

X Child Custody

State of Michigan
Court of Appeals

*Publ opn 7-15-14
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Jenny N. ~~Heinze~~ (fka-Glaubius),
Plaintiff-Appellee,

SC No. _____
COA No. 318750
TC No. 2012-004307-DM
Macomb Circuit Court
Hon. Kathryn A. Viviano

v

John A. Glaubius,
Defendant-Appellant.

OK

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Defendant-Appellant's Application for Leave to Appeal

Notice of Hearing

Proof of Service

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Statement of Jurisdiction

The Supreme Court has jurisdiction under MCR 7.301(A)(2). The Court of Appeals issued its published decision on July 15, 2014. Defendant moved for reconsideration. The Court of Appeals denied reconsideration in an order dated August 26, 2014. This application for leave to appeal is filed within 42 days after August 26, 2014.

Defendant contended below that the Court of Appeals lacked jurisdiction to hear plaintiff's appeal by right. Plaintiff asserted in the Court of Appeals that the trial court's order dated October 4, 2013, is a "final order." She contended that the trial court's order is a post-judgment domestic relations order affecting custody of a child. MCR 7.202(6)(a)(iii).

Defendant disagreed that the trial court's order qualifies as an order affecting custody. First, the order does nothing more than decline to reopen the divorce case and grant plaintiff relief from the terms of the judgment declaring the minor child to be a child of the parties. While that order has the **potential** to affect custody, it does not directly do so. It is not the equivalent to denial of a motion to change custody. It is at least one step, and possible two to three steps, removed from such an order.

Had the trial court agreed that plaintiff was entitled to relief from the divorce judgment, she would still be required to prove the required elements under the Revocation of Paternity Act (ROPA), MCL 722.1431 et seq. Even if she proved that her motion can be adjudicated under ROPA, the trial court has

statutory authority to decline to grant plaintiff's requested relief and preserve the custody/parenting time provisions in the judgment based on its assessment of the best interests of the child. MCL 722.1443(4)

Even if the trial court made a factual finding that the child was not issue of the parties' marriage, on the undisputed facts of this case, defendant would have an exceptionally strong claim to status as the child's equitable parent. *Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516 (1987). If declared the child's equitable parent, defendant would retain his current status as the child's legal parent and joint legal custodian. Therefore, despite a determination under ROPA that the child was "born out of wedlock," defendant would continue to exercise parental rights, including custody and parenting time. *York v Morofsky*, 225 Mich App 333, 571 NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 553 NW2d 619 (1996).

The trial court's order only has the **potential** at some future date, based on remand proceedings not yet held, to affect custody. It does not itself affect custody. It is not a final order as that term is defined in MCR 7.202(6)(a)(iii) and the Court of Appeals erroneously assumed jurisdiction to hear plaintiff's appeal by right.

Statement of Order Appealed and Relief Sought

Defendant seeks leave to appeal from a published decision of the Michigan Court of Appeals issued July 15, 2014, in Docket No. No. 318750, attached as **Exhibit J**. The Court of Appeals reversed a trial court order denying plaintiff's post-divorce motion under the Revocation of Paternity Act, MCL 722.1431 et seq to disestablish defendant's paternity of the parties' daughter born during the marriage. Plaintiff's complaint for divorce alleged that defendant was the child's father and the agreed-upon divorce judgment found him to be so while awarding him joint legal custody, parenting time, and imposing a support obligation on him.

The trial court held that the Revocation of Paternity Act provides no remedy once a judgment of divorce is entered declaring a child to be a child of the marriage. Upon entry of a judgment, the mother's husband ceases being merely a presumed father by virtue of the marital presumption and becomes an affiliated father based on the court's determination of paternity inherent in the divorce judgment.

Plaintiff appealed and the Court of Appeals reversed the trial court. The holdings by the Court of Appeals were:

1. Unless paternity is a contested issue in the divorce action, a finding in the divorce judgment that a child is a child of the marriage does not constitute a determination of paternity.

2. A husband determined to be a child's father in a divorce judgment remains merely a presumed father, not an affiliated father, unless paternity was actually litigated as part of the divorce action.
3. The ability to file a motion under the Revocation of Paternity act at any stage of the proceedings does not end with entry of a final judgment, but extends indefinitely so long as the court retains jurisdiction to modify custody, parenting time, or support.
4. The Revocation of Paternity Act was intended by the Legislature to abrogate the doctrine of *res judicata* that historically precluded relitigation of a child's paternity after entry of a divorce judgment determining the child to be a child of the marriage.

Defendant asserts that the Court of Appeals erred in each of these holdings. Furthermore, the Court of Appeals failed to address whether plaintiff satisfied the threshold requirement of MCL 722.1441(1)(a)(ii) by proving a mutual acknowledgment by the presumed father, the alleged father, and the child's mother of a biological relationship between the alleged father and the child. A case decided during the pendency of this appeal, *Parks v Parks*, 304 Mich App 232, 239, 850 NW2d 595 (2014), held that such a showing was mandatory to establish standing to seek relief under the Revocation of Paternity Act.

Defendant asks this Court to grant leave to appeal, ultimately reverse the Court of Appeals, and reinstate the trial court's order denying plaintiff's motion.

Statement of Questions Presented

A. Where defendant is not merely the "presumed father" of the minor child but is the "affiliated father" of the minor child by virtue of the determination of paternity in the parties' divorce judgment, does plaintiff lack a remedy under the Revocation of Paternity Act and did the Court of Appeals err in its interpretation of the Revocation of Paternity Act when it reversed the trial court and held that defendant was not an "affiliated father" under that Act?

B. Was the agreed-upon determination of paternity contained in the parties' judgment of divorce *res judicata* as to the question of who is the minor child's legal father, thereby precluding re-litigation of that issue and cannot now be collaterally attacked by plaintiff, and did the Court of Appeals err when it ignored established Michigan case law, including authority from this Court, and held that *res judicata* did not bar plaintiff's effort to disestablish defendant's paternity?

C. Did the Court of Appeals erred when it failed to remand this matter to the trial court for a factual determination as to whether the threshold requirements of MCL 722.1441(1)(a)(ii) were satisfied by a mutual acknowledgment by the presumed father, the alleged father, and the child's mother of a biological relationship between the alleged father and the child as recognized in *Parks v Parks*, 304 Mich App 232, 239, 850 NW2d 595 (2014)?

D. Did the Court of Appeals err when it held that a post-judgment motion could brought under the Revocation of Paternity Act to disestablish the husband's paternity of a child born during the marriage after entry of a final divorce judgment that treats the child as a child of the marriage?

To each question:

Plaintiff-appellee answers "No"

Defendant-appellant answers "Yes"

The Court of Appeals answered "No"

Grounds for Application for Leave to Appeal

The grounds for an appeal to this Court as defined in MCR 7.302(B). This case satisfies two grounds for appeal.

MCR 7.302(B)(3) authorizes this Court to grant leave to appeal where “ the issue involves legal principles of major significance to the state's jurisprudence.” Family law cases are the largest single category of cases in the circuit courts. They make up more than half of the total case filings. Michigan Supreme Court Annual Report, 2013, p 34. Domestic Relations is the largest component of Family Law case filings. *Id.* The Statistical Supplement to the 2012 Annual Report shows there were over 17,000 divorce judgments involving minor children entered in Michigan in 2013. Statewide Circuit Court Summary, 2013 Court Caseload Report, p 1.

Since the Revocation of Paternity Act took effect on June 12, 2012, only two years ago, it has been the subject of voluminous trial court and appellate litigation. This Court granted leave to appeal in *Helton v Beamon*, SC No. 148927 on September 24, 2014. Like the instant case, *Helton* presents several first-impression issues involving application and interpretation of the Revocation of Paternity Act. As evidence of the complexity and uncertainty associated with the Act, none of the several first impression issues presented by this case are the same as those presented by *Helton*.

Each of the issue identified in this appeal are matters of first impression. There is not yet a decision from this Court addressing the classification of fathers under the Act, determining whether the Act permits post-divorce motions for relief, or deciding if the Act was intended by the Legislature to abrogate the *res judicata* effect of paternity

determinations made in divorce judgments. Each of these issues involves legal principles of major significance to the state's jurisprudence.

