STATE OF MICHIGAN

COURT OF APPEALS

KARI LYNN LIPNEVICIUS,

Plaintiff-Appellee,

v

GEOFFREY MICHAEL LIPNEVICIUS,

Defendant-Appellant,

and

JASON BRISTOL,

Intervening Party-Appellee.

UNPUBLISHED
August 26, 2010

No. 289073
Genesee Circuit Court
LC No. 06-270914-DM

Before: JANSEN, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

This case is before us as on leave granted. *Lipnevicius v Lipnevicius*, 485 Mich 872; 771 NW2d 802 (2009). After review of the pertinent facts and relevant law, we unanimously agree with parts I, II and III (A)-(E)(2) of Judge JANSEN'S opinion. We disagree with part III(A)(3) of Judge JANSEN'S opinion for the reasons stated *infra*, and instead hold that the trial court's order should be vacated, and this matter remanded for an evidentiary hearing on whether defendant is entitled to be recognized as the minor child's equitable parent. And, although we recognize it as dicta, we note our disagreement with the continued recognition of the equitable parent doctrine. Accordingly, the trial court's opinion and order are vacated, and this case is remanded for an evidentiary hearing on whether defendant is entitled to the status of an equitable parent.

Defendant's main argument on appeal is that the trial court erred in refusing to consider whether defendant met the *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987), standards because it had previously ruled that the child was not an issue of the marriage, and so it could not now "confer the status of equitable parent on the Defendant [for] it would . . . undermine this court's prior order and determination that [the child] was not an issue of the marriage which is impermissible pursuant to *Coble v Green*, 271 Mich App 382; 722 NW2d 898 (2006)." This legal ruling, that a court finding that a child was not born of the marriage precludes application of the equitable parent doctrine, was in error. Indeed, *Atkinson* adopted the equitable parent doctrine so that "a husband who is not the biological father of a child born or

conceived during the marriage may be considered the natural father", so long as the criteria are proven. *Atkinson*, 160 Mich App at 608. See also *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999). The trial court's finding that the child was not an issue of the marriage is in fact a prerequisite to invocation of the equitable parent doctrine, for if the child was an issue of the marriage, there would be no parentage dispute. The timing of these decisions is not the critical factor, as revealed in *York v Morofsky*, 225 Mich App 333; 571 NW2d 524 (1997). In that case, the trial court entered a divorce judgment excluding the minor child as an issue of the marriage, and "later determined that defendant was not [the minor child's] biological or equitable parent." *Id*. at 334-336. Our Court affirmed the trial court's determination that the husband was not the biological father, but reversed the decision denying him the permanent status of equitable parent. *Id*.

The trial court's reliance on *Coble* was misplaced. In that case this Court held that the mother lacked standing to bring a subsequent paternity suit against the biological father because the trial court had previously found the husband to be an equitable parent, which we had affirmed in a prior appeal.[1] *Coble*, 271 Mich App at 388-389. Once a father is deemed an equitable parent, he has the same rights–as does the child–as if the child were an issue of the marriage. *Id.*, citing *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 616 (1996). Hence, that finding of equitable parent foreclosed *someone else being declared a father* by a court.[2] Here, however, a finding that defendant was not the biological father did not preclude a declaration *in the same case* that defendant was the equitable parent. *York*, 225 Mich App at 334-335.

Although some may quibble over the notion that a biological father can be permanently excluded as a parent when a trial court finds a husband to be an equitable parent, the notion is consistent with the equitable parent doctrine and Michigan's (and our Nation's) long-standing policy in favor of preserving the parent-child relationship. This holds true because the purpose of the equitable parent doctrine is to permanently protect an established father-child relationship that was fostered from birth to the point of divorce, and which the father wants to continue. This preserves the stability, consistency, and bond that was created while the presumption of legitimacy governed their lives, and is considered a benefit to the child. So, the fact that the biological father is now in the picture does not foreclose *as a matter of law* the application of the equitable parent doctrine. See *Soumis*, 218 Mich App at 36 (MARKMAN, J., concurring).[3]

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[1] *York*, 225 Mich App at 340.

[2] A child cannot, by nature or by law, have two fathers. See *Michael H v Gerald D*, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (SCALIA, J.); *Sinicropi v Mazurek*, 273 Mich App 149, 185; 729 NW2d 256 (2006).

[3] In a case where the equitable parent doctrine is invoked by the court because of the strong father-child bond, denying a right of parentage to the biological parent who was not involved in the child's life or upbringing does not run afoul of the United States or Michigan Constitutions. The protected liberty interest arises from the family life and bond between the father and child, not simply from a biological link. *Sinicropi*, 273 Mich App at 169, citing *Hauser v Reilly*, 212 Mich App 184, 188-189; 536 NW2d 865 (1995). Whether this holds true when the plaintiff has

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While recognizing this may not be the strongest case to invoke the doctrine, the fact intensive determination of whether to apply the equitable parent doctrine should first be made by the trial court after conducting an evidentiary hearing. For this reason, we must vacate and remand.

With respect to whether the equitable parent doctrine should continue to be recognized in Michigan, the Supreme Court's order of remand does not ask us to determine the soundness of *Atkinson*, i.e., whether Michigan courts should continue to *recognize* the equitable parent doctrine. Nonetheless, we note that the continuing existence of the equitable parent doctrine necessitated a lengthy, multifaceted analysis of an otherwise simple and straightforward case. In our view, the equitable parent doctrine irreconcilably conflicts with statutes intended to occupy the entire field of child custody regulation. The governing laws, enacted by our Legislature, compel a far more direct end to this litigation.

The circuit court's ruling that Nathan was born out of wedlock disestablished defendant's paternity of the child, rendering defendant a "third person" under the Child Custody Act (CCA), MCL 722.22(j). Pursuant to MCL 722.26c(1), defendant lacked standing to bring an action for custody. These directly applicable statutes chart the way to a simple affirmance of the circuit court's denial of defendant's motion for summary disposition. Instead, the equitable parent doctrine resuscitates a claim otherwise unrecognized in the statutory framework governing child custody matters. Because this doctrine clashes with the well-established principle that "the public policy issues related to child custody disputes are to be resolved by the Legislature, not the judiciary," *Van*, 460 Mich at 327, it has no place in Michigan's jurisprudence.

In 1980, our Legislature amended the paternity act, MCL 722.711 *et seq*., to "expand[] the definition of a child born out of wedlock to include 'a child which the court has determined to be a child born during a marriage but not the issue of that marriage." *Girard v Wagenmaker*, 437 Mich 231, 240; 470 NW2d 372 (1991), quoting former MCL 722.711(a).[4] With this amendment, the Legislature allowed divorcing parents to contest the biological parentage of their children, as occurred in this case. After a circuit court has extinguished the paternity presumption, a putative father may file a parentage action under MCL 722.714. *Girard*, 437 Mich at 242-243.[5]

Here, a "stipulated judgment" reflects that Bristol "acknowledges paternity of the minor child . . . ." This acknowledgment placed Nathan in "the same relationship" to Bristol "as a child born or conceived during a marriage," and invested Nathan with "the identical status, rights, and duties of a child born in lawful wedlock effective from birth." MCL 722.1004. When the circuit

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both a biological link and a father-son bond may be another issue, but cannot now be decided in this case until after findings are made on remand.

[4] Currently, the relevant portion of MCL 722.711(a) defines a "child born out of wedlock" as "a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[5] The court rules describe an alternate mechanism for establishing biological fatherhood in MCR 3.921(D).

court recognized Bristol as Nathan's natural father, Bristol became a "parent" under the Child Custody Act, MCL 722.22(h), and defendant assumed the status of a "third person," whom the Legislature has defined as "an individual other than a parent." MCL 722.22(j).

"Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim." *Miller v Allstate Ins Co*, 481 Mich 601, 606; 751 NW2d 463 (2008). A third person may initiate a custody action only pursuant to authority conferred by the Legislature. Two pertinent statutes confer standing in child custody actions, MCL 722.26b and MCL 722.26c. In MCL 722.26c, our Legislature, authorized, in relevant part as follows, the commencement of third-party custody actions:

> (1) A third person may bring an action for custody of a child if the court finds either of the following:
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> (a) Both of the following:
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> (*i*) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in effect at the time the action is filed.
>
> (*ii*) After the placement, the child has resided with the third person for a minimum of 6 months.
>
> (b) All of the following:
>
> (*i*) The child's biological parents have never married to one another.
>
> (*ii*) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.
>
> (*iii*) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

Defendant did not possess standing under the clear and unambiguous terms of MCL 722.26c(1). The alternate standing statute applicable in child custody actions, MCL 722.26b, applies only to guardians and limited guardians. Thus, the Legislature has not supplied defendant with any legal avenue for obtaining custodial rights to Nathan. As our Supreme Court recently emphasized, "no constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child." *Hunter v Hunter*, 484 Mich 247, 263; 771 NW2d 694 (2009).

Moreover, neither the Child Custody Act nor the Paternity Act contemplates the notion of an "equitable" parent. The Legislature simply has not bestowed parental prerogatives on persons whose status falls outside MCL 722.22(h). Absent the equitable parent doctrine introduced in

Atkinson, defendant would have no legally cognizable interest in custody of Nathan.[6] "Very few jurisdictions have embraced the equitable-parent doctrine adopted in *Atkinson* . . . ." *Titchenal v Dexter*, 166 Vt 373, 384-385; 693 A2d 682 (1997). The Connecticut Supreme Court explained as follows one rationale for other jurisdictions' rejection of the equitable parent doctrine:

> [E]ven if we were to conclude that our statutes left room for a redefinition of parentage, we are not persuaded that it would be wise to employ the equitable parent doctrine in that fashion. It is true that the doctrine has considerable emotional appeal, because it permits a court, in a particularly compelling case, to conclude that, despite the lack of biological or adoptive ties to the child, the deserving adult nonetheless may be determined to be the child's parent. This appeal may be enhanced in a given case because the best interests of the child, if determined irrespective of the otherwise invalid claim of parentage, may point in that direction. That doctrine, however, would lack the procedural and substantive safeguards provided to the natural parents and the child by the adoption statutes. In addition, the equitable parent doctrine, which necessarily requires an ad hoc, case-by-case determination of parentage after the facts of the case have been determined, would eliminate the significant degree of certainty regarding who is and who is not a child's parent that our jurisprudence supplies. [*Doe v Doe*, 244 Conn 403, 444 n 46; 710 A2d 1297 (1998), overruled in part on other grounds, *In re Joshua S*, 260 Conn 182, 796 A2d 1141 (2002).]

While the Supreme Court has apparently reserved this question for another day, the continuing viability of the equitable parent doctrine merits prompt and careful evaluation. In *Hunter*, 484 Mich at 251, 261, 271-275, our Supreme Court overruled *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005), a case similarly premised in part on equitable considerations, instead of a governing statute. This Court had held in *Mason* "that unfit parents have the burden 'to show, by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests.'" *Hunter*, 484 Mich at 272, quoting *Mason*, 267 Mich App at 207. The Supreme Court criticized that "*Mason* and its predecessors created this new standard out of thin air." *Id*. The equitable parent doctrine suffers from the same intrinsic infirmities as *Mason*'s groundless injection of unfitness considerations into the parental presumption contained in MCL 722.25(1). As did the fit parent requirement adopted in *Mason*, the equitable parent doctrine plainly contravenes the statutory scheme governing child custody. For this reason, it should be overruled.

Vacated and remanded. We do not retain jurisdiction.

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[6] Although this Court has referenced and relied on the equitable parent doctrine in several cases since *Atkinson*, none of those cases addresses whether the 1993 enactment of MCL 722.26c, governing third person actions for custody, conflicts with the common-law equitable parent doctrine. 1993 PA 259. This Court must "presume that the Legislature is aware of the common law that legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control." *Lewis v LeGrow*, 258 Mich App 175, 183-184; 670 NW2d 675 (2003).

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher