

STATE OF MICHIGAN
COURT OF APPEALS

MARK EDWARD SNAY,

Plaintiff-Appellant,

v

DESTINY ROSE VEST,

Defendant-Appellee.

UNPUBLISHED
November 18, 2010

No. 293618
Lapeer Circuit Court
LC No. 09-041541-DP

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiff appeals from the order granting defendant's motion for summary disposition because plaintiff does not have standing. We affirm.¹

Plaintiff is the biological father of a child he fathered with defendant. Defendant is married to another man, and was married to this other man throughout her relationship with plaintiff and her pregnancy with the child. But, defendant's husband is not present in either defendant's life or the child's life, nor has he been since before plaintiff and defendant's relationship. Defendant's utilities were shut off, and two of defendant's older children are under the jurisdiction of the probate court through guardianship. Plaintiff is requesting custody of the child because he is her biological father and because he believes that defendant is not fit to parent.

To bring a claim for custody, plaintiff must have standing. When a child is not born out of wedlock, her legal father is the mother's husband. Even though plaintiff is the child's

¹ We believe that the Supreme Court should revisit this issue in the context of this case. Here, a man is denied standing to request custody of his biological child because of the marital status of the child's mother. The law that denies him standing is designed to provide for children born out of wedlock and to promote the sanctity of marriage. The facts suggest that this child is neither provided for, nor is the marriage intact. But, because there has been no court determination that the child is not the product of the marriage, the biological father cannot legally request custody of his own child, even though he is willing to parent her and provide for her.

biological father, he does not have standing because he is not her legal father. Under MCL 722.711(a), a child can only be considered born “out of wedlock” if the mother was not married during the period from conception to birth, or if there is a court “determination that the child was not the issue of the marriage at the time of filing the complaint.” *McHone v Sosnowski*, 239 Mich App 674, 678; 609 NW2d 844 (2000) (quoting *Girard v Wagenmaker*, 437 Mich 231, 242-243; 470 NW2d 373 [1991]). Under the in pari materia rule, this definition is applied to the three related statutes: the Paternity Act (MCL 722.711 et seq.), the Acknowledgment of Parentage Act (MCL 722.1001 et seq.), and the Custody Act (MCL 722.21 et seq.). *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003) (applying the in pari materia rule to the three acts). This means that plaintiff also does not have standing to request that the court make a determination that the child was not the issue of the marriage. *Girard*, 437 Mich at 252. Because there has been no court determination and because defendant was and is married to another man, the child is not considered born out of wedlock, and plaintiff does not have standing to bring a claim for custody.

Plaintiff argues that the current law for determining standing denies equal protection to plaintiff because the law creates three distinct groups that are treated differently. The purpose of the Equal Protection Clause (US Const, Am XIV, § 1) is to prevent intentional and arbitrary discrimination whether it is by the express terms of a statute, or the improper execution of a statute. *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). When a legislative classification is challenged, it is measured by one of three tests. *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000), cert den 531 US 1074; 121 S Ct 767; 148 L Ed 2d 667 (2001). Which test is used depends on the type of classification and the nature of the interest affected. *Dep’t of Civil Rights ex rel Forton v Waterford Twp*, 425 Mich 173, 190; 387 NW2d 821 (1986); *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). The classifications of gender and illegitimacy are subject to the mid-level, substantial relationship test. *United States v Virginia*, 518 US 515, 533; 116 S Ct 2264; 135 L Ed 2d 735 (1996). Under the substantial relationship test, the classification must be substantially related to an important government purpose. *Id.*

The classifications of the Paternity Act are substantially related to its purpose. The Paternity Act classifies the different groups as: “(1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, and (3) the Family Independence Agency on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance.” *McHone*, 239 Mich App at 846. The Legislature intended to provide support for illegitimate children and to preserve the sanctity of marriage. *Girard*, 437 Mich at 240, 249. These reasons are substantially related to the statute