This case also satisfies the ground stated in MCR 7.302(B)(5) because the Court of Appeals decision "is clearly erroneous and will cause material injustice." The Court of Appeals ignored well-established Michigan law, or stretched it beyond recognition, in fashioning an opinion to reverse the trial court. It would be a material injustice to allow the Court of Appeals decision to stand. Neither plaintiff nor the Court of Appeals were satisfied with the plain language of the Revocation of Paternity Act. At plaintiff's request, the Court of Appeals legislated from the bench and read into the statute remedies that do not exist in its text. The trial court refused to look beyond the words provided by the Legislature. The trial court's approach was correct and should be affirmed. The Court of Appeals should be reversed for expanding ROPA remedies beyond what the Legislature intended.

ROPA gave plaintiff a remedy, but she chose not to seek it when it was available. Instead, she played fast and loose with the truth and participated in entry of a divorce judgment containing a paternity finding she knew, or had strong reason to suspect, was false. What is done cannot, on these facts, be undone.

This is an unfortunate situation for all involved. But only defendant and the child are innocent here. The heartache all will feel is solely the doing of plaintiff and Mr. Witt. Mr. Witt is not a party to these proceedings. Plaintiff,

although a party, has neither a legal nor an equitable claim for relief. Justice demands that she not be rewarded for her deceit, infidelity, and duplicity.

Statement of Facts

Introduction and Overview: Both plaintiff and the Court of Appeals in its decision attempt to rewrite the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*, to obliterate any distinction between the terms "presumed father" and "affiliated father." The Legislature gave these terms distinct meanings. The availability of a remedy under ROPA depends on whether defendant is merely a presumed father or a court-adjudicated "affiliated father." Defendant's unequivocal status as the child's affiliated father mandated the result reached by the trial court. The Court of Appeals misinterpreted the statute when it held that defendant was merely a "presumed father."

Plaintiff misrepresented the facts in her presentation to the Court of Appeals. Plaintiff acknowledged in her supplemental brief filed with the trial court that "during the marriage, and at the time of the conception of the minor child, the Plaintiff was romantically and intimately involved with another man, that being Joseph Witt." Pls Supp Brf, p 1; T8-13-13, 5. On this basis, her contention that, throughout the marriage and the divorce proceedings, she believed defendant to be the child's father is not credible.

Defendant's response to plaintiff's motion for revocation of parentage demonstrates how little credibility plaintiff's assertion should be given. Defendant details evidence demonstrating plaintiff's knowledge that Mr. Witt was the child's father from early in her pregnancy. Defendant's Response,

attached as **Exhibit A**, ¶ 6 a-f, pp 1-2. When faced with this evidence, plaintiff cannot deny that she knew defendant was not the child's biological father when she filed her complaint for divorce on August 1, 2012. She also cannot deny that she kept that information from defendant and encouraged him to believe he was the child's father. On that basis, defendant fully assumed parental responsibilities concerning the child.

Despite knowing that defendant was not the child's biological father, plaintiff signed and filed a divorce complaint alleging: "The parties have had one (1) child born of this marriage, whose names and birthdate is as follows: Zia S. Glaubius, born May 18, 2011." Divorce Complaint attached as **Exhibit B**, p 2. Plaintiff then negotiated a divorce settlement with defendant premised on defendant's belief, encouraged by plaintiff, that he was the child's father.

Based on the negotiated settlement, plaintiff's lawyer prepared a divorce judgment, obtained defendant's signature approving the form and content of that judgment, and presented it to the trial court for entry. The judgment not only declared the child to be issue of her marriage to defendant, but granted defendant joint legal custody and a very detailed parenting time schedule making up the largest portion of the judgment. Judgment of Divorce attached as **Exhibit C**, pp 2-11.

Notably, the divorce judgment contained a provision called "Parental Designation" stating:

The parties shall ensure that the designations of "Dad" and "Mom", or their equivalents, are used by the child only to refer to the

parties hereto, and not to other third persons. Neither party shall permit any third parties to use such designations when referring to the relationship between the child and any such third parties.

Exhibit C, p 13. Despite abundant Michigan law holding that the agreed-upon provisions of divorce judgments are for contracts (even on provisions affecting children), plaintiff sought to void that contract. *Holmes v Holmes*, 281 Mich App 575, 760 NW2d 300 (2008), by filing post-judgment motion under the ROPA to disestablish defendant's paternity of the child.

Defendant's supplemental brief in the trial court outlined the evidence he would present if the trial court found it necessary to take testimony. That evidence would prove that both plaintiff and Witt knew during plaintiff's pregnancy that Witt was the child's father. Defs Supp Brf attached as **Exhibit D**, pp 2-3. These facts were also presented to the trial court during oral argument by defendant's trial counsel. T8-13-13, 44, 46.

Unlike plaintiff, defendant was entirely unaware that another man might be the child's biological father. When plaintiff advised him of the results of DNA testing on the child, he was devastated. It was like experiencing the death of a child. Defendant's Brief, attached as **Exhibit E**, p 10. However, at no time did defendant file anything with the trial court or take any other legally binding action to acknowledge Mr. Witt's paternity of the child. He has asserted throughout these proceedings that he is the child's father.

Factual Background: Plaintiff and defendant were married on August 30, 2008. **Exhibit B**, p 2. The parties' daughter was born on May 18, 2011.

Id. Based on her date of birth, she was likely conceived in July-August, 2010. Plaintiff acknowledged that "during the marriage, and at the time of the conception of the minor child, the Plaintiff was romantically and intimately involved with another man, that being Joseph Witt." Pls Supp Brf, p 1; T8-13-13, 5.

Despite plaintiff's knowledge that Mr. Witt could be, and likely was, the child's biological father, she filed a complaint for divorce on August 1, 2012, alleging that defendant was the child's father. **Exhibit B.** Specifically, in paragraph 4 , plaintiff alleged, "The parties have had one (1) child born of this marriage, whose names and birthdate is as follows: Zia S. Glaubius, born May 18, 2011." In paragraph 5 of the same complaint, she stated, "Plaintiff does not know of any person, not a party to these proceedings, who has physical custody of the minor child of the parties or claims custody or visitation rights with the child." *Id.*

In paragraph 8 of her complaint, she alleged, "It is in the best interests of the minor child of the parties that physical custody and primary residence of said child be awarded to Plaintiff, JENNY N. GLAUBIUS, and that joint legal custody of the said minor child be awarded to the parties, with Defendant, JOHN A. GLAUBIUS, granted a reasonable parenting time schedule." *Id.* Her prayer for relief also requested that the parties share joint legal custody and that defendant have a reasonable parenting time schedule. *Id.*

During the pendency of the divorce case, plaintiff and defendant submitted their financial information to the Macomb County Friend of the Court and a child support recommendation was made on October 26, 2012. Register of Actions, p 1. Due to his financial circumstances, defendant relocated from Michigan to his home state of Nebraska in May of 2012 a few months before the divorce action was filed by plaintiff. T 2-13-13, 7. While the divorce was pending, defendant exercised parenting time with the child in both Michigan and Nebraska. *Id.*

The Friend of the Court conducted a child support investigation. There was an appointment at the Friend of the Court on October 25, 2012, at which both parties appeared and presented their financial information to the Friend of the Court support investigator, Ellen A. Schneider. **Exhibit F.** Defendant also participated by completing and submitting a detailed financial questionnaire. **Exhibit G.** This resulted in Friend of the Court support recommendation and computer printout of the same date. **Exhibit H.**

The parties entered into negotiations and settled in December of 2012. T 2-13-13, 4. That settlement was incorporated into a consent judgment of divorce signed by both parties as to "form and substance." **Exhibit C,** p 23.

