

STATE OF MICHIGAN
COURT OF APPEALS

REBEKA SUE KILLINGBECK,
Plaintiff-Appellee,

FOR PUBLICATION
December 6, 2005
9:00 a.m.

and

TONY ROSEBRUGH,
Plaintiff-Appellant,

v

DENNIS DEAN KILLINGBECK,
Defendant-Appellee.

No. 258358
Arenac Circuit Court
LC No. 03-008651-DP

REBEKA SUE KILLINGBECK,
Plaintiff/Counterdefendant-
Appellant,

and

TONY ROSEBRUGH,
Intervening Party,

v

DENNIS DEAN KILLINGBECK,
Defendant/Counterplaintiff-
Appellee.

No. 261404
Arenac Circuit Court
LC No. 02-008187-DM

REBEKA SUE KILLINGBECK,
Plaintiff/Counterdefendant,

and

TONY ROSEBRUGH,

Intervening Party-Appellant,

v

DENNIS DEAN KILLINGBECK,

Defendant/Counterplaintiff-
Appellee.

No. 261405

Arenac Circuit Court

LC No. 02-008187-DM

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

COOPER, P.J. (*concurring in part and dissenting in part*).

I do agree with the majority's disposition of some of the issues on appeal, including the majority's conclusion, although not its analysis, that the trial court improperly revoked Mr. Killingbeck's acknowledgment of parentage. However, in an effort to obviate the reasonable and necessary pronouncement that the trial court reached in this case—equitable parenting—the majority has created an absurd and illogical result. On remand, if the trial court determines not to revoke Mr. Killingbeck's acknowledgment of parentage, he will remain Devon's legal father with full rights of visitation. However, Mr. Rosebrugh, who would be legally responsible to support his biological child (as the majority has not reversed that order), would have no grounds to seek visitation. If the trial court again determines to revoke Mr. Killingbeck's acknowledgment, he would be precluded from seeking visitation with the child that he raised and supported from birth, the half-brother to his daughters. Without relying on equitable principles, Devon must be separated from one of these men.

It is well established that child custody disputes are equitable in nature.¹ There is an extensive statutory framework under which child custody, parenting time, and support issues must be pursued.² However, even the Legislature specifically recognized that these proceedings are equitable.³ It is the role of a trial judge to enter a verdict with fairness and equity⁴ and the

¹ See *Bowie v Arder*, 441 Mich 23, 38-39; 490 NW2d 568 (1992) (discussing the historical equitable jurisdiction of the chancery courts over children).

² *Van v Zahorik*, 460 Mich 320, 328; 597 NW2d 15 (1999).

³ MCL 722.26(1).

paramount concern is the best interests of the child.⁵ The trial court exercised its equitable powers and granted parenting time to both Devon's biological and legal/equitable fathers. As Devon cannot have two legal fathers, the court's power to grant equitable relief was the only way to serve the best interests of this child, to grant him access to two father figures who wish to parent him. The majority abandons concern for the best interests of the child and ignores the equitable nature of child custody proceedings in favor of an obdurate adherence to judicial fundamentalism. However, even interpreting the statutes and caselaw by these inflexible standards, their decision is untenable.

I. Factual Background

Plaintiff and Mr. Killingbeck were involved for a number of years before Devon was conceived. They moved in together before Devon's birth and agreed to raise their son together. Believing Devon to be Mr. Killingbeck's biological child, the couple filed an acknowledgment of parentage shortly after Devon's birth. The couple proceeded to have two more children together (Devon's half-sisters) and subsequently married. In early 2002, plaintiff and Mr. Killingbeck began having marital problems, and plaintiff filed for divorce in September. In October of 2002, when Devon was four years old, plaintiff informed Tony Rosebrugh, a former boyfriend, that she believed that he may be Devon's biological father. Mr. Rosebrugh submitted to a paternity test, which revealed that he was, in fact, Devon's biological father.⁶ However, knowing this result, plaintiff still stipulated the entry of the judgment of divorce in May of 2003, indicating that Mr. Killingbeck was Devon's father, awarding him joint legal custody and liberal parenting time, and ordering him to pay child support.

II. Acknowledgment of Parentage

By joining with plaintiff to complete an acknowledgment of parentage, Mr. Killingbeck was considered to be Devon's natural father.⁷ The acknowledgment of parentage establishes paternity, and it "may be the basis for court ordered child support, custody, or parenting time without further adjudication."⁸ While an acknowledgment of parentage "does not afford the father the same legal rights as a father whose child is born within a marriage," it does confer upon the child the full rights of a child born in wedlock.⁹ The child "bear[s] the same relationship to the mother and the man signing as the father as a child born or conceived during

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⁴ See *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993) ("[A] judge's role is to achieve equity, not to 'punish' one of the parties."); *Perrin v Perrin*, 169 Mich App 18, 23; 425 NW2d 494 (1988) ("The trial court is to see that the parties receive a fair trial . . .").

⁵ *Mason v Simmons*, 267 Mich App 188, 194-195; 704 NW2d 104 (2005), quoting *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

⁶ Mr. Rosebrugh had no contact with Devon until that time. However, Mr. Rosebrugh has had regular contact with Devon since learning of their relationship.

⁷ MCL 722.1003(1).

⁸ MCL 727.1004, quoted in *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003).

⁹ *Eldred*, *supra* at 148-149, citing MCL 722.1004.

marriage"¹⁰ As Devon was a child "born out of wedlock" and Mr. Killingbeck "properly executed" an acknowledgment of parentage, Mr. Killingbeck was entitled to "reap the benefits and acquire the burdens of parenthood."¹¹ Accordingly, Devon had the same right to continue his relationship with Mr. Killingbeck, his legally acknowledged natural father, as he did with his mother. The trial court could properly grant Mr. Killingbeck parenting time and order him to pay child support without further adjudication of the issue of paternity.

For reasons only she can know, plaintiff joined with Mr. Rosebrugh in October of 2003 to file a paternity action and petition the court to revoke Mr. Killingbeck's acknowledgment of parentage. The trial court granted this petition in January of 2004. However, the trial court refused plaintiff's attempts to deny Mr. Killingbeck his rights to parent Devon, finding him to be Devon's "de facto" father. Although I agree with the trial court that Mr. Killingbeck had an equitable right to parent Devon, I believe that the trial court erred in revoking the acknowledgment of parentage in the first instance.

MCL 722.1011 provides, in relevant part:

(1) The mother or the man who signed the acknowledgment, the child who is the subject of the acknowledgment, or a prosecuting attorney may file a claim for revocation of an acknowledgment of parentage. . . . A claim for revocation may be filed as a motion in an existing action for child support, custody, or parenting time in the county where the action is and all provisions in this act apply as if it were an original action.

(2) A claim for revocation shall be supported by an affidavit signed by the claimant setting forth facts that constitute 1 of the following:

(a) Mistake of fact.

(b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.

(c) Fraud.

(d) Misrepresentation or misconduct.

(e) Duress in signing the acknowledgment.

(3) . . . The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that,

¹⁰ MCL 722.1004.

¹¹ *Aichele, supra* at 153.

considering the equities of the case, revocation of the acknowledgment is proper.^[12]

A petitioner may file a motion to revoke an acknowledgment of parentage in an existing action. Although plaintiff and Mr. Rosebrugh knew that Mr. Killingbeck was not biologically related to Devon one month after plaintiff filed her complaint for divorce, they took no action to revoke the acknowledgment during the divorce proceedings. The judgment of divorce naming Mr. Killingbeck as Devon's father was entered months before plaintiff and Mr. Rosebrugh finally filed their petition. Plaintiff made no attempt to amend that portion of the judgment naming Mr. Killingbeck as Devon's legal father until more than a year after the judgment was filed.¹³ The trial court denied this belated request and the judgment of divorce was never amended. Trial courts speak through their judgments, which represent the final determination of the matters submitted.¹⁴ With the entry of the judgment of divorce, Mr. Killingbeck was judicially determined to be Devon's legal father. Consent judgments are binding, final orders; they do not have less force than a judgment entered following trial.¹⁵ "Indeed, 'public policy demands finality of litigation in the area of family law to preserve [the] surviving family structure.'"¹⁶

Furthermore, plaintiff did not allege sufficient grounds for revocation of the acknowledgment of parentage or to set aside the judgment of divorce.¹⁷ Plaintiff truthfully

¹² MCL 722.1011 (emphasis added).

¹³ See MCR 2.517(B) (a party must file a motion to amend a final judgment within 21 days after its entry); MCR 2.612(C)(2) (a motion for relief from judgment must be made within a reasonable time or within one year if the motion is brought pursuant to subsection [C][1][a], [b], or [c]).

¹⁴ *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

¹⁵ *Staple v Staple*, 241 Mich App 562, 564; 616 NW2d 219 (2000).

¹⁶ *Id.* at 564-565, quoting *McGinn v McGinn*, 126 Mich App 689, 693; 337 NW2d 632 (1983). See also *Mixon v Mixon*, 237 Mich App 159, 167; 602 NW2d 406 (1999).

¹⁷ Pursuant to MCR 2.612(C)(1), a party may be granted relief from a final judgment on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct by an adverse party.

(d) The judgment is void.

