STATE OF MICHIGAN

COURT OF APPEALS

AMELIA D. JOHNSON, a/k/a AMY JOHNSON, and HARVEY C. JOHNSON, Plaintiffs-Appellees, v GREGORY DARNELL WHITE, Defendant-Appellant.	FOR PUBLICATION March 23, 2004 9:05 a.m. Nos. 241414; 241992 Berrien Circuit Court LC No. 2000-001368-DZ Updated Copy June 18, 2004

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

BORRELLO, J. (*concurring*).

I concur in the decision reached by the majority for the sole reason that we are bound by our Supreme Court's ruling in *DeRose v DeRose*, 469 Mich 320; 666 NW2d 636 (2003). However, I write separately because I find persuasive the reasoning of Justice Kelly in her dissent in *DeRose*, when she stated:

> Accordingly, when the Legislature enacted the grandparent visitation statute, it saw fit to explicitly require that trial courts give deference to a fit parent's decisions regarding grandparent visitation. The majority's argument that the provisions requiring deference are inapplicable in the context of grandparent visitation are untenable. The Legislature resolved this issue by including grandparent visitation within the gamut of custody disputes. Therefore, because it is narrowly tailored to serve a compelling governmental interest, the statute is constitutional. [*Id.* at 357.]

Justice Kelly was correct in stating that when our Legislature drafted MCL 722.27b, it did so in a way that passes constitutional muster. I would incorporate those findings in her dissent and add to them the suggestion that despite the holding in *DeRose*, the jurisprudence of this state does not recognize a fundamental right to parent.

The majority's opinion in *DeRose* is problematic because much of the decision rested on the United States Supreme Court's determination in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), that there exists a "fundamental right" to parent. However, recent decisions by our Supreme Court and this Court are seemingly at odds with the concept that there

exists a "fundamental right" to parent. A review of the cases addressing issues of a "fundamental right" to parent shows that they rely more on our Courts' enchantment with the phrase "the sanctity of marriage" than on allowing a parent to exercise this right, or even be heard so as to attain this "fundamental right."

In *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003), Justice Taylor, writing for the majority, denied a putative father's right to intervene in a parental rights termination proceeding. While the majority's decision was predicated on several factors, Justice Taylor, in contrasting his ruling to that of the dissent, stated:

> 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. [*Id.* at 199-200 (citation omitted)].

Such a basis for denying a putative father's right to intervene in an action wherein he was requesting the right to be a legally sanctioned parent is at odds with the *DeRose* finding that there exists a "fundamental right" to parent. Similarly, this Court in *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003), held:

> [W]hen a child is born during a marriage, a putative father can never successfully institute legal proceedings to be declared a parent. Because plaintiff cannot obtain a legal determination that he is the child's "parent," he does not have standing to seek custody of her under the Child Custody Act. [*Id.* at 162.]

Because the majority in these cases did not allow putative parents to intervene in cases that would allow them the opportunity to even prove their parentage, we cannot state that Michigan recognizes a "fundamental right" to parent. For these reasons, I concur in the result only.

/s/ Stephen L. Borrello