A hearing on entry of the judgment took place on February 13, 2013. Plaintiff's trial counsel represented to the court that the parties "are in agreement on all issues...." T 2-13-13, 4. Part of the parties' agreement was

for a deviation from the Michigan Child Support Formula. As explained to the trial court by plaintiff's counsel:

The parties entered into an agreement regarding custody, parenting time and to provide for transportation to and from the State of Nebraska; both for him and for the minor child, as the child gets older. Taking into consideration the cost involved in the limited support he would be paying to foster that relationship, the parties agreed, as a result of the expense, that he wouldn't be paying child support at this time.

The trial court questioned plaintiff about the proposed deviation. Plaintiff confirmed that the deviation was in the best interests of the child because it preserved defendant's financial ability to pay for the travel to exercise his parenting time. Based on plaintiff's testimony, the trial court granted the deviation request. T 2-13-13, 8. See *also* the UCSO dated 2-13-13, p 3, ¶ 13.

On custody, the judgment provided that "to ensure a stable loving relationship with both parents, the legal custody, care, education and maintenance of the minor child, to wit: Zia S. Glaubius, born May 18, 2011, shall be jointly granted to the parties, Plaintiff, JENNY N. GLAUBIUS, and Defendant, JOHN A. GLAUBIUS...." **Exhibit C**, p 2. Plaintiff was given "physical custody and primary residence...." *Id.*

The judgment recognized that although defendant was residing in Nebraska, "Defendant-Father's time with the minor child is important to both he and the child." *Id.*, at p 4. There was a separate provision stating, "The parties shall ensure that the designations of 'Dad' and 'Mom', or their

equivalents, are used by the child only to refer to the parties hereto, and not to other third persons.... *Id*, at p 13.

The actual parenting time schedule was exceptionally detailed and, in single-spaced text, consumed pp 6-11 of the judgment, concluding at the top of p 12. *Id*, pp 6-12. It not only provided for current parenting time, but also prescribed a schedule for the period after the child reached the age of 5 years. At the time of the judgment, she was only 22 months old. T 2-13-13, 8.

In response to questioning by her trial counsel, plaintiff verified that the proposed divorce judgment contained both her signature and that of defendant. T 2-13-13, 10. She then acknowledged that she was "bound by the terms contained in the Judgment of divorce" and that she could not "come back next week or next month and say I've changed my mind." *Id*.

The Revocation of Paternity Motion: Plaintiff did not come back "next week or next month," but she returned to court on June 10, 2013, a mere 117 days after she agreed under oath to be bound by the February 13, 2013, divorce judgment. Register of Actions, p 2.

Plaintiff claimed in her motion that she did not question defendant's paternity of the child until, post-divorce, "it was noted to Plaintiff that the minor child does not bear any physical resemblance to the Defendant...." Pls Mtn, p 2. Yet in her supporting brief, she admitted to having an "intimate relationship" with Joseph Witt when the child was conceived. Pls Brf, p 1. She further explained her tardy discovery that the child might not be plaintiffs,

stating, "After the Judgment of Divorce had been entered, a family member of the Plaintiff approached the Plaintiff and made the observation that Zia did not bear any physical resemblance to the Defendant, John Glaubius." *Id*, p 2.

That "discovery" led plaintiff to contact Mr. Witt and request he submit to a DNA paternity test. *Id*. The results of the test revealed that it was a 99.999 percent probability that Joseph Witt was the biological father of Zia S. Glaubius. *Id*. On May 19, 2013, plaintiff telephoned defendant to tell him he was not the child's father. Pls Mtn, p 2. Under the agreed-upon terms of the divorce judgment, defendant's parenting time was to expand to include overnights when the child reached her second birthday. **Exhibit C**, p 6. Plaintiff's call to defendant with this news was the day following the child's second birthday.

Defendant was understandably shocked by the revelation and responded emotionally in an email to plaintiff and her trial counsel "to request and/or support her [plaintiff's] actions to have me removed from Zia's birth certificate." Email message attached as an exhibit to Pls Brief Supporting Mtn for Revocation of Parentage. Upon reflection of the enormity of this decision, defendant then promptly contacted plaintiff's counsel to advise that he did not wish to surrender his parental rights to Zia. Pls Brf, p 4; Pls Supp Brf, p 3. At no time did defendant file anything with the trial court or made any legally binding statement acknowledging Witt's paternity of the child.

On June 10, 2013, plaintiff filed her Verified Motion for Revocation of Parentage with an affidavit and supporting brief. She acknowledged being "intimately involved" with Joseph Witt during the marriage and particularly at the time of the child's conception. Pls Mtn, p 2; Pls Brf, p 1; Pls Supp Brf, p 1. Nonetheless, she denied suspecting that Witt was the child's father until after the divorce judgment was entered affirming that the child was a child of the parties. Pls Brf, p 1.

Plaintiff's motion further alleged that DNA testing done less than three months after the divorce judgment proved that Joseph Witt was the child's biological father. On that basis, she alleged that she was entitled to a court determination that defendant was not the child's father under Section 11 of the Revocation of Paternity Act (ROPA), MCL 722.1441. To support her motion, she alleged that defendant was a "presumed father" under the ROPA statute whose paternity could be revoked under MCL 722.1441(1)(a)(i)-(iv). Pls Brf, pp 3-5. Plaintiff also alleged under MCL 722.1443 (Section 13 of ROPA) that it is in the best interests of the child to determine that the child was not issue of the parties' marriage.

Defendant retained counsel, Mr. Feringa, and filed a response and supporting brief opposing plaintiff's motion. **Exhibits A and E**. He denied that plaintiff only learned of Mr. Witt's alleged paternity of the child after the divorce and asserted that plaintiff and Witt knew during plaintiff's pregnancy

that Witt may be the child's father. Defs Resp, pp 1-2. Defendant's response itemized the factual allegations upon which he based his belief, including:

- a. That on or about October, 2012, prior to the divorce being started, Plaintiff introduced Zia as Joe Witt's child to Joe's family at a funeral.
- b. That after the divorce was initiated, but prior to the entry of the Judgment, Plaintiff told Joe Witt that Zia was his.
- c. That, upon present information and belief, there was significant and frequent email communication between Joe Witt and Plaintiff regarding the child and communication relating to Joe being the father of the child.
- d. That Defendant was not privy to this information until after being informed that DNA testing suggest that Witt may be Zia's father.
- e. That attorney Julie Gatti, Nicole Witt's counsel is prepared to testify that during their FOC support recommendation, in January, 2012, that Joe Witt disclosed that he had another child other than those issue of his marriage.
- f. That, upon present information and belief, Ms. Nicole Witt, whose divorce was entered with this court on May 30, 2012, would be able to testify that she had knowledge that Joe Witt assumed that Zia was his child.

Exhibit A, p 2.

Defendant also challenged plaintiff's entitlement to relief under ROPA. Specifically, defendant denied the applicability of Section 11 of ROPA, MCL 722.1441, because once the divorce judgment determined him to be the child's father, he ceased being a "presumed father" as that term is defined at MCL 722.1433(4). Instead, he became an "affiliated father," which is defined as "a man who has been determined in a court to be the child's father." MCL 722.1433(2). **Exhibit E, p 2.**

Trial Court Proceedings: Plaintiff's motion was initially heard by the trial court on June 24, 2013, but was adjourned to August 13, 2013, to allow

for the submission of supplemental briefs. There is no transcript for the June 24, 2013, proceedings. Counsel met with the trial court in chambers given the sensitive subject of plaintiff's motion. Then, based on the recollection of defendant's trial counsel, brief proceedings were on the record to allow the trial court to formally request supplemental briefs and set the adjourned date.

Plaintiff's supplemental brief, dated August 6, 2013, continued plaintiff's assertion that defendant was merely a "presumed father" not an "affiliated father." Pls Supp Brf, p 5. Therefore, plaintiff maintained that her request for revocation of paternity could be properly filed under Section 11 of ROPA. *Id*, at p 6. She also argued that even if defendant were an affiliated father, a child's mother is always allowed to bring an action to have her child declared "born out of wedlock." *Id*, at p 12.