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asserted at the time Mr. Killingbeck signed the acknowledgment of parentage that she believed him to be Devon's biological father.¹⁸ However, plaintiff was aware that Mr. Rosebrugh was Devon's biological father long before she stipulated the entry of the judgment of divorce. Plaintiff was no longer mistaken regarding Devon's paternity at the time of the judgment. Mr. Rosebrugh's biological relationship to Devon clearly was not newly discovered evidence when the judgment of divorce was entered or when plaintiff and Mr. Rosebrugh filed the petition to revoke the acknowledgment. Moreover, Mr. Killingbeck did not engage in any wrongful conduct in acknowledging paternity of a child when he believed he was the biological father.

Most importantly, plaintiff failed to establish by clear and convincing evidence that revocation of the acknowledgment was proper "considering the equities of the case." There is more to fatherhood than mere biology.¹⁹ Mr. Killingbeck "'demonstrate[d] a full commitment to the responsibility of parenthood'" in Devon's life and formed "a substantial parent-child relationship" with him.²⁰ He lived with Devon as the boy's father and supported and cared for Devon. Mr. Killingbeck and Devon have an interest in continuing that relationship.²¹ Accordingly, I would find that plaintiff and Mr. Rosebrugh did not establish grounds to support revoking Mr. Killingbeck's acknowledgement of parentage and would, therefore, reverse that order.²²

III. Fathers' Right to Parenting Time

Although the trial court improperly revoked the acknowledgment of parentage, the court properly granted Mr. Killingbeck parenting time with Devon. Pursuant to Michigan law, a child's rights in regard to custody, support, and parenting time must be determined in accordance

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(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

¹⁸ Mr. Killingbeck also truthfully asserted that he believed himself to be Devon's biological father when he signed the acknowledgment. Accordingly, it cannot be said that the acknowledgment contains a false swearing. See *Aichele, supra* at 155-156.

¹⁹ See *Tuan Anh Nguyen v Immigration and Naturalization Service*, 533 US 53, 64-68; 121 S Ct 2053; 150 L Ed 2d 115 (2001) (upholding a gender-based distinction in determining the citizenship of a child born to unwed parents of different nationalities as a biological father without an established and legally acknowledged parent-child relationship does not have sufficient ties to confer citizenship on his child); *Lehr v Robertson*, 463 US 248, 261; 103 S Ct 2985; 77 L Ed 2d 614 (1983); *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (protecting an unwed father's interest in rearing "the children he has sired *and* raised") (emphasis added).

²⁰ *Michael H v Gerald D*, 491 US 110, 142-143; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (Brennan, J., dissenting), quoting *Lehr, supra* at 261.

²¹ *Id.* at 143.

²² My belief that Mr. Killingbeck should remain Devon's legal father does not negate my belief that Mr. Rosebrugh also has a right to parenting time with his biological child.

with the Child Custody Act.²³ As a party who acknowledged parentage of a child born out of wedlock, and who was proclaimed to be Devon's legal father by the final judgment of the court, Mr. Killingbeck had standing to seek parenting time pursuant to the act.²⁴ It is well established that the paramount concern in resolving child custody and parenting time disputes is the best interests of the child.²⁵ Pursuant to the plain language of the act, it "is equitable in nature and shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved."²⁶

In an attempt to remedy the inequity of this situation, and to protect Devon from the whims of his mother, the trial court recognized Mr. Killingbeck's right to parent the child that he had raised from birth. Innumerable states have recognized the rights of de facto, or psychological, parents.²⁷ A de facto or psychological parent is a person who is not biologically

²³ MCL 722.21 *et seq.*; MCL 722.24(1).

²⁴ *Aichele, supra* at 167.

²⁵ *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004); *Mason, supra* at 194-195, quoting *Eldred, supra* at 150; *Farrell v Farrell*, 133 Mich App 502, 512; 351 NW2d 219 (1983).

The best interests factors include, in relevant part:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

* * *

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

* * *

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

* * *

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

²⁶ MCL 722.26(1).

²⁷ See *Kinnard v Kinnard*, 43 P3d 150 (Alas, 2002) (granting joint custody to biological father and stepmother); *In re Slayton*, 292 Ill App 3d 379; 685 NE2d 1038 (1997) (granting visitation rights to man who raised child, believing himself to be the natural father); *In re AD & GD*, 489 NW2d 50 (Iowa App, 1992) (granting custody to father of both his natural child and stepchild); *Karen P v Christopher JB*, 163 Md App 250; 878 A2d 646 (2005) (granting custody to man who raised daughter, believing himself to be the natural father); *Youmans v Ramos*, 429 Mass 774; (continued...)

related to a child, but has lived with and raised the child as his or her own, taking on all the duties and benefits of parenthood.²⁸ Mr. Killingbeck was Devon's legally acknowledged natural father and is his legal father. Mr. Killingbeck lived with and raised Devon from infancy. Devon clearly bonded with Mr. Killingbeck over his lifetime and, psychologically, views Mr. Killingbeck as his father. Nothing in our caselaw requires a child to be torn from his legal and psychological parent. To the contrary, such upheaval cannot be in the child's best interests.²⁹

