

STATE OF MICHIGAN
IN THE COURT OF APPEALS

[REDACTED],

Plaintiff – Appellant,

v.

Court of Appeals No.

Circuit Court No. [REDACTED]

[REDACTED],

Defendant – Appellee.

[REDACTED]

[REDACTED]

PLAINTIFF-APPELLANT’S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED

The Plaintiff -Appellant (“Appellant”) seeks reversal of the trial court’s order granting summary disposition in favor of Defendant-Appellee (“Appellee”) and also the denial of Appellant's motion for court ordered DNA testing, on the ground that an alleged father may only file an action to establish paternity if he "did not know or have reason to know that the mother was married at the time of conception". The lower court refused to give Plaintiff-Appellant standing because it felt that he knew or had reason to know that the mother was married at the time of conception and disregarded any evidence that he was in fact the biological father.

On [REDACTED], Appellant filed the paternity Complaint under Section 11 of the Revocation of Paternity Act (“ROA”). MCL 722.1441. The Complaint sought orders for DNA testing to establish Appellant’s paternity over the child born out of Appellant’s and Appellee’s relationship, for entering an order acknowledging Appellant as the father of the child and entry in the birth certificate to that effect, for joint custody of the child, and for reasonable parenting time with the minor child. The Appellee filed a response to the Complaint on [REDACTED]. The case was referred to the Referee and the Referee entered an order against the Appellant on [REDACTED]. The Appellee filed a Motion for Summary Judgment. On [REDACTED], the Family division of the Circuit Court for the County of Macomb granted Motion for Summary Disposition in favor of the Appellee, and denied Appellant’s motion for DNA testing dismissing Appellant’s case. This timely Appeal follows.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.308(1) (a) and MCR 7.203(A) (1), which provides that “all final judgments from the Circuit Court shall be appealable as of right.” The final judgment in this case was entered on [REDACTED], and this timely appeal is filed on [REDACTED].

LEGALEASE SOLUTIONS

STATEMENT OF QUESTIONS PRESENTED

- A. Did the lower court misapply the Revocation of Paternity Act and err in its factual findings?

Appellant's answer: Yes

Appellee answers: No

Trial Court answered: No

- B. Does the lower court's decision violate Appellant's constitutional rights?

Appellant's answer: Yes

Appellee answers: No

Trial Court answered: No

LEGALEASE SOLUTIONS

STATEMENT OF MATERIAL FACTS

The Appellant [REDACTED] (“Appellant”) and Appellee [REDACTED] (“Appellee”) were in a long-term romantic relationship for more than four years. On [REDACTED], a son, [REDACTED], was born out of their relationship. They were close to each other, travelled together and often made trips. It was only during the Appellee’s pregnancy that the Appellant came to know that the Appellee was still married, when she informed the Appellant that she was technically married and wanted “badly” to get a divorce. (See Affidavit of [REDACTED]).

For all purposes, Appellant believed Appellee when she told him she was “technically married”, that is on paper, but not in the traditional sense. Appellee and her husband [REDACTED] (“[REDACTED]”) did not hold themselves out as husband and wife. The Appellee routinely stayed overnight with the Appellant for extended periods of time and often kept her personal belongings at his home. (Affidavit of [REDACTED]) Appellee never wore a wedding ring and told Appellant that she had “roommate arrangement” with [REDACTED], the presumed father, and said that their relationship was wholly platonic. *Id.* When Appellee conceived a child in late [REDACTED], Appellant was the first person with whom the Appellee shared the news. *Id.* Appellee represented early on in the relationship that she would be getting a divorce. *Id.*

Further, Appellee made various representations to Appellant to the foregoing effect. According to Appellee, she had an estranged relationship with [REDACTED] and while being technically married, had no intimate relationship with [REDACTED]. *Id.* The Appellee told Appellant that she would be getting a divorce. *Id.* However, given today’s tough economic conditions, costs associated with divorce, and the time the process takes, it is a fact that there are many married people who are technically married on paper, but not in any other substantial way,

just because they have not gotten around to getting a divorce. In view of this, the Appellant took Appellee at her words and had no reason to not believe her.

In [REDACTED], when the Appellee went into labor, Appellee's mother contacted Appellant to inform him of the impending birth. In the hospital, she openly acknowledged him as the father of the child and introduced him for the first time to [REDACTED] who was visiting his roommate/wife at the hospital. [REDACTED] openly acknowledged that Appellant was indeed the father of the minor child. *Id.* Appellant was present in the birthing suite of his son and openly participated in the care of Appellee and their son while he remained in Neonatal Care. This fact is admitted even by the Appellee (Defendant's Answer p. 2) Moreover, Appellant made daily visits to the hospital and he was also given the hospital bracelet that recognized him as the father of the child. During the time, Appellee assured Appellant repeatedly that they would both raise their son together. While at the hospital, Appellant submitted to an over-the-counter DNA test which confirmed that Appellant is the biological father of the child. (See Paternity Analysis Report). Furthermore, Appellant kept continuous contact with his son and has met him as recently as [REDACTED] when visitation was abruptly stopped by Appellee. (Defendant's Answer p.2).

After the child was born, it seems that the Appellee changed her mind and decided to cut Appellant out of her life and proclaim that [REDACTED] is her legal husband with whom she currently has intentions to stay with. Notwithstanding, she promised the Appellant that he would be a part of their son's life. Relying on the promises made by the Appellee, Appellant made appropriate accommodations at his home, by furnishing and decorating a nursery and obtaining all of the necessities for a new baby. (See Exhibit). Since the birth of the minor child, Appellant has had some parenting time, upon the consent of the Appellee.

Appellant filed a Complaint when Appellee revealed to Appellant her plans and intention to move out of [REDACTED] with their son. Appellant wishes to have a father-son relationship with his child as he is their only son and this wish and interest has been acknowledged by Appellee through repeated promises made by Appellee.

ARGUMENT

Standard of Review

This court has ample power to review de novo the trial court's ruling on a motion for summary disposition. *Aichele v. Hodge*, No. 247021 (Mich. App. 10/21/2003) (Mich. App., 2003). "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of law. Statutory interpretation is a question of law reviewed de novo." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

A. THE LOWER COURT MISAPPLIES THE REVOCATION OF PATERNITY ACT AND ERRS IN ITS FACTUAL FINDING.

The lower court committed clear error in relying on its referee's factual findings that "Plaintiff testified that Defendant informed him she was married **at the initiation of their relationship**" (emphasis added) to establish the legal requirement that Appellant knew or had reason to know that the mother was **married at the time of conception** (emphasis added). The above mentioned referee finding was the only evidence and support for the court's conclusion for Appellant's knowledge at time of conception. Despite the overwhelming evidence to the contrary asserted by Appellant and unrefuted by Appellee, the trial court failed to find that there was no evidence supporting a finding that Appellant knew or had reason to know Appellee was married at time of conception. The trial court failed to appreciate the fact that Appellee and her husband

did not hold themselves as a married couple, nor were they married in the traditional and functional sense of the word.

Marriage is inherently a unique relationship between a man and a woman. MCL 551.1. Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. Black's Law Dictionary. A common law marriage is one not solemnized in the ordinary way, but created by an agreement to marry, followed by cohabitation. *Id.* The definition of marriage is more than just a piece of paper binding two parties, a man and a woman, with nothing more. Other than the marriage certificate indicating that Appellee was married to her husband, no other aspect of Appellee's life conformed with being a married woman or intending to continue to be married to her then husband. Though they lived in the same household, there was no sex and certainly no unification in law for life.

As a matter of law, the Referee's finding that the Appellant was aware of the Appellee's marital status at the time of conception is without any clear findings of fact or evidence and clear error. Findings of fact made by the hearing referee shall be conclusive if supported by competent, material, and substantial evidence on the whole record. *Holden v. Ford Motor Co.*, 484 NW 2d 227 (Mich Supreme Court, 1992). In this case, the Circuit Court's decision is not supported by competent and material evidence as the Appellant's testimony does not speak directly to Referee's final finding and cannot be considered as a conclusive proof to reject the claim made by the Appellant. It is also to be noted that the Appellee has not denied her relationship with the Appellant or refuted Appellant's assertion that he is the child's father anywhere in her Answer or other documentary and oral evidence submitted by her before the

court. Appellee even admits that the Appellant was with her during the time she was in the hospital for her delivery. Further, the DNA test the Appellant conducted at the hospital found that the baby was that of Appellant's with a very high chance of probability.

In the case before us, even though the marriage was not solemnized in the ordinary way, the Appellee and Appellant had planned to marry, cohabited, and a child was born to them. This is not denied by the Appellee anywhere in her pleadings. The Appellee routinely stayed overnight with the Appellant for extended periods of time and often kept her personal belongings at his home. They were close to each other and often made trips and travelled together. While deciding the case, the court failed to consider these material facts and made a decision contrary to and unsupported by the majority of evidence.

Further, the lower court's decision and interpretation of "the alleged father did not know or have reason to know that the mother was married at the time of conception" in MCL 722.1441(3) is not only incorrect but has perverse public policy implications. First, the Court basically equated the "time of conception" to the "time of initiation of relationship" between Appellant and Appellee. This is in direct contradiction to the plain reading of the statutory language. If the legislature intended for the standard to be alleged father's knowledge at the time they begin a relationship with a married women, they would have plainly said so. However, this is not what the statute states. The statute indicates that the decisive stage for alleged father's knowledge is at the time of conception. As indicated above, Appellant initiated the relationship with Appellee long before conception of child. At that time, Appellant has admitted that he knew Appellee was married. However, Appellee made numerous representations and promises that for all practical purposes, Appellee was no longer with her husband and will be obtaining a divorce. For all intensive purposes, Appellee's husband was out of her life and she now shared her life,

cohabitated, and carried herself as the significant other of Appellant. Under common law marriage, the Appellee would have been considered Appellant's wife. To read the statute in any other way than as expressly written would result in limiting the fathers' rights and punishing alleged fathers because of mother's misrepresentations and deceit. Even worse, such a reading would place all potential males who courted a significant other who was in the process of obtaining a divorce at risk of losing fatherhood of their children if any children were to be conceived before their significant other was legally determined to be divorced.

The circuit court clearly erred in its interpretation of the Revocation of Paternity Act and in its factual findings that Appellant knew or had reason to know that Appellee was married at the time of conception.

B. THE LOWER COURT'S DECISION VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS.

The United States Supreme Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights". *Stanley v. Illinois*, 405 US 645 (1972).

The law of child custody has undergone a dramatic transformation over the past few decades. The area where the rights of fathers have been most recognized is the so-called "unwed father" cases. The Supreme Court had specifically considered the issue related to rights of unwed fathers in various decisions from 1970 onwards and has progressively expanded unwed father's rights in a series of cases since then.

In 1972, in *Stanley v. Illinois*, 405 U.S. 645, the Court held that an unmarried father who had lived with his three children and their mother was constitutionally entitled to be recognized

as a “parent” in deciding the children’s placement upon her death. The Supreme Court held that the Due Process Clause did not permit Illinois’ categorical disregard of unmarried fathers. Court noted that, at least some unwed fathers, “are wholly suited to have custody of their children.” Later, in *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court held that New York could not permit the adoption of an unmarried father’s children by another man without first obtaining his consent or proving his unfitness, as was required for married parents. Prior to this decision, the Court in *Armstrong v. Manzo*, 380 U.S. 545 (1965), had previously held that married or divorced fathers are constitutionally entitled to object to the adoption of their children. However, only some unwed fathers qualified for constitutional protection.

Society and family dynamics are not what they were 4 decades ago or even a decade ago. What is acceptable and common is changing very rapidly. Reflecting these realities, the state interest with respect to the distinction being made between a biological father and biological mother cannot and are not the same as they were. There is no state interest substantial enough to preserve relic archaic distinctions between men and women. Unwed fathers should be given the same rights as unwed mothers, when such father is ready to acknowledge his paternity and is ever willing to give the care and support to the child. It is unconstitutional to limit such rights by imposing irrelevant legislative measures. Further the marital presumption often conferred on a married couple is becoming less and less relevant. No longer is there a concern that a child born out of wedlock will be considered illegitimate. Further, the exponential growth of alternative families in recent years is turning many of these past legal presumptions and state interests on their head. Unwed parents are becoming more prevalent and this lifestyle is becoming more acceptable and no longer a target of social stigma.

In Michigan, the presumption that a child born to a married couple is the child of the husband has been longstanding principle. This principle has been the basis for fending off prior constitutional challenges to the Michigan Paternity act. However, one of the key developments of the Revocation of Paternity Act has been to weaken this presumption in the paternity context, if not revoke, by allowing alleged fathers standing to establish paternity of child born to a married mother. This is a remarkable development in Michigan family law and an implicit recognition by the state legislature of the increasing irrelevance of the marital presumption. MCL 722.1441. The very purpose of enacting the Revocation of Paternity Act was "to provide procedures to determine the paternity of children in certain circumstances; to allow acknowledgments, determinations, and judgments relating to paternity to be set aside in certain circumstances; to provide for the powers and duties of certain state and local governmental officers and entities; and to provide remedies." This is in great contrast to the purpose of the previous Act which was only "to ensure that the minor children born outside a marriage are provided with support and education." This development in the law weakens the state's prior assertions in paternity cases and father standing cases that the marital presumption trumps all other concerns and is so strong to justify gender based distinctions or trump alleged father's constitutional parental rights.

Prohibiting unwed fathers who are indeed interested in being in their child's life and providing them support and care, especially sympathetic Appellants as in this case, who had no reason not to believe their significant other when they claimed they would obtain a divorce, would be a direct violation of their constitutional rights, both the due process right to parent and the equal protection clause of the fourteenth amendment and Michigan constitution.

1. Violation of Appellant's Due Process Right to Make Decisions Regarding The Care, Custody, And Control of Their Children

The Appellant has a fundamental right to care, custody and control of his child. It is a basic right of a person to have the companionship of the child who is his own blood. The Appellant meets all the prerequisite standards set by the Supreme Court precedent to establish his paternity. The Appellant was interested in his child's life from before the child's birth. The Appellant was of the belief and understanding that he is starting a new life with his child's mother and that the mother had moved on from her previous marriage. The circuit court's decision has the effect of denying Appellant's fundamental right to parent, care for, and control his child protected by the Due Process Clause of the Fourteenth Amendment." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Supreme Court found that the state presumption that unmarried father was unfit parent undermined "the interest of a parent in the companionship, care, custody, and management" of child.

In the case before us, the Appellant has met all the criteria set forth in the Revocation of Paternity Act ("RPA") and has standing to establish paternity. If the RPA is interpreted to deny Appellant paternity, then the RPA would be in direct contradiction of the US constitution. A statutory presumption of paternity exists if a blood or DNA test establishes a probability of paternity of ninety-nine percent or higher. MCL 722.716(5); MSA 25.496(5). *Crego v. Coleman*, 591 N.W.2d 277, 282, 232 Mich.App. 284 (Mich. App., 1998). The Appellant in this case has done everything right, except perhaps his belief and trust of Appellee. He was committed to Appellee, they cohabitated, and after some time together, they happened to conceive a child. During the pregnancy, Appellant was present and supportive. Appellant even made preparations in his home to receive newborn. Appellant was there at the hospital when Appellee was giving birth and while at the hospital, the Appellant had submitted to an over-the-counter DNA test

which confirmed paternity of above ninety-nine percent (99.98%), which indeed proved that Appellant is the biological father of the child.

When an alleged father files an action for paternity and proves by clear and convincing evidence he is the child's father, "the court may make a determination of paternity and enter an order of filiation as provided under Section 7 of the Paternity Act," MCL 722.717, or Section 15 of the Revocation of Paternity Act, MCL 722.1445. The presumed father, Appellee's mother and the Appellee, openly acknowledged that the Appellant is the child's father. It is to be noted that it was the Appellant who enjoyed the privilege of wearing bracelet, given to a father for access to the new born. The over the counter DNA test taken by Appellant confirmed that Appellant is the child's biological father.

With regard to establishing paternity of children born out of wedlock, MCL 722.1441(3)(c)(i) takes away rights of a biological father to establish paternity, if he had knowledge of the marital status of mother at the time of conception. The lower court has taken this further and determined that anytime a father knows or has reason to know his significant other is married, even if this is long before the time of conception, this knowledge preempts father from establishing paternity under MCL 722.1441(3). Such a reading would be a direct violation of Appellant's constitutional rights. This amounts to a clear violation of Appellant rights.

The basic intent or goal of the legislators in revoking the 1956 Paternity Act and replacing it with the Revocation of Paternity Act, MCL sections 722.1431 through 722.1443 ("Act") was to allow claims to be filed by a putative [biological] fathers, even when the mother is a married woman, that is, married to someone other than the putative father. The original paternity law that presumes that the husband of a married woman is the legal father of any child

born during a marriage was characterized as a law poorly designed to protect the sanctity of the marriage institution. Paternity Act does not confer standing on a father or putative father unless the child satisfies the statutory definition of “born out of wedlock.” *Snay v. Vest*, 489 Mich. 914, 796 N.W.2d 464 (Mich., 2011).

If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice. *Snay v. Vest*, 489 Mich. 914, 917, 796 N.W.2d 464, 466 (Mich., 2011). There is no wisdom in refusing to allow a proven biological father standing to adjudicate his rights with respect to his child. *Id.* at 464. The Appellant is not to be denied the opportunity to file a paternity suit based on the ground that he might have had the knowledge that the mother was married to another (which is contested by Appellant here—Appellant did not know that Appellee was married at the time of conception) person at the time of conception. If this opportunity is denied it would be counter to the very purposes of the Act. Further, interpreting the Act in such a way would make the very law unconstitutional because it would violate the Due Process clause and the Equal Protection Clause of the constitution.

In *Lehr v. Robertson*, 463 U.S. 248, 261-262, 103 S.Ct. 2985, 2993-2994, 77 L.Ed.2d 614 (1983), the Court in suggested that States must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child. *Id.* When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban*, 441 U.S., at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Lehr*, 463 U.S., at 261, 103 S.Ct.,

at 2993. The Appellant is ever ready to assume his responsibilities as a parent and has asserted his interests in raising and providing for his child since the very time of the child's birth.

A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394 [34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)]. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process entitles a biological father a meaningful opportunity to qualify as a presumed father. *IN RE JESUSA*, 10 Cal.Rptr.3d at p.214.

In the case before us, if the Appellant is denied standing to file a paternity action in light of the recent legal developments with the passing of the ROA, this would be a clear violation of his rights protected by the Due Process Clause of the Fourteenth Amendment.

2. Violation of The Equal Protection Clause of The Fourteenth Amendment And Michigan Constitution

The equal protection clauses of the Michigan and the federal constitutions require that no person be denied the equal protection of the law. Const 1963, art 1, § 2; US Const, Am XIV. The US Constitution provides that "...No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Const 1963, art 1, § 2. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. US Const, Am XIV § 1. The Court has found Michigan's equal protection provision coextensive with the Equal Protection Clause of the federal constitution. See, e.g., *Frame v. Nehls*, 452 Mich. 171, 183, 550 N.W.2d 739 (1996) ("[t]he Michigan and federal Equal Protection Clauses offer similar protection"); *Doe v. Dep't of Social Services*, 439

Mich. 650, 670-671, 487 N.W.2d 166 (1992) ("a review of the jurisprudence and constitutional history of this state suggests ... that our Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection"). *Crego v. Coleman*, 615 N.W.2d 218,223, 463 Mich. 248 (Mich. App., 2000).

"Gender-based [i.e., sex-based] distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Adoption of Kelsey S.*, 4 Cal.Rptr.2d 615, 625, 1 Cal.4th 816, 823 P.2d 1216 (Cal., 1992). See also, *Caban v. Mohammed* (1978), 441 U.S. at p. 388, 99 S.Ct. at p. 1766. It is contrary to all public policy interests to deny the father of a child an opportunity to prove paternity and establish his fatherhood, especially when he was duped by the mother of his child in believing she will be getting divorced and for all practical purposes was no longer married.

Gender-based classification schemes are subject to heightened scrutiny review. *Rose v. Stokely*, 673 N.W.2d 413, 424, 258 Mich. App. 283 (Mich. App., 2003). Under heightened scrutiny review there are two determinations that must be made. *Id.* at 424. The first determination is whether the classification serves an important governmental interest. *Id.* The second determination is whether the classification is substantially related to the achievement of the important governmental objective. *Id.* These determinations are to be made by the judiciary. *Id.* at 425.

The Appellant seeks only a paternity determination that he is the biological father of the child, [REDACTED]. The Revocation of Paternity Act was created as a procedural vehicle for determining the paternity of children 'born out of wedlock,' and enforcing the resulting support obligation. The Appellant is requesting that the Court determine the status of the child

and his biological paternity as the Act allows fathers to seek and receive such determinations. The denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children is challenged by the State constitutes a denial of equal protection of the laws. *Stanley v. Illinois* 8212 5014, 405 U.S. 645, 658, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). As stated in dissenting opinion in *Girard v. Wagenmaker*, at P. 378. , "The unfortunate fact that, in our society, the act's primary utility lies in compelling unwilling and recalcitrant fathers to meet their support obligations is no reason to deny standing to those fathers who desire to acknowledge their paternal responsibilities." When a court voluntarily blindfolds itself to what every citizen can see, the public must justifiably question the administration of law to just that extent. *Barnes v. Jeudevine*, 475 Mich. 696, 713, 718 N.W.2d 311 ((Mich., 2006).

The *Girard* court observed that the standing of putative fathers was not directly at issue with regard to the 1980 amendment [of the paternity Act] because the putative father's standing to bring a paternity claim had long since been established under the Paternity Act." *Id.* at 384. According to the *Girard* Court it was in 1941--thirty-nine years before the 1980 amendment-- that the ancestor of the present Paternity Act was amended to grant standing to putative fathers to claim paternity of their children. *Id.* This provision has survived as modified into Paternity Act as M.C.L. Sec. 722.714(6); M.S.A. Sec. 25.494(6). It is equally apparent that the primary utility of M.C.L. Sec. 722.714(6); M.S.A. Sec. 25.494(6) and its ancestor provisions has been to permit the biological father to independently assert and preserve his own interest in, and relationship to, the child. *Id.*

In the **dissenting opinion** in *Michael v. Gerald*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), the dissenting judge did not agree with the plurality opinion's conclusion that a natural father can never "have a constitutionally protected interest in his relationship with a

child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." *Ante*, at 133 (STEVENS, J., concurring in judgment). *Michael* at 157.

Justice Stevens stated that:

Prior cases here have recognized the liberty interest of a father in his relationship with his child. In none of these cases did we indicate that the father's rights were dependent on the marital status of the mother or biological father. *Id.* The basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child. *Id.* at 157-158. This court has not before faced the question of a biological father's relationship with his child when the child was born while the mother was married to another man. On several occasions however, we have considered whether a biological father has a constitutionally cognizable interest in an opportunity to establish paternity. *Michael* at 158. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), recognized the biological father's right to a legal relationship with his illegitimate child, holding that the Due Process Clause of the Fourteenth Amendment entitled the biological father to a hearing on his fitness before his illegitimate children could be removed from his custody. *Id.* We rejected the State's treatment of Stanley "not as a parent but as a stranger to his children." *Id.*, at 648, 92 S.Ct., at 1211. *Id.*

Unlike in *Michael v. Gerald*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), the case before us does not involve a married couple who were cohabiting. As far as Appellant was concerned, Appellee wished to live the rest of her life with him and indeed openly traveled and stayed overnight with him, as many committed unwed couples do in this day and age.

Appellee's husband was for all practical purposes a former husband and only still in her life because of the legal divorce procedure had not run its course yet.

As in the *Michael v. Gerald* case dissent, Chief Justice Cavanagh in his **dissenting opinion** in *Girard v. Wagenmaker*, at p. 392 observed that;

“ [t]here is a sadly negative cast to the entire law of paternity. The focus is almost always on the recalcitrant father, forced unwillingly into supporting a child he refuses to acknowledge. It is rarely on the out-of-wedlock father who willingly shoulders his paternal responsibilities and voluntarily seeks to establish a relationship with his child. This undertow of social assumptions has even affected the constitutional case law of the United States Supreme Court, which has shown solicitous concern for the due process

rights of the unwilling father threatened with involuntary liability for child support, while turning a remarkably cold shoulder to the due process claims of willing fathers who wish to maintain a relationship with their children. This Court, however, need not and should not interpret Michigan's Paternity Act in such a selective and negative manner”.

Michigan Supreme Court Justice Marilyn Kelly, in her concurring judgment in *Snay v. Vest*, 489 Mich. 914, 796 N.W.2d 464 (Mich., 2011), strongly disagreed with the overly rigid standing threshold in the Paternity Act. Justice Marilyn Kelly urged the Legislature to reconsider the act and to confer standing on fathers who can definitively prove their paternity. *Id.* at 468. Stressing the need for change, and adopting Chief Justice Cavanagh’s concerns and analysis in *Girard* as her own, Justice Kelly noted that “taking the broadest view of the statutory scheme, it seems to me that there would be something oddly askew with a legal framework which recognized the standing of a husband seeking to disclaim paternity of his wife's child, yet refused standing to a man seeking to claim paternity of such a child.” *Id.* “It is more than a little hypocritical to contend, as do the Wagenmakers, that denying standing to *Girard* is consistent with “the law's repugnance to adulterers.” The biological mother in this kind of situation is certainly no less an “adulterer” than the biological father.” The Justices observed that “[i]nstead of leaving such paternity disputes unresolved, to fester and rankle down through the years, would it not be more desirable to give the parties their day in court and settle the issue once and for all”. *Id.* at 465.

The court in *Snay v. Vest*, although ultimately denying plaintiff’s application for leave to appeal, pointed out the adverse policy consequences of part of the Paternity Act. *Snay*, at p.5. They noted that it raises an unyielding barrier to fathers and putative fathers who seek to have their claims redressed by our courts. “When a plaintiff, like Mr. Snay, has presented

conclusive evidence of paternity, the legal system should not turn a blind eye to his claims.” *Id.* at 466.

Reading MCL 722.1441(3)(c)(i) to exclude unmarried fathers from filing a paternity action when the father knew that the mother was married on paper but not effectively, unjustifiably gives favorable treatment to the mother and takes away the rights of alleged fathers (notwithstanding biological fathers) to establish paternity of their children. This is a clear a violation of the Equal Protection Clause. It is to be noted that the biological mother in this kind of situation is certainly no less an "adulterer" than the biological father in the face of Michigan law. *Snay v. Vest*, 489 Mich. 914, 796 N.W.2d 464 (Mich., 2011). Despite this fact, the biological mother is given more favorable treatment under the law because of the conventional presumption that a child born to a married couple is the child of husband. However, with the passing of the ROA, this should no longer be the case and such a position is unsupported by the law.

A gender-based classification is subject to so-called "intermediate scrutiny": to survive an equal protection challenge, the classification must serve an important governmental objective and must be substantially related to achievement of that objective. *In the Matter of RFF, Minor. LAF, Appellant, v BJJ, Appellee*, 242 Mich App 188, 209-210; 617 NW2d 745 (2000), *Leh v Robertson*, 463 US 266; 103 S. Ct. 2985. "Gender-based classifications will be upheld when men and women are not similarly situated in the area covered by the legislation in question and the statutory classification is realistically based upon differences in their situations." *Parham v Hughes*, 441 U.S. 347, 354, 99 S. Ct. 1741, 60 L. Ed. 2d 269 (1979). *Rose v. Stokely*, 673 N.W.2d 413, 417, 258 Mich. App. 283 (Mich. App., 2003). Like in *Caban*, the distinction made between the rights of biological mothers and the rights of biological fathers is not substantially

related to an important state interest. Such previously asserted state interests as preserving the marital unit or concern over illegitimate children, are no longer relevant and no longer apply with the same force as they once did. Further, the passing of the Revocation of Paternity Act is evidence of this eroding of claimed state interests propped by the marital presumption as the Act enacted significant exceptions to the marital presumption.

It is not sufficient that a classification simply relate to an important governmental interest but it is also required to determine whether the classification is substantially related to the achievement of that important governmental objective. *Rose v. Stokely*, 673 N.W.2d 413, 428, 258 Mich. App. 283 (Mich. App., 2003). Here in this case, the classification is not substantially related to an important governmental interest and the decision of the lower court goes directly against the very purpose of the Revocation of Paternity Act.

The courts in other jurisdictions also have upheld the rights or have discussed in favor of unwed fathers. The court in *Adoption of Kelsey S* rejected the mother's argument that the distinction was justified by a "fundamental difference between maternal and paternal relations." (Caban, supra, 441 U.S. at p. 388, 99 S.Ct. at p. 1766.) The court observed that "[M]aternal and paternal roles are not invariably different in importance." (Id., at p. 389, 99 S.Ct., at p. 1766.). Due process entitles a biological father a meaningful opportunity to qualify as a presumed father. *IN RE JESUSA*, 10 Cal.Rptr.3d at p.214. In *Michael v. Gerald*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), a California case, four justices agreed that the biological father had a protected liberty interest in his relationship with his child. (Id., at p. 136, 109 S.Ct. at p. 2348 (dis. opn. by Brennan, J., with Marshall and Blackmun, JJ., conc.); id., at p. 157, 109 S.Ct. at p. 2360 (dis. opn. by White, J., with Brennan, J., conc.)). Justice Stevens in concurrence assumed

for purposes of the decision that the natural father's relationship was entitled to constitutional protection.

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." The Appellant has a right to parenting time and companionship of his child. The decision of the trial court denies him an opportunity to claim his rights.

3. Violation of Appellant's Biological Child's Rights to Care and Filiation to Biological Parent(s)

The child also has a right to get the care, love and affection of his or her natural father. Michigan allows an illegitimate child to maintain an independent cause of action to determine parentage and support obligations. *Spada v. Pauley*, 385 N.W.2d 746, 748 (Mich. Ct. App. 1986). These rights have been recognized in relation to the marital presumption. The presumption that children born or conceived during a marriage are the issue of that marriage vindicates a number of interests, including the interest of the child in not having his or her legitimacy called into question, the interest of the state in ensuring that children are properly supported, and the interest of both in assuring the effective operation of intestate succession. *Barnes v. Jeudevine*, 475 Mich. 696,715, 718 N.W.2d 311 ((Mich., 2006), Markman, J. (dissenting)). These same children interests should apply equally in the context of a biological parent seeking to establish paternity over his or her biological children.

Moreover, in the context of adoption, advocates of open access to birth records contend that "adult adoptees have the right to learn about their backgrounds . . . for psychological [reasons,] . . . medical reasons [,] . . . [and] because all other adults are able to access the same

type of information without restriction.” Fleming, 11 WM. & MARY J. OF WOMEN & L. at 470–71. In addition to children raised by only one biological parent, children who were adopted may also seek the identity of their biological parent or parents. Michigan allows adults who were adopted as children to obtain their birth records. Under MICH. COMP. LAWS § 710.68 (1995), information identifying birth parents may be accessed by an adult adopted person, birth parents, and adult birth siblings. *Id.* Under § 710.68, adult adoptees’ birth records can be released “unless either biological parent has filed, with the state, a written request that the information not be released. . . . A policy decision has been made in favor of disclosure. However, legislative history reveals that there is no constitutional or statutory right for children to know the identity of both of their parents. The legislative purpose of paternity disclosure laws is for children of single parents to collect support from their absent parent, and adult adoptees to obtain their birth records.

These disclosure laws were designed with sympathy for children seeking information about their biological identity and genetic medical history. Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. OF WOMEN & L. 461, 461 n.3 (2005). “Unlike children seeking support, most adult adoptees never knew either of their biological parents. Unless birth records are disclosed to them, they have neither the ability to establish any biological identity, nor any way of knowing their susceptibility to genetic disorders.” There are countless public policy reasons for children to know who their biological parents are, ranging from knowing and being aware of family physical health history and genetic dispositions, through inheritance, to emotional health and having a relationship with one’s biological parents.

The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship. *Adoption of Kelsey S.*, 4 Cal.Rptr.2d 615, 627, 1 Cal.4th 816, 823 P.2d 1216 (Cal., 1992). The Appellant herein has made every attempt to fulfill his obligations and duties as the father of the child and he is ever ready to do anything to establish his paternity. "[A] father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship." *Id.* at 628.

"The underlying purpose of the Paternity Act was to ensure that the minor children born outside a marriage are provided with support and education." *Crego v. Coleman*, 463 Mich. 248, 615 N.W.2d 218, 228 (2000). *Dubay v. Wells*, 506 F.3d 422,430, 69 Fed.R.Serv.3d 405 (Mich. App. 2007). While this is a legitimate governmental interest, equally or even more important is that the child knows and has a relationship with his or her biological parents.

The Revocation of Paternity Act was enacted to overcome the limitations of the former Paternity Act. It affords putative and alleged fathers greater opportunities to establish the paternity of their children born out of wedlock. The purpose of enacting the Revocation of Paternity Act was "to provide procedures to determine the paternity of children in certain circumstances; to allow acknowledgments, determinations, and judgments relating to paternity to be set aside in certain circumstances; to provide for the powers and duties of certain state and local governmental officers and entities; and to provide remedies." However, MCL 722.1441(3)(c)(i) which takes from a biological father, because mother was technically married but not in the functional sense of the word, an opportunity to establish parentage is against the

spirit of Revocation of Paternity Act and the progressive history of Paternity laws. This would constitute a clear violation of Appellant's constitutional rights under the US constitution and Michigan constitution.

Furthermore, the interpretation of the lower court of the statute (MCL 722.1441) and denying plaintiff father standing to establish paternity because of the alleged knowledge of marriage at the initiation of relationship contradicts the explicit language of the statute. Additionally, this decision basically foregoes alleged fathers' expanded rights granted by the Revocation of Paternity Act and contradicts the very purposes the Revocation of Paternity Act sought to achieve.

CONCLUSION

For all the forgoing reasons, Appellant requests that this Court reverse the order granting motion for summary disposition for Appellee, reverse the denial of motion for DNA testing, and allow Appellant to establish paternity.

Respectfully submitted,

By: _____

A large black rectangular redaction box covering the signature of the appellant.

Dated: _____

STATE OF MICHIGAN
IN THE COURT OF APPEALS

[REDACTED],

Plaintiff – Appellant,

v.

[REDACTED],

Defendant – Appellee.

Court of Appeals No.

Circuit Court No. [REDACTED]

PROOF OF SERVICE

On [REDACTED], I served a copy of Appellant’s Brief on Appeal, in the above captioned matter by First Class Mail by enclosing the same in an envelope with sufficient postage to:

[REDACTED]

Respectfully submitted,

By: _____
[REDACTED]

Dated: [REDACTED]