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**From the Putative Father's Perspective: An Analysis of His Rights to Seek Paternity  
Under Michigan's Paternity Act, and a Plea for Reform**

The divorce of Suzanne and James Childers became final on December 4, 1992.<sup>1</sup> Suzanne gave birth to Brandon on September 12, 1993, which was 40.42 weeks, or 283 days, after her marriage formally ended.<sup>2</sup> Since Suzanne did not know she was pregnant at the time of the divorce, the judgment of divorce did not mention Brandon.<sup>3</sup> James died on April 12, 1995.<sup>4</sup> One year later, a circuit court judge amended the judgment of divorce at Suzanne's request to indicate that James was Brandon's biological father.<sup>5</sup> On March 13, 1997, Scott Horie filed a complaint for paternity in the circuit court, alleging that he was Brandon's biological father.<sup>6</sup> The complaint was dismissed based on the prior court order determining James Childers to be Brandon's biological father.<sup>7</sup> Scott appealed, and the Michigan Court of Appeals held that he lacked standing to pursue a determination of paternity under the Paternity Act because the circuit

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<sup>1</sup> Childers v. Childers, 2000 WL 33522373 at \*1 (Mich. App.), *appeal denied*, 463 Mich. 866, 617 N.W.2d 692 (Sept. 12, 2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Brandon was born on the 284<sup>th</sup> day after Suzanne and James were divorced. The average length of human gestation is 266 days, or 38 weeks, from conception. <http://transitiontoparenthood.com/ttp/birthed/duedates.htm>. Assuming that Suzanne carried Brandon for an average 38-week pregnancy, Brandon was not conceived until approximately December 21, 1992, 18 days after the marriage ended. Even if Brandon were conceived days before the judgment of divorce was entered, common sense dictates that Brandon was not issue of the marriage. The record does not affirmatively so state, but it appears as though Suzanne was involved with another man at the time, Scott Horie, and that he is Brandon's biological father.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* There is no indication in the record that the judge made any findings of fact regarding who Brandon's biological father was. This determination, presumably, was based solely on the timeline. The judge likely determined that Brandon was conceived during the marriage, despite the fact that the conception would have had to have taken place just days before the divorce became final, and then applied the traditional presumption that a child conceived during a marriage is issue of the marriage.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

court, in amending the divorce judgment, had determined that Brandon was conceived while Suzanne was married to James.<sup>8</sup>

This result seems unfair to Scott, who wished to take responsibility for and establish a relationship with Brandon if proven to be his biological father. His only initial request—an opportunity to find out whether he was Brandon’s biological father through an evidentiary hearing or a procedure as simple and reliable as a blood test—was denied. This result is also unfair to Brandon, who was denied a living, legal father. Determining Scott to be the biological father would not infringe son James’ right to raise, nurture, or influence the child, as James was deceased. Moreover, the result is downright illogical because Brandon was born after Suzanne and James were divorced, and arguably was conceived after they were divorced. Regardless of when Brandon was conceived and born, it is apparent that Brandon was not issue of the Suzanne-James marriage. It seems as though the only person who benefited from the situation was Suzanne.<sup>9</sup> However, this is the statutorily-mandated result under current Michigan law.

The purpose of this paper is twofold. First, it will demonstrate the illogical and undesirable results created by the Paternity Act’s denial of standing to a putative father wishing to establish his paternity of a child who was born or conceived while the mother was married to another man. Second, it will argue that the Michigan Legislature should reconsider the validity of the assumptions and values on which the Act was based, and how policy concerns could be more effectively furthered by the Act, and then amend the Act to reflect the changing values in society, to promote public policy concerns other than simply securing child support payments,

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<sup>8</sup> Id.

<sup>9</sup> Suzanne’s motives for amending the judgment of divorce to reflect James’ paternity of Brandon are unclear from the case. Perhaps she benefited personally by gaining money or other benefits from James’ family, or by cutting Scott out of her life after their relationship turned sour. If her reason for challenging Scott was an honorable one, such as preventing him from having a role in Brandon’s life if it would not be in Brandon’s best interests, this determination would have been better left to the court to decide after a determination of paternity was reached.

and to prevent the illogical results created by the current Act. Part I will explain the language of the Act and the primary appellate cases decided under it. Part II will provide the historical and cultural context in which the Act was drafted and explain the legislative intent behind it. Part III criticizes the Act for its absurd results, and Part IV proposes ways in which the Michigan Legislature should amend the Act.

## **I. The Paternity Act and its Interpretive Case Law**

### **A. The Language of the Act and the Statutory Challenges**

The Paternity Act<sup>10</sup> grants standing to seek a determination of paternity to a child born out of wedlock, the mother of a child born out of wedlock, the father of a child born out of wedlock, or the Family Independence Agency on behalf of a child born out of wedlock who receives public assistance.<sup>11</sup> The Act defines “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 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.”<sup>12</sup> Thus, there are two ways in which a child can be considered a “child born out of wedlock,” and a putative father can seek paternity under the Paternity Act only if the child falls into one of the two categories.<sup>13</sup>

As to the first category—that of “a child begotten and born to a woman who was not married from the conception to the date of birth of the child”—the Michigan Court of Appeals has interpreted this language as requiring the mother to have been continuously unmarried from

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<sup>10</sup> MCL §§ 722.711-722.730.

<sup>11</sup> MCL §§ 722.714(1), (10); 722.711(b).

<sup>12</sup> MCL § 722.711(a). Although the act does not define the term “father,” the cases treat a man who seeks to have his paternity established (or a man against whom a mother, child, or the FIA seeks to have paternity established), to be a “father,” as well as the mother’s husband who seeks to deny his paternity. To avoid confusion, the cases commonly refer to the first type of man as the “putative father” or “alleged father,” while referring to the mother’s husband as the “legal father.” The terms “putative father” and “legal father” will be used throughout the paper to distinguish the two types of fathers.

<sup>13</sup> Spielmaker v. Lee, 205 Mich. App. 51, 60; 517 N.W.2d 558 (1994).

conception to birth in order for the child to be deemed born out of wedlock.<sup>14</sup> In *Spielmaker v. Lee*, the plaintiff and defendant were an unmarried man and an unmarried woman who ended their relationship after conception of the child.<sup>15</sup> The defendant, Emily Lee, married a man other than the plaintiff, Michael Spielmaker, approximately two months before the child's birth, and placed her husband's name on the birth certificate.<sup>16</sup> Michael then brought an action seeking paternity, and Emily moved for summary disposition, arguing that Michael lacked standing to seek paternity under the Paternity Act.<sup>17</sup> The specific issue before the Court of Appeals was whether Emily's having been unmarried at the time of conception but married at the time of birth sufficed to designate the child as born out of wedlock.<sup>18</sup>

In analyzing the definition, the Court recognized that there are two ways in which the first clause could be interpreted. One interpretation would be that the prepositional phrase "from the conception to the date of birth of the child" modifies the term "married." In that case, the statute would be referring to a woman who was not *continuously* married from conception to childbirth. As a result, a child would be deemed to have been born out of wedlock even if the child's mother was married for part, but not all, of the pregnancy.<sup>19</sup> However, the Court determined that the proper construction of the definition is that the prepositional phrase "from the conception to the date of birth of the child" modifies the term "*not* married," such that a child is born out of wedlock only if the mother remains continuously unmarried from conception to birth.<sup>20</sup> Because Emily had not remained continuously unmarried throughout gestation, but had

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<sup>14</sup> *Id.* at 55.

<sup>15</sup> *Id.* at 52.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 53.

<sup>19</sup> *Id.* at 54.

<sup>20</sup> *Id.* at 55. (Emphasis added.)

become married before the child’s birth, the child was not “born out of wedlock,” and therefore Michael lacked standing to seek paternity.<sup>21</sup>

As to the second category—that of “a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage”—the Michigan Supreme Court has interpreted this language to require a court determination that the child is not issue of the marriage *prior to* the putative father filing his complaint seeking paternity.<sup>22</sup> This determination usually takes place as part of divorce proceedings.<sup>23</sup> In *Girard v. Wagenmaker*, the plaintiff, Larry Girard, brought an action against Judy Wagenmaker claiming that he was the father of a child conceived and born while Judy was married to another man.<sup>24</sup> Judy moved for summary disposition, alleging that Larry could not contest paternity because he had not established that the child was born “out of wedlock,” and that a circuit court determination that a child was born out of wedlock was necessary under the statute to contest paternity.<sup>25</sup> The trial court ruled that Larry did not have standing to bring the suit.<sup>26</sup> The Michigan Court of Appeals reversed, and the Michigan Supreme Court granted leave to consider whether a putative father can obtain standing under the Paternity Act to dispute the paternity of a child born while the mother is married to another man.<sup>27</sup>

Because Judy and her husband were married at the time the child was conceived and born, the child did not fall within the first clause of the definition of a “child born out of

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<sup>21</sup> *Id.* at 60.

<sup>22</sup> *Girard v. Wagenmaker*, 437 Mich. 231, 235; 470 N.W.2d 372 (1991).

<sup>23</sup> A court that is competent to hear an action for divorce or annulment may, incident to the underlying action, determine the paternity or legitimacy of a minor child born during the marriage. *Gonzalez v. Gonzales*, 117 Mich. App. 110, 323 N.W.2d 614 (1982). However, only a paternity question involving the parties to a divorce action can be resolved by a court during the divorce action; the paternity of a third party cannot be determined as part of a divorce proceeding. *Smith v. Robbins*, 91 Mich. App. 284, 283 N.W.2d 725 (1979). There is no statutory authority to join a third party to a divorce proceeding to adjudicate paternity, and it would not serve the convenient administration of justice to do so. *Pruitt v. Pruitt*, 90 Mich. App. 230, 282 N.W.2d 785 (1979).

<sup>24</sup> *Girard*, 437 Mich. at 235.

<sup>25</sup> *Id.* at 235-36.

<sup>26</sup> *Id.* at 236.

<sup>27</sup> *Id.*

wedlock” because it was not “a child begotten and born to a woman who was not married from the conception to the date of birth of the child.” Therefore, the question was whether the child fell within the second clause, governing “a child which the court has determined to be a child born during a marriage but not the issue of that marriage.” The issue turned on whether the language “which the court has determined” required a prior court determination that a child was born out of wedlock for a putative father to have standing to seek paternity.<sup>28</sup>

The Court held that under the Paternity Act, a putative father does not have standing to seek paternity of a child born while the mother was legally married to another man unless a legal determination that the mother’s husband is not the father exists at the time the putative father files his complaint.<sup>29</sup> The Court explained that the plain language of MCL § 722.711(a) required this result, because “has determined” is the present perfect tense of “determine,” indicating action that was started in the past and has recently been completed, or action started in the past which is continuing up to the present time.<sup>30</sup> Additionally, the Court stated that this outcome was the only reasonable construction of the Act that would give effect to all its parts as a whole.<sup>31</sup> If the putative father had sought standing under the first clause of the definition of “child born out of wedlock,” he would only need to allege that the child was conceived and born to a woman who had been continuously unmarried during the pregnancy.<sup>32</sup> He would not have to allege that the court “has determined” such facts.<sup>33</sup> However, to seek standing under the second clause, he must show that a court “has determined” that the child is not issue of the marriage.<sup>34</sup> To ignore the phrase “has determined” would render those words a nullity.<sup>35</sup>

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<sup>28</sup> Id. at 238.

<sup>29</sup> Id. at 235.

<sup>30</sup> Id. at 242.

<sup>31</sup> Id. at 243-244.

<sup>32</sup> Id. at 244.

<sup>33</sup> Id.

<sup>34</sup> Id.

Finally, the legislative history supported this view, and the result conformed to the traditional presumption of legitimacy of a child born during a marriage.<sup>36</sup>

Since the landmark decisions of *Girard* in 1991 and *Spielmaker* in 1994, nine putative fathers have appealed their denial of standing to the Michigan Court of Appeals.<sup>37</sup> Standing has been granted in only one of those cases.<sup>38</sup> In *Afshar v. Zamarron*, the Court held that a putative father had standing to bring an action under the Paternity Act when allegations and acknowledgments made by the parties throughout the divorce litigation, combined with a divorce judgment that implicitly held that the child was not issue of the marriage, was a sufficient determination that the child was not issue of the marriage.<sup>39</sup> In that case, the child was conceived and born while defendant-mother was married.<sup>40</sup> Two years later, defendant's husband filed for divorce, alleging in his complaint that blood tests revealed that he could not be the child's father.<sup>41</sup> Defendant's answer to the divorce complaint acknowledged that the husband was not the child's father.<sup>42</sup> The putative father and the defendant-mother had also executed an agreement acknowledging paternity.<sup>43</sup> Finally, the divorce judgment provided for custody and support of one minor child of the marriage, but not of the child whose paternity was in question.<sup>44</sup> The Court of Appeals acknowledged that a specific legal determination of the child's

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 245-46.

<sup>37</sup> *Afshar v. Zamarron*, 209 Mich. App. 86, 530 N.W.2d 490 (1995); *Hauser v. Reilly*, 212 Mich. App. 184, 536 N.W.2d 865 (1995), *appeal denied* 451 Mich. 875, 549 N.W.2d 566 (1996); *Price v. Willingham*, 2000 WL 33538587 (Mich. App.); *McHone v. Sosnowski*, 239 Mich. App. 674, 609 N.W.2d 844 (2000); *Childers v. Childers*, 2000 WL 33522373 (Mich. App.); *FIA v. Graham*, 2001 WL 716105 (Mich. App.); *Ritchie v. Barnett*, 2001 WL 694045 (Mich. App.); *Stanton v. Diebler-Baugh*, 2001 WL 1547883 (Mich. App.); *FIA v. Heier*, 2002 WL 31475285 (Mich. App.).

<sup>38</sup> *Afshar v. Zamarron*, 209 Mich. App. 86, 530 N.W.2d 490 (1995).

<sup>39</sup> *Id.* at 92.

<sup>40</sup> *Id.* at 88.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 89.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 92.

paternity had not been made.<sup>45</sup> However, the blood test, allegations in the divorce pleadings, “Acknowledgement of Paternity,” and language in the divorce judgment providing for the custody and support of one child of the marriage but not of the child in question, when viewed as a whole, sufficed as a determination.<sup>46</sup>

The other Michigan cases have not been so generous. In *Hauser v. Reilly*, the putative father brought a paternity action against the mother alleging that the child was conceived between the time the mother filed for divorce from her husband and the time the divorce judgment was entered, that the mother had expressed her belief of the putative father’s paternity, and that the parties had consented to blood tests showing a 99.99% probability that he was the child’s biological father.<sup>47</sup> He argued that although the child was not technically “born out of wedlock” under the statute, the results of the blood test along with the parties’ verbal acknowledgement that he was the biological father constituted a determination that the child was not issue of the marriage, and that he should be granted standing on this basis.<sup>48</sup> The Court viewed *Girard* as being directly on point, and held that the plaintiff clearly lacked standing.<sup>49</sup>

In the past three years, the Court has written several unpublished opinions, which, although not having the impact of precedent, are instructive as to the results of the statute. As the standing issue has become more firmly decided, the Court’s rationale has become shorter with each case. The putative father in *Price v. Willingham* argued that the *Girard* Court erred in holding that the phrase “which the court has determined” requires a *prior* court determination that a child was born out of wedlock *before* a putative father has standing to bring a paternity

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<sup>45</sup> *Id.* at 88.

<sup>46</sup> *Id.*

<sup>47</sup> *Hauser v. Reilly*, 212 Mich. App. 184, 185-86; 536 N.W.2d 865 (1995), *appeal denied*, 451 Mich. 875, 549 N.W.2d 566 (1996). The plaintiff also made the argument that denying him standing violated his right to due process under the Michigan Constitution, with which the court disagreed. A discussion of the constitutional issues follows later in this paper.

<sup>48</sup> *Id.* at 186.

<sup>49</sup> *Id.* at 187.

action.<sup>50</sup> The Court dismissed this argument with little discussion, stating that a decision of the Supreme Court was binding on the Court of Appeals until the Supreme Court overrules itself.<sup>51</sup> However, it further agreed with the Supreme Court that a literal reading of the “has determined” language required this result, and that it follows the traditional preference for not questioning the presumed legitimacy of a child born during a marriage.<sup>52</sup> Similarly, in the following two months the Court paid little attention to two putative fathers’ Paternity Act claims, stating that the Court has consistently applied the Supreme Court’s interpretation of the standing requirement.<sup>53</sup>

In a case brought by the Family Independence Agency to terminate the mother’s and putative father’s parental rights, the Court held that because the putative father lacked standing to establish paternity, he lacked standing to appeal the termination of any parental rights.<sup>54</sup> In a case that has become a run-of-the-mill paternity action—one in which the child was conceived and born while the mother was married to another man and there was no prior court determination that the child was not issue of the marriage—the trial court dismissed the action, noted that the law in this area was clear, questioned why the plaintiff would bring such an action, and awarded the defendant-mother’s motion for costs and fees finding that the claim was frivolous.<sup>55</sup> The Court of Appeals agreed, noting that the plaintiff did not bring a constitutional

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<sup>50</sup> Price v. Willingham, 2000 WL 33538587 (Mich. App.).

<sup>51</sup> *Id.* at \*1, citing Hauser v. Reilly, 212 Mich. App. at 187.

<sup>52</sup> *Id.*

<sup>53</sup> *McHone v. Sosnowski*, 239 Mich. App. 674,678; 609 N.W.2d 844 (2000); *Childers v. Childers*, 2000 WL 33522373 at \*2 (Mich App). See also *Stanton v. Deibler-Baugh*, 2001 WL 1547883 (Mich. App.), (where the court dismissed the claim without analysis, by simply citing the statute).

<sup>54</sup> *FIA v. Graham*, 2001 WL 716105 (Mich. App.).

<sup>55</sup> *Ritchie v. Barnett*, 2001 WL 6904045 at \*1 (Mich. App.).

challenge<sup>56</sup> or present a good faith argument for reversal of existing law, but merely argued that the Court should reject the *Girard* holding.<sup>57</sup>

In addition to the above actions brought by putative fathers, there were three cases in which each mother brought an action against the putative father in an attempt to obtain a paternity judgment and order of filiation. These cases, although brought by mothers seeking paternity determinations against putative fathers who had no interest in the child, are instructive on the Court's idea of under what circumstances a circuit court "has determined" that a child was "born or conceived during a marriage but [is] not the issue of that marriage."<sup>58</sup> Moreover, the definition of "child born out of wedlock" is the same whether it is applied to the mother, the child, or the putative father bringing the action, and therefore the Court's interpretation of that language would remain the same regardless of who the plaintiff is.

In *DSS v. Baayoun*, the Court held that a default judgment of divorce, which was silent on the issue of paternity, was insufficient to determine that the child was not issue of the marriage so as to render the child a "child born out of wedlock."<sup>59</sup> In that case, the child was conceived during the marriage.<sup>60</sup> The husband, unaware of his wife's pregnancy, filed the complaint for divorce during the pregnancy alleging that there were no children born of the marriage, and a default judgment was entered.<sup>61</sup> Five months later, the child was born.<sup>62</sup> The Court distinguished this case from a similar case decided a year earlier, *DSS v. Carter*,<sup>63</sup> which

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<sup>56</sup> A constitutional challenge has not yet been successful in Michigan, but the Court of Appeals has suggested that it might be successful on the right set of facts. See *Hauser v. Reilly*, 212 Mich. App. 184; 536 N.W. 2d 865 (1995), and the discussion below.

<sup>57</sup> *Id.*

<sup>58</sup> *DSS v. Carter*, 201 Mich. App. 643, 506 N.W.2d 603 (1993); *DSS v. Baayoun*, 204 Mich. App. 170, 514 N.W.2d 522 (1994); *Opland v. Kiesgan*, 234 Mich. App. 352, 594 N.W.2d 505 (1999).

<sup>59</sup> *DSS v. Baayoun*, 204 Mich. App. 170, 174; 514 N.W.2d 522 (1994).

<sup>60</sup> *Id.* at 172.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *DSS v. Carter*, 201 Mich. App. 643, 506 N.W.2d 604 (1993).

held that because the mother was unaware of her pregnancy until after the divorce, determination that the child was born out of wedlock could not have been made in the divorce action, so that plaintiffs (the department of social services on behalf of the mother) had standing to bring a paternity action.<sup>64</sup> In *Baayoun*, however, the mother knew she was pregnant and the issue of paternity could therefore have been determined in the divorce action.<sup>65</sup>

In the third case, the Court held that an amended judgment of divorce finding that a child was not issue of the marriage, correcting the previous judgment which, based on false information, had adjudicated the child to be issue of the marriage, was a sufficient “prior determination” to confer standing to bring a paternity action.<sup>66</sup> In that case, Melanie Opland and Stephanie Craft brought suit against Gregory Kiesgan, alleging that he was the biological father of Stephanie, who was born while Melanie was married to but separated from her husband.<sup>67</sup> At the time of the divorce, Melanie claimed that Stephanie was issue of her husband, and the judgment of divorce designated him as the child’s father.<sup>68</sup> One year later, Melanie filed the paternity suit against Gregory, which was dismissed based on her lack of standing because there had been no prior court determination that the child was not issue of the marriage.<sup>69</sup> Plaintiff returned to the divorce court with her former husband, the parties stipulated that Stephanie could not be issue of the marriage because she had been conceived while the parties were not physically intimate, and a consent order modifying the original judgment of divorce was entered, stating that the court had made a factual finding that the child was not issue of the marriage.<sup>70</sup>

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<sup>64</sup> *Id.* at 175.

<sup>65</sup> *Id.* The court’s rationale suggests that the result might have been different if the court had not suspected the mother of hiding her pregnancy at the time of the divorce and later seeking paternity when she needed child support.

<sup>66</sup> *Opland v. Kiesgan*, 234 Mich. App. 352, 594 N.W.2d 505 (1999).

<sup>67</sup> *Id.* at 354.

<sup>68</sup> *Id.* at 355-56.

<sup>69</sup> *Id.* at 356.

<sup>70</sup> *Id.* at 357.

The Court of Appeals held that the amended divorce judgment reflecting the true facts constituted a prior court determination sufficient to satisfy the *Girard* standing requirement.<sup>71</sup>

**B. The Constitutional Challenges**

In addition to challenging the language of the Act, several putative fathers who have been found to lack standing have challenged the constitutionality of the Act. In Michigan, only a handful of cases before the Court of Appeals have involved constitutional claims.<sup>72</sup> In order to understand those few cases, one must first understand the United States Supreme Court's handling of the issue.

In the seminal case on this issue, the United States Supreme Court held that a California statute which created a presumption that a child born to a married woman living with her husband is the child of the marriage did not violate the putative father's procedural or substantive due process rights.<sup>73</sup> In that case, Victoria was born to Carole while Carole was married to and living with Gerald.<sup>74</sup> During the first three years of Victoria's life, mother and daughter lived with three different men at several different times: Michael, a man with whom Carole had had an extra-marital affair and who held Victoria out as his own daughter; Gerald, Carole's husband at the time of Victoria's birth, who considered Victoria his daughter and who was listed on Victoria's birth certificate; and a third man.<sup>75</sup> After learning that the results of a blood test indicted a 98.07% probability that he was Victoria's biological father, Michael brought an action seeking a determination of paternity.<sup>76</sup>

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<sup>71</sup> Id. at 359.

<sup>72</sup> *Hauser v. Riley*, 212 Mich. App. 184, 536 N.W.2d 865 (1995); *McHone v. Sosnowski*, 239 Mich. App. 674, 609 N.W.2d 844 (2000).

<sup>73</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>74</sup> Id. at 114.

<sup>75</sup> Id.

<sup>76</sup> Id.

Michael lacked standing to seek paternity because under California law, “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”<sup>77</sup> The presumption could be rebutted by blood tests, but only if a motion for such tests was made within two years from the date of the child's birth, either by the husband or, if the natural father had filed an affidavit acknowledging paternity, by the wife.<sup>78</sup> Because his statutory claim would fail, Michael argued that procedural due process required that he be afforded an opportunity to demonstrate his paternity in an evidentiary hearing.<sup>79</sup> He also brought a substantive due process claim arguing that he had a constitutionally protected liberty interest in the parental relationship he had established with Victoria, and that protection of Gerald's and Carole's marital union was an insufficient state interest to support termination of that relationship.<sup>80</sup>

Justice Scalia, writing for the plurality, explained that the right Michael claimed was not so deeply imbedded within society's traditions as to be a fundamental right entitling him to due process.<sup>81</sup> On the contrary, the common-law presumption of legitimacy, and even modern statutory and decisional law, reflected society's historical protection of the marital family against claims by the putative father.<sup>82</sup> He stated that the idea of the family unit was “deeply rooted in this Nation's history and tradition” and found it irrelevant to examine current trends, including the fact that several states allowed the natural father, even one who has not established a

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<sup>77</sup> Cal. Evid. Code § 621(a) (West Supp 1989).

<sup>78</sup> Cal. Evid. Code §§ 621(c) and (d) (West Supp 1989).

<sup>79</sup> Michael H., 491 U.S. at 121.

<sup>80</sup> Id.

<sup>81</sup> Id. at 124.

<sup>82</sup> Id.

relationship with the child, standing to rebut the marital presumption.<sup>83</sup> Therefore, California was free to maintain a statute denying a putative father standing to rebut the marital presumption.

Putative fathers have brought similar claims under the Michigan Constitution, each one alleging that he has a protected liberty interest in paternity based on his established relationship with the child.<sup>84</sup> Although each of the claims brought to date has been unsuccessful, a putative father arguably has a slightly better chance of succeeding under the state constitution than under the federal one. In *Hauser v. Reilly*, a panel of the Court of Appeals adopted the standard articulated by Justice Brennan in his dissenting opinion in *Michael H.*, stating that a putative father's liberty interest entitling him to due process of law derives from his biological link with the child, combined with a substantial parent-child relationship.<sup>85</sup> In *Hauser*, the putative father never had custody of the child and never had responsibility for the education, health, care, or supervision of the child, and the Court found that no substantial parent-child relationship existed.<sup>86</sup> The Court stated, "if plaintiff in this case had an established relationship with his child, we *would* hold that he had a protected liberty interest in that relationship that entitled him to due process of law."<sup>87</sup>

In another case, without stating the facts on which it based its determination, the Court of Appeals acknowledged that the putative father had established "some degree of parenting

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<sup>83</sup> *Id.* at 124 and 127. See *R. McG. v. J.W.*, 200 Colo. 345, 352-53; 615 P.2d 666, 672 (1980) (holding that a provision of the act barring suit by putative father is unconstitutional on equal protection grounds); *Happel v. Mecklenburger*, 101 Ill.App.3d 107, 112; 427 N.E.2d 974, 979 (1981) (allowing putative father to bring suit to rebut the marital presumption and establish his paternity of a legitimate child).

<sup>84</sup> See Michigan Constitution, art. 1, § 17.

<sup>85</sup> See *Hauser*, 212 Mich. App. at 187-88. Brennan, J., dissenting in *Michael H.* at 143, defined a "substantial parent-child relationship" as "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" Although Michigan courts claim to have adopted the substantial relationship test articulated by Justice Brennan, they appear to be using a slightly more stringent standard to determine what constitutes a "substantial parent-child relationship" than Brennan would. However, the Michigan standard is still more generous to the putative father than the standard announced by Justice Scalia in *Michael H.*, as it at least acknowledges the possibility of a successful constitutional challenge.

<sup>86</sup> *Id.* at 190.

<sup>87</sup> *Id.* at 188. (Emphasis added.)

relationship” with the child.<sup>88</sup> However, it declined to apply the *Hauser* reasoning to the case, stating that because the *Hauser* Court found no parenting relationship to exist between the putative father and child, an analysis of a liberty interest based on a substantial parent-child relationship was mere dicta.<sup>89</sup> It left the question for the Supreme Court to address.<sup>90</sup> Two subsequent cases were decided similarly, viewing the *Hauser* statement as dicta which failed to establish a constitutional right of a putative father who has an established relationship with his child to file a paternity action if the mother is married to another man.<sup>91</sup>

In one case, however, the Court of Appeals took the *Hauser* view, but found that the child’s several visits to the putative father’s place of incarceration shortly after the child’s birth did not suffice to create a “substantial parent-child relationship” which would entitle the putative father to due process protection.<sup>92</sup> Thus, the Court of Appeals has not found a “substantial parent-child relationship” in any of the cases before it, but has suggested that on an appropriate set of facts and before the right panel of the Court, a putative father could succeed in his constitutional challenge. The Michigan Supreme Court has yet to speak on the issue.

## **II. Historical Context and Legislative Intent**

Before examining the continued validity of the Paternity Act, it is important to understand the legislative intent behind it and the historical and cultural context in which it arose. The Paternity Act was first passed in its modern form in 1941 and has been amended several times since. However, its roots go much deeper than 1941, and show a long history of restricting standing to cases in which the child is “illegitimate.” The first Michigan statute resembling the

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<sup>88</sup> *McHone v. Sosnowski*, 239 Mich. App. 674, 679; 609 N.W.2d 844 (2000).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Childers v. Childers*, 2000 WL 33522373 at \*2 (Mich. App.); *Stanton v. Diebler-Baugh*, 2001 WL 1547883 at \*1 (Mich. App.).

<sup>92</sup> *Price v. Willingham*, 2000 WL 33538587 at \*3 (Mich. App.).

Paternity Act was enacted in 1820, and was entitled, “An Act for the support and maintenance of Illegitimate Children.”<sup>93</sup> In 1846 it was re-named the Bastardy Act, and was amended over the years.<sup>94</sup> These titles reflect the Legislature’s conscious distinction between legitimate and illegitimate children, with the first title explicitly stating that the primary purpose of the Act is to secure child support payments for “illegitimate” children.

The most significant amendments did not occur, however, until the 20<sup>th</sup> century. In 1941, the Bastardy Act was amended to allow the father of an illegitimate child to bring a claim in the circuit court to prevent the issuance of a warrant of prosecution against the alleged father.<sup>95</sup> In 1956, it was revised to eliminate the criminal aspects of the statute.<sup>96</sup> The amendments allowed a putative father to file a complaint in the circuit court.<sup>97</sup> In order for a complaint to be proper, the putative father had to be one of a “child so born out of wedlock under this act...”<sup>98</sup> These amendments were not intended to provide the putative father a legal forum in which to claim his parental status, but to have a decree entered providing for the child’s support.<sup>99</sup> They reflect the fact that the Legislature’s primary concern in passing the legislation was the support of illegitimate children, and also suggests that it intentionally kept accessibility to the Paternity Act narrow.<sup>100</sup>

Although standing under the Act remains limited, amendments to the Act demonstrate a slow broadening over the years. Two cases from the 1970s inspired the 1980 amendments.<sup>101</sup> In

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<sup>93</sup> See Girard, 437 Mich. at 239, citing 1 Laws of the Territory of Michigan 640 and 643 (1871). The act was amended in 1827 and 1838.

<sup>94</sup> Id., citing 1846 R.S., tit. IX, ch. 42; 1857 C.L., tit. XV, ch. 43; 1871 C.L. 1973; 1882 How. Annot. Stat. 2004; 1897 C.L. 5901; 1915 C.L. 7753; 1929 C.L. 12910.

<sup>95</sup> Id., citing 1941 P.A. 316, ch. 42, § 12.

<sup>96</sup> Id., citing 1956 P.A. 205.

<sup>97</sup> Id.

<sup>98</sup> Id. at 240.

<sup>99</sup> Id. at 249, citing 1941 P.A. 316, § 12.

<sup>100</sup> Id.

<sup>101</sup> Id.

one case, the Michigan Supreme Court abrogated Lord Mansfield's Rule<sup>102</sup> and stated that the presumption that a child born during a marriage is issue of the marriage can be rebutted by the mother or her husband by clear and convincing evidence.<sup>103</sup> In the second case, the Court of Appeals defined the term "unmarried" to include "not lawfully married to the father of the child."<sup>104</sup> Thus, a woman could be considered "unmarried," and the child would therefore be one "born out of wedlock," even if the mother was married, as long as she was married to someone other than the biological father.

The 1980 amendments resulting from these decisions 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."<sup>105</sup> These amendments were intended to prevent the *Serafin* decision from leaving a mother, whose husband had just been determined not to be the child's biological father, without a way to force the biological father to undertake parental responsibilities and to prevent "a gap in the law by which some children are deprived of access to support from their fathers."<sup>106</sup> They were also an attempt to prevent the *Smith* decision from unconstitutionally distinguishing between support provided for an illegitimate child of an unmarried mother and support provided for an illegitimate child of a married mother.<sup>107</sup> The 1980 amendment added the second definition contained in the current statute (where the court has determined the child not to be issue of the marriage) and changed the word "unmarried" to

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<sup>102</sup> Lord Mansfield promulgated his famous rule in *Goodright v. Moss*, 2 Cowp. 591; 98 Eng. Rep. 1257 (1777), an ejectment case, stating, "The law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage. As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious."

<sup>103</sup> *Serafin v. Serafin*, 401 Mich. 629, 636; 258 N.W.2d 461 (1977).

<sup>104</sup> *Smith v. Robbins*, 91 Mich. App. 284, 288-89; 283 N.W.2d 725 (1979).

<sup>105</sup> *Id.*, citing 1980 P.A. 54, MCL § 722.711(a); MSA 25.491(a). This second definition of "child born out of wedlock" is the one that was at issue in *Girard v. Wagenmaker*.

<sup>106</sup> *Girard*, 437 Mich. at 240, quoting House Legislative Analysis, HB 4389, April 11, 1979.

<sup>107</sup> *Id.* at 241, citing *Syrkowski v. Appleyard*, 420 Mich. 367, 374; 362 N.W.2d 211 (1985).

“not married” in the first definition of born out of wedlock.<sup>108</sup> In 1986, it was amended to add the term “or conceived” to the definition of a child born out of wedlock.<sup>109</sup> Amendments in the 1990s reflect the changing times by making provisions for genetic testing,<sup>110</sup> but the only changes to the sections regarding standing are grammatical and structural rather than substantive.

The *Girard* Court opined that the legislative history and analyses indicate that the Legislature’s primary focus in drafting the 1980 amendments was on making sure that the mother would be protected in the case of divorce and support proceedings.<sup>111</sup> The Legislature’s aim was to allow the mother to obtain support from the biological father of a child born out of wedlock where support from the legal father was uncertain.<sup>112</sup> The amendments, therefore, are concerned with what actions a mother can take to secure child support when obtaining it from the legal father becomes endangered, not the rights of a putative father to claim paternity.<sup>113</sup> However, as will be explained in Part III, the goal of the Legislature in securing a mother’s right to obtain child support is not necessarily in opposition to a putative father’s right to seek paternity.

The goals of the Paternity Act reflect the cultural expectations and priorities of the time in which it was written, such as the marital presumption of paternity, the interest in legitimizing children, and the desire to preserve the family unit. The American concept of the marital presumption of paternity dates back to eighteenth century English common law, which stated that a child born to a married couple was presumed to be the issue of that marriage.<sup>114</sup> This

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<sup>108</sup> Spielmaker, 205 Mich. App. at 57.

<sup>109</sup> *Id.*, citing 1986 PA 107, MCL 722.711(a); MSA 25.491(a).

<sup>110</sup> See 1998 P.A. 113 and 1999 P.A. 157, adding provisions for DNA identification profiling in M.C.L. §§ 722.711, 722.716, and 722.716a, for example.

<sup>111</sup> *Id.* at 244-45.

<sup>112</sup> *Id.* at 245.

<sup>113</sup> *Id.* at 246.

<sup>114</sup> Theresa Glennon, *Somebody’s Child: Evaluating the Marital Presumption of Paternity*, 102 W Va L Rev 547, 562 (2000).

presumption could only be rebutted by proof that the husband was beyond the seas, such that he could not possibly have had access to his wife during the period of conception.<sup>115</sup> This rule was intended to support the goals of preserving family integrity and inheritance rights, protecting against bastardy, and helping “local officials guard their purses.”<sup>116</sup> If the result was rebutted, the child was declared a bastard, and was no longer entitled to support or inheritance.<sup>117</sup> In 1777, however, Lord Mansfield abolished the option of spouses testifying to non-access, creating an almost irrebutable presumption that a child born during a marriage was the issue of that marriage.<sup>118</sup> This rule supported the public policy in those days, and became widely used.<sup>119</sup> American courts began to accept the rule in the early nineteenth century as a way to protect children from being bastardized and the parents’ immorality from being publicized.<sup>120</sup> Even though Lord Mansfield’s Rule became limited or abrogated by many states in the early twentieth century, most states maintained a rebuttable presumption of legitimacy through statutes or the common law.<sup>121</sup> Michigan did not abrogate Lord Mansfield’s Rule until 1977.<sup>122</sup>

### **III. Analysis and Criticism**

The Paternity Act, originally enacted in 1820 and amended through the 1990s, was inspired by important social values, was based on legitimate policy considerations, and was intended to further valid legislative goals. However, aspects of it have become antiquated in the past two decades. Society’s values have changed dramatically, technology has improved, and

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<sup>115</sup> Id. at 562-63.

<sup>116</sup> Id. at 563.

<sup>117</sup> Id.

<sup>118</sup> Id., citing *Goodright v. Moss*, 2 Cowp. 591; 98 Eng. Rep. 1257 (1777). Third parties, such as the husband’s friends or family, could testify as to non-access, however.

<sup>119</sup> Id.

<sup>120</sup> Id. at 564. Michigan adopted Lord Mansfield’s Rule in *Egbert v. Greenwalt*, 44 Mich. 245, 248; 6 N.W. 653 (1880), where the court stated that “no judge or author has ever dissented” from the rule. However, since 1880, dozens of judges and authors have expressed dissatisfaction with the rule. See 7 *Wigmore on Evidence* (3d ed.), §§ 2063, 2064.

<sup>121</sup> Id. at 565.

<sup>122</sup> *Serafin v. Serafin*, 401 Mich. 629, 258 N.W.2d 461 (1977).

the “normal” family structure has undergone a metamorphosis to the extent that almost any type of family is considered to be acceptable. Therefore, it is time to re-evaluate the assumptions on which the Act was based when considering its continued validity. It is also prudent to examine whether the goals that the Act was intended to further are being met by the Act in its current form, or whether they could be better achieved by amending the statute to broaden standing.

As explained in Part II, one of the primary policies behind the Act was for the mother to secure child support in the event she divorced and it became known that her ex-husband was not the child’s biological father.<sup>123</sup> This continues to be an extremely important goal. However, granting standing to putative fathers to seek paternity of a child born within wedlock does not conflict with this policy. All that is needed to secure the availability of child support is to grant the mother standing to seek a paternity determination against the putative father after it has been determined that her husband or ex-husband is not the child’s biological father.<sup>124</sup> In fact, granting standing to the putative father could support the policy of ensuring that child support is available. While the mother would still have standing to sue the putative father for a determination of paternity and a support obligation, granting standing to the father would often eliminate the need for the mother to go through the trouble, because the putative father might have already done so. In cases in which the child receives public assistance, granting standing to the putative father would save the state the expense of having the family independence agency initiate a paternity determination.

Justice Cavanagh made a similar observation in his dissenting opinion in *Girard*, stating, “I frankly do not understand why the Paternity Act’s concededly predominant purpose of facilitating support for children born out of wedlock should be thought to militate affirmatively

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<sup>123</sup> *Girard*, 437 Mich. at 249.

<sup>124</sup> Standing to seek a paternity determination of a child born out of wedlock is already granted to the mother, child, and the FIA if the child is a welfare recipient. See MCL § 722.714(1).

*against* the standing of a putative father in a case like the one before us. 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.”<sup>125</sup> Interestingly, the majority did not disagree with him, but simply based its holding on the fact that “the Legislature has made its choice and the answer to the dissent’s concerns will have to come from that body.”<sup>126</sup> Justice Cavanagh further pointed out, in response to the argument that the only reason putative fathers had standing at all was to provide for child support for children born out of wedlock, that the Act grants standing to putative fathers without requiring a showing of need for child support.<sup>127</sup>

One of the values that inspired codification of the presumption of legitimacy of a child born within a marriage was the interest in preventing the “bastardization” of children and the stigma attached to that label. Lord Mansfield opined that his rule “was founded in decency, morality, and policy” which dictates that a married couple should not be allowed to say that the “offspring is spurious.”<sup>128</sup> This interest has been diminished in recent decades, such that reflecting and promoting society’s goal of maintaining legitimacy is not a compelling justification for the Act. There is no longer a major distinction between legitimacy and illegitimacy in other areas of the law.<sup>129</sup> Further, there can be little societal injury to the parents or the illegitimate child. As it becomes more common each year for children to be born to unmarried parents, society places less importance on the distinction. Parents of illegitimate

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<sup>125</sup> Girard, 437 Mich. at 269. (Cavanaugh, J., dissenting.) (Emphasis in original.)

<sup>126</sup> *Id.* at 250.

<sup>127</sup> *Id.* at 273. (Cavanagh, J., dissenting.)

<sup>128</sup> Goodright v. Moss, 2 Cowp. 591; 98 Eng. Rep. 1257 (1777). Lord Mansfield’s Rule was abrogated in Michigan by Serafin v. Serafin, 401 Mich. 629, 258 N.W.2d 461 (1977), which allowed the mother and husband to testify regarding non-access as a way to deny the husband’s paternity. However, a hint of the rule remains in the portion of Paternity Act limiting standing to instances in which the child is born out of wedlock. See MCL § 722.714(1).

<sup>129</sup> The court has invalidated statutory schemes which make it difficult for illegitimate children to inherit, for example. See Silverman, 1995 Det. C. L. Mich. St. U. L. Rev. 1123.

children are not considered to be as indecent or immoral as they were in Lord Mansfield's day, and their children are rarely stigmatized on the school playground as being "spurious." The term, "bastard" is rarely used in its dictionary sense. Families come in many shapes and sizes these days.<sup>130</sup> The Legislature has recognized this in other areas of the law, and should do so in this area.

Another proclaimed state interest, that of protecting the sanctity or integrity of the existing family unit, appears at first blush to be a noble reason for maintaining the Act in its current form. However, when the mother has broken her marriage vows by becoming pregnant by someone other than her husband, as is often the situation in the cases discussed, there is little family sanctity to save. As Justice Cavanagh pointed out, "It is surely a bit late to talk of preserving the 'sanctity' of the marital family by the time a situation like the one alleged in this case has arisen."<sup>131</sup> This statement is especially valid in light of the family dynamics that probably existed before the birth of the child. There was likely a rift in the marriage leading to the infidelity, and likely an even greater one after its discovery. Despite how hard the family might try to make the unit work, and despite how solid the familial relationship might appear to the public, much tension probably exists under the surface. The husband might be a father in name only if he knows that the child is not biologically his, and even more upsetting, if he views

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<sup>130</sup> "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide by someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, 'liberty' must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty." Michael H., 491 U.S. 110. (Brennan, J., dissenting.)

<sup>131</sup> Girard, 437 Mich. 231 at 250 and 271 (Cavanagh, J., dissenting.) In response, the majority stated, "[w]e could not agree more" but found that because the Legislature had chosen to protect this sanctity for 182 years, the Court was in no position to decide otherwise.

the child as a constant reminder of his wife's relationship with another man.<sup>132</sup> The family unit that remains will probably be a weak one, susceptible to crumbling on its own. It is doubtful that maintaining a legal fiction of the husband's paternity can prevent its demise.

Moreover, it is unlikely that any integrity that might remain in the family unit after an instance of infidelity would be preserved by a statute preventing a putative father from seeking a legal determination of his paternity. Although the putative father would not have a legal right to see the child or participate in his upbringing if denied a paternity determination, one can imagine him calling the family home and attempting to become involved in the family unit, visiting the family home or the school playground hoping to catch a glimpse of his alleged child, or pressuring the mother to agree to an informal visitation arrangement. Each of these actions could substantially interfere with the family unit, create additional stress for the married couple, and raise questions and confusion in the mind of the child. However, these scenarios could be avoided if the putative father were given access to the judicial system to pursue his objectives in a civil, organized, court-supervised manner.

The interest in preserving the family unit is even less compelling when the child is conceived by a married woman while her divorce action is pending.<sup>133</sup> Although a child conceived between the filing of the divorce complaint and the entry of the divorce judgment is technically conceived during the marriage and hence is not "born out of wedlock," there is little

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<sup>132</sup> If the husband is aware of his wife's adultery or suspects that he is not the child's biological father, he may seek a legal determination that the child was born or conceived during the marriage but is not issue of the marriage under MCL § 722.714(1) and Girard. Once the court "has determined" that the child is not issue of the marriage, the putative father has standing. The benefit to the husband of disputing his own paternity would be to avoid a child support obligation. In some cases, the husband attempts to make the best of the situation and accept the child as his own. See Girard v. Wagenmaker; Hauser v. Reilly. However, if he is unaware of his wife's adultery and has no reason to suspect that he may not be the child's biological father, the putative father has an incentive to tell him of the adultery in an attempt to motivate him to get angry, file for divorce, and dispute his paternity. In this situation, the putative father's intrusion into the family unit is just as severe, if not more severe, as it would have been if he had simply initiated his own paternity action.

<sup>133</sup> See Hauser, 212 Mich. App 184; Childers, 2000 WL 33522373 (Mich. App.)

reason to deny standing to a putative father in this situation. If the marital unit has fallen apart, as evidenced by a divorce complaint being filed, there is not much of a family unit to preserve. Assuming that the putative father wishes to seek paternity either during the pregnancy or soon after the child's birth, his claim is more persuasive than that of the mother's husband or ex-husband.<sup>134</sup> The husband has no biological connection to the child. He has no emotional bond with the child resulting from an established relationship. He no longer has a connection to the mother which would facilitate the creation of a family unit any better than the putative father's connection would. His only claim would be that the child was conceived (with the help of another man) before the judge signed the judgment of divorce, but after the marriage was realistically over. The chronology of events is not persuasive enough to give the husband or ex-husband such control over the child's legal paternity, and to deny this new family unit (mother, child, and putative father) the integrity it has the potential to form.

The third situation in which preserving the family unit at the putative father's expense is a poor reason for denying standing is when the mother marries a man other than the putative father after conception but before birth of the child.<sup>135</sup> In this case, the husband's interest is outweighed by that of the putative father.<sup>136</sup> The husband knows what he is getting into when he marries a woman carrying another man's child. There is an intrusion into his family unit before the unit is even formed. He has not developed a relationship with the child, and his only claim is

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<sup>134</sup> This argument assumes that the putative father seeks paternity of a child conceived during the pendency of a divorce action while the child is an infant. A more difficult situation would arise if the putative father were to initiate the paternity action when the child was ten years old, for example. In that situation, the child might have developed a parent-child relationship with the mother's ex-husband. The child's and ex-husband's interests in maintaining that relationship would weigh heavily against the putative father's interest in developing a relationship. For this reason, a statute of limitations on a putative father's claim for paternity is proposed in Part IV of this paper.

<sup>135</sup> See Spielmaker, 205 Mich. App. 51.

<sup>136</sup> Again, this argument assumes that the putative father brings an action when the child is young. As time goes on, the husband's and child's interest in maintaining their deeply-rooted parent-child relationship begins to outweigh the putative father's interest in developing a parent-child relationship. Therefore, a statute of limitations for a putative father's claim is proposed in Part IV.

based on timing. Therefore, it is not unfair to expect him to endure the putative father being the child's legal father. The mother's husband would play the role of the stepfather residing with the mother and child, just as he would if the mother and putative father had been married and divorced while the child was young.

The Paternity Act is also flawed because it creates illogical and undesirable results. Perhaps the most illogical result of the Act is that, under a necessarily literal reading of *Spielmaker*, a putative father in certain circumstances could find himself denied standing to seek paternity of a child who was *neither conceived nor born* while the mother was married to another man. Imagine this scenario: The unmarried woman becomes pregnant by the putative father. Shortly after conception, she marries another man, but before the child is born, she and her husband divorce. After the divorce, her child is born. The putative father would not have standing to seek paternity of the child unless a determination had been made in the divorce proceeding that the child was not issue of the marriage, because the mother had not been “unmarried for the entire time from conception to birth.”<sup>137</sup>

In another scenario, illustrating what could happen under a literal reading of the *Girard* “has determined” requirement, assume that a married couple in a divorce proceeding fails to deny the husband's paternity of a child conceived or born during the marriage. Further assume that the mother and putative father later marry and desire custody of the child. Under the current statutory regime, the putative father would never have standing to obtain legal recognition of his status as the child's father because a court had never determined that the child was not issue of the marriage. Therefore, it would be up to the parties to the divorce to amend the judgment, but there is no guarantee that the ex-husband would cooperate in doing so.

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<sup>137</sup> *Spielmaker*, 205 Mich. App. at 60.

In these hypothetical situations, it would be tragic for a putative father to be denied a parenting relationship with his child because of something as insignificant as the mother's brief marriage during the pregnancy, or because of the ex-husband's refusal, for whatever reason, to disclaim his paternity. Common sense dictates that in most cases, the former husband would probably seek a determination during the divorce proceedings that the child was not issue of the marriage, to avoid liability for child support payments regarding a child that he did not father. However, parties can easily make outrageous decisions when involved in highly emotional domestic disputes, and a statute providing for this result upon certain facts is troubling.<sup>138</sup>

A situation similar to the one that occurred in *Baayoun* is also troubling. In that case, the mother knew that she was pregnant at the time the default judgment of divorce was entered, but the husband/legal father was unaware of the pregnancy.<sup>139</sup> The court held that the default judgment did not constitute a prior determination that the child was not issue of the marriage.<sup>140</sup> Thus, the mother did not have standing to seek a determination of the putative father's paternity.<sup>141</sup> Under this rule, imagine what would happen if it had been the putative father, instead of the mother, who had desired to seek paternity against the mother's wishes. The result would be that he would be denied standing, based on the fact that the child was conceived while the divorce action was pending, the mother kept the pregnancy a secret from her future ex-husband, and the judgment of divorce did not comment on the child or his paternity. Unless the mother and legal father cooperated in having the divorce judgment amended,<sup>142</sup> the putative father would be forever barred from establishing his paternity of the child.

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<sup>138</sup> In fact, in several cases the ex-husband has failed to dispute his paternity in the divorce proceedings. See *Hauser v. Reilly*; *Girard v. Wagenmaker*.

<sup>139</sup> *DSS v. Baayoun*, 104 Mich. App. at 172.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *Opland v. Kiesgan*, 234 Mich. App. 352.

An important fact to keep in mind when analyzing the situations described above is that the mother and legal father hold most of the cards, and are at liberty to play them when they wish. A putative father's rights often depend on what the mother and her husband choose to do. For example, they can deny the putative father a relationship with his child, yet suddenly require him to pay child support if they divorce, successfully dispute the ex-husband's paternity, establish the biological father's paternity, and sue him for a support order. How unfair it is to require a putative father to pay support for a child whose formative years have been shaped by another man, especially when he was willing to pay support from the beginning and play a significant role in the child's life, but has been denied the opportunity to do so.<sup>143</sup>

A putative father's biological link with his child, although perhaps not compelling enough to outweigh the legal father's interest in maintaining his established relationship with an older child, should weigh heavily against the legal father's interest in the case of an infant or toddler. A husband/legal father should not be able to prevent a putative father from establishing a relationship with his young child simply because it would be inconvenient in terms of the legal father's marriage, or simply because he wants the child. For this reason, a revised statute providing that the putative father should have no rights to his own flesh and blood without consent of the other adults involved would be insufficient to protect the putative father's interests. It would keep all the playing cards in the hands of the mother and her husband, just as they are under the current statute. A statute making a putative father's rights dependent on whether the mother and her husband seek child support payments would also be insufficient to protect the putative father's interests for two reasons. First, if the mother has secured a right to child support payments from the putative father, a determination of his paternity has necessarily been made and he would be entitled to certain rights including parenting time. Second, the

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<sup>143</sup> See Spielmaker, 205 Mich. App. at 61 (Hammond, J., concurring).

putative father would not receive rights to the child if the mother and her husband are financially stable and do not seek support payments.

The possibility of succeeding in a constitutional challenge to the statute is of little consolation to the putative father who is denied standing under the language of the Act. The putative father's primary purpose in seeking paternity is to establish a legal right to a parenting relationship with the child. If a putative father lacks standing under the Paternity Act, the only way to obtain this right is to invalidate the statute on constitutional grounds. Under Michigan law, the only way to succeed in a constitutional challenge of the statute is to show a biological link combined with a substantial parent-child relationship.<sup>144</sup> However, it is impossible to develop this relationship when the mother has denied the father access to the child.<sup>145</sup> Therefore, the fate of the parent-child relationship lies in the mother's hands, and neither a statutory or constitutional challenge brought by the putative father can change that.

Moreover, requiring the putative father to show a substantial parent-child relationship puts the cart before the horse. For example, in *Hauser*, the Court held that no substantial parent-child relationship existed because the putative father never had custody of the child and never had responsibility for the education, health, care, or supervision of the child.<sup>146</sup> It is not surprising that the putative father did not have this type of relationship—a substantial parent-child relationship was exactly what he was trying to obtain a right to develop through paternity proceedings. If the mother had allowed the father to have a relationship with the child, this relationship, depending on its extent, might pre-empt the putative father's need to legally

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<sup>144</sup> *Hauser*, 212 Mich. App. at 188.

<sup>145</sup> This was the case in *Hauser*. The court noted that the putative father would have been entitled to due process if he could have established that he had a substantial parent-child relationship with the child. The court acknowledged, however, that the putative father's lack of interaction in the child's life was a direct result of the mother's denial of access to the child, instead of resulting from the father's disinterest.

<sup>146</sup> *Id.* at 188.

establish paternity. In some cases, the putative father is driven to seek paternity because the mother has denied him access to the child.<sup>147</sup> The Court’s requirement that the putative father show a substantial parent-child relationship requires the putative father to prove the existence of a relationship that he is seeking. Sadly, the Court makes no distinction between a putative father who has shown little interest in developing a relationship with the child before initiating paternity proceedings, and a father whose attempts to develop a relationship with the child have been thwarted by the mother’s refusal to allow that relationship.<sup>148</sup>

Another problem with the “biological link combined with a substantial parent-child relationship” test is that a putative father cannot obtain a determination of paternity while the child is still young. Although it is unclear how much time must pass, it is clear that it takes time to develop a substantial parent-child relationship. While the putative father is trying to create this relationship with the child, he lacks a legal right to provide input on the child’s education, healthcare, religious upbringing, supervision, care, and daily activities—the very things of which a substantial parent-child relationship is made.

#### **IV. A Proposed Solution**

The Court and the Legislature, although perhaps not consciously, are well on their way to broadening the standing requirements for putative fathers. The Act began as a way to provide for the support of illegitimate children, was amended to allow putative fathers to avoid criminal sanctions, and was amended to eliminate its criminal aspects. Later, the class of children “born out of wedlock” was broadened to include children conceived out of wedlock, and the term “unmarried” was defined as including not only a truly unmarried woman, but also a woman who

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<sup>147</sup> See Hauser, 212 Mich. App. at 188-89, for example.

<sup>148</sup> See Hauser at 188-89, in which the court found that the lack of a substantial parent-child relationship resulted from the mother’s lack of cooperation instead of the father’s lack of interest, yet did not carve out an exception for the father who can show that he attempted to develop a substantial parent-child relationship.

was married to someone other than the child's biological father. In addition to the Legislature's subtle but telling broadening of the standing requirements, the court has stretched the standing requirements as far as it can.<sup>149</sup> When it has not been able to grant standing while staying true to the statute, it has expressed its dissatisfaction with the result it has reached, and has rationalized its conclusion in an "our hands are tied" manner.<sup>150</sup> The time has come for the Legislature to take the Court's cue and amend the statute to reflect society's changing values and goals.

The Legislature should amend the Paternity Act to provide the putative father standing to seek a determination of his paternity, without regard to whether the child was born or conceived during the mother's marriage to another man.<sup>151</sup> This amendment, while making the courts more accessible to the legitimate claims of well-meaning putative fathers, could have the unintended negative effect of opening the courts to unfounded claims. This problem could be deterred by a provision allowing the imposition of sanctions for frivolous or harassing claims.<sup>152</sup> The putative father who is granted standing should be required to prove by clear and convincing evidence that he is the child's biological father before being considered the child's legal father. With today's DNA testing capable of establishing paternity with extreme precision, there is little concern that

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<sup>149</sup> See Afshar, 209 Mich. App. 86; Opland, 234 Mich. App. 252; CAW, 2002 WL 31475285.

<sup>150</sup> The Spielmaker Court expressed its dislike for its conclusion. In light of society's problem with "deadbeat dads," the court regretted having to deny standing to a putative father who wished to assume responsibility for a child. However, it was constrained to follow the plain meaning of the statute, and it explained that if any change were to be made, it should be done in the Legislature. Spielmaker, 205 Mich. App. at 59. The Hauser Court similarly opined, "[T]his Court may not repeal a statute on the basis of policy concerns. That is the job of the Legislature. While we encourage the Legislature to reconsider the effects of this law, we must have a constitutional basis for invalidating a statute. In this case, no such constitutional basis exists." (internal citations omitted). Hauser, 212 Mich. App. at 191.

<sup>151</sup> The only change necessary to confer standing on a putative father regardless of the mother's marital status is to redefine "child" to include a child born within wedlock. This change could be made by simply excising the definition of "child" and "child born out of wedlock" from MCL § 722.711(a) and (b). Alternatively, the act could affirmatively state that the term "child" as used in the act refers to a child whether born within or without wedlock. See the attached appendix for the proposed statutory language.

<sup>152</sup> MCL § 722.722 already states, "Any person making a false complaint under this act as to identity of the father, or the aiding or abetting therein, shall be guilty of a misdemeanor. This section shall not apply to an authorized official of the department of social services who in good faith filed a complaint under this act based upon information and belief."

the results will be ambiguous or that important decisions will be made based on imperfect evidence.

If the putative father’s paternity is established by clear and convincing evidence, the best interests of the child should control the extent of any actual relationship he will be allowed to have with the child.<sup>153</sup> This best interests determination would take into consideration, among other factors relevant to the particular case, any disparate impact the legal recognition of the biological father’s paternity would have on the family unit, any potential emotional impact on the child, the extent of the child’s established relationships with the former legal father and the biological father, and the influence that each “father” has had and might continue to have on the child’s life. Finally, the revised Act should contain a statute of limitations to prevent the disruption in the life of an older who may have a deeply-rooted relationship with the legal father.<sup>154</sup>

This type of amendment would continue to promote the primary purpose of the Act by ensuring the availability of child support. It would also more accurately reflect society’s changing values and its increasingly expansive view of the “family.” Amending the statute in this way would help foster a new family unit—that of the mother, child, and putative father—which could be just as strong, if not stronger, than the family unit that includes the mere nominal father and a potentially strained marriage. Finally, such an amendment would eliminate the illogical and undesirable results that harm the putative father under the current version of the Act. A putative father would not be denied standing on a mere technicality, such as the fact that the judgment of divorce between the mother and her soon-to-be ex-husband was not yet entered

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<sup>153</sup> See Hauser, 212 Mich. App. at 195 (Cavanagh, J., concurring in part and dissenting in part).

<sup>154</sup> The current statute allows an action to be brought during the pregnancy or at any time before the child reaches 18 years of age. MCL § 722.714(3). It should be revised to state that a legal father seeking to dispute his paternity or a putative father seeking to establish his paternity must commence the action before the child reaches five years of age.

when the child was conceived. He would not be denied a parenting relationship for many years, then later required to pay child support when the mother and her former husband change their minds and seek a paternity determination. He would not find the fate of his parenting relationship in the hands of the mother and her husband, who can change their minds on a whim.

## APPENDIX

The following text contains the portions of the current Paternity Act relevant to a putative father's standing to seek a paternity determination (M.C.L. §§ 722.711 and 722.714). The text appearing in normal font represents the current language of the Act which should remain unchanged. The text that is underlined should be removed. The text appearing in bold type should be added.

§ 722.711. Definitions.

Sec. 1. As used in this act:

(a) "Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of 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.

(b) "Child" means a child born out of wedlock.

**(a) "Child" means a child begotten and born to a woman, regardless of the woman's marital status.**

**(b) "Putative father" means a man alleging himself to be the biological father of a child, or a man who the mother, child, or family independence agency alleges to be the biological father of a child.**

**(c) "Legal father" means a man legally considered to be the father of a child.**

**(d) "Mother" means the mother of a child born out of wedlock.**

**(e) "Court" means the circuit court.**

**(f) "DNA identification profile" means the results of the DNA identification profiling of genetic testing material.**

**(g) "DNA identification profiling" means a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a sample of genetic testing material to identify the pattern of the components' chemical structure that is unique to the individual.**

**(h) "State disbursement unit" or "SDU" means the entity established in section 6 of the office of child support act, 1971 PA 174, MCL 400.236.**

**(i) "Genetic testing material" means a sample of an individual's blood, saliva, or tissue collected from the individual that is used for genetic paternity testing conducted under this act.**

**(j) "Summary report" means a written summary of the DNA identification profile that includes only the following information:**

**(i) The court case number, if applicable, the laboratory case number or identification number, and the family independence agency case number.**

**(ii) The mother's name and race.**

**(iii) The child's name.**

**(iv) The alleged **putative** father's name and race.**

**(v) The collection dates and identification numbers of the genetic testing material.**

**(vi) The cumulative paternity index.**

**(vii) The probability of paternity.**

(viii) The conclusion as to whether the alleged putative father can or cannot be excluded as the biological father.

(ix) The name, address, and telephone number of the contracting laboratory.

(x) The name of the individual certifying the report.

§ 722.714. Paternity proceeding; parties; venue; action not required; commencement of action; statute of limitations; initiating and conducting proceedings; utilization of child support formula; verification of complaint; charge; summons; default judgment; genetic paternity testing; next friend or guardian ad litem; rights of indigent defendant; order of filiation.

Sec. 4. (1) An action under this act shall be brought in the circuit court by the mother, the **putative father, the legal father**, a child who became 18 years of age after August 15, 1984 and before June 2, 1986, or the family independence agency as provided in this act. The Michigan court rules for civil actions apply to all proceedings under this act. A complaint shall be filed in the county where the mother or child resides. If both the mother and child reside outside of this state, then the complaint shall be filed in the county where the putative father resides or is found. The fact that the child was conceived or born outside of this state is not a bar to entering a complaint against the putative father.

(2) An action to determine paternity shall not be brought under this act if the child's father acknowledges paternity under the acknowledgment of parentage act, or if the child's paternity is established under the law of another state.

(3) An action under this act may be commenced **by the mother, the child, or the family independence agency** during the pregnancy of the child's mother or at any time before the child reaches 18 years of age. For a child who became 18 years of age after August 15, 1984 and before June 2, 1986, an action under this act may be commenced before January 1, 1995. This subsection applies regardless of whether the cause of action accrued before June 1, 1986 and regardless of whether the cause of action was barred under this subsection before June 1, 1986. **An action under this act may be commenced by a putative father to establish his paternity, or by a legal father to disestablish his paternity, during the pregnancy of the child's mother or at any time before the child reaches 5 years of age.** A summons issued under this section shall be in the form the court determines and shall be served in the same manner as is provided by court rules for the service of process in civil actions.

(4) If the county family independence agency of the county in which the mother or alleged father resides first determines that she or he has physical possession of the child and is eligible for public assistance or without means to employ an attorney; if the family independence agency is the complainant; or if the mother, alleged father, or child is receiving services under part D of title IV of the social security act, 42 U.S.C. 651 to 667, then the prosecuting attorney or an attorney employed by the county under section 1 of 1941 PA 15, MCL 49.71, shall initiate and conduct proceedings under this act. The prosecuting attorney shall utilize the child support formula developed under section 19 of the friend of the court act, 1982 PA 294, MCL 552.519, as a guideline in petitioning for child support. A complaint filed under this act shall be verified by oath or affirmation.

(5) The party filing the complaint shall name the person believed to be the father of the child and state in the complaint the time and place, as near as possible, when and where the mother became pregnant. If the family independence agency is the plaintiff, the required facts shall be stated upon information and belief.

(6) Upon the filing of a complaint, the court shall issue a summons against the named defendant. If the defendant does not file and serve a responsive pleading as required by the court rules, the court may enter a default judgment. Neither party is required to testify before entry of a default judgment in a proceeding under this act.

(7) If, after service of process, the parties fail to consent to an order naming the man as the child's father as provided in this act within the time permitted for a responsive pleading, then the family independence agency or its designee may file and serve both the mother and the alleged putative father with a notice requiring that the mother, alleged putative father, and child appear for genetic paternity testing as provided in section 6.

(8) If the mother, alleged putative father, or child does not appear for genetic paternity testing as provided in subsection (7), then the family independence agency or its designee may apply to the court for an order compelling genetic paternity tests as provided in section 6 or may seek other relief as permitted by statute or court rule.

(9) It is unnecessary in any proceedings under this act commenced by or against a minor to have a next friend or guardian ad litem appointed for the minor unless required by the circuit judge. A minor may prosecute or defend any proceedings in the same manner and with the same effect as if he or she were of legal age.

(10) If a child born out of wedlock is being supported in whole or in part by public assistance, including medical assistance, the family independence agency may file a complaint on behalf of the child in the circuit court in the county in which the child resides. The mother or alleged putative father of the child shall be made a party plaintiff and notified of the hearing on the complaint by summons. The complaint made by the family independence agency shall be verified by the director of the family independence agency, or his or her designated representative, or by the director of the county family independence agency of the county in which an action is brought, or the county director's designated representative.

(11) 1986 PA 107, which added this subsection, does not affect the rights of an indigent defendant in proceedings under this act as established by decisions of the courts of this state before June 1, 1986.

(12) If a determination of paternity is made under this act **by clear and convincing evidence**, the court may enter an order of filiation as provided in section 7. Regardless of who commences an action under this act, an order of filiation entered under this act has the same effect, is subject to the same provisions, and is enforced in the same manner as an order of filiation entered on complaint of the mother or father.

**(13) If the putative father's paternity is established by clear and convincing evidence, the extent of any parenting relationship to which he may be entitled shall be determined under the provisions of the Child Custody Act, MCL 722.21 et seq.**