*Child Custody
-Adoption

STATE OF MICHIGAN
IN THE SUPREME COURT

In ~~the Matter of~~ re
ARS, ~~a~~ Minor.

Supreme Court No.

Court of Appeals No.318638

Gpu 6-12-14
Rec 8-14-14

Phillip Schnebelt and
Pamila Schnebelt,
Petitioners/Appellants

v.

Derek Musall,
Respondent/Appellee

and

Kayleigh Marie Schnebelt,
Respondent/Appellant

Shiawassee County Circuit
Family Division
No.13-003727-AF
Hon. Thomas J. Dignan

Ok

150142

APPLICATION FOR LEAVE TO APPEAL

APPL
12/21

344469

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September 25, 2014

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STATEMENT AS TO JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2) as Appellants timely filed an application from the 8/14/14 order denying reconsideration o f the Court of Appeals' June 12, 2014 Opinion. (06/12/14 COA, attached to Application at **Tab A**). MCR 7.302(C)(2). The appeal to the Court of Appeals arose from the Shiawassee Circuit Court's dismissal of Appellants' petition for adoption and improper establishment of a legal relationship between Respondent-Musall and the minor child. (09/26/13 Opinion, attached at **Tab B**).

STATEMENT IDENTIFYING THE ORDER ON APPEAL AND RELIEF SOUGHT

Appellants challenge the Court of Appeals' unpublished decision, which held that the Trial Court properly adjourned and then dismissed the adoption proceedings after declaring Respondent-Musall the legal father in the adoption proceeding. (6/13/14 COA, p. 2).

Appellants request that this Court grant leave to appeal to resolve what a putative father must show in order to establish good cause to stay an adoption proceeding in favor of a paternity proceedings and also to define the procedural interplay between the Adoption Code, MCL 710.21 *et seq.*, and the Paternity Act, MCL 722.711 *et seq.*

STATEMENT OF GROUNDS ON APPEAL AND WHY THIS COURT SHOULD GRANT LEAVE

This case presents significant jurisprudential questions regarding the interpretation of "good cause" under the Adoption Code, MCL 710.25, and the procedural interplay between the Adoption Code, MCL 710.21 *et seq.*, and the Paternity Act, MCL 722.711 *et seq.* Throughout the state, trial courts and various panels of the Court of Appeals are inconsistently interpreting and improperly applying the procedures and requirements of the

two acts, resulting in varied, unpredictable outcomes. This Court's input is needed to provide long-awaited clarity for consistent, intended results.

First, Michigan jurisprudence is in dire of need of a decision from this Court on what is required under the Adoption Code for a putative father to establish "good cause" to stay an adoption proceeding. MCR 7.302(B)(3). Notably, MCL 710.25(2) does not define "good cause," and only one Court of Appeals' case with precedential weight exists on the matter – *In re MKK*, 286 Mich App 546; 781 NW2d 132 (2009). Various panels of the Court of Appeals continue to expand and inconsistently apply the ruling in *MKK* – such as the decision in this case – and which decisions have contradicted the statute. In the instant decision, the Court of Appeals expanded the definition of good cause to include a putative father who never filed a notice of intent to claim paternity, provided minimal effort to provide support to the child or prepare himself for fatherhood, and filed a paternity action 11 months after the child was born – an unreasonable delay that can be explained only by an intention to "thwart" the adoption proceedings - resulting in a decision that is in direct violation of the Court of Appeals' decision in *MKK*.

This case is of interest to this Court because the Court of Appeals' decision, as well as recent other Court of Appeals' opinions in adoption cases, present the opportunity for putative fathers to establish legal parentage without following the requirements set forth in statute, effectively thwarting adoption proceedings on the basis of very little effort and modifying the way adoption proceeding are conducted in Michigan. Moreover, allowing the case at bar to stand will expand the law in all adoption cases moving forward, allowing broad construction of the term "good cause" as well as allowing improper interjection of the Paternity Act into the adoption proceedings, in contravention of the Legislature's intent.

Second, allowing the Court of Appeals' decision to stand would allow the improper

blending of the adoption and paternity cases, ignoring the intended, separate requirements and procedures of the Paternity Act MCL 722.711 *et seq.* and the Adoption Code MCL 710.21 *et seq.* In affirming the Trial Court's decision, the Court of Appeals erroneously approved Trial Court's interjection of the Paternity Act into an adoption proceeding, effectively allowing a backdoor attempt to evade the proper and necessary procedural requirements for establishing paternity. The Court of Appeals' opinion incredibly allowed for a putative father to be established as a legal father during an adoption hearing, ignoring all of the other procedural requirements of the Paternity Act. Not only does this contravene the Legislature's intent in terms of allowing an expansion of paternity rights without the required process, but it also creates an unacceptable overlap of the two precesses, when the Legislature has clearly established the intention for the Adoption Code to take priority over all other actions.

The dearth of published adoption cases in Michigan highlights the significant need for this Court to correct the legal error of the Court of Appeals and provide guidance to the lower courts in future adoption cases. There is not a single Michigan Supreme Court decision addressing the interplay of the Adoption Code and the Paternity Act or the requirements for establishing good cause to stay an adoption proceeding under MCL 710.25. This Court should grant leave on both issues.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals clearly err when it failed to follow the Adoption Code, ignored the legislative intent of MCL 710.25 and MCL 710.39, and its binding precedent on the issue – *In re MKK*, 286 Mich App 546; 781 NW2d 132 (2009) – when it affirmed the Trial Court's finding of good cause without explanation for a putative father who never filed an intent to claim paternity, never established a legal relationship with the child, only contributed gas money and a bag of used clothes as any kind of support, and significantly delayed in initiating any paternity action only filing as a measure to thwart the adoption proceeding?

   Petitioners-Schnebelt answer: Yes.

   Respondent-Kayleigh Schnebelt answers: Yes.

   Respondent-Musall answers: No.

   Court of Appeals answers: No.

   Trial Court answers: No.

2. Did the Court of Appeals clearly err when it affirmed the Trial Court's improper consolidation of the Adoption Code and the Paternity Act, failing to consider the Legislature's clearly expressed intention that the Adoption Code take precedence over all other actions, including paternity actions, in allowing the Trial Court to merely declare a putative father a legal father in the midst of an adoption proceeding, in violation of the requirements and procedures of both acts?

   Petitioners-Schnebelt answer: Yes.

   Respondent-Kayleigh Schnebelt answers: Yes.

   Respondent-Musall answers: No.

   Court of Appeals answers: No.

   Trial Court answers: No.

STATEMENT OF FACTS

The Parties and Background.

This case involves three distinct sets of parties: the petitioners for adoption – Pamila and Phillip Schnebelt; the Biological Mother – Kayleigh Schnebelt (daughter of the petitioners); and the Putative Father – Derek Musall. The child at issue in this appeal, [redacted] Schnebelt, was born on [redacted]. (I:46).

Kayleigh and Mr. Musall had been involved in an on-again, off-again relationship since mid-2009. (I: 29).[1] Two children were the product of this relationship: [redacted] and [redacted] [redacted] was born in February [redacted]. (I: 52).[2] In September 2010, Petitioners Pamila and Phillip, adopted [redacted] by consent of Kayleigh and Mr. Musall. (I: 53, 159-160; PX A).

Kayleigh's pregnancy with [redacted], the child at issue.

In July 2011, Kayleigh conceived again. (I:58). She discovered her pregnancy in August 2011. (I:58). Two days later, Kayleigh informed Mr. Musall of the pregnancy. (I:30, 70). By that time, she and Mr. Musall had gone their separate ways, and Mr. Musall began dating the woman that is now his wife. (I:191). When Kayleigh found out she was pregnant, she was living with her parents. (I:51)

The parties had conflicting versions of the amount of support Mr. Musall provided

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[1] The evidentiary hearing on the adoption matter took place over two days: July 19, 2013 and August 16, 2013. Citations to these transcripts will appear as (Vol: Page).