In response to a question apparently raised by the trial court during the June 24 chambers conference, plaintiff denied that it was necessary to set aside the divorce judgment to grant her requested relief under ROPA. *Id*, at pp 13-14. She did not deny that the divorce judgment served as a determination of paternity.

Defendant's supplemental brief (**Exhibit D**) is dated August 5, 2013. Defendant described the evidence supporting his assertion that both plaintiff and Witt knew that Witt was the child's father as early as plaintiff's pregnancy. Defs Supp Brf, pp 2-5. On the legal issue before the trial court, defendant denied that ROPA provides the court with authority to grant plaintiff's

requested relief. *Id.*, at p 5. If the court found it had authority under ROPA to act, defendant asserted that it should not revoke his paternity because plaintiff is estopped from requesting such relief and doing so would be contrary to the child's best interests. *Id.*

Defendant again argued that once the divorce judgment was entered naming Zia a child of the marriage, he ceased being a "presumed father" under ROPA and became an "affiliated father" because he was "determined in a court to be the child's father." MCL 722.1433(2). Therefore, Section 11 of ROPA does not apply and plaintiff cannot be granted her requested relief. He asserted that without a remedy under ROPA, plaintiff's only option was to seek relief from the divorce judgment under MCR 2.612. *Id.*, at p 7.

Defendant also raised the defense of *res judicata*, asserting that plaintiff cannot disavow paternity after it was decided in the divorce action. He argued:

This issue has been litigated. This court has determined the paternity of this child and has adjudged John Glaubius to be Zia's father. The Court should apply the doctrine of *res judicata* to this issue and deny Plaintiff's motion to revoke paternity absent her showing of proper grounds under MCR 2.612(C)(1).

Id., at p 8.

Defendant also claimed that plaintiff's motion was barred by the doctrine of equitable estoppel. He cited *Johnson v Johnson*, 93 Mich App 415, 286 NW2d 886 (1979), *Nygaard v Nygaard*, 156 Mich App 94, 401 NW2d 323 (1986), and *Johns v Johns*, 178 Mich App 101, 443 NW2d 446 (1989), to support his position this doctrine estops a husband from, post-divorce, denying paternity

of a child born during the marriage. Therefore, the child's mother is similarly estopped. Defs Supp Brf, pp 8-9.

Defendant's final argument was that it would not be in the child's best interests to revoke his paternity after consideration of the factors in Section 13 of ROPA, specifically those found at MCL 722.1443(4). Defs Supp Brief, pp 10-12.

On August 13, 2013, the trial court heard oral argument from counsel on the legal issues before it. No testimony was taken. Upon questioning by the trial court, plaintiff's counsel argued that even after a determination in a divorce judgment that a child was born to the parties during the marriage, the mother's husband remains merely a "presumed father" under ROPA. T 8-13-13, 15-16. Plaintiff's counsel then acknowledged that entry of a divorce judgment naming the child as a child of the parties is a determination of paternity, even if it can be challenged later. *Id*, at 18-19. It was further acknowledged by plaintiff's trial counsel that no explicit provision in ROPA provides for setting aside a divorce judgment:

THE COURT: Okay. But, we all agree that there is no explicit provision in this statute that provides for the setting aside of a Judgment of Divorce where custody, parenting time and child support are at issue. It definitely contemplates an Order of Filiation.

MR. MILLER: Correct.

Id, at 20.

Defendant's counsel responded that the legislative analysis attached as an exhibit to plaintiff's supplemental brief verifies that ROPA was not intended to address revocation of a paternity determination made previously in a divorce judgment. That can be done only before entry of the judgment just as has been true under the common law. *Id*, at 31-32.

Defendant's counsel then went through the history of the common law prohibition against disestablishing the husband's paternity of a child born during the marriage (Lord Mansfield's Rule), Michigan's abrogation of that rule in *Serafin v Serafin*, 401 Mich 629, 258 NW2d 461 (1977), and the requirement that requests to disestablish the husband's paternity be made before entry of a divorce judgment determining the child to be issue of the marriage. *Id*, at 36-38.

Next, defendant's counsel explained that the reason a mother's husband is called a "presumed father" during the marriage, but an "affiliated father" after entry of the divorce judgment is that before the judgment, the presumption of the husband's paternity may still be rebutted. During that time frame, the Legislature under Section 11 of ROPA allowed certain parties under certain circumstances come to court to rebut the presumption of the husband's paternity of a child born during the marriage. However, after entry of a divorce judgment determining the husband's paternity, that presumption is no longer rebuttable and the husband becomes an "affiliated father." Any proceedings

under ROPA dealing with an affiliated father must be brought under Section 9. *Id*, at 39-42.

Defendant's counsel next addressed the *res judicata* and equitable estoppel arguments made in his supplemental brief. *Id*, at 42-47. He then concluded with his argument by noting that the best interests factors on which a court may refuse to revoke a paternity determination under ROPA are consistent with those that would apply to equitable estoppel. *Id*, at 48-49.

The trial court responded with questions for both attorneys and then identified the central issue as being whether ROPA applies to the facts before it – an attempt by a party post-divorce to revoke a paternity finding made by agreement in the divorce judgment. *Id*, at 51-55. If the answer is yes, the trial court indicated that it would set the case for an evidentiary hearing. *Id*, at 55.

Trial Court Ruling: The trial court did not rule from the bench on August 13, but instead issued a written opinion and order dated October 4, 2013. **Exhibit L.** The trial court first summarized the factual and procedural background before addressing the legal issues. O, 1-2.

On the legal issues, the trial court first determined that defendant was no longer merely a "presumed father" under ROPA. Instead, the judgment adjudicated him to be the child's father. Therefore, Section 11 of ROPA did not apply and plaintiff could not be granted relief under that provision. Instead, she "must first establish that she is entitled to relief from the

judgment of divorce." O, 3. The trial court analyzed plaintiff's allegations in the context of MCR 2.612(C)(1)(a)-(f) and found no basis to grant relief from the divorce judgment. O, 3-4.

The trial court then determined that plaintiff identified no other provision in ROPA that would entitle her to the requested relief. The court held there are "no provisions in the Act which even arguably provide for setting aside a judgment of divorce or an adjudication of paternity contained within a judgment of divorce." O, 4. "Absent any authority allowing a party to challenge a judgment of divorce under the Revocation of Paternity Act, this Court shall not legislate from the bench and construe the Act as providing for such relief." O, 5.

The trial court also addressed defendant's argument that *res judicata* barred plaintiff's request for relief. The court held that because the parties agreed in the judgment that defendant was the child's father and neither party appealed that judgment, "issue preclusion applies and bars the parties from relitigating the issue." [citing and quoting from *Hawkins v Murphy*, 222 Mich App 664, 672, 565 NW2d 674 (1997)]. O, 5. Finally, having determined there was no authority to revoke paternity, the trial court declined to address the best interests issues. O, 5-6.

The Court of Appeals Decision: Plaintiff claimed an appeal by right from the trial court's opinion and order. It is not clear that plaintiff was entitled to an appeal by right from the trial court's order. However, the Court of

Appeals treated plaintiff's appeal as an appeal by right and, in a footnote to its decision, rejected defendant's jurisdictional challenge.

After briefing and oral argument, the Court of Appeals on July 15, 2014, issued a published decision reversing the trial court and remanding for further proceedings under ROPA. **Exhibit J.**

The Court of Appeals held first that defendant was a "presumed father" not an "affiliated father" under ROPA. COA, p 7. This was a key holding because, as acknowledged by the Court of Appeals, "no express provision is made for setting aside an order establishing a man as an affiliated father where the man participated in the court proceedings determining his paternity. See MCL 722.1439(1)." COA, p 4. Were defendant an affiliated father under ROPA, plaintiff would lack a remedy and the trial court would be affirmed.

The Court of Appeals based its classification of defendant as merely a presumed father on its erroneous view that "this particular divorce judgment was not a determination of defendant's fatherhood and thus not an order establishing him as an affiliated father." COA, p 6. The panel failed to address the undisputed fact that plaintiff alleged defendant's paternity of the child in her divorce complaint, and defendant participated in the proceedings the proceedings to determine custody, parenting time, and child support. The panel also failed to recognize that the judgment declared defendant to be the

child's father¹, granted him joint legal custody, parenting time, and imposed upon him a support obligation.

