FAMILY LAW – PARENTAL RIGHTS – TO BRING A CLAIM UNDER THE MICHIGAN PATERNITY ACT, IF THE MOTHER WAS MARRIED AT THE TIME OF CONCEPTION, THE FATHER MUST PROVE THAT THE CHILD WAS BORN OUT OF WEDLOCK BY OVERCOMING THE PRESUMPTION THAT THE CHILD WAS AN ISSUE OF THE MARRIAGE BY CLEAR AND CONVINCING EVIDENCE. *Barnes v. Jeudevine*, 718 N.W.2d 311 (Mich. 2006).

INTRODUCTION

In *Barnes v. Jeudevine*,[1] the Michigan Supreme Court granted certiorari to determine (1) whether an individual has standing under the Michigan Paternity Act[2] when the child's mother was married at the time the child was conceived;[3] and (2) whether a default judgment of the divorce satisfies the "judicial determination that the child was born or conceived during marriage but was not the issue of the marriage."[4] The Plaintiff in this action, Michael Barnes, sought a determination of paternity, alleging that he was the biological father of the child that Defendant Kim Jeudevine conceived while still married to her husband, James Charles.[5] Defendant became pregnant before her husband had filed for divorce; however, she did not inform him of the pregnancy.[6] The Defendant neither responded to the divorce complaint nor attended the hearing, and a default judgment was entered against her.[7] As a result of her failure to appear at the hearing, neither her husband nor the court knew of the pregnancy.[8] The default judgment provided that "no children were born of this marriage and none are expected."[9]

After the divorce was finalized, the Defendant gave birth and listed the Plaintiff as the child's father on the birth certificate; additionally, an affidavit of parentage was signed by both the Plaintiff and the Defendant.[10] The three lived together for over four years and raised the child together until the relationship ended in 2003.[11] From this point on, the Defendant prohibited the Plaintiff from seeing his child.[12] That same year, the

---

1. 718 N.W.2d 311 (Mich. 2006).
2. MICH. COMP. LAWS ANN. § 722.711 (West 2002).
3. *Barnes*, 718 N.W.2d at 313.
4. *Id.*
5. *Id.* at 312.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Plaintiff brought this paternity action, relying on the birth certificate, affidavit, and the judgment of divorce, which stated that the Defendant and her husband had no children in the marriage, to prove that he is the child's biological father.[13] While the Defendant did not deny the paternity, she denied that the child was born out of wedlock, since the child was conceived while she was still married to her husband.[14]

The Kalamazoo Circuit Court concluded that the Plaintiff lacked standing to sue under the Paternity Act and granted Defendant's motion for summary disposition, finding that "the child was conceived during the marriage" and "there was no court determination that the child was a child born or conceived during the marriage but is not the issue of that marriage," as required by the Paternity Act.[15] The Michigan Court of Appeals reversed, reasoning that the default judgment in the divorce proceedings which stated "no children were born of this marriage and none are expected" satisfied the requisite determination by the court that the child "was not an issue of the marriage."[16] The Michigan Supreme Court reversed the court of appeals' judgment and held that the Plaintiff did not have standing to bring a suit under the Paternity Act because the divorce default judgment was not sufficient to satisfy the requirement that the child was not an issue of the marriage by clear and convincing evidence.[17]

I. BACKGROUND

The Michigan Paternity Act was enacted to ensure "that the child's legitimacy will not be decided by a mere causal inference, but only after specific statutory procedures are followed."[18] In 1820, Michigan enacted a law which resembled the current Paternity Act.[19] Further, in 1956, the Michigan Paternity Act was revised, allowing the "father or putative father to file a complaint in the circuit court"; however, the child had to be born out of wedlock.[20] The Act was again amended in 1980, defining a child born out of wedlock as one "which the court has determined to be a child born during a marriage but not the issue of that marriage."[21] This amendment was intended to allow the presumed legitimacy of the child to be overcome only by clear and convincing evidence.[22] Section 722.711(a)

13. *Id.* at 312-13.
14. *Id.* at 313.
15. *Id.*
16. *Id.*
17. *Id.* at 312.
18. *Id.* at 313.
19. Girard v. Wagenmaker, 470 N.W.2d 372, 375 (Mich. 1991). The act to which *Girard* refers was entitled "AN ACT for the support and maintenance of Illegitimate Children." *Id.*
20. *Id.* at 376.
21. *Id.* (quoting MICH. COMP. LAWS ANN. § 722.711(a) (West 2002)).
22. *Id.*

of the Michigan Paternity Act describes a child born out of wedlock as "a child begotten and born to a woman who was not married from the conception to the date of the birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."[23] In this immediate case, Plaintiff relied on the default judgment of divorce statement which stated "no children were born of this marriage and none are expected," as the court determination that his child was "conceived during marriage but not the issue of the marriage," and therefore, born out of wedlock.[24]

II. ANALYSIS

A. Majority Opinion

The justices first focused their attention on determining whether the judgment in the prior divorce proceeding comported with the requirement that the court actually determine that the child was "born or conceived during the marriage and that the child was not an issue of the marriage"[25] as required by section 722.711(a). The court emphasized that there is a strong presumption that a child born during a marriage is the issue of that marriage, and this "presumption of legitimacy" can be overcome only with clear and convincing evidence that the child was born out of wedlock.[26] However, the majority refused to recognize the divorce judgment as the clear and convincing evidence needed to rebut the presumption.[27] Relying on its decision in *Girard v. Wagenmaker*,[28] the court reasoned that to constitute a prior court decision, there must have been some "previous action . . . undertaken to determine the child's paternity . . . ,"[29] and because the divorce proceeding and subsequent judgment had not determined whether or not the child was born out of wedlock or was an issue of the marriage, the prerequisite had not been met. The court reasoned that though the divorce judgment did convey that there were no children of the marriage, it did not state whether there was a child conceived during the marriage or whether it was an issue.[30] While the majority recognized that the affidavit and the birth certificate demonstrated that the Plaintiff is the biological father of the child, it concluded that these documents were not a court determination as required by the Paternity Act, and therefore they did not rebut the presumption that the child was

23. § 722.711(a).
24. Barnes v. Jeudevine, 718 N.W.2d 311, 312-13 (Mich. 2006).
25. *Id.* at 314.
26. *Id.*
27. *Id.*
28. 470 N.W.2d 372, 377 (Mich. 1991).
29. *Barnes*, 718 N.W.2d at 315 (quoting *Girard,* 470 N.W.2d at 377).
30. *Id.*

legitimate.[31] Based on the majority's reasoning, the Plaintiff did not have standing to bring his claim under the Michigan Paternity Act.

B. Justice Kelly's Dissent

Justice Kelly argued that in holding as it did, the majority did not afford the default judgment in the divorce proceedings the weight deserved.[32] "Like other judgments, a default judgment of divorce operates as a final statement of the fact and law to the world."[33] Since this judgment held that there were no children born of the marriage between the Defendant and her husband, the child born to the Defendant was obviously not an issue of the marriage. Justice Kelly criticized the majority for continuing to rely on this presumption of legitimacy, even in the face of actual evidence that suggests otherwise.[34] She even went as far as to suggest that their reliance on this presumption of legitimacy will result in rendering this child fatherless.[35] Justice Kelly articulated that the only reason the divorce judgment was not more specific was due to the fact the Defendant did not attend the proceedings and kept the pregnancy a secret; otherwise, the presumption would have been tested and rebutted.[36] She opined that the Defendant should not be able to rely on this presumption to defeat the Plaintiff's claim.[37]

C. Justice Markman's Dissent

Focusing on the rebuttable presumption that the child was legitimate, Justice Markman would have held that the presumption was indeed overcome by clear and convincing evidence.[38] In his complaint for divorce, Defendant's husband alleged that she was never pregnant and that no children were born.[39] Though this was not true, Defendant's failure to dispute the allegations and the subsequent entry of default judgment was, in fact, a legal admission that no issue resulted from the marriage.[40] Justice Markman explained that as a result of this admission, "any child born after the date of the divorce was a 'child born out of wedlock' for purposes of the Paternity Act . . . ."[41] While the majority rejected the contention that this was an "affirmative finding regarding the child's paternity,"[42] Justice

31. *Id.* at 316.
32. *Id.* at 317 (Kelly, J., dissenting).
33. *Id*.
34. *Id.* at 318.
35. *Id.*
36. *Id*. at 319.
37. *Id.*
38. *Id.* at 326 (Markman, J., dissenting).
39. *Id.* at 321.
40. *Id.*
41. *Id.*
42. *Id.* at 315 (majority opinion).

Markman argued that since it was held in the judgment that the marriage resulted in no children, the Defendant's child was indeed born out of wedlock, and this could not be more clear or convincing.[43] He also relied on Michigan Compiled Laws section 552.9f, which requires that when minor children are involved in a divorce, "no proofs or testimony shall be taken in such cases for divorce until the expiration of 6 months from the day the bill of complaint is filed."[44] Justice Markman reasoned that since the divorce was granted only four months after the complaint was filed, the trial court had concluded that no issue had resulted from the marriage.[45]

In an argument similar to Justice Kelly's, he reasoned that this decision frustrates the purpose of the Paternity Act, since in holding as the majority did, neither the Plaintiff nor the ex-husband will have any legal obligation to support the child.[46]

CONCLUSION

Though the majority seems to acknowledge that the purpose of Michigan's Paternity Act is to protect illegitimate children, its decision does not support this goal. By barring any action by the biological father, the court has essentially relieved the Plaintiff of any obligation that he may have to this child -- a child that he had raised for the first four years of its life. The ex-husband, having no part in the child's upbringing, will surely not step up to support the child and become a part of its life, for he is no longer married to the Defendant, and the child is not his. As a result of the majority's decision to ignore the clear and convincing evidence -- evidence that was undisputed by all parties involved -- the child has lost its father who truly wanted to be part of his child's life. The majority's reliance on the presumption of legitimacy, a presumption which was designed to guarantee support, has now cost the Defendant and her child the support. The court has, in fact, chosen "no support" for the family and forcefully pushed away an involved father because the evidence needed to bring this claim was not packaged in a way that the majority would have preferred.

JESSICA DOPIERALA

43. *Id.* at 321-22 (Markman, J., dissenting).
44. *Id.* at 323 (quoting MICH. COMP. LAWS ANN. § 552.9f (West 2005)).
45. *Id.*
46. *Id.* at 325.