STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW HELTON, Plaintiff-Appellant,	FOR PUBLICATION February 4, 2014
v	No. 314857 Oakland Circuit Court Family Division
LISA MARIE BEAMAN and DOUGLAS BEAMAN, Defendants-Appellees.	LC No. 2012-798218-DP

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

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

I respectfully dissent from both Judge O'CONNELL's view in the lead opinion that the trial court properly considered the best interests factors and from Judge KELLY's view in her concurrence that *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), lv pending, was incorrectly decided. I believe that *Moiles* was correctly decided and would reverse the decision of the trial court and remand with instructions to enter an order revoking the acknowledgment of parentage.

The revocation of paternity act, MCL 722.1431 *et seq.*, addresses three related, but separate situations: setting aside an acknowledgment of paternity, setting aside an order of filiation, and the determination that a presumed father is not a child's father. Each of these situations is governed by a separate section of the act. MCL 722.1435. Because this case involves setting aside an acknowledgment of parentage, MCL 722.1435(1) directs us to section 7 of the act, MCL 722.1437.

MCL 722.1437(2) provides that an action for revocation of an acknowledgment of parentage may be pursued for a number of reasons, including a mistake of fact. Under subsection (3), the burden lies with the petitioner to establish by clear and convincing evidence that the acknowledged father is not the father of the child. Nothing in MCL 722.1437 directs the trial court to consider the best interests of the child in determining whether the petitioner has met that burden of proof. In the case at bar, not only do defendants stipulate that plaintiff is the biological father of the child, the trial court specifically found that plaintiff had met his burden to establish that fact by clear and convincing evidence. Rather, the trial court declined to enter an

order setting aside the acknowledgment of parentage because it was not in the child's best interests.

Moiles presented a similar situation whereby a man who was not the child's biological child, Moiles, had signed an acknowledgment of parentage and, later, an action was filed to revoke that acknowledgment of parentage. Moiles had argued in the trial court, and then on appeal, that the trial court should have considered the best interests of the child before deciding whether to revoke Moiles' acknowledgment of parentage despite the fact that he was not the biological father of the child. This Court rejected that argument, concluding that the best interests of the child only applies when the trial court is faced with setting aside a determination of paternity or a determination that a child is born out of wedlock, but not to the decision of whether to set aside an acknowledgment of parentage. I agree with the reasoning of the *Moiles* majority.

The reference to the consideration of the best interests of the child is found in MCL 722.1443(4), which reads in part as follows:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interest of the child.

As the *Moiles* majority explained, at 75-76, this provision is inapplicable to the revocation of an acknowledgment of parentage:

> Moiles contends that an acknowledgment of parentage *is* a paternity determination because it establishes a child's paternity. We disagree, and conclude that the trial court correctly determined that an acknowledgment of parentage is not a paternity determination as that term is used in the statute, and therefore, that MCL 722.1443(4) did not apply. An acknowledgment of parentage does establish the paternity of a child born out of wedlock and does establish the man as a child's natural and legal father. However, in MCL 722.1443(2)(d), the Legislature expressly linked a "determination of paternity" to the section 7 of the Paternity Act. We conclude that the Legislature's use of the phrase "paternity determination" in MCL 722.1443(4) specifically refers to a "determination of paternity" under MCL 722.717, and the resulting order of filiation.
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> When a statute expressly mentions one thing, it implies the exclusion of other similar things. Here, while MCL 722.1443 generally applies to any of the actions listed in subdivision (2), including revoking an acknowledgment of parentage, subdivision (4) specifically addresses only paternity determinations and determinations that a child is born out of wedlock. These are only two of the four types of actions that the trial court may take under the Revocation of Paternity Act. Had the Legislature wished the trial court to make a determination of the child's best interests relative to revoking an acknowledgment of parentage, it could have included language to do so. But it did not. [Footnotes omitted.]

Indeed, the first definition of "determination" in Black's Law Dictionary (5th ed), is "The decision of a court or administrative agency."

Both of my colleagues acknowledge that *Moiles* is controlling here. Judge KELLY disagrees with *Moiles* and would invoke a conflict panel to overrule it. She reaches this conclusion based upon the argument that, because an acknowledgment of parentage establishes paternity, it must be a determination of paternity. *Ante,* slip op at 2. For the reasons discussed above, I do not agree. Because there was no decision by a court, there was no determination of paternity; rather, there was merely an acknowledgment of such. My colleague's reasoning overlooks the fact that paternity can be established by means other than a determination.

Turning to the lead opinion, while acknowledging that *Moiles* is controlling, reaches the conclusion that, despite the decision in *Moiles*, the trial court can apply the best interest factors, albeit for a different reason. The lead opinion simultaneously concludes that the trial court erred in applying the best interest factors, *ante*, slip op at 6, and that this case must be resolved by considering the best interest factors, *ante*, slip op at 9-10. This essentially turns this case into a child custody dispute rather than a revocation of paternity dispute.