The Court of Appeals next held that the divorce judgment was not a final determination of defendant's paternity because the trial court retained jurisdiction to modify provisions related to custody, support, and parenting time. COA, pp 6-7. As such, the ROPA provision permitting an action at any stage of the proceedings applies to post-judgment proceedings as well as proceedings prior to entry of a final judgment. The panel ignored long-established Michigan law that a determination of paternity in a divorce judgment is a final determination and is not among the issue left open for modification during ancillary proceedings post-divorce. It also ignored established law defining what constitutes "proceedings."

Finally, contrary to established case law, including authority from this Court², the Court of Appeals determined that doctrine of *res judicata* did not prohibit plaintiff from attacking a paternity determination that was made, or could have been made, in their divorce proceedings.

¹ "The parties shall ensure that the designations of "Dad" and "Mom", or their equivalents, are used by the child only to refer to the parties hereto, and not to other third persons. Neither party shall permit any third parties to use such designations when referring to the relationship between the child and any such third parties." JOD, p 13.

² *Hackley v Hackley*, 426 Mich 582, 585, 395 NW2d 906 (1986); *Hawkins v Murphy*, 222 Mich App 664, 671, 565 NW2d 674 (1997); *Rucinski v Rucinski*, 172 Mich App 20, 22, 431 NW2d 241 (1988); *Baum v Baum*, 20 Mich App 68, 74, 173 NW2d 744 (1969).

Standards of Review

The issues in this appeal are questions of law. Questions of law are reviewed on appeal *de novo*. *Brown v Loveman*, 260 Mich App 576, at 591, 680 NW2d 432 (2004). Whether there was a mutual acknowledgment of Witt's paternity of the child sufficient to satisfy the threshold requirement in MCL 722.1441(1)(a)(ii) is a mixed question of fact and law. Findings of fact are reviewed for clear error, and questions of law *de novo*. *In re Temple Marital Trust*, 278 Mich App 122, 128, 748 NW2d 265 (2008). Here, however, no testimony has been taken and there has been no finding on the threshold issue.

Argument

A. Where defendant is not merely the "presumed father" of the minor child but is the "affiliated father" of the minor child by virtue of the determination of paternity in the parties' divorce judgment, plaintiff lacks a remedy under the Revocation of Paternity Act. The Court of Appeals erred in its interpretation of the Revocation of Paternity Act when it reversed the trial court and held that defendant was not an "affiliated father" under that Act.

Introduction: Plaintiff asked below that the trial court legislate from the bench and read into ROPA a remedy not stated in the statute. The trial court declined. On appeal, she asks this Court to do the same. Unfortunately, the Court of Appeals read into the Act remedies beyond what was provided for by the Legislature.

The Purpose of ROPA: ROPA was enacted to grant certain *limited* rights that did not exist at common law. See p 4 of the Bill Analysis attached

as Tab D to plaintiff's brief in the Court of Appeals. Statutes in derogation of common law must be narrow construed. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508, 309 NW2d 163 (1981).

ROPA expanded legal standing for biological fathers to establish paternity of their children. The intent was to bypass the requirement in the Paternity Act, MCL 722.711 *et seq*, that there be a prior determination that a child born during the mother's marriage was not issue of that marriage. ROPA was a long-awaited response to this Court's decision in *Girard v Wagenmaker*, 437 Mich 231, 470 NW2d 372 (1991). See p 3 of the Bill Analysis attached as Tab D and p 3 of the Bill Analysis attached at Tab E to plaintiff's brief in the Court of Appeals.

Notably, in *Girard*, the husband and wife remained married, no divorce action was pending, and there had been no divorce judgment finding the husband to be (or not to be) the child's father. Assuming that ROPA was narrowly intended to correct the *Girard* problem, doing so did not require authorization of post-divorce actions by any of the parties (mother, former husband, or biological father) to set aside the paternity determination in the judgment. Addressing the *Girard* problem required only that ROPA permit a remedy during the marriage or while divorce proceedings were pending.

Given the purpose of ROPA, it is not a surprise that nothing in the statute references an action to set aside a finding in a divorce judgment that the husband is the father of a child born during the marriage. The trial court

correctly found that post-divorce remedies are not mentioned anywhere in ROPA. The Court of Appeals improperly read into the statute a post-divorce remedy which does not exist.

The Common Law: At common law, the only way for a husband or wife to rebut the presumption of the husband's paternity of a child born during the marriage was for the court in the pending divorce case to make a finding by clear and convincing evidence that the child was not issue of the marriage. *Barnes v Jeudevine*, 475 Mich 696, 704-706, 718 NW2d 311 (2006). Once the divorce judgment was entered, the presumption of paternity could no longer be rebutted. *Rucinski v Rucinski*, 172 Mich App 20, 431 NW2d 241 (1988).

A divorce judgment that fails to expressly find that the husband is not the father of a child conceived or born during the marriage serves as a final court determination of the husband's paternity of that child. *Hackley v Hackley*, 426 Mich 582, 395 NW2d 906 (1986). As such, it is *res judicata* on the question of paternity and both parties are estopped from challenging it. *Cogan v Cogan*, 119 Mich App 476, 326 NW2d 414 (1982).

The Court of Appeals was wrong in its assessment that the common law is no longer viable after enactment of ROPA. In *Baum v Baum*, 20 Mich App 68, 173 NW2d 744 (1969), the Court of Appeals held that a child support order in a divorce judgment, although uncontested, was an adjudication of paternity with full *res judicata* effect. The support obligor could not at a later date seek to disestablish his paternity of the child. Plaintiff incorrectly argued on appeal

that *Baum* was abrogated by this Court's subsequent decision in *Serafin v Serafin*, 401 Mich 629, 632-33, 258 NW2d 461 (1977). *Serafin* addresses only the ability to rebut the husband's presumption of paternity **during a pending divorce action**. *Serafin* is silent on *res judicata* and whether a determination of paternity in a divorce case is thereafter binding on both parties.

Plaintiff also incorrectly argued on appeal that *Thompson v Thompson*, 112 Mich App 116, 315 NW2d 555 (1982), abrogates the *Baum* rule and holds that a court can accept post-divorce evidence from the husband to disestablish his paternity of a child born during the marriage. *Thompson* has one very unusual fact that distinguishes it from *Baum* and the instant case.

In *Thompson*, the parties were divorced pre-*Serafin*. The husband testified **during the divorce action** he was not the father of one of the three children born during the marriage ["Plaintiff contended that Tyrone was not his son, as he had at the time of the original divorce proceedings"]. *Id.*, at 117. Because Lord Mansfield's Rule was still in effect, the court was powerless to relieve the husband of his support obligation even if it could determine that he was not the child's father.

After *Serafin* was decided by this Court, the husband asked that the claim of non-paternity he asserted in the divorce proceedings be retroactively recognized. The trial court did so and terminated his support obligation for that child. However, the trial court refused the father's request for

reimbursement of past support payments. The husband appealed. The only issue presented to and decided on appeal was whether the husband was entitled to reimbursement of past payments from the mother. This Court of Appeals said no. Nothing in *Thompson* reversed or abrogates the rule that a party must challenge paternity **at the time of divorce**.

In both the trial court and on appeal, plaintiff failed to mention *Cogan v Cogan*, 119 Mich App 476, 326 NW2d 414 (1982). *Cogan* was decided after *Thompson*. It is a resounding affirmation of the *res judicata* rule described in *Baum*. In *Cogan*, "[t]he parties' marriage was terminated by a judgment of divorce entered on April 26, 1978. The judgment was entered after proceedings in which various matters were contested but in which defendant admitted paternity of the parties' two minor children." *Id*, at 477. Three years later, the defendant-husband moved to determine paternity of one child alleging that he was not the child's biological father.

