rationale was inadequate to justify the statute's gender-based classification. *Id.* at 281-282.

Likewise, under our Paternity Act, circuit courts already conduct individualized hearings to examine the parties' relative financial circumstances. Indeed, such hearings must be conducted before a trial court can enter an order of filiation specifying the unmarried parents' respective child support obligations. MCL 722.717(2). We recognize that only mothers undergo confinement and childbirth, while fathers do not. However, it is not true that all mothers, or even all unwed mothers, are unable to afford costs associated with confinement and childbirth. Because individualized hearings can determine which unwed mothers are in need of financial assistance from the father of their child, the statutory purpose advanced by the prosecutor can be effectuated without placing the burden of confinement costs solely on fathers. *Orr, supra* at 281-282.

Defendant argues that the Paternity Act's confinement cost allocation provision is a lingering vestige of the common-law "necessaries" doctrine, which required husbands to pay for the necessary medical services received by their wives. Defendant contends that the Legislature adopted this provision of the Paternity Act in order to place unmarried women on an equal footing with married women, regarding payment for the necessary costs of confinement. While the necessaries doctrine remained in force, the fathers of children borne [sic] to married women (i.e., their husbands) were automatically liable for the necessary medical costs incurred during childbirth. The Paternity Act's confinement cost allocation provision gave unmarried women the same advantage, requiring the fathers of their children to be entirely liable for their necessary medical costs incurred during childbirth.

The common-law necessaries doctrine remained unmodified until just four short years ago, when our Supreme Court recognized that the doctrine violated equal protection principles. *North Ottawa Community Hosp v Kieft*, 457 Mich 394; 578 NW2d 267 (1998). In that case, our Supreme Court abrogated the common-law necessaries doctrine, stating:

"[T]he common-law necessaries doctrine imposing the support burden only on a husband could be justified in the past because it was substantially related to the important governmental objective of providing necessary support to dependent wives. However, the contemporary reality of women owning property, working outside the home, and otherwise contributing to their own economic support calls for the abrogation of this sex-discriminatory doctrine from early common law." [*Id.* at 407-408.]

> We agree with defendant that the abrogation of the common-law necessaries doctrine removed any legitimate basis for the Paternity Act's allocation of confinement costs on the basis of gender.
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> The prosecutor's appeal brief can also be read to advance another purpose for the Paternity Act's gender-based classification. The prosecutor argues that the [Family Independence Agency] pays the confinement expenses of unwed mothers who are entitled to state Medicaid benefits, and that the Legislature intended to permit recoupment of these expenses from the fathers of children born out of wedlock. This argument relies on a crucial, but mistaken assumption: that the Paternity Act's confinement expense allocation provision applies only to unwed mothers receiving government assistance. The Paternity Act is not so limited; the statute applies to *all unwed mothers*, regardless of their financial status. Not all unwed mothers need financial assistance from the father of their child in order to pay for proper medical care. Many women, wed and unwed, are covered by their own health care insurance and are otherwise equally able to pay for the birth of their children.
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> The prosecutor's argument also implies that relieving fathers of sole responsibility for confinement costs regarding the birth of illegitimate children will result in an unintended consequence: unwed mothers receiving state welfare benefits will be required to repay the FIA for the necessary costs of their confinement. We stress that the issue before us is not whether the mother of a child born out of wedlock should or may be required to repay the FIA for her necessary confinement expenses. The issue before us is whether the father of a child born out of wedlock may properly be required to shoulder the entire burden of the mother's confinement expenses. Although we concede that recoupment of confinement expenses from fathers who have the ability to pay such expenses constitutes an important governmental objective, this purpose can be achieved by gender-neutral legislation. [*Rose*, *supra* at 245-254 (emphasis in original).]

The lead opinion by Chief Judge Whitbeck correctly concludes that "[t]he objective of the Paternity Act is, . . . to ensure that minor children born outside a marriage are supported and educated." *Ante* at ___. To achieve this end for all financial burdens except confinement expenses, the act grants the circuit court discretion to apportion the expenses of parenthood between the father and the mother in a fair and equitable manner for the best interests of the child. However, in regard to confinement expenses only, the statute affords no discretion in the interest of the child and instead directs that "[t]he father is liable to pay [one hundred percent of]

the expenses of the mother's confinement . . . ." MCL 722.712(1). Chief Judge Whitbeck would hold that this sex-based classification is substantially related to the important governmental objective of ensuring that a child born out of wedlock receive support. In the words of the lead opinion: "making the father liable for the necessary confinement expenses assures that under all circumstances [whether the mother is "needy" or not] the child will receive this essential support."[2] *Ante,* at ___.