[2] There was a great deal of questioning regarding the parties' oldest child [redacted] and Mr. Musall's relationship with that child. (*See e.g.*, I: 132, 150, 159, 177). The Trial Court also gave weight to his relationship with [redacted] in its consideration of the adoption of [redacted] even though these facts are irrelevant to the adoption case. (09/26/13 Opinion, pp. 3-4).

during the pregnancy. But even focusing on Mr. Musall's story, he testified that he did not talk to Kayleigh about how he could support her through her pregnancy – "We just kind of played it by ear." (I:165). Mr. Musall admitted at trial that he never attended a single doctor's appointment with Kayleigh during her pregnancy with [redacted] (I:71). Mr. Musall testified that he gave Kayleigh money on a few occasions during her pregnancy with [redacted] but he was unable to specify the dates when he gave her money or how much money he gave her. (I:71-72). He indicated that he would have given her a little over two hundred dollars total during the course of her pregnancy. (I:72-73). Mr. Musall testified that he "didn't hardly see her at all during the pregnancy," indicating that his statement in the pre-trial brief, that he gave her $30 to $100 per week during the pregnancy was inaccurate. (I:73). He then admitted that his pleadings before the Trial Court may have been inaccurate because they may have confused support that he gave to Kayleigh during her pregnancy with [redacted] with support he may have given her during her pregnancy with [redacted] (I:74). He testified that during the pregnancy, however, he gave Kayleigh a garbage bag full of girls clothes that he had stored in his home. (I:83). His mother, Laura Musall, also testified that he was not there for Kayleigh during the pregnancy. (II:174).

At the beginning of her pregnancy, Mr. Musall and Kayleigh discussed him being present during [redacted] birth. (I:59). However, Kayleigh did not tell Mr. Musall when [redacted] was born "[because he wasn't there the whole entire pregnancy. I didn't want him to be there for the birth." (I:34). Kayleigh gave birth to [redacted] on March 29, 2012. (I:46).

Mr. Musall's limited support after [redacted]s birth.

Kayleigh testified that Mr. Musall has not offered her money or handed her any cash since [redacted] birth. (I: 32, 37). She testified that Mr. Musall would offer to give her money

or to help pay for expenses with [redacted] "but he never came through." (I: 50). Pam Schnebelt also testified that in [redacted] 17 months of life, the entire time the child being under her care, Mr. Musall has never given money to help raise the child. (II: 79).

Mr. Musall admitted that he has never paid for any of [redacted] medical care or daycare expenses. (I:84, 85). He did not send her a gift for Christmas 2012 or her first birthday. (I:85). He admitted that since [redacted] birth he has never sent Kayleigh money for [redacted] (I:81). He admitted he has never purchased formula, clothing or diapers for [redacted] (I:81-82).

Mr. Musall testified that after [redacted] was born he would buy diapers and formula to keep at his mother's home. (I:166). Pam Schnebelt testified that when she would drop the girls off at Mrs. Musall's home on the four occasions that Mrs. Musall babysat, she made sure the children went with a diaper bag full of clothes, food, wipes, and diapers. (II:82). Pam also testified that when she picked up the children all the contents of the diapers bag had been used. (II: 82). Mr. Musall testified that he never gave support to Kayleigh, and he testified that he has had "zero contact with [Kayleigh]." (I:167).

Mr. Musall's limited contact with [redacted]

The parties also disputed how much contact Mr. Musall had with [redacted] Focusing on Mr. Musall's version of the facts, Mr. Musall testified that he had seen [redacted] a few times. (I:75). He testified that the first time he saw the child was in June 2012, when she was about three months old. (I:75). He said that his next visit with the child was brief, and must have occurred sometime between June 2012 and July 4, 2012. (I:76). His next visit with the child was during a fourth of July parade. (I:76). He "hung out with Kayleigh and [redacted] and [redacted] at his mother's home. (I:76). Mr. Musall testified that he has seen

[redacted] perhaps twelve times in her sixteen months of life. (I: 244). Significantly, Mr. Musall admitted that he had zero contact with [redacted] since September 2012. (I:213, 80). Mr. Musall has contacted Kayleigh once or twice via Facebook or text message to inquire about the child. (I:36; I:215).

Laura Musall, Putative-Father's mother, babysat the child for a few weeks in September 2012. (I:41). Kayleigh had just started a new job, and Mrs. Musall asked her if she could watch the children two days a week. (I:41). Initially, Kayleigh decided that Mrs. Musall could watch the children, but the arrangement ended after two weeks. (I:42-43). To her knowledge, Mr. Musall was never present when his mother cared for the girls. (I:47). He did not live with his mother at that time. (I:47).

Mr. Musall testified that this babysitting arrangement with his mother went on for much more than a few weeks, alleging they continued for ten weeks. (I: 77). Mr. Musall testified that he would see [redacted] and [redacted] twice a week for about six hours each time when his mother babysat the girls, and that he would take off work in order to visit with [redacted] and [redacted] when his mother babysat. (I:76, 90). He later admitted that "sometimes" these visits would be once a week. (I:210). "You know, is that when my mom got her that's pretty much the only time I could see her cuz establishing parenting time with [Kayleigh] wasn't gonna happen." (I:210). He testified that during these visits he would change diapers, play with [redacted] and hold and put [redacted] to sleep. (I: 212). [redacted] would have been just a few months old at this time. (I: 212). He admitted that since September 2012, once his mother stopped watching the girls, that he has had zero contact with his children. (I: 213).

David and Rosemary Lobdell, Derek Musall's grandparents, testified on his behalf. Mr. Lobdell said he knew that Mr. Musall had seen [redacted] a few times, but did not know

whether or not he was parenting her. (II:106). Mrs. Lobdell testified that she had seen [redacted] 5 or 6 times total. (II:125). She saw Mr. Musall with [redacted] when he visited her at Laura Musall's house. (II:122). She also claimed that Mr. Musall and [redacted] have a bond because [redacted] didn't cry when he held her. (II:115).

According to Jacqueline Kallin, Pamila Schnebelt's mother, she babysat both [redacted] and [redacted] five to seven days a week. (II:38). Pam Schnebelt would drop both the girls off at her home and provide food and diapers. (II:40). Ms. Kallin also testified that Laura Musall, Derek Musall's mother, did babysit both girls in September 2012 on the 19th, 20th, 26th, and 27th. (II:40). Ms. Kallin stated she began to watch the girls again full time in October 2012. (II:43). Pam Schnebelt's testimony corroborated that these were the only dates that Laura Musall babysat [redacted] and [redacted] (II:81).

Kayleigh testified that Mr. Musall has no relationship with [redacted] (I:45). She stated that he does not know anything about her including her sleep schedule, eating schedule, how many teeth she has, what words she can say, when she started walking, her favorite show, and that her sister is her best friend. (I:45).

Mr. Musall admitted that he had never had an overnight visit with the child. (I:77). He testified that he spent some alone time with [redacted] once in August 2012 for about an hour. (I: 78). Mr. Musall testified that he requested parenting time with [redacted] on a few occasions, but he could not recall how many. (I:79). "It was this far and between. Like I was getting to see them so I was content with that, you know, so I didn't really want to push for like overnighters or things like that. I didn't want to personally get this involved in the courts, so I was just trying to play it safe and just do what she would want me to do." (I:79).

Mr. Musall testified that he knows very little about the child: he does not know what her first word was, what size clothing she wears, her daily routine, or how many teeth she

has. (I:81). He has never taken her to the doctor or cared for her when she was sick. (I:81).

Pamila and Phillip Schnebelt File An Adoption Action, and Mr. Musall Responds by Filing a Paternity Claim One Month Later.

When [redacted] was eight months old, Kayleigh created an adoption plan for her daughter, allowing her parents to file the petition for adoption of [redacted] (I:46). On January 7, 2013, Pamila and Phillip Schnebelt petitioned to adopt [redacted] (01/07/13 Petition for Adoption; Adoption Case Register of Actions, attached at **Tab C**). The case was assigned to Judge Dignan, File No. 13-003727-AF. (Adoption ROA). On January 23, 2013, Kayleigh filed a Petition for Hearing to Identify Father and Determine or Terminate His Rights, identifying Derek Scott Musall as the putative father. (01/23/13 Petition for Hearing).

Then, on February 15, 2013, Mr. Musall filed a complaint for paternity – five weeks after the adoption proceedings began and when [redacted] was 11 months old. (Paternity ROA, attached at **Tab D**). The paternity action was originally assigned to Judge Lostracco, File No. 13-004447-DP, but was later re-assigned to Judge Dignan. (Paternity ROA; 04/03/13 Order of Reassignment). At no point in these proceedings during Mr. Musall ever file a notice of intent to claim paternity under MCL 710.33.