The trial court, expressly relying on *Baum*, held that the husband's motion was barred by *res judicata* and estoppel. The Court of Appeals affirmed, holding that defendant made no showing sufficient to be relieved from the paternity finding implicit in the divorce judgment. Defendant's appeal was found to be vexatious, holding that "[d]efendant's position on appeal is indefensible under any conceivable theory." *Id*, at 479. *Cogan* remains good law. It was cited in *In re Cook Estate*, 155 Mich App 604, 400 NW2d 695 (1986), which held at 609:

The doctrine of *res judicata* applies to default judgments and consent judgments as well as to judgments derived from contested trials, and includes every point properly the subject of the litigation which the parties could have brought forward at the time.

Post-*Serafin*, the question of the husband's paternity of a child born during the marriage is "properly the subject of the litigation which the parties could have brought forward at the time." Based on the above-cited cases, *Baum* remains valid law in Michigan. Both plaintiff and the Court of Appeals were incorrect in their view that the rule in *Baum* and by extension, this Court's decision in *Hackley*, were not binding.

Plaintiff argued in the Court of Appeals that *Baum* is "outdated" presumably because *Serafin* changed the ability to introduce evidence of non-paternity at the time of divorce. That issue was squarely before this Court and addressed in Justice Boyle's plurality opinion in *Hackley*. Justice Boyle rejected the assertion that the doctrine of *res judicata* should not apply to paternity determinations in divorce cases "because of subsequent changes in the legal climate affecting the evidence admissible on the issue of paternity." *Hackley, supra*, at 584. This was a reference to *Serafin* and the abrogation of Lord Mansfield's Rule. Despite *Serafin* opening the door to paternity challenges **during a pending divorce case**, *Hackley* said the door remains closed to challenging the husband's paternity **post-divorce**.

Presumed v Affiliated Fathers Under ROPA: The Court of Appeals accepted plaintiff's unsupported argument that defendant is merely a

"presumed father" as that term is defined in ROPA. Section 3 of ROPA, MCL 722.1433, defines the actors in a ROPA proceeding. Under MCL 722.1433(4), a "presumed father" is "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." It is not disputed that defendant, during his marriage to plaintiff and continuing until entry of the divorce judgment on February 13, 2013, a "presumed father."

However, once the divorce judgment was entered determining that defendant is the father of the child born during the parties' marriage, defendant became more than a mere "presumed father." Upon entry of the judgment, defendant became an "affiliated father. Under MCL 722.1433(4), an "affiliated father" is "a man who has been determined *in a court* to be the child's father." [Emphasis added.]

ROPA defines "order of filiation" as "a judicial order establishing an affiliated father." MCL 722.1433(5). The statute doesn't say it must be "a judicial order under the Paternity Act" or "a judicial order under this Act." **Any** judicial order by a court of competent jurisdiction declaring a man "to be the child's father" is an order determining filiation. There is no other way to read the statute.

The Court of Appeals acknowledged that "any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of" ROPA. COA, p 5.

The panel, in its only legally correct ruling, rejected plaintiff's argument that that an order of filiation may only arise from the procedures prescribed in the Paternity Act. A provision in a divorce judgment treating a child born during the marriage as issue of that marriage constitutes a judicial determination of paternity. *Hackley, supra*, at 585 ["A support order arising from a divorce decree constitutes an adjudication of paternity and establishes the defendant's duty of support"]. *Hackley* remains good law. There have been only two decisions distinguishing *Hackley*, and neither supports plaintiff's position nor the Court of Appeals decision.

In *Opland v Kiesgan*, 234 Mich App 352, 594 NW2d 505 (1999), it was held that where parties agree post-divorce to set aside a finding in the divorce judgment that the husband is the father of a child born during the marriage, *res judicata* does not bar them from entering into such an agreement to amend the judgment. In *Opland*, the amendatory order revoking the husband's paternity was "was based on the uncontested stipulation of Opland [mother] and Craft [mother's former husband] that although they were married at the time Stephanie [child] was conceived, they were separated at that time and had no opportunity for any sexual relationship." *Id*, at 357. In the instant case, there is no stipulation to amend the judgment and revoke defendant's paternity. Nor were plaintiff and defendant separated when the child was conceived. Therefore, this case resembles *Hackley*, not *Opland*.

The second decision distinguishing *Hackley* is *Dept of Social Services v Franzel*, 204 Mich App 385, 516 NW2d 495 (1994). There, the request for relief from a stipulated order of filiation came **while the action itself was still pending**, not in ancillary post-judgment proceedings. As explained by in *Franzel*, at 390:

[D]efendant's motions were brought, not a prior proceeding. These parties are involved in '*res litigious*,' things that are in litigation; not *res judicata*, a prior final judgment that is conclusive of the parties' rights. In other words, this matter has not been finally decided and the proceedings are ongoing.

Until the litigation is concluded by entry of a final order, a stipulation on paternity may be challenged. After a final order is entered, *res judicata* bars relitigation of paternity. Here, the divorce judgment was final. All issues were conclusively resolved. Nothing was left open. This case is like *Hackley*, not *Franzel*.

The trial court's February 13, 2013, judgment of divorce is an order of filiation. It declares defendant to be Zia's father. Defendant became more than Zia's "presumed" father. He is now her "affiliated" father. On this basis alone, plaintiff's claim for relief under Section 11 of ROPA, MCL 722.1441, fails. Section 11 applies only to actions involving "presumed fathers." MCL 722.1435(3).

Had plaintiff sought relief a few months earlier, before entry of the divorce judgment while defendant remained merely a "presumed father," she could attempt to prove her case under Section 11. She may not have

ultimately prevailed given the many additional requirements of Section 11, but the trial court would have given her an evidentiary hearing to prove that she was entitled to the requested relief.

Nor does plaintiff have a claim under Section 9 of ROPA. It "governs an action to set aside an order of filiation." MCL 722.1435(2). As the Court of Appeals acknowledged, a court finding in a divorce judgment that a child born during the marriage is issue of that marriage may qualify as an order of filiation. However, plaintiff never sought relief under Section 9 in the trial court. On appeal she denied that Section 9 applied on these facts. Therefore, any claim plaintiff may have under Section 9 was not addressed by the trial court nor was it preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443, 695 NW2d 84 (2005).

Were section 9 were at issue, plaintiff fares not better under its terms than under Section 11. Section 9 recognizes and codifies the common law *res judicata* bar against relitigating a court's prior paternity determination. This section of ROPA fully follows the principles in *Hackley* and *Cogan*. Once paternity is determined by a court in a proceeding involving the participation of the affiliated father, neither the mother, the alleged father, nor the affiliated father have standing under ROPA to challenge that determination.

It is only where "paternity was determined based on the affiliated father's **failure to participate** in the court proceedings" that a party "may file a motion with the court that made the determination to set aside the

determination." MCL 722.1439. [Emphasis added.] Defendant participated in the divorce proceedings that resulting in the paternity determination. While he filed no answer to plaintiff's divorce complaint, he fully participated in negotiating its terms, including those related to custody, parenting time, and support of the child. As plaintiff testified under oath when the judgment was entered, it bears defendant's signature approving all terms "as to form and substance." **Exhibit C**, p 23; T2-13-13, 9-10. Defendant also participated by appearing at the Friend of the Court for the child support investigation and completing and submitting a detailed questionnaire containing financial and other information. **Exhibit F** and **G**.

Because of defendant's participation, this was not a case where "paternity was determined based on the affiliated father's failure to participate in the court proceedings." Not only does Section 9 codify the prior case law barring re-litigation of paternity once it has been established by court order, it carves out a small exception for true default cases where the father failed to participate in the proceedings that led to the paternity determination. Since those are not the facts of this case, the narrow exception does not apply and no remedy is available to plaintiff under Section 9.

Conclusion: The Revocation of Paternity Act fails to provide a remedy to plaintiff. Defendant is no longer a presumed father. No relief may be granted under Section 11. As an affiliated father who participated in the

proceedings that resulted in the paternity determination, Section 9 is similarly unavailable to plaintiff.