I respectfully disagree. As emphasized by the United States Supreme Court in *Orr, supra* at 283, gender-based statutory distinctions often reinforce unfair stereotypes between the sexes and thus impede the furtherance of equal protection for women:

> "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. Cf. *United Jewish Organizations v. Carey,* 430 US 144, 173-174 [97 S Ct 996; 51 L Ed 2d 229] (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the state's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

Furthermore, as noted by the Michigan Supreme Court in *Crego, supra* at 258-259, quoting with approval *Avery v Midland Co, Texas,* 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d

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[2] This appears to be a ruling from a different era. As the *Orr* Court stated in holding that Alabama's statutory scheme of imposing alimony obligations on husbands but not on wives violates the constitutional guarantee to equal protection of the law:

> *Stanton v. Stanton,* 421 U.S. 7, 10 [95 S Ct 1373; 43 L Ed 2d 688 1373] (1975), held that the "old [notion]" that "generally it is the man's primary responsibility to provide a home and its essentials," can no longer justify a statute that discriminates on the basis of gender. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas," *id.*, at 14-15. [*Orr, supra* at 279-280.]

45 (1968), the coextensive equal protection guarantees of the United States and Michigan constitutions[3] prohibit the state from treating persons differently on the basis of "arbitrary or invidious" distinctions:

> The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment. *Miller v Johnson,* 515 US 900, 919; 115 S Ct 2475; 132 L Ed 2d 762 (1995); *El Souri v Dep't of Social Services,* 429 Mich 203, 207; 414 NW2d 679 (1987). Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics. *Puget Sound Power & Light Co v City of Seattle,* 291 US 619; 54 S Ct 542; 78 L Ed 1025 (1934). Moreover, even where the Equal Protection Clauses are implicated, they do not go so far as to prohibit the state from distinguishing between persons, but merely require that "the distinctions that are made not be arbitrary or invidious." *Avery v Midland Co, Texas,* 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968).

Although raised in the context of an argument alleging a violation of due process, amicus curiae Family Law Section of the State Bar of Michigan argues that the statutory mandate of liability for confinement expenses is so arbitrary that it is unconstitutional:

> MCL 722.712(1) creates an irrebuttable presumption that in all cases the father is the appropriate parent to pay for all of the mother's confinement expenses. The due process clause forbids the application of an irrebuttable presumption that impinges on a fundamental liberty interest, when that presumption is not necessarily or universally true in fact, and where the state has reasonable alternative means of making a determination. *Vlandis v Kline,* 412 U.S. 441, 452 [93 S Ct 2230; 37 L Ed 2d 63] (1973), *Stanley v Illinois,* 405 U.S. 645 [92 S Ct 1208; 31 L Ed 2d 551] (1972).
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> It is not necessarily or universally true that fathers are more financially able than mothers to pay for confinement expenses. The state has a reasonable alternative means of making a determination of apportionment of confinement expenses. The policy of the State of Michigan, as evidenced by the Michigan Child Support Formula, is that both parents should share the costs of raising their children in accordance with their relative earnings. The information necessary to apportion confinement expenses is available to the court when it calculates child support during proceedings under the Paternity Act. A system that irrebuttably presumes that fathers have the greater ability to pay the mother's confinement expenses violates the due process clauses of the state and Federal Constitutions.

[3] *Harvey v Michigan,* 469 Mich 1; 664 NW2d 767 (2003).

In the present case, the parties have not raised or preserved an issue alleging violation of due process. Nevertheless, the arbitrariness of the sex-based classification is relevant in determining whether the statute passes constitutional muster under a heightened scrutiny, equal protection analysis. *Crego, supra; Avery, supra*.

In my view, the interest of the child in obtaining necessary support is not substantially furthered by the arbitrary and inflexible rule of liability for confinement expenses based solely on a parent's sex. As with other parenthood expenses, a fair and equitable apportionment between the father and the mother in the best interests of the child is the standard that substantially furthers the governmental objective at issue. The arbitrary mandate based solely on a parent's sex is not substantially related to an important governmental objective. *Orr, supra*. Because the statutory sex-based classification fails to withstand the intermediate scrutiny required under our federal and state guarantees of equal protection under the law, I would hold MCL 722.712(1) and MCL 722.717(2) to be unconstitutional in regard to the parental financial responsibility for confinement expenses. I would affirm the fair and equitable apportionment of the confinement expenses ordered by the trial court.

Meter and Cooper, JJ., concurred with Griffin, J.

/s/ Richard Allen Griffin
/s/ Patrick M. Meter
/s/ Jessica R. Cooper