Parents never married: Biological dad gets custody, parenting time

Presumed father's Revocation of Paternity Act challenge is denied

By Traci R. Gentilozzi

A trial court properly awarded a biological father parenting time with and joint legal custody of the unmarried parties' child, the Michigan Court of Appeals has ruled in a 2-1 published decision.

Paternity testing determined that the child, MP, was the plaintiff's biological daughter. The defendant mother had given birth to MP shortly after marrying another man, who was the child's presumed father under Michigan law. The plaintiff later filed an action for custody and parenting time in Berrien County Circuit Court.

Focusing on the best-interest factors in MCL 722.23, the trial judge ruled the child had an established custodial environment with the defendant. The judge also found that it was in the child's best interests that the defendant and the plaintiff share joint legal custody, the mother have sole physical custody and the plaintiff have parenting time.

The Court of Appeals affirmed in *Demski v. Petlick, et al.* (MiLW No. 07-88090, 49 pages). Judge Mark T. Boonstra wrote the majority opinion, joined by Judge Pat M. Donofrio.

"The [best interest] factors were relatively evenly split between the parents, and the trial court's award of joint legal custody was not 'grossly violative of fact and logic' as required to show an abuse of discretion," Boonstra wrote.

Regarding parenting time, the trial court's findings "were not against the great weight of the evidence, and the trial court's grant of supervised parenting time to plaintiff was not a palpable abuse of discretion," Boonstra said.

Boonstra also rejected the defendant's equal protection challenge to the Revocation of Paternity Act.

"Although defendants argue that the RPA severs a fundamental liberty interest in the presumed father, the actual effect of the RPA, combined with the paternity act, is to provide a mechanism for determining *which* man is the father of a minor child, and thus in possession of a fundamental liberty interest in his relationship with the child," Boonstra said. "We find no merit to defendants' constitutional challenge to MCL 722.1441."

Judge Elizabeth L. Gleicher dissented, saying the plaintiff did not present clear and convincing evidence that declaring the child born out of wedlock would serve the child's best interests.

"Moreover, the trial court's ex parte consideration of expert testimony and its failure to hold a separate evidentiary hearing to consider the child's best interests contravened the Child Custody Act ..., mandating reversal of its joint legal custody and parenting-time decisions," Gleicher wrote.

As for the RPA, "although the Legislature did not specify the standard of proof applicable to best-interest determinations under the RPA, it did not enact the statute in a vacuum," Gleicher said. "The principles that only clear and convincing evidence of a child's best interests justify disrupting an established environment or depriving a legal father of his paternal rights are firmly fixed in family law. I cannot conclude that the Legislature intended to abandon the heightened standard of proof in a directly analogous custodial context simply because it failed to reiterate it in the RPA."

Perspectives of parties' lawyers

Benton Harbor attorney Kevin Banyon represents the plaintiff father. He said the Court of Appeals did a "great job" setting forth the RPA's procedural framework.

"Being one of the first cases filed after the statute was enacted, we realized that we were setting forth on new ground and the steps we took would likely be repeated in future cases," he said. "I give great credit to [the trial judge] in taking the time to follow the proper legal procedure through this case even if it took us a little while to get there."

According to Banyon, who is with Burch & Banyon, the facts of the case show the "shortcomings" of the old Paternity Act. "I'd also like to think that [my client's] perseverance to have a relationship with his daughter helped change the law," he said, noting that testimony and exhibits showed that the plaintiff, through counsel, continually petitioned legislators to change the law.

St. Joseph attorney W. Brendan Neal, who represents the defendant mother,

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said the decision is inconsistent with the child's best interests.

"As a practicing lawyer, I am discouraged and somewhat troubled," said Neal, who is with Armstrong, Betker & Schaeffer, PLC. "There are good policy reasons that justify handling child custody cases swiftly. However, those reasons do not justify compromising the fact-finding process."

The defendant has not yet decided whether to appeal, Neal said.

RPA 'shortfalls'

Grosse Pointe Farms family law appellate attorney Trish Oleksa Haas, who was not involved in the case, said the decision clearly illustrates the "shortfalls" of the RPA.

"First and foremost, the case appropriately recognizes that while the act provides a mechanism for genetic fathers to pursue a paternity action when a child is born to a married woman, the act itself does not provide a trial court with the authority to enter custody and parenting time orders in conjunction with a such an action," she said.

"However, the Court of Appeals held that even though the RPA does not provide the trial court with such authority, the Child Custody Act does," Haas noted. "Therefore, it was proper for the trial court to enter a custody and parenting time order incident to the RPA action even though the RPA did not explicitly provide the trial court with that authority."

Haas pointed to Gleicher's dissent, which she said indicated the RPA does not appear to effectively deal with the competing interests of a genetic father and a presumed father.

"Whereas the RPA provides a mechanism for establishing paternity, in so doing it also severs all rights of a presumed father," she said. "Therefore, once an order establishing paternity in a genetic father is entered under RPA, it effectively renders a presumed father a 'legal stranger' to the child."

According to Haas, Gleicher's dissent analyzes these competing interests and concludes that the RPA intended the rights of genetic fathers to be subordinate to the rights of presumed fathers.

"In sum, although the RPA can be deemed a significant improvement in the status of the law in such situations, it falls short of considering the practical implications of such an order to both the presumed father and the child," Haas said.

Liisa R. Speaker, a Lansing family law appellate attorney, said she agreed with parts of both the majority and dissenting opinions. The most interesting portion, she said, is the transition for an RPA action into the custody and parenting-time issues.

"That is where the dissent makes some excellent points," Speaker said, noting that she agreed the evidentiary hearing for the RPA case is not the same as the best interests under the Child Custody Act. "Once it turned into a Child Custody Act case, then the case should have been handled accordingly."

Speaker noted that many of the issues discussed in the majority opinion are currently before the Michigan Supreme Court in *Helton v. Beaman* (MiLW No. 07-84336, 25 pages), which is scheduled for oral argument on April 7.

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