ROPA preserves the common law prohibition against re-litigation of paternity once it has been determined by entry of a court order, including in a divorce judgment. Plaintiff may have been able to assert a Section 11 ROPA claim if she sought to rebut defendant's presumption of paternity **during the marriage or while divorce proceedings were pending**. Once there was a provision in the divorce judgment declaring the child to be "of the marriage," this case fell outside ROPA. Plaintiff's only possible remaining remedy, a remedy she voluntarily decided to forego, was a motion for relief from the judgment under MCR 2.612. The Court of Appeals erred by reading into ROPA a remedy not provided by the Legislature. The trial court should be affirmed.

B. The agreed-upon determination of paternity contained in the parties' judgment of divorce is *res judicata* as to the question of who is the minor child's legal father, thereby precluding re-litigation of that issue and cannot now be collaterally attacked by plaintiff. The Court of Appeals erred when it ignored established Michigan case law, including authority from this Court, and held that *res judicata* did not bar plaintiff's effort to disestablish defendant's paternity

Introduction: Plaintiff argued on appeal that the law related to paternity determinations prior to ROPA was "ripe for legislative change." On that, most experienced family law practitioners can agree. However, ROPA was a limited expansion of the ability to revoke a prior paternity determination. It did not open the floodgates to all manner of litigation to revisit paternity of a child.

ROPA allows a court to set aside a previously executed acknowledgment of parentage within limited time frames based on the age of the child and how long ago the acknowledgment was signed. MCL 722.1437. ROPA also permits actions to rebut the marital presumption of paternity under certain limited circumstances. MCL 722.1441. However, nowhere in Section 11 is any mention made of the right to seek relief from a court determination of paternity in a divorce judgment. Rebutting a mere presumption that the mother's husband is the father of a child is not the same as attacking a provision in a divorce judgment treating the husband as father of a child born during the parties' marriage. Neither plaintiff nor the Court of Appeals recognized the considerable difference between a rebuttable presumption and a judicial determination.

The trial court's determination that ROPA did not grant plaintiff the relief she sought was not a frustration of legislative purpose. The Legislature, well aware of the iron gate (*Girard*) blocking the path of persons in the position of plaintiff and Mr. Witt, opened that gate only part way. There is a time to seek that the remedy of revocation of paternity. That time is **before** entry of judgment of divorce. Once that time is gone, so is the remedy. Plaintiff played fast and loose with the truth and participated in entry of a divorce judgment containing a paternity determination she knew was false. Her remedy is now gone.

Res Judicata: Michigan law is well-established that parties to a divorce cannot, after entry of a judgment, attack the paternity determination made in that judgment. The leading cases, such as *Cogan v Cogan*, 119 Mich App 476, 326 NW2d 414 (1982), and *Hackley v Hackley*, 426 Mich 582, 395 NW2d 906 (1986), involved former husbands desiring to disestablish paternity of children born during the marriage. Under any view of equal protection, that restriction would apply equally to a mother wants to remove her former husband from the life of the child they raised together.

Hackley quoted from *Gursten v Kenney*, 375 Mich 330, 134 NW2d 764 (1965) in holding at 585:

In Michigan, the doctrine of *res judicata* applies, except in special cases, in a subsequent action between the same parties and 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

Plaintiff consistently admitted that she was having intimate relations with Mr. Witt during her marriage to defendant, and particularly when the child was conceived. Had she "exercised reasonable diligence," the issue of paternity of the child "could have been brought forward at the time" of the divorce.

Finality is important in all litigation, but particularly in family litigation. As stated by this Court in *Hackley*, at 598:

There is no area of law requiring more finality and stability than family law: 'Public policy demands finality of litigation in this area to preserve surviving family structure.' *Ex parte Hovermale*, 636 SW2d 828, 836 (Tex Civ App, 1982); *McGinn v McGinn*, 126 Mich App 689, 693, 337 NW2d 632 (1983).

The Court of Appeals acknowledged that until enactment of ROPA, "it had been repeatedly recognized that a support order arising from a divorce decree constituted an adjudication of paternity and, consequently, the doctrine of *res judicata* precluded a party to the divorce from later challenging paternity." COA, p 8. Without citing authority, the panel determined that ROPA, which neither specifically nor implicitly abrogates *res judicata*, wipes clear many decades of authority. While it may be true that "the Legislature clearly evidenced an intent to allow relitigation or reconsideration of paternity in certain circumstances," a post-divorce motion to disestablish a husband's paternity of a child born during the marriage after entry of a judgment treating the husband as that child's father is not one of those circumstances.

The Court of Appeals mistakenly determined that application of *res judicata* was an all or nothing proposition, irrespective of the circumstances. It held, "it would nevertheless clearly subvert the Legislature's intent if we employed *res judicata* as a categorical bar to all litigation of paternity where paternity had been previously determined by a court, or could have been previously decided." COA p 9. The Legislature already solved that problem by expressly stating under what circumstances a prior court determination could be challenged. Those circumstances are set forth in Section 9 of ROPA.

Nothing in Section 11 of ROPA, the provision under which plaintiff sought relief, permits relitigation of a court determination of paternity.

This is an unfortunate situation for all involved. But only defendant and the child are innocent here. The heartache all will feel is solely doing plaintiff and Mr. Witt. Mr. Witt is not a party to these proceedings. Plaintiff, although a party, has neither a legal nor an equitable claim for relief. The Court of Appeals was wrong in determining that ROPA rendered *res judicata* in applicable to these facts.

Equitable/Judicial Estoppel and Waiver: Although the Court of Appeals acknowledged the equitable/judicial estoppel argument made by defendant in the trial court and in his brief on appeal, it failed to address the issue in its decision.

"Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Bergan v Bergan*, 226 Mich App 183, 187, 572 NW2d 272 (1997).

Equitable estoppel precludes a party from asserting or denying the existence of facts inconsistent with facts the she previously induced another party to believe, *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141, 602 NW2d 390 (1999), or from otherwise challenging the consequences

of her own inaction. *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 124, 346 NW2d 911 (1984). Equitable estoppel should have barred plaintiff from taking any action to disestablish defendant's paternity after she fully participated in causing entry of the divorce judgment that declared defendant to be the child's father.

Besides equitable estoppel, plaintiff should have been barred by the doctrine of judicial estoppel from denying defendant's paternity of the parties' child. "Under the 'prior success model' of judicial estoppel, 'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 480, 822 NW2d 239 (2012). "Judicial estoppel . . . 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id*, at 479.

During the divorce proceedings, plaintiff asserted that defendant was the child's father and that defendant should therefore be required to fulfill all of the obligations and to enjoy all of the privileges attendant to his fatherhood. Plaintiff's assertions were unequivocal and they were accepted as true by the trial court and incorporated by agreement into the divorce judgment. The doctrine of judicial estoppel therefore precluded plaintiff from asserting an inconsistent position in the lower court in her motion to revoke defendant's paternity.

The parties divorce judgment, at p 19, contains a mutual waiver and release clause that states:

IT IS FURTHER ORDERED AND ADJUDICATED that upon entry of this Judgment, each of the parties hereby release the other from any cause of action that either may have against the other for any incident which may have occurred prior to the entry of this Judgment of Divorce, whether that claim be founded in contract, tort or any other basis, except for fraud or misrepresentation in connection with the disclosure or transfer of assets in this divorce proceeding.

A court should enforce a valid waiver clause within the agreed-upon provisions of a divorce judgment *Sweebe v Sweebe*, 474 Mich 151, 156, 712 NW2d 708 (2006). A "waiver is the intentional relinquishment of a known right." *Id* at 156-57. "[A] waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Id*.

The language of the judgment is broad, leaving no room for exceptions. *Shay v Aldrich*, 487 Mich 648, 660-61, 790 NW2d 629 (2010). Under the plain language in the mutual waiver and release provision of the parties' judgment, plaintiff waived her claim under the Revocation of Paternity Act and violated the express terms of the judgment when she filed her motion.

Conclusion: The trial court correctly determined that ROPA provided no statutory remedy for plaintiff. Looking to the common law, the trial court also correctly determined that the doctrine of *res judicata* barred relitigation of the paternity determination in the judgment. The Court of Appeals should be reversed and the trial court should be affirmed.

C. The Court of Appeals erred when it failed to remand this matter to the trial court for a factual determination as to whether the threshold requirements of MCL 722.1441(1)(a)(ii) were satisfied by a mutual acknowledgment by the presumed father, the alleged father, and the child's mother of a biological relationship between the alleged father and the child as recognized in *Parks v Parks*, 304 Mich App 232, 239, 850 NW2d 595 (2014).

Introduction: While this case was pending in the Court of Appeals, the published decision in *Parks v Parks*, 304 Mich App 232, 239, 850 NW2d 595 (2014), was released. However, other than citing *Parks* for the standard of review, the Court of Appeals in this did not address the substantive holding in *Parks*. Instead, the panel references an alleged email in which "defendant arguably acknowledged Witt's biological relationship with the minor child." COA, p 2.

However, no testimony was taken by the trial court and no finding was ever made that the threshold requirement of MCL 722.1441(1)(a)(ii) were satisfied by a mutual acknowledgment by the presumed father, the alleged father, and the child's mother of a biological relationship between the alleged father and the child. Once he retained counsel, defendant consistently maintained that he is the child's father and wishes to retain his parental rights.

Unless there is a factual determination this threshold requirement has been satisfied, plaintiff lacks legal standing to pursue her motion to disestablish defendant's paternity of the child. Before addressing the legal

issues raised in plaintiff's appeal, the Court of Appeals should have remanded the case to the trial court for a determination whether plaintiff satisfied the threshold requirement of MCL 722.1441(1)(a)(ii) because it is a dispositive issue.

Argument: Without warning, plaintiff delivered shocking news to defendant that he allegedly was not his daughter's biological father in a telephone call in a telephone call to defendant at 10:27 p.m. on May 19, 2013. An initial email from defendant to plaintiff concerning the child's paternity was sent just three days later on May 22, 2013, at 7:44 p.m. The email cited by the Court of Appeals in its decision was from defendant to plaintiff's counsel and followed just five days later on May 27, 2013, at 6:51 p.m. This was while defendant was still under the influence of this disturbing news and before he could consult with legal counsel.

No Michigan authority holds that informal email may serve as a waiver of parental rights. Also, because the communication was unilateral and made privately by defendant to plaintiff's counsel, it cannot serve as the required "mutual and open" acknowledgement of a biological relationship between the child and Witt required by MCL 722.1441(1)(a)(ii). As stated in *Parks, supra*, at 239, "MCL 722.1441(1)(a)(ii) thus requires that the presumed father, the alleged father, and the child's mother must at some time mutually and openly acknowledge a biological relationship between the alleged father and the child."

Once defendant consulted with counsel, he steadfastly maintained that he was the child's father. Throughout the litigation, in all documents filed with the trial court, defendant never acknowledged that Witt was the child's biological father nor that defendant was not the child's father. Defendant's initial emails were caused by the shock and grief of the profound betrayal by his former wife and the prospect of losing his daughter. Given the surrounding circumstances, they do not meet the strict and narrow definition of mutual acknowledgement set forth by this Court in *Parks*.

If there is a question whether the emails satisfy the threshold requirements of MCL 722.1441(1)(a)(ii), there must be an evidentiary hearing and a factual determination by the trial court. If the requirements of MCL 722.1441(1)(a)(ii) are not satisfied, *Parks* controls and plaintiff's motion to revoke defendant's paternity must fail.

Conclusion: Before addressing plaintiff's legal arguments, the Court of Appeals should have remanded this case to the trial court for testimony and a finding whether plaintiff established the threshold requirements of MCL 722.1441(1)(a)(ii) that the presumed father, the alleged father, and the child's mother must mutually and openly acknowledge a biological relationship between the alleged father and the child.

D. The Court of Appeals erred when it held that a post-judgment motion could be brought under the Revocation of Paternity Act to disestablish the husband's paternity of a child born during the marriage after entry of a final divorce judgment that treats the child as a child of the marriage.

Introduction: The Court of Appeals held at pages 7-8 of its opinion that because a court in a divorce action retains authority to modify custody, support, and parenting time, the proceedings were continuing and that a motion under ROPA could be brought at "any stage" of the proceedings. In so ruling, the Court of Appeals confused the concept of continuing jurisdiction and continuing proceedings. While a court granting a divorce involving minor children retains continuing jurisdiction to address child-related issues, it does so in ancillary proceedings. The divorce proceedings themselves conclude with entry of a final order, typically a divorce judgment.

Argument: The court rules create a clear distinction between "actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support" in MCR 3.201(A)(1) and proceedings that are "ancillary or subsequent to" the aforementioned actions such as those relating to "custody of minors" in MCR 3.201(A)(2)(a). Plaintiff's motion to revoke paternity was, as determined by the Court of Appeals in FN1 of its decision, an ancillary proceeding concerning custody from which there is an appeal by right. The motion was not, per MCR 3.201, part of the divorce proceedings.

"Black's [Law Dictionary] defines 'proceeding,' in pertinent part, as '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment'"
." *People v Kissner*, 292 Mich App 526, 536, 808 NW2d 522 (2011) [rejecting

argument that signing and affidavit constituted "proceeding"], *lv den* 490 Mich 893 (2011). See also, *Harbor Tel 2103, LLC v Oakland Cnty Bd of Comm'rs*, 253 Mich App 40, 60, 654 NW2d 633 (2002). "Accordingly, the term 'proceeding' encompasses the entirety of a lawsuit, from its commencement to its conclusion." *Kissner*, 292 Mich App at 536.

An action or proceeding is concluded or terminated upon the entry of a final judgment. See, *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 534, 164 NW2d 19 (1969); *State v Iron Cliffs Cnty*, 54 Mich 350, 408, 20 NW 493 (1884) ["A judgment lawfully rendered ends the controversy, but nothing else can."] If the divorce proceedings between the parties constituted "an action for the support, custody, or parenting time of the child," those proceedings were concluded and closed when, on February 13, 2013, the trial court entered the parties' judgment of divorce.

No "action for the support, custody, or parenting time of the child exist[ed] at any stage of the proceedings" when plaintiff filed her motion to revoke defendant's paternity. She could not proceed by motion. The Court of Appeals erred when it held that because a motion under the act may be brought at "any stage" of the proceedings, it may be brought post-judgment. The correct reading of the statute, consistent with the court rules and existing case law, precludes moving to revoke paternity after entry of a judgment of divorce that either declares the husband to be the child's father or given the

strong presumption of paternity, fails to expressly exclude the mother's husband as the biological father of the child.

Conclusion: The divorce proceedings were concluded with entry of the judgment of divorce. There were no "proceedings" pending when plaintiff filed her motion under ROPA. Because the proceedings had already been concluded, plaintiff lacked standing to seek relief under ROPA. The Court of Appeals determination that a motion for relief under ROPA may be filed post-divorce is erroneous and should be reversed.

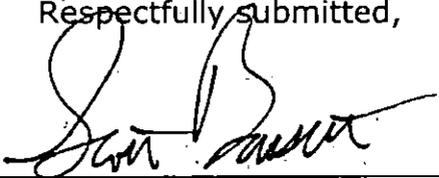
Conclusion/Relief Requested

Neither plaintiff nor the Court of Appeals were satisfied with the plain language of the Revocation of Paternity Act. At plaintiff's request, the Court of Appeals legislated from the bench and read into the statute remedies that do not exist in its text. The trial court refused to look beyond the words provided by the Legislature. The trial court's approach was correct and should be affirmed. The Court of Appeals should be reversed for expanding ROPA remedies beyond what the Legislature intended.

ROPA gave plaintiff a remedy, but she chose not to seek it when it was available. Instead, she played fast and loose with the truth and participated in entry of a divorce judgment containing a paternity finding she knew, or had strong reason to suspect, was false. What is done cannot, on these facts, be undone. The trial court should be affirmed.

Defendant asks this Court to grant leave to appeal and ultimately reverse the Court of Appeals.

Respectfully submitted,

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