STATE OF MICHIGAN

COURT OF APPEALS

GEORGE A. AICHELE,

Plaintiff-Appellant,

v

SANDRA CAROL HODGE,

Defendant-Appellee,

and

CAREY L. HODGE,

Third-Party Intervenor-Appellee.

FOR PUBLICATION
October 21, 2003
9:10 a.m.

No. 247021
Branch Circuit Court
LC No. 02-090663-DC

Updated Copy
December 30, 2003

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

COOPER, P.J. (*dissenting*).

I respectfully dissent. Much has been made in the majority opinion of the presumption of legitimacy in order to protect the "sanctity of marriage" and ensure the "peace and quiet of the family." To this end, I question whether this is an issue of "sanctity" under the circumstances of this case.[1] Regardless, the presumption of legitimacy is just that—a presumption—and presumptions of legitimacy can be rebutted.[2] Under the majority analysis, there would be no presumption of legitimacy; it would be irrefutable fact.

In this case, the following evidence was placed on the record:

[1] It is interesting to note that the word "sanctimonious" follows "sanctify" in the *Random House Webster's Unabridged Dictionary* (1998), although it has a totally opposite meaning.

[2] See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977).

- A blood test indicating a 99.99% probability that plaintiff is Katherine's biological father;

- An acknowledgment of parentage signed by plaintiff and defendant nearly five years before the instant petition;

- An application to name plaintiff as Katherine's father on the birth certificate that was signed by defendant nearly five years before the instant petition;

- The actual birth certificate naming plaintiff as Katherine's father; and

- Defendant's acceptance of child support from plaintiff.

In the face of this overwhelming evidence, it is clear that defendant would have met his burden to rebut the presumption of legitimacy.

Defendant waited nearly five years before deciding to terminate plaintiff's relationship with Katherine. Not only did defendant acknowledge plaintiff's role as Katherine's biological father during those five years, but the record reveals that the child was able to reap the emotional and financial benefits that plaintiff offered. While the majority points out that defendant disputes the amount of money plaintiff provided, the fact remains that defendant admits accepting some money from plaintiff for child support. The amount is irrelevant; the fact that she accepted any money for child support is pertinent as an admission. Defendant's further contention that plaintiff's visits to her house were *only* to see her and her husband's other children strains the imagination. The majority notes that defendant denies contributing to the birth certificate naming plaintiff as Katherine's father. Yet, it is an undisputed fact that the application for this birth certificate, changing Katherine's last name from Hodge to Aichele, bears her signature. Defendant also does not deny signing an acknowledgement of plaintiff's paternity. Although the majority labels this a "false affidavit" because the small print on the form states that defendant is an unmarried woman, it is the defendant who perjured herself regarding this particular fact and not plaintiff. It is clear that defendant never filed a claim to revoke this acknowledgment and the substance of her affidavit regarding plaintiff's paternity cannot be affirmatively denied. In point of fact, the results from the blood test indicate the probability of plaintiff's paternity at 99.99 percent and, therefore, put any further questions in this regard to rest.

"An acknowledgment signed under [the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*] establishes paternity, and . . . may be the basis for court ordered child support, custody, or parenting time . . . ."[3] The majority's determination that the acknowledgement in question is invalid stems from a flawed analysis of the statutory definition of "child" in the act. According to the majority, a putative father can never establish paternity under the Acknowledgement of Parentage Act unless the child is born out of wedlock or a trial court

[3] MCL 722.1004.

previously determines that the child is not issue of a marriage. In concluding that the Acknowledgment of Parentage Act should be construed in the same manner as the Paternity Act, MCL 722.711 *et seq.*, the majority comments that the definitions of "child" in the two acts are virtually identical. By making this comparison, however, the majority overlooks a significant difference between the two acts.

In *Girard v Wagenmaker*,[4] our Supreme Court interpreted the Paternity Act and concluded that a putative father could only establish paternity under the act if a child was born out of wedlock or if a circuit court had already determined that the child was not issue of the marriage. The foremost rationale for this decision was the fact that the Legislature used the present perfect tense of "determine" when discussing the time frame for the circuit court's determination.[5] As explained in *Girard*:

> In the second clause of the born out of wedlock definition, the Legislature used the term "which the court has determined" to define one of the necessary requirements to find that a child is born out of wedlock. "[H]as determined" is the present perfect tense of the verb "determine." The present perfect tense generally "indicates action that was started in the past and has recently been completed or is continuing up to the present time," or shows "that a current action is logically subsequent to a previous recent action." For a putative father to be able to file a proper complaint in a circuit court, a circuit court must have made a determination that the child was not the issue of the *marriage at the time of filing the complaint*.[6]

Our Supreme Court noted that if it ignored the plain meaning of the phrase "has determined," it would essentially be declaring a portion of the Parentage Act a nullity.[7]

Notably, the Acknowledgement of Parentage Act defines a child as an individual "conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court *determines* was born or conceived during a marriage but is not the issue of that marriage."[8] In this regard, I note that both *Girard* and the Paternity Act existed well before the Legislature enacted the Acknowledgement of Parentage Act in 1996. So, it can only be assumed that the Legislature was aware of the Supreme Court's analysis in *Girard* that the use of "determine" in the present perfect tense would require a previous court determination that the child was not issue of the marriage. Under the same rationale, the use of "determine" in the present tense indicates a legislative intent to depart from

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[4] 437 Mich 231; 470 NW2d 372 (1991).

[5] *Id*. at 242-243.

[6] *Id*. (citations omitted; emphasis in original).

[7] *Id.* at 243-244.

[8] MCL 722.1002(b) (emphasis added).

the requirement of a past determination in the Acknowledgement of Parentage Act.[9] Basic principles of statutory construction dictate that the Legislature is presumed to act with knowledge of the statutory interpretations of this Court and the Supreme Court.[10] Accordingly, I conclude that the Legislature's use of the present tense in the phrase "that the circuit court determines," renders a prior determination of whether the child was an issue of the marriage unnecessary in the Acknowledgement of Parentage Act. This is only logical, given the fact that a putative father seeking standing under this act is armed with an acknowledgment of his paternity voluntarily signed by the mother.

I also disagree with the majority's stated disapproval of this Court's recent decision in *Kaiser v Schreiber*.[11] A panel of this Court is required to follow a prior published opinion of this Court issued on or after November 1, 1990.[12] Although *Kaiser* focuses on a biological father's action under the Paternity Act, it offers some guidance for the instant case. The biological father in *Kaiser* was determined to have standing to bring an action under the Child Custody Act because the defendant mother admitted in her pleadings that he was the father.[13] The Court noted, "[n]owhere in the Child Custody Act is there a requirement that parentage be established first under the Paternity Act even if parentage is undisputed."[14] Consequently, the Court held that there was no need to proceed under the Paternity Act where the putative father's status as a parent was confirmed by the mother's admission.[15]

Likewise, in the instant case plaintiff has standing as a parent to bring an action under the Child Custody Act because defendant formally admitted that plaintiff was Katherine's father when she signed the acknowledgment of parentage form and changed the birth certificate.[16] Because the Child Custody Act only specifically limits the standing of guardians and third persons, plaintiff, as an acknowledged parent, would not have to establish standing under MCL 722.26c.[17]

The majority expresses grave concern for the due process rights of the defendants' husbands in cases like *Kaiser* and the instant case. I find this conclusion grossly exaggerated and legally unsound. According to the majority, allowing the mother of a child born in wedlock to

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[9] See Sabin, ed, *The Gregg Reference Manual* (New York: McGraw-Hill, 9th ed, 2001), § 10, p 250.

[10] *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991).

[11] 258 Mich App 357; ___ NW2d ___ (2003).

[12] MCR 7.215(J)(1).

[13] *Kaiser, supra* at 366.

[14] *Id*. at 367.

[15] *Id.*

[16] See *id*. at 366-367.

[17] *Id*.

confer standing on a putative father, through admission of his paternity, would leave married fathers without any recourse with respect to their parental rights. However, there is no provision in the Acknowledgement of Parentage Act or the Child Custody Act forbidding these husbands from intervening in such actions. In fact, that is exactly what the husband did in this particular case. The more troubling question is what happens to biological fathers in these types of cases when they are denied standing and therefore access to the halls of justice. Quoting Judge Schuette's concurring opinion in *Kaiser*, the "strained interpretation of the 'plain meaning' of [these acts] is a tortured journey that leaves [the putative father] as a bystander on the wayside of Michigan's statutory freeways."[18]

If we are to tout societal values then it should be noted that there has been public outcry for the increased accountability of biological fathers. Unfortunately, the justice system is sending a mixed message when it denies fathers who attempt to accept their responsibility access to the courtroom and their children. Lord Mansfield's Rule is no longer the prevailing authority in today's legal system. The presumption of legitimacy originated to ensure that children would not be denied support or their rights of inheritance.[19] In cases like the instant case, the putative fathers are seeking to provide support and rights of inheritance to their children. And with the advent of modern technology and DNA evidence, courts do not have to rely upon a witness's credibility to determine paternity.

I find it particularly interesting that the majority chose to quote the following passage from *In re CAW*, a case involving a child protective proceeding:

> There is much that benefits society and, in particular, the children of our state, by a legal *regime* that presumes the legitimacy of children born during a marriage. It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration.[20]

With the availability of 99 percentile proofs of paternity, there can be no justification for denying due process rights to putative fathers. Additionally, the phrase "regime" connotes a system devised under a certain authority or power. I would remind my colleagues that the judiciary was created as a *balance* of power. And, as such, the judicial system should never be used to impose the value system of the current political "regime" upon litigants under the guise of justice.

I would reverse.

/s/ Jessica R. Cooper

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[18] *Id*. at 378 (Schuette, J, concurring).

[19] See *Girard, supra* at 240-241; *Serafin, supra*.

[20] *Ante* at ___, quoting *In re CAW*, 469 Mich 192, 199-200; 655 NW2d 475 (2003) (emphasis added).