First, the lead opinion notes that, under MCL 722.1443(5), the results of DNA testing are not binding on the trial court. Then the learned judge's opinion takes a logical leap to the conclusion that this must somehow create discretion in the trial court to consider other factors in determining whether to revoke an acknowledgment of parentage. *Ante*, slip op at 7-8. I disagree. I think the clearer and more obvious observation is that the Legislature merely did not want the trial court's factual determination to be limited by the DNA test results. That is, it allows for the possibility that the trial court, in making the factual determination regarding who is the biological father of the child, may be presented with a situation in which the DNA test results do not provide clear and convincing evidence that the acknowledged father is not the father of the child and, therefore, should not be deemed controlling.[1]

The shortcomings of the lead opinion is underscored by two additional factors. First, as the lead opinion itself points out, the now repealed provision in the Acknowledgment of Parentage Act which dealt with revocation of an acknowledgment of parentage, the former MCL 722.1011, included a provision that a party seeking to revoke an acknowledgment of parentage,[2] "has the burden of proving, by clear and convincing evidence, that the man is not the father and

[1] For example, the trial court may have reason to believe that the test results are not accurate. Or perhaps the difference in the results between the two potential fathers is sufficiently small that the trial court is unwilling to merely determine paternity on whose results gave the slightly higher percentage. Or, for that matter, the results may suggest that neither man is the actual father, in which case the DNA results should not compel the court to rule in favor of the man who has the higher, though still small, likelihood of being the father.

[2] It is worth noting that under the former MCL 722.1011, a man claiming to be the biological father of the child could not file the action to revoke the acknowledgment of parentage. It was to be filed by the mother, the man who signed the acknowledgment or the prosecuting attorney.

that, *considering the equities of the case*, revocation of the acknowledgment is proper." MCL 722.1011(3) (emphasis added), repealed by PA 2012, No 161. The lead opinion argues the Legislature replaced this "equitable standard" with "the statutory declaration that DNA results are not binding on a court making a determination under the new Act." *Ante*, slip op at 7. This is a tenuous argument at best. The provision of the new act which most closely relates to the former MCL 722.1011(3) is MCL 722.1437(3), which establishes the clear and convincing evidence burden (without the reference to the equities of the case), rather than MCL 722.1443(5), which establishes the principle that DNA results are not binding on the trial court. Moreover, the lead opinion ignores the principle of statutory construction that "when a statute is repealed and another statute is enacted that covers the same subject area, a change in wording is presumed to reflect a legislative intent to change the statute's meaning." *People v Henderson*, 282 Mich App 307, 328; 765 NW2d 619 (2009). Thus, the proper interpretation to be given to the Legislature's omission of the phrase "considering the equities of the case" from the new statute is that the Legislature no longer wished for the equities to be considered.

And this leads to the second problem with the lead opinion, which is that the statute does not, as the opinion acknowledges, "identify the relevant factors or the legal standard that governs the circuit court's discretion" in determining whether to revoke an acknowledgment of parentage. *Ante*, slip op at 7-8. Rather, the lead opinion goes on to supply that standard by looking to the child custody best interest factors, with nothing in the revocation of paternity act to supply a basis for those standards.

In sum, we are presented with two possible statutory interpretations. The first is fairly direct and simple: in the context of revoking an acknowledgment of parentage, the Legislature decided to remove consideration of the equities of the case and leave it to a factual determination of the trial court, placing a burden on the party seeking the revocation to establish by clear and convincing evidence that the acknowledged father is not, in fact, the actual father of the child, with the recognition that the trial court, in making its factual findings, is not compelled to accept the DNA results in every case.

The second interpretation is to follow the lead opinion's wanderings through the statute, ignoring that which the Legislature chose to delete and then finding its way into the child custody act in order to supply a standard for the exercise of discretion where the Legislature has not chosen to grant discretion to the trial court. This interpretation has no support in the statute itself. Therefore, I choose the first.

But I should also recognize that the lead opinion's conclusion overlooks a very obvious point. After reviewing the best interest factors, it notes that "these two best interest factors plainly favor maintaining the custodial environment the child has enjoyed thus far in life." *Ante*, slip op at 10. Not only does the lead opinion err by turning this revocation of paternity case into a child custody case, it overlooks the fact that this is only a revocation of paternity case and not a child custody case. That is, merely because the acknowledgment of parentage is revoked and plaintiff becomes the child's legal father, that does not mean that there will be a change of custody. If, after establishing paternity, plaintiff chooses to pursue custody, the trial court will look to the custody act and the best interest factors to determine whether a change in custody from the mother to plaintiff is warranted.

While it would be premature for me to address that question, I have no particular reason to disagree with my colleagues' analysis of that question and, assuming that their analysis is correct that the best interest factors favor the mother, the trial court would presumably leave custody with the mother. All that will have changed is who is recognized as the child's legal father. And that presumably would reflect the intent of the Legislature in enacting the revocation of paternity act in the first place: to allow biological fathers to establish their status as a child's legal father despite the fact that another man erroneously signed an acknowledgment of paternity.

Finally, as for resolving this case based upon laches, while defendants did plead laches as an affirmative defense, the trial court did not resolve this case based upon laches. And, more importantly, defendants did not raise laches in their brief on appeal. I am not inclined to raise it sua sponte.

For these reasons, I conclude that *Moiles* was correctly decided, and I would follow it and conclude that the trial court erred in considering the best interests factors. Because this is an acknowledgment of parentage case and plaintiff has established by clear and convincing evidence, as the trial court and the parties agree, that he is the child's biological father, I would reverse the trial court and remand the matter for entry of an order revoking the existing acknowledgment of paternity and for entry of an order of filiation establishing plaintiff as the child's father.

/s/ David H. Sawyer