STATE OF MICHIGAN

COURT OF APPEALS

JOHN C. SPRENGER,

Plaintiff-Appellant,

v

EMILY R. BICKLE,

Defendant-Appellee.

FOR PUBLICATION
September 10, 2013

No. 310599
Benzie Circuit Court
LC No. 11-009301-DP

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

GLEICHER, J. (*concurring*).

I fully concur with the lead opinion and write separately only to respectfully respond to the dissent.

The dissent laments that "[a]t a time when too many fathers are running *from* their parental responsibilities, plaintiff in this case is running *toward* his." (Emphases in original.) Plaintiff's virtue aside, an insurmountable obstacle blocks his path to paternity: the minor child already *has* a father. That father is Adam Bickle. Adam and Emily Bickle legally married before the child was born. Their marriage created a presumption that Adam fathered the child. Neither Emily nor Adam ever attempted to rebut this presumption. And no court has determined that Adam is not the child's father. These facts resolve this case, regardless of plaintiff's noble intentions.

Emily and Adam have divorced each other twice and married thrice. They have three children other than the involved minor. Relying on statements attributed to Emily Bickle regarding the date of the involved minor child's conception, the dissent would hold that "the presumption of Adam Bickle's paternity of the child was sufficiently and effectively rebutted in a prior legal proceeding between defendant and Mr. Bickle to require further proceedings in the trial court." That legal proceeding, the dissent asserts, was the Bickle's second divorce. The dissent theorizes that Emily conceived the involved child as early as March 27, 2011, less than two weeks before the *pro confesso* divorce hearing. According to the dissent, Emily may have known that she was pregnant with plaintiff's child when she testified at the hearing, and may

have committed a fraud on the court by not revealing her pregnancy.[1] The dissent posits that because Adam had undergone a vasectomy, Emily's failure to disclose the pregnancy at the divorce hearing affords plaintiff with standing to sue under the Paternity Act.

The dissent misapprehends the law. To have standing to file a paternity action, plaintiff must "allege that a 'court has determined' that the child was not the issue of the marriage." *Girard v Wagenmaker*, 437 Mich 231, 244; 470 NW2d 231 (1991). "To overcome the strong presumption of the legitimacy of a child born or conceived during a marriage, a court determination must settle with finality a controversy regarding the child's legitimacy." *Barnes v Jeudevine*, 475 Mich 696, 704; 718 NW2d 311 (2006). No court has made any such determination. Emily's post-divorce statements concerning the date of conception are not a substitute for a prior legal proceeding. And Adam's vasectomy (even if he actually had one) possesses no relevance whatsoever.[2] Neither Emily nor Adam ever sought to rebut the presumption that Adam is the child's father. Accordingly, plaintiff lacks standing to do so.

Contrary to the dissent, the facts in this case are not "unique" and do not counsel a creative reinterpretation of the Paternity Act. Plaintiff's story merely echoes *Barnes*, *Girard* and countless other cases: the spurned lover of a married woman seeks a declaration that he fathered the child born of the affair. As the Supreme Court has repeatedly explained, when married parents choose not to explore the paternity of a child born during a marriage, a putative father has no right to meddle with their decision. Children born during a marriage benefit from a "legal regime" that presumes their legitimacy. *In re CAW*, 469 Mich 192, 199-200; 665 NW2d 475 (2003). "It is likely that these values, rather than the failure to consider the plight of putative

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[1] Most home pregnancy tests are not accurate until more than two weeks after ovulation, rendering it highly unlikely that Emily knew she was pregnant by the April 8, 2011 divorce hearing even if she had conceived on the earliest date postulated by the dissent, March 27, 2011. See *Home pregnancy tests: can you trust the results?*, <http://www.mayoclinic.com/health/home-pregnancy-tests/PR00100> (accessed July 9, 2013).

[2] The "evidence" of Adam's vasectomy is a statement contained in a letter written by Emily's mother. Needless to say, this "evidence" is pure hearsay. Moreover, even if Adam actually had a vasectomy, he nevertheless could have impregnated Emily. Vasectomy has a failure rate of less than one percent if performed by an experienced doctor, but tests are required afterward to ensure the effectiveness of the procedure. *Vasectomy risks and benefits: what every man should know*, <http://men.webmd.com/features/vasectomy-risks-benefits> (accessed July 9, 2013). In *Foster v Eichler*, 939 SW2d 40 (Mo Ct App, 1997), for example, a father contesting paternity asserted that he had undergone a vasectomy and had three post-operative semen analyses negative for sperm, two before and one after the child's birth. Yet a DNA test identified him as the child's father, which sufficed to support the trial court's paternity ruling.

Moreover, the irrelevance of Adam's alleged vasectomy is not a "sweeping[] assert[ion]" meant to negate the ability of a party with standing to rebut the presumption of legitimacy with evidence of an "incapability of procreation." The dissent misses the point that this ground could have been raised by Adam or Emily, just not plaintiff.

fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration." *Id.* Make no mistake, plaintiff seeks to invade a marriage and the dissent would provide him the legal tools to accomplish that invasion.

The dissent asserts that plaintiff's presentation of "clear and convincing evidence" that Adam did not father the child should open the courthouse door to discovery in plaintiff's paternity action. The dissent is incorrect. Plaintiff has no standing to challenge the validity of the Bickles' earlier divorce regardless of any "evidence" that plaintiff may amass. "[T]his Court has been loath to invalidate divorce judgments on the urgings of third parties when neither spouse challenged the validity of the divorce in a direct appeal." *Estes v Titus*, 481 Mich 573, 588; 751 NW2d 493 (2008). Nor is plaintiff empowered to launch an inquisition into whether Emily misrepresented at the *pro confesso* hearing that she was not pregnant: "[T]he Court has refused to invalidate divorces on the basis of third-party allegations of nonjurisdictional irregularities in the divorce proceedings." *Id*. In other words, the validity of the Bickles' divorce is the Bickles' business, not that of plaintiff. And by making a "prior proceeding" prerequisite to a paternity action, "the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue . . . — the mother and the legal father." *In re KH*, 469 Mich 621, 635; 677 NW2d 800 (2004).

The dissent suggests an exploration of the *pro confesso* divorce proceedings to determine Emily's veracity but provides no details concerning the appropriate scope of such discovery. Should Emily be forced to submit to a polygraph regarding her awareness of the exact date of conception? And why stop there? If plaintiff may explore whether Emily made a misrepresentation, why not evaluate Adam's fertility by ordering him to produce semen for a sperm analysis? Of course, the child would be compelled to undergo a DNA evaluation. Emily's medical records would be fair game for disclosure as would Adam's. Perhaps expert witnesses could be engaged to opine regarding the date of conception, the accuracy of home pregnancy tests, and the success rate of vasectomies. The specter of an invaded marriage has arrived.

Adam has chosen not to test or renounce his paternity of the involved child. Emily has elected to consider Adam the child's father. This married couple is raising three other children who undoubtedly consider the fourth child their sibling. Adam is the only father the child has ever known. That a court may disrupt this family by issuing discovery orders or ultimately removing the child from his home is nothing short of chilling. It is precisely this scenario that the Legislature intended to avoid by limiting the parties that may challenge a child's paternity to the child's legal parents. Thus, as the lead opinion correctly concluded, plaintiff lacks standing regardless of Emily's statements, the date of her conception, Adam's putative vasectomy, or the fruits of any discovery.

The Legislature and our Supreme Court have placed beyond debate that only a mother or a legal father has standing to rebut the presumption of paternity. By resting its decision on this tenet, the trial court correctly resolved this case.

/s/ Elizabeth L. Gleicher