I disagree with the majority that *Van v Zahorik*³⁰ forecloses reliance on equitable principles in this case. As acknowledged by the majority, *Van* is distinguishable from the current case. In *Van*, the Michigan Supreme Court limited the doctrine of equitable parenthood to prohibit "a person with a longstanding relationship to a child, but who is not a biological *or legal parent* of the child and not related by marriage to the child's biological parent" to pursue parental rights to a child under equitable principles.³¹ According to the Court, a father who is not biologically related to his child may only succeed under the doctrine of equitable parenthood if the child was born or conceived during marriage.³²

However, the Court in *Van* did not limit the rights of *legal* fathers to pursue parental rights. As in this case, Mr. Van believed himself to be the biological father of his children and raised them accordingly. Unlike Mr. Killingbeck, however, Mr. Van never pursued the means to

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711 NE2d 165 (1999) (granting visitation rights to aunt who raised an eleven-year-old child from infancy); *Karner v McMahon*, 433 Pa Super 290; 640 A2d 926 (1994) (granting custody to stepfather following mother's placement in a nursing home, as biological father did not attempt to contact the children until stepfather filed his petition); *Quinn v Mouw-Quinn*, 552 NW2d 843 (SD, 1996) (granting visitation rights to and ordering support from man who was the natural father of one child, but stepfather to another).

²⁸ The Supreme Court of Massachusetts defined "de facto parent" as

"an adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances, . . . has resided with the child, and . . . for reasons primarily other than final compensation, and with the consent of a legal parent to the formation of a de facto parent relationship . . . regularly has performed . . . a majority of the caretaking functions for the child." [*Youmans, supra* at 776 n 3, quoting ALI Principles of the Law of Family Dissolution, § 2.03(1) (Tent Draft No 3 Part 1 1998).]

See also *Karner, supra* at 929.

²⁹ Justice Markman, while still a judge of this Court, noted in *York v Morofsky*, 225 Mich App 333, 338; 571 NW2d 524 (1997), that "stability in acknowledged parent-child relationships is generally in the child's best interests. . . . [F]or [the child] to suddenly be deprived of the only father that he has ever known might well be emotionally traumatizing."

³⁰ *Van, supra*.

³¹ *Id.* at 323 (emphasis added).

³² *Id.* at 331.

become the legal parent of his children.³³ Mr. Killingbeck did sign an acknowledgment of parentage, became Devon's legally acknowledged natural father, and was named as Devon's legal parent in the parties' judgment of divorce. As a legal parent, he had full rights to seek visitation with his child pursuant to the Child Custody Act, limited only by a determination of what visitation was in Devon's best interests.³⁴ Although the parties were not married at the time of Devon's conception, or the conception of their subsequent children, plaintiff and Mr. Killingbeck did marry and raise their children together as one family. It is antithetical to "Michigan's public policy favor[ing] marriage" to divest legal parents of their natural right of parenthood merely because they married later rather than sooner.³⁵

Furthermore, it is not inconsistent to grant parenting time to both Mr. Killingbeck and Mr. Rosebrugh. Mr. Rosebrugh is Devon's biological father. He was unable to determine his paternity or develop a relationship with Devon until the child was four years old. Certainly, blood line is important and a fit biological parent is entitled to a presumption in his favor.³⁶ While the interests of a fit, biological parent may outweigh the interests of a third party, neither supersedes the best interests of the child.³⁷ Devon is bonded to Mr. Killingbeck in an established parent-child relationship. It would be inequitable to deny parenting time to the only father Devon has ever known; to the man who legally acknowledged his parentage of Devon; to the man who married Devon's mother and fathered Devon's sisters. Although the Supreme Court found in *Van* that Mr. Van was not legally entitled to court-ordered parenting time, it noted that Mr. Van and his children were not legally prohibited from maintaining their relationship.³⁸ Devon is currently only seven years old, however, and cannot maintain a relationship with either Mr. Killingbeck or Mr. Rosebrugh on his own. As his mother's cooperation in this matter is dubious, the trial court properly ordered specific parenting time to protect Devon's best interests.

Accordingly, I would reverse the trial court's order revoking the acknowledgment of parentage and affirm the trial court's orders recognizing Mr. Killingbeck's right to parent his child. I would also affirm the trial court's orders granting parenting time to Mr. Rosebrugh.

/s/ Jessica R. Cooper

³³ *Id.* at 328.

³⁴ See *id.* (distinguishing biological and legal parents from third persons under the Child Custody Act).

³⁵ *Id.* at 332. In fact, as Justice Scalia noted in *Michael H.*, "[t]he family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children." *Michael H.*, *supra* at 123 n 3.

³⁶ *Mason*, *supra* at 197.

³⁷ *Id.* at 194-195.

³⁸ *Van*, *supra* at 337.