The Notice of Hearing in the adoption case was served on March 26, 2013, and scheduled a hearing date of April 22, 2013. (03/26/13 NOH). The March 26, 2013 date is critical because the Adoption Code requires the Trial Court to look at the 90-day period preceding the notice of hearing to determine whether the putative father has provided substantial and regular support. MCL 710.39(2). Thus, the critical time period is from <u>December 25, 2012 until March 25, 2013</u>. MCL 710.39(2).

The Trial Court in the Paternity Case entered an order for genetic testing on April 16, 2013. (04/16/13 Order Genetic Testing). The adoption hearing to identify the father was adjourned until May 17, 2013, presumably so Mr. Musall could obtain the DNA test results. One day prior to the May 17, 2013 hearing, the Schnebelts received notice that the hearing would be cancelled as the "paternity results are not in." (05/17/13 Motion to Proceed with Hearing). Petitioners filed a motion to proceed with the scheduled hearing, but that hearing was adjourned twice until July 19, 2013. (05/17/13 Motion to Proceed with Hearing; 05/28/13 NOH; Adoption Register of Actions).

On June 20, 2013, Mr. Musall filed a motion to adjourn the scheduled July 19, 2013 adoption hearing because he was still waiting for the DNA results. (06/20/13 Motion to Adjourn). The genetic testing for [redacted] was scheduled for July 10, 2013. (06/20/13 Motion to Adjourn, ¶ 10). Mr. Musall was advised by the testing center that it would take 7-10 days to obtain the results once they obtained the sample from [redacted] (06/20/13 Motion to Adjourn, ¶ 11). Mr. Musall, therefore, did not expect the results of the DNA testing to arrive before the July 19, 2013 hearing and requested that the Trial Court adjourn that evidentiary hearing. (06/20/13 Motion to Adjourn, ¶ 12).

It is not clear from the record what happened with this motion. It appears that on the day of the scheduled July 11 hearing, there was an off the record conference between the Trial Court and the attorney for Mr. Musall. (07/11/13 NOH; I: 9-10). Attorneys for Kayleigh contended that they did not receive notice of the hearing. (I:8). In any event, the Trial Court did not hold a hearing or rule on the Motion to Adjourn. (I:9; Adoption Register of Actions). It appears that the Trial Court declined to rule on the motion because it believed that the DNA testing would be available by July 19, 2013 and so it, instead, instructed Mr. Musall's attorney to bring the DNA testing results with him to the hearing. (I:5).

The adoption hearing began on July 19, 2013. (07/19/13 Transcript). The testimony adduced during these two full day hearings has already been summarized above. The DNA test results were presented to the Trial Court which indicated that there was a greater than 99% chance that Mr. Musall was [redacted] biological father. (I:5). Nonetheless, and over the objection of Mr. Musall's attorney, the Trial Court declined to stay the adoption hearing. (I:17). The Trial Court noted that the "DP action is not noticed for today," so it decided to proceed with the adoption hearing. (I:7, 9).

Following the first day of hearing, Mr. Musall's attorney filed a motion for summary disposition in the paternity action, asking the Trial Court to declare Mr. Musall the legal father of [redacted] (07/24/13 MSD; Paternity Register of Actions). The motion for summary disposition was noticed for hearing on August 16, 2013, although the actual occurrence of that hearing is not indicated on the Paternity Register of Actions. (Paternity Register of Actions; 07/24/13 NOH for MSD).

Instead, the Trial Court apparently held the hearing on summary disposition in the paternity case at the same time as the second day of the adoption trial. (II:6). The attorneys started to present their arguments on the motion for summary disposition when the proceeding was interrupted so that the Trial Court could take the testimony of Philip Schnebelt, who was calling in from Cuba to testify in the adoption matter. (II:6-8). After entertaining additional arguments on the motion, (II:24-36), the Trial Court reserved its ruling on the motion for summary disposition. (II:36). The Trial Court advised that it would make "contemporaneous rulings on the paternity matter and the adoption matter." (II:127). At the end of the adoption hearing, the Trial Court entertained additional arguments about the paternity action. (II:205-264). Ultimately, the Trial Court decided that it would not reach a decision that day. (II:264).

The Trial Court Declares Mr. Musall Legal Father in Its Opinion in the Adoption Case and also finds that Mr. Musall provided substantial and regular support to satisfy MCL 710.39(2) of the Adoption Code.

The Trial Court issued a written opinion on September 26, 2013, which is described below. (09/26/13 Opinion). Although the cases had never been consolidated, the Trial Court captioned its Opinion and Order in the Adoption case with the file number from the Paternity action. (09/26/13 Opinion, p.1).

The very first page of the Trial Court's opinion indicates that the Trial Court felt that petitioners had conceded that Mr. Musall was the legal father of [redacted] (09/26/13 Opinion, p. 1). This is inaccurate since during trial petitioners merely explained that they did not contest that Mr. Musall was the biological father of [redacted] but that he did not, at that time, have a legal relationship to [redacted] (I:12).

The Trial Court discussed that it "did not issue a formal stay on the paternity proceedings but rather allow[ed] the parties to go forward with their proofs on the adoption petition while preserving the courts right to rule on either and or both petitions." (09/26/13 Opinion, p. 3). The Trial Court then detailed the history between the parties and the birth of their first child in detail. (09/26/13 Opinion, pp. 3-4). It also made some credibility findings, noting "Mr. Musall struck the court as a very candid witness he seemed to freely acknowledge things that were both in and against his personal interest." (09/26/13 Opinion, p. 4). The Trial Court gave a brief synopsis of the claims of support made by Mr. Musall and the contradictory testimony from Kayleigh that Mr. Musall gave no support to her during her pregnancy with [redacted] (09/26/13 Opinion, p. 4). The Trial Court then found that Mr. Musall did not offer the level of support that he claimed. (09/26/13 Opinion, p. 4).

The Trial Court also found that Kayleigh and Pamila frustrated Mr. Musall's wishes to be present at [redacted] birth. (09/26/13 Opinion, p. 4). It indicated that Mr. Musall's "moving on to another relationship may have been an impetus in the acute break down in the cooperation of parenthood between [Mr. Musall] and Kayleigh." (09/26/13 Opinion, p. 5). It then found that there was good cause to stay the adoption proceedings in favor of the paternity action and found Derek Musall as the legal father. (09/26/13 Opinion, p. 5).

The Trial Court continued, finding that Mr. Musall "attempted to provide substantial and regular support in accordance with his ability to provide such support or care for the mother during the pregnancy." (09/26/13 Opinion, p. 6). It highlighted that Mr. Musall was certainly not "'father of the year,'" but Mr. Musall "did attempt to provide some support and contact with regularity he admitted that he did not go to any of the doctor appointments but the court finds that Pam Schnebelt was also a looming presence in determining who would have contact with whom." (09/26/13 Opinion, p. 6). The Trial Court also accepted Mr. Musall's testimony that he had a desire to stay out of court as "reasonable," but that it does "rise in this case to the level of his attempts of support being somewhat diminished." (09/26/13 Opinion, p. 6). The Trial Court then denied relief to the petitioners in the Adoption action. (09/26/13 Opinion, p. 6).

The Court of Appeals Affirms the Trial Court's Order Declaring Mr. Musall the legal father in the adoption proceeding and denying the petition to adopt.

The Court of Appeals affirmed the Trial Court's erroneous determination. The Court of Appeals acknowledged the unusual procedural posture – that the Trial Court held an evidentiary hearing for the adoption proceeding and only then dismissed the adoption request, while simultaneously ruling in the adoption order that Musall is the child's legal

father. (6/12/14 Opinion, p. 1). Ignoring any flaws with this procedure, the Court of Appeals went on to apply a good cause analysis under the *In re MKK* precedent and held that Mr. Musall was able to meet the good cause standard because of his biological connection to the child and because he did not unreasonably delay the proceeding. (6/12/14 Opinion, p.2).

STANDARDS OF REVIEW

The Trial Court's decision to stay an adoption proceeding is reviewed for an abuse of discretion – that is, was the Trial Court's decision within a range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *see also In re Treloar*, unpublished per curiam opinion of Court of Appeals, issued August 9, 2005, at 2 (Docket No 258950) (construing trial court's discretion to adjourn proceeding under MCL 710.25(2) (attached to Application at **Tab E**); *In re Sanchez*, 422 Mich 758, 769; 375 NW2d 353 (1985) (allowing trial court discretion to ensure prompt proceedings under MCL 710.25 and MCL 710.21a); *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996) (construing trial court's discretion to adjourn proceeding under MCR 2.503(C)(1)). This Court reviews a trial court's findings of fact under the clear error standard when considering decisions under MCL 710.39. *In re Hill*, 221 Mich App 683, 691-92; 562 NW2d 254 (1997).

This case also involves a question of whether the Trial Court correctly followed the Adoption Code. Questions of statutory interpretation are reviewed by this Court de novo. *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

ARGUMENT

The Adoption Code is a statutory creation in contravention of the common law. As such, it must be strictly construed. *In re RFF*, 242 Mich App 188, 617 NW2d 745 (2000). The Adoption Code states unequivocally that adoptions take the highest priority on the court's docket and that the trial court *shall not* adjourn an adoption proceeding unless there is good cause. MCL 710.25 (emphasis added). Moreover, the Adoption Code mandates that "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount." MCL 710.21a(b). Despite these statutory schemes, lower courts are simply hearing issues and deciding cases based on a range of other considerations, in total contravention to the respect owed our Legislature.

I. The Court of Appeals committed clear error when it failed to follow the Adoption Code and its own binding precedent on the matter - *In re MKK*, 286 Mich App 546; 781 NW2d 132 (2009) - when it affirmed the Trial Court's finding of good cause to stay the adoption proceeding under MCL 710.25(2) for a putative father who never filed an intent to claim paternity, never established a legal relationship with the child, admittedly contributed at most $200 to Petitioner-Kayleigh during pregnancy and nothing to the child for the next 18 months, and significantly delayed in initiating any paternity action, only filing as a measure to thwart the adoption proceeding.

The error here is the result of the Trial Court's improper determination of "good cause" to stay an adoption proceeding, from which it then concluded that Mr. Musall is a "legal father," when the facts and the law clearly indicate otherwise. Importantly, when the Trial Court paused the adoption proceeding (for the **third time**) so that it could make a determination of the parentage issue, Mr. Musall was nothing more than a putative father whose efforts failed to create any kind of necessary "good cause" to stay the adoption, let alone establish him as a "do something" father so as to enjoy the status of "legal father" for purpose of the adoption proceeding. Nevertheless, the Trial Court's inaccurate analysis led to the conclusion that his efforts were enough to satisfy both inquiries, and the Court of

Appeals improperly affirmed. This issue in large part stems from the lack of clear direction from this Court in relation to the "good cause" requirement in the Adoption Code; moreover, the only related case with any precedential value – *In re MKK* – is, at best, inconsistently applied, rendering completely unreasonable, inconsistent results in total contravention of the Michigan Legislature's intent in enacting the Adoption Code.

A. Consistent with statute, *In re MKK* set a high bar for establishing good cause to stay an adoption proceeding.

The Adoption Code does not define what constitutes good cause; rather, case law endeavors to do so. MCL 710.25 provides that "all [adoption] proceedings . . . shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practical disposition" and "[a]n adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause." However, *In re MKK* is the only published case that has provided any analysis of the Legislature's directives in Section 25 of the Adoption Code.

MKK involved a putative father who wished to parent the child that the birth mother sought to place for adoption. *Id.* at 548-54. Mr. Mattson, the putative father in that case, demonstrated his genuine desire to care for the birth mother and parent the child by doing a number of things before the birth of the child which the court found profoundly compelling and sufficiently significant to constitute "good cause" under MCL 710.25(2). *Id.* at 563-64. He attempted to send the birth mother financial support on three separate occasions and provided support to the birth mother through her attorney on four occasions, he took extensive in-person parenting classes and worked with a licensed Michigan social services agency during the pregnancy to prepare to be a father, he opened a bank account in the

child's name, he filed a notice of intent to claim paternity, and finally, before the adoption petition, he filed a paternity action, which he pursued vigorously. *Id.* at 550-54. The Court of Appeals found that there was no doubt that Mr. Mattson was the biological father, Mr. Mattson made exceptional efforts, before the filing of the adoption petition, and that these efforts together with the fact that there was a pending paternity action before the adoption petition was filed, constituted good cause under MCL 710.25(2) to allow the already pending paternity action to go forward and halt the adoption proceedings. *Id.* at 563-64.

The *MKK* court did not hold that a pending adoption action should be stayed so that a paternity action could be pursued. The Court did hold that the specific combination of factors presented to them in *MKK* demonstrated good cause for the trial court to allow an already pending paternity action to move forward. *Id.* at 562. The *MKK* court went on to articulate the factors it found compelling in deciding that Mr. Mattson had demonstrated good cause for staying the adoption action and allowing the already pending paternity action to move forward.

First, *MKK* iterated the importance of a biological connection to the child, but was clear to establish a biological connection alone will not suffice, which is in concert with the United States Supreme Court. *See Lehr v Robertson*, 463 US 248, 261; 103 SCt 2985 (1983) (holding that a putative father's "mere existence of a biological ink does not merit equivalent constitutional protection" to that of a putative father who "demonstrates a full commitment to the responsibilities of parenthood").

Second, a determination of a putative father's "efforts to provide support and prepare for fatherhood" allows courts to make a flexible determination that can take other aspects into consideration, such as an individual's inability to provide support or denied attempts to provide support. 286 Mich App at 563. The putative father in *MKK* attempted to provide

financial support to the birth mother by mailing it directly on three separate occasions and to her counsel on four occasions, offering to help her with medical bills, and when all of his offers of support were rebuffed, opening a bank account for the child and depositing his intended support for the child there; taking extensive parenting classes before the birth of the child; and working with social services on his parenting skills to become prepared to parent before the child's birth. *Id.* at 562-564.

Finally, *MKK* was clear that timing would not be the sole determination, so as not to create a "race to the courthouse," but nevertheless allows courts to consider whether the action was filed merely as an effort to thwart the adoption proceedings. *Id.* at 562. The putative father in *MKK* had filed a notice of intent to claim paternity during the pregnancy, and then filed a paternity action shortly after the child's birth. *Id.* at 562-564.

Ultimately, the good cause test fashioned by *MKK* allows guidance with necessary flexibility for courts to make case-by-case determinations. The *MKK* court found that all of these factors together constituted good cause to stay the adoption action and allow the paternity action to go forward. *Id.*

B. Subsequent cases have expanded the good cause requirement in violation of both statute and *In re MKK*.

MKK was appropriately decided and supports a workable set of factors to help determine good cause. Additionally, *MKK* maintained the importance of adoption proceedings taking precedence over all other actions absent good cause, in support of the Legislature's intentions. 286 Mich App at 562. *MKK* was correctly decided with an emphasis on several factors: a biological connection, a demonstrated desire to parent and support the child, and filing of paternity or intent to claim paternity without an unreasonable delay.

286 Mich App 546.

Although *MKK* is indeed helpful in defining "good cause," it is not adequately followed. Courts are inconsistently and inappropriately applying various versions of the factors, or ignoring them altogether, resulting in unacceptable outcomes. It is time for this Court to address this topic of good cause to stay an adoption proceeding, and provide much needed guidance and direction to the trial courts and Court of Appeals. The following cases have interpreted and applied *MKK*, often resulting in inconsistent, unfair, and ineffective decisions.

In re KMS, unpublished opinion per curiam or the Court of Appeals, issued August 15, 2013 (Docket No. 314151) (attached at **Tab F**), interpreted *MKK* and erroneously held that the filing of a notice of intent to claim paternity alone provides "good cause" to stay an adoption proceeding. In *In re KMS*, the possible putative father, the putative father, having learned that the mother planned to place the child in an adoptive home, filed a notice of intent to establish paternity before the child was born and file a paternity action as well as a motion to stay the adoption proceeding several weeks after the child was born. *Id.* at *1. The Trial Court denied the motion, at least in part because there was no DNA evidence linking the putative father to the child and there was another possible father, before subsequently terminating his rights. *Id.* at *2. The Court of Appeals reversed.

The Court of Appeals held that the Trial Court abused its discretion for not finding good cause to stay an adoption proceeding. The *KMS* Court erroneously established that any putative father who files a notice of intent to claim paternity has not only established good cause to stay, but also enjoys the rebuttable presumption of legal parentage in the adoption proceeding. *Id.* at *4-6. There is no support in case law or statute for such a holding, and *MKK* is decidedly silent on this issue.

Unlike *MKK* where there was no question as to the biological connection between Mr. Mattson and the child and where Mr. Mattson repeatedly provided or attempted to provide support to the birth mother as well as other efforts to evidence his desire to parent at the time he filed the motion to stay, the putative father in *KMS* had no established biological relation to the child nor had he presented any evidence as to his desire and intention to parent or support the child. Given that he filed the paternity action only after learning of the pending adoption, he arguably filed in an attempt to "thwart the adoption proceedings," in direct contradiction to the factors the court used to find good cause in *MKK*. Even if the putative father was able to show that he had not filed to thwart the proceedings, the Court of Appeals nonetheless erred in allowing his action to prevail based on the lone fact that he filed the notice of intent to claim paternity.

In re J Minor, unpublished curiam opinion of Court of Appeals, issued June 24, 2014 (Docket No. 319359) (attached at **Tab G**), the Court of Appeals again applied *MKK*, and this case represents a correct interpretation of *MKK* and MCL 710.25. The putative father in *J Minor* appealed the Trial Court's order terminating his parental rights, but the Court of Appeals held that a biological connection "alone did not constitute good cause to stay the proceedings." *Id.* The Court of Appeals reasoned that a DNA test is only conclusive on "the identity of the father," but that "status as the biological father did not transform him from a putative father into a legal father." *Id.* Finally, the court reiterated that the only way a biological father can become a legal one is "by an order of filiation or judgment of paternity." *Id.* (citing MCL 722.717). The Court of Appeals went on to affirm the termination, holding that "while respondent demonstrated an interest in providing support or care for the mother or the child, he never actually provided "substantial and regular support or case" commensurate with his ability. *Id.* at *3.

MKK was also correctly applied in the case *In re MMK*, unpublished per curiam opinion of Court of Appeals, issued July 29, 2014 (Docket No. 319156) (attached at **Tab H**), a case in which the Court of Appeals held that failing to file a paternity action and not requesting adjournment of the adoption proceedings until the end of the termination hearing is enough to deny good cause, citing timeliness. In *MMK*, the adoptive parents petitioned for adoption on May 7, 2013 and a hearing to identify the father was held on June 19, 2013, when the putative father requested that the Trial Court deny the adoption so that he may have custody of the minor child. *Id.* at *1. The Trial Court held, and the Court of Appeals affirmed, that his untimely request was not enough to establish good cause to stay the adoption proceedings. *Id.* at *2.

In re JDH, unpublished per curiam opinion of Court of Appeals, issued January 5, 2010 (Docket No. 291839, 291850) (attached at **Tab I**), also considered the term good cause, citing *MKK*, albeit briefly. In a combined custody/adoption case, the Court of Appeals determined that the Trial Court had erred in establishing that a custody case took precedence over a termination/adoption action merely because the custody case was filed first. *Id.* at * 2. However, the Court of Appeals affirmed the Trial Court's decision to postpone the termination hearing, citing an impending Friend of the Court hearing regarding custody and parenting time as good cause.

Without citing *MKK* at all, the Court of Appeals in *KLW* held that good cause to adjourn termination proceedings also include illness of one party's attorney. *In re KLW*, unpublished per curiam opinion of Court of Appeals, issued May 17, 2011 (Docket No. 301741) (attached at **Tab J**).

In each of these post-*MKK* cases, the Court of Appeals cites differing, and at times conflicting, reasons for establishing good cause, even when applying the same standard

from *MKK*. For instance, while *In re J* held that a biological connection is not enough to reach the level of good cause to stay an adoption proceeding, the *KMS* Court determined that DNA testing alone was sufficient for good cause to adjourn a termination, arguably because the biological connection would be significant. *In re MKK* established the importance of making efforts to support the child and prepare for parenthood, a factor which *In re J* reiterated as important, yet *KMS* entirely ignored that factor, choosing instead to heavily weigh the fact that the putative father had filed a notice of intent to claim paternity in favor of finding good cause. Finally, *MKK* established the importance of the time of filing for paternity, so as to prove against any motive to simply thwart the adoption proceedings, yet *KMS* clearly expanded that requirement in finding good cause even when the putative father only filed for paternity directly after finding out about the adoption action.

C. The Court of Appeals misapplied *MKK* here as well, finding support for good cause when the putative father did not demonstrate a desire to parent or support his child, nor did he file a notice of intent to claim paternity, and, although he did have a biological connection to the child, he filed a paternity action 11 months after the child was born and after the commencement of the adoption proceedings, in a clear effort to thwart the adoption proceedings.

The instant case of *In re ARS* is the sixth post-*MKK* case to emanate from the Court of Appeals and provides yet another example of the improper expansion and inconsistent application of *MKK*. Here, the Court of Appeals gravely erred in its application of *MKK*. The Trial Court adjourned or stayed the adoption case in favor of the paternity proceedings **three times** – (1) an adjournment from April 22, 2013 until May 17, 2013, so that Mr. Musall could obtain genetic testing, which the Trial Court in the paternity case had granted on April 16, 2013; (2) an adjournment from May 17, 2013 until July 19, 2013 because "the paternity results are not in"; (3) after two full days of evidentiary hearing in the adoption case, the

Trial Court stayed the adoption case so that it could render its decision on the paternity action.

In the instant case, despite the factors established in *MKK* to honor the Legislature's intended meaning of "good cause" in MCL 710.25, the Court of Appeals incredibly found good cause, in contravention to the facts and law. (6/12/14 Opinion, p. 1). In fact, the only factor that Musall could establish was a biological connection, but both *MKK* and the United States Supreme Court have held that this is not enough to determine parentage. *See* 286 Mich App at 563; *Lehr v Robertson*, 463 U.S. 248, 261 (holding that a putative father's "mere existence of a biological ink does not merit equivalent constitutional protection" to that of a putative father who "demonstrates a full commitment to the responsibilities of parenthood"). Thus, Mr. Musall's biological connection alone does not reach the level of good cause.

MKK also emphasized the importance of an interest in parenting and attempts to provide support so as to show a reason for stay other than to thwart the adoption proceedings, which Respondent-Musall cannot demonstrate. The analysis on that point really turned on the fact that Mr. Mattson took extensive steps to prepare to be a parent. *Id.* at 563. Importantly, this factor suggests that these efforts *should* have been analyzed under MCL 710.39(2) as a "do something" father because he had made "efforts to provide support and prepare for fatherhood" by taking many affirmative actions. *Id.* For example, the putative father in *MKK* took parenting classes, he worked with social services, he sent money directly to the mother three times, set up a bank account for the child, and sent money to the mother's attorney four times. *MKK*, *supra* at 549-53. None of these indicia exist in the instant case.

Here, even accepting all of Musall's testimony as true, at most, he provided $200 to

Kayleigh during the pregnancy, but he has provided literally nothing to the child since she was born. Mr. Musall admitted that he did nothing to support Kayleigh during her pregnancy with [redacted] with the exception of giving her a garbage bag full of new and used clothes for both [redacted] and [redacted] (I: 83, 166). He also freely admitted that he had not seen [redacted] let alone provided support for her, since September 2012. (I: 80). He admitted that since [redacted] birth he had never given money to Kayleigh or purchased any items for the child. (I: 81-82). Moreover and separate from the amount of support, Musall is unable to demonstrate any efforts he made to prepare himself to be a father. As such, he cannot meet this factor of *MKK* either.

Along with the importance of providing support and expressing interest in raising the child, *MKK* emphasized the importance of timing and that there be no "unreasonable delay" to establish paternity. 286 Mich App at 564. Noting that the putative father in *MKK* filed a notice of intent to claim paternity before the child was born and filed a paternity action within a month of the child's birth, the Court of Appeals held "[t]his is not a case in which a putative father delayed filing a paternity action for many months or years, or until an adoption petition had already been filed." *Id.* at 563. While the *MKK* Court held that the timing is just one factor to determine good cause, it was sufficient in addition to the putative father's efforts to support and prepare for the child for the Court to determine that he was not merely filing in an effort to thwart the adoption plan. *Id.*

Yet in the instant case, Respondent-Musall never filed a notice of intent to claim paternity, and waited until [redacted] was 11 months old before filing a paternity action. In fact, his paternity action came on the heels of the adoption petition, which had been filed 5 weeks earlier. The Court of Appeals held Musall did not wait an unreasonable amount of time, reasoning that he did not file because he thought he and Kayleigh would be able

"work something out," but that "[o]nce the adoption petition was filed, it became that [he] would not be able to informally negotiate with the mother and her family for access to the child, and he promptly filed his complaint for paternity." (6/12/14 Opinion, p.2). Mr. Musall admitted that he had not seen [redacted] since September 2012 and he had never paid child support. Mr. Musall delayed many long months before filing, and only filed because the adoption proceeding has been filed. Indeed, based on Respondent-Musall's actions, it appears that the *only* reason he filed the motion to stay the adoption case was to thwart the adoption by establishing paternity because he knew he could not establish substantial and regular support of the biological mother or the child.

The overarching theme of the decision in *MKK* is the series of significant efforts made by the putative father in that case to care for mother and child before an adoption petition was filed. As observed in *MKK*, the good cause analysis turns more on the fact that the putative father was a "do something" father, plus the fact that he already had proof positive that he was biologically related to the child at the time of the proceedings. *MKK*, *supra* at 563-64. This was not the case for Respondent-Musall, and the Court of Appeals has yet again gravely expanded the definition of good cause in contravention to the Legislature's intent.

D. Respondent-Musall's inactions and delay regarding this child establish that he was a "Do Nothing" Father under Section 39(1) of the Adoption Code, further solidifying the lower courts' error in allowing the paternity case to take priority over the adoption proceeding.

The Trial Court's finding and the Court of Appeals' affirmance that Mr. Musall was a "do something" father were clearly erroneous when the facts demonstrated that, at most, Derek Musall provided less than $200 in support over three occasions during Kayleigh's pregnancy, and zero support during the 90 days prior to receiving notice of the adoption

hearing, and had no established custodial relationship with the child. Mr. Musall's inactions and lack of interest do not qualify as "substantial and regular support and care" as required by the Adoption Code. MCL 710.39(2).

Significantly, the Trial Court did not find that Mr. Musall had an established custodial relationship with [redacted] likely because, according to his own testimony, he saw her no more than a dozen times during her entire life. (09/23/13 Opinion, p. 5; I:244, 35). The Trial Court also did not find that Mr. Musall provided substantial and regular support during the 90 days before being served the notice of hearing in the adoption matter. Indeed, the record provides that Mr. Musall provided **zero support** to his daughter during the 16 months of her life up to the adoption hearing. (I:166-167). The critical time period under MCL 710.39(2) is December 25, 2012 to March 25, 2013 – the 90 days preceding the notice of hearing.

The Legislature's demand of an established relationship of custody or support between the mother or child and the putative father requires "more than an incidental, fleeting, or inconsequential offer of support or care and therefore must have intended more than 'any' contribution by the putative father." *In re Gaipa*, 219 Mich App 80, 85-86; 555 NW2d 867 (1996). The *Gaipa* court indicated that the factors to be considered include "the father's ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother impeded the father's efforts to provide her with support, and any other factors that might be significant under the facts of the case." *Id.* at 86.

The courts have a very high threshold when it considers what constitutes an inability to provide support. Most squarely on point is *In re RFF*, 242 Mich App 188; 617 NW2d 745 (2000). The Court of Appeals in *RFF* reasoned that the Legislature did not intend to create

a deceived father exception to the Section 39 requirement of "substantial and regular support." *Id.* at 199. When the Legislature amended the statute, it discussed its concerns that the previous statute, which only required "support or care" was "too low of a standard for a putative father to receive a hearing on the termination of his parental rights because even a minimal amount of support or care could be used to justify not having parental rights terminated without a hearing." *Id.* at 199-200.

In light of the *RFF* case, Mr. Musall's alleged "inability" pales in comparison. He knew about the pregnancy from the start, and yet he still did little to nothing to support his unborn child. (I: 30, 70). He knew where Kayleigh and [redacted] lived. (I: 38; I: 214-15). He was more than capable of mailing support or even dropping off diapers and formula on the front door, which he never did. (I:81-82).

Beyond the absolute zero support Mr. Musall provided during the critical time period, Mr. Musall can present nothing to this Court other than fleeting attempts at support during the pregnancy. There was conflicting testimony over the amount of support that he provided to Kayleigh during her pregnancy. Mr. Musall testified that his cash contributions amounted to about $225 in support during the pregnancy. (I:71-73). Yet, Mr. Musall also testified that he may have confused support he gave Kayleigh during her pregnancy with [redacted] their oldest child who was not at issue in this case, with support he gave her during her pregnancy with [redacted] (I:74). Indeed, Mr. Musall later admitted at trial that he did nothing to support Kayleigh during her pregnancy with [redacted] other than give her a garbage bag full of new and used clothes for both [redacted] and [redacted] (I: 83, 166). Kayleigh testified that he never gave her cash assistance during the pregnancy with [redacted] or after [redacted] birth. (I:32-33, 37). She testified that she requested assistance from him, and he would make offers of assistance, but never "came through." (I: 50). Even in a light most favorable

to Mr. Musall, cash every once in a while is certainly fleeting, and does not rise to the level of "substantial and regular support."

Mr. Musall argues that he was hindered from providing support due to actions of Kayleigh and her parents, and therefore, he did provide support within his ability. (Appellee's COA Brief, p. 20). It is important to note that although the Trial Court found that Kayleigh and the Schnebelts impeded his ability to have a custodial relationship with the child, the Trial Court did not find that they impeded his ability to provide support or care. (09/26/13 Opinion, p. 5). Indeed, Mr. Musall makes great pains to point out to this Court that Mr. Musall is in a financially stable position to where he could provide financial assistance. (*See* Appellee's COA Brief, pp. 5-6).

MCL 710.25(2) is the only statute that defines what constitutes good cause to allow a trial court to stay an adoption proceeding. In enacting the Adoption Code, the Legislature did not cite as a basis for good cause that a person filed a paternity action after the commencement of an adoption case. The Legislature could have enacted a statute that allows a putative father the right to halt an adoption proceeding for any reason, but it opted to require "good cause." Instead, the Legislature gave adoption proceedings the "highest priority" and mandated that a trial court "shall not" adjourn an adoption proceeding without good cause. MCL 710.25. This Court should grant leave on this important issue that continues to impact adoption cases, and to create uniformity in the application of MCL 710.25 and the statutory interpretation enunciated in *MKK*.

II. The Court of Appeals clearly erred when it affirmed the Trial Court's improper interjection of the Paternity Act into the Adoption Code, failing to consider the Legislature's intent that the Adoption Code take precedence over all other matters, including a paternity action, in allowing the Trial Court to declare a putative father a legal father in the midst of an adoption proceeding, violating the requirements and procedures of both acts.

Under a strict construction of the Adoption Code, a putative father cannot be declared a legal father in the adoption proceeding. As discussed, *supra*, the Adoption Code is a statute that must be strict construed. *In re RFF*, 242 Mich App 188, 617 NW2d 745 (2000). Adoption proceedings "shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition," including over paternity issues. *See also In re Brookman*, unpublished per curiam opinion of Court of Appeals, issued April 7, 2009 (Docket No. 287131) (attached at **Tab K**). However, lower courts in this case injected the Paternity Act into this adoption case, going against the statutory schemes and the intent of the Legislature. Allowing this case to stand will allow further misuse of these statutes, and our Legislature deserves greater deference than what lower courts have shown.

A. Background on the interplay between the Adoption Code and Paternity Act.

Although this appeal arises from an adoption case, the way the Trial Court and the Court of Appeals reached their decisions requires an understanding of the interplay between the Paternity Act and the Adoption Code.

When a child is born out of wedlock and the father is undetermined, there are two ways to become a legal father – by filing a complaint to establish paternity under the Paternity Act, obtaining an order of filiation, or by executing an acknowledgment of

parentage under the Acknowledgment of Parentage Act. *Cf.* MCL 722.717 *with* MCL 722.1004. There is no dispute here that Mr. Musall solely attempted to establish paternity through the filing of a court action, which he instituted when [redacted] was 11 months old. (02/15/13 Paternity Complaint; Paternity Register of Actions). He did not execute an acknowledgment of parentage. (II:28). Moreover, the Trial Court merely declared Mr. Musall to be the legal father in his opinion and order stemming from the adoption proceeding. Thus, Mr. Musall's paternity is *still* not legally valid.

There is no provision in the Adoption Code for the trial court to enter an order of filiation or otherwise establish paternity. Instead, an order of filiation arises only from an action under the Paternity Act. If a man files an action to establish paternity under the Paternity Act, there are several situations in which the Trial Court must enter an order of filiation establishing paternity. MCL 722.717(1). The Trial Court must enter an order of filiation establishing paternity if a court finding or verdict determines paternity, the father orally acknowledges paternity before the court, the father files a written acknowledgment of paternity, or if the father is served with a summons or default judgment entered against him. MCL 722.717(1). A default judgment will be entered in favor of the man filing the paternity action if a DNA test confirms paternity. MCL 722.716(1). **These procedures are outlined under the Paternity Act**. MCL 722.717(1). **A putative father can *never* be declared a legal father under the Adoption Code.** The **only way** for a man to be declared a legal father **by a trial court** is by entry of an order of filiation under the Paternity Act. MCL 722.716(6).

By contrast, when an unmarried woman seeks to place her child up for adoption, and files an action under the Adoption Code she must provide the court with the potential father

of the child. MCL 710.36. This potential father, in the eyes of the court is called the "putative father." MCL 710.36. A putative father is not equal to a legal father. MCL 710.36. Rather, the Adoption Code requires the mother to serve a notice of her intent to release the child for adoption to any putative father. MCL 710.36(3). The notice filed under Section 36 of the Adoption Code is typically how the putative father learns an adoption petition has been filed. A putative father is also permitted to file a notice of intent to claim paternity even before the child is born. MCL 710.33(1). The purpose of this statutory provision is to ensure that the putative father will receive notice of any adoption proceeding. MCL 710.33(3).

Once the putative father learns of the adoption proceeding, a hearing follows which is known as a "Section 39 hearing" referring to MCL 710.39. Section 39 sets forth the steps that the trial court must take in order to determine or terminate the parental rights of a putative father. *In re TMK*, 242 Mich App 302, 303; 617 NW2d 925 (2000). The Trial Court determines whether the putative father is a "do nothing" or "do something" putative father. MCL 710.39(2); *In re Baby Boy Barlow*, 404 Mich 216, 229; 273 NW2d 35 (1978). A "do something" putative father is one who has taken either established a custodial relationship with the child or who has provided "substantial and regular or care" to the child. MCL 710.39(2); *In re Baby Boy Barlow*, 404 Mich 216, 229; 273 NW2d 35 (1978). The Adoption Code specifically provides greater protections to the rights of a "do something" father because such a father has taken affirmative steps to either provide support or establish a custodial relationship to the mother or child. MCL 710.39(1). In such a case, the rights of the father can <u>only</u> be terminated through Child Protective Services and the Juvenile Code's abuse and neglect proceedings. MCL 712A.19b(3). Typically, if a trial court finds that a putative father is a "do something father," then the adoption case is dismissed.

In contrast, when a "do nothing" putative father requests custody, the Trial Court does not have to go through the rigors of a Section 712A proceeding under the Juvenile Code. Instead, Section 39 only requires that the court inquire into "his fitness and his ability to properly care for the child." MCL 710.39(1). The trial court can terminate the do nothing putative father's rights if the trial court finds that it is not in the child's best interests to have custody awarded to him. MCL 710.39(1). While Section 39 outlines the putative father's ability to halt the adoption, the Adoption Code at no time allows for the putative father become the legal father of the child. *See* MCL 710.39.

B. The Trial Court repeatedly and wrongly injected the Paternity Act into this adoption proceeding in contravention of the Legislature's intent.

In the present case, the Trial Court improperly conflated the adoption proceeding with the paternity action. The Trial Court effectively consolidated the two actions, even though there is no statutory provisions to allow consolidation, and even though no order was entered consolidating the cases. The Trial Court also repeatedly delayed the adoption proceeding so that the paternity action could move forward. Eventually, the Trial Court held two days of evidentiary hearings on the adoption case, but continued to intermingle the two proceedings. And when it finally came time to rule on the statutory requirements of the Adoption Code, the Trial Court instead declared Mr. Musall the legal father in the adoption case, yet never entered an order of filiation or otherwise satisfy the requirements of the Paternity Act. The Trial Court's actions in this case wholly disregarded the Legislature's intent in enacting both the Adoption Code and the Paternity Act. The Court of Appeals' affirmance creates dangerous precedence, and exhibits the continued erosion of those two statutory schemes.

A more detailed examination of the procedural facts from this case highlights the problems created when the Trial Court interjected the Paternity Act into the adoption proceedings. Here, the mother initiated an adoption proceeding in January 2013. (01/07/13 Petition to Adopt). She then filed a petition to identify the father and determine or terminate his parental rights, as required by the Adoption Code. MCL 710.34. More than a month after Kayleigh filed her adoption petition, Mr. Musall filed a paternity complaint. (02/15/13 Paternity Complaint; Paternity Register of Actions). The paternity action is a separate action from the adoption case, with separate case codes, and separate registers of actions. Both the paternity action and the adoption case were assigned to Judge Thomas Dignan.

Mr. Musall never filed a notice of intent to claim paternity. MCL 710.33. Nonetheless, on March 26, 2013, Kayleigh served Mr. Musall with the notice of hearing for the adoption hearing. MCL 710.34. For reasons that are unclear, but appear to be related to Mr. Musall's quest for DNA results, the adoption hearing was adjourned until July 19, 2013. (05/28/13 NOH; 05/17/13 Motion to Proceed with Hearing). Mr. Musall obtained an order to obtain genetic testing on April 16, 2013. (04/16/13 Order for Genetic Testing; Paternity Register of Actions).

While he was waiting for the testing results, Mr. Musall then filed a motion to adjourn the adoption proceeding. (06/20/13 Motion to Adjourn). The hearing for that motion was scheduled for July 11, 2013, but did not occur on the record. (06/201/3 NOH). Instead, it appears that the Trial Court and Mr. Musall's attorney had an off the record conversation. (I:9-10). The end result was that the Trial Court did not rule on the motion to adjourn, but instead told Mr. Musall's attorney to bring the DNA results with him to the adoption hearing that was scheduled for July 19, 2013. (I:5).

The hearing on July 19, 2013 was exclusively an adoption proceeding. (05/28/13 NOH). No hearing had been noticed in the paternity case. (Paternity Register of Actions). The Trial Court obtained the DNA results, which indicated a greater than 99% chance that Mr. Musall was [redacted] biological father. (I:5). The Trial Court proceeded with a lengthy evidentiary hearing in the adoption case, hearing the testimony of four witnesses, and which lasted all day. (07/19/13 Transcript). The adoption hearing was scheduled to be concluded on August 16, 2013.

After the first day of the adoption hearing, Mr. Musall filed a motion for summary disposition in the paternity case so that he could establish himself as the legal father of [redacted] (07/24/13 MSD; Paternity Register of Actions). The motion for summary disposition was also scheduled to be heard on August 16, 2013.

The parties convened on August 16, 2013. The transcript from that day appears to switch back and forth between the adoption case and the paternity action. The Trial Court entertained lengthy arguments by the parties about the motion for summary disposition and also on Mr. Musall's previously filed motion to stay the adoption proceeding, even though the latter was not noticed for August 16, 2013. (II:5-9, 23-37, 205-240; Adoption Register of Actions). The Trial Court did not rule on either motion at the hearing. Instead, the parties presented seven witness for the adoption case. (08/16/13 Transcript). At the conclusion, the Trial Court took the adoption petition under advisement. (II:264).

A month later, the Trial Court issued a written opinion. (09/26/13 Opinion). That opinion is a curious document and contains many legal errors. First, it purports to be an opinion and order in both the adoption case and the paternity case. (09/26/13 Opinion, p. 1). Even the Trial Court recognized that the two cases were never consolidated. (II:5).

The Trial Court went through a lot of the facts from the two days of trial, including spending a lot of time discussing [redacted] the parties other daughter, who has already been adopted by Pamila and Philip Schnebelt. Quite frankly, [redacted] is not at all relevant to whether an adoption of [redacted] should occur under the Adoption Code. The fact that Mr. Musall has a relationship with [redacted] is not at all relevant to whether he was a "do something" father as to [redacted] MCL 710.39(2). The only possible way that anything about [redacted] would ever be relevant in this case, would be if the Trial Court was conducting a best interests analysis to determine whether it was in [redacted] best interest to have custody awarded to Mr. Musall, then the existence of a sibling is relevant to MCL 722.22(g)(xi) – "the ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings." Since the Schnebelts had already adopted [redacted] presumably this factor would have weighed against Mr. Musall.

The Trial Court found that there was "good cause to consider the paternity claim first." (09/26/13 Opinion, p. 5). The Trial Court also stated that it "does find that Derek Musall is the legal father of [redacted] Schnebelt." (09/26/13 Opinion, pp. 5-6). This finding is the heart of the Trial Court's legal error. Declaring Mr. Musall the legal father in its opinion in the adoption case does not make him the legal father. There is no provision in the Adoption Code that would permit a court sitting on an adoption case to establish a man as a legal father, even if the man comes to court with DNA evidence. *See* MCL 710.21 *et seq.*

As noted above, the Trial Court could not issue a single order for both cases. But even assuming for the sake of argument that the Trial Court was legally permitted to issue a single order, the Trial Court's finding in this case does not satisfy the Paternity Act. To make a man the father of a child, the Trial Court must enter an order of filiation. MCL

722.714(12); MCL 722.717(1). That order must provide for the support of the child. MCL 722.717(1). The order must also provide that the legal father pay for the "necessary expenses connected to the mother's pregnancy and the birth of the child." MCL 722.717(2). Once the order of filiation enters, the clerk of the trial court "shall collect a fee of $9.00 for entering the order...from the person against whom the order of filiation is entered." MCL 722.717(4).

Because none of these required items occurred here, this is further indicia that the Trial Court's finding in its September 26, 2013 adoption order was not an "order of filiation." The September 26, 2013 order does not order support. It does not order Mr. Musall to pay for Kayleigh's expenses from her pregnancy and [redacted] birth. (09/26/13 Opinion). Apparently after the entry of the September 26, 2013 Opinion in the adoption case, the Trial Court referred the parties in the paternity case to Friend of Court for a conciliation conference (which would relate to parenting and support). (Paternity Register of Actions). It appears that a support order was eventually entered, but that certainly is not part of the September 26, 2013 Opinion. (Paternity Register of Actions). There is no notation that the clerk of the court required the payment of the $9.00 fee which must accompany the order of filiation. (Paternity Register of Actions). The bottom line is that there is no order of filiation making Mr. Musall the legal father, and the Trial Court certainly did not accomplish that task by entering its Opinion in the adoption case on September 26, 2013. The fact that the Trial Court entered a notation on the register of actions for the paternity case is of no consequence because the September 26, 2013 Opinion is not an "order of filiation."

The Trial Court committed legal error in the adoption case by treating its opinion as an order of filiation. In his brief, Mr. Musall admits that the Trial Court committed clear legal

errors by declaring Mr. Musall a legal father in an adoption action. (*See* Appellee's COA Brief, pp. 15-16). However, Mr. Musall indicates that the Trial Court's failure to declare Mr. Musall a legal father was nothing more than a "procedural error which can easily be cured." (Appellee's COA Brief, p. 16). He suggests the cure is remand to the Trial Court with the direction to enter an Order of Filiation pursuant to MCL 722.717. (Appellee's COA Brief, p. 17). It would be clear legal error for this Court to do so since this appeal pertains to the adoption case only and orders of filiation cannot be entered under the Adoption Code. Instead, on remand, this Court should direct the Trial Court to engage in a proper Section 39 .

It is not harmless error for the Trial Court to erroneously consolidate two cases without proper procedures. In fact, it is an abuse of discretion. *See Bordeaux v Celotex Corp*, 203 Mich App 158, 163; 511 NW2d 899 (1993). If the Trial Court wanted to consolidate the paternity and adoption proceedings, it was required to do so under MCR 2.505. No such consolidation order was ever entered. By doing so, the Trial Court abused its discretion and also violated due process.

By erroneously granting a stay of the adoption proceedings **after having already held** the adoption proceedings, and then, by improperly consolidating the paternity and the adoption actions, the Trial Court attempted to leap frog through the procedures required by law in order to have a more favorable outcome to Mr. Musall. In total, the Trial Court adjourned the adoption proceeding not once or twice, but three separate times, prioritizing the paternity action again and again. The final adjournment was even after the court held two days of an evidentiary hearing on the adoption issue. The Trial Court simply may not do as it pleases with respect to the required procedures. This result prejudiced the biological

mother and the potential adoptive parents, in addition to being legally incorrect.

Moreover, a putative father can ***never*** be declared a legal father in an adoption proceeding. There is simply no provision for this to occur under the Adoption Code, which must be strictly construed. The only way for a man to be declare a legal father by a trial court is by entry of an order of filiation under the Paternity Act. MCL 722.716(6). Here, the Trial Court committed clear legal error by declaring Mr. Musall the legal father of [redacted] simply by making a statement in its adoption opinion.

Mr. Musall also claims that the Trial Court committed a procedural error by failing to declare him legal father under MCL 710.39(3). (Appellee's COA Brief, pp. 15-16). MCL 710.39(3) has no bearing on the instant case. Instead, MCL 710.39(3) exclusively operates once parental rights are terminated to the mother. The Trial Court here did not terminate Kayleigh's parental rights to [redacted] By its plain language, MCL 710.39(3) also only applies when the Trial Court grants custody to the putative father. This also did not happen in this case. Therefore, Appellee's assertion that it is "unclear" whether the Trial Court had the authority to legitimize him under the Adoption Code is erroneous. It did not have the authority under MCL 710.39(3); therefore, its determination that Mr. Musall was [redacted] legal father was clear legal error.

The June 13, 2014 Court of Appeals' Opinion improperly affirms the improper procedural conduct of the Trial Court, blending the paternity and adoption actions, and indeed, issuing a sham stay of the adoption proceedings, and in the same Opinion, declaring Mr. Musall a legal father. (06/12/14 COA Opinion, pp. 1-2). The Trial Court cannot transform Mr. Musall into a legal father by simply declaring him as such in its opinion in the adoption case. There is no provision in the Adoption Code that would permit a court sitting

on an adoption case to establish a man as a legal father, even if the man comes to court with DNA evidence. *See* MCL 710.21 *et seq.*

The lack of published cases on adoptions in Michigan highlights the need for this Court to address this matter. Practitioners and judges frequently rely on unpublished adoption cases, and this Court of Appeals opinion significantly decreases the burden for any putative father. It essentially eradicates the requirements under MCL 710.39, which exist to grant greater protections to fathers that have shown an actual desire to parent, to oblivion. If lower courts choose to apply this case, putative fathers can essentially guarantee a pathway to legal fatherhood by simply filing a paternity action once an adoption case commences – regardless of how old the child is and how little support the putative father has provided.

CONCLUSION

The Court of Appeals affirmed both the Trial Court's erroneous interpretation of the good cause requirement and its improper procedural overlap of the Adoption Code and Paternity Act. In doing so, the Court of Appeals added yet another inconsistent application of its own precedent, *In re MKK*, adding to a long line of varied analyses and determinations of good cause to stay an adoption proceeding. This Court has yet to weigh in on the issue of good cause, and failure to do so now will result in continued and increased confusion, leading to more inconsistent and unfair results.

Perhaps even more importantly, this Court's guidance is needed to establish the proper procedural interplay between the Adoption Code and the Paternity Act, consistent with the Legislature's intent. Although the Legislature had provided a statutory guide that

adoption proceedings are to take precedence over all other actions, including paternity actions, lower courts have failed to provide the Legislature its due deference, and instead have been creating their own procedures, allowing total interjection and overlap of the two acts. Allowing this case to stand will continue to provide lower courts latitude in establishing whatever process it deems proper, even if in direct contradiction to the Legislature. This Court must address these egregious errors.

REQUEST FOR RELIEF

Appellants respectfully requests that this Court grant leave to appeal to resolve the question of what constitutes good cause in granting a stay in an adoption proceeding in favor of a paternity action, and further grant leave to appeal to clarify the appropriate interplay of the Adoption Code and the Paternity Act.

NOTICE OF HEARING

Pursuant to MCR 7.302(A)(2), this Application for Leave to Appeal will be submitted to the Court on a date which is on or after October 21, 2014.

Dated: September 25, 2014

Respectfully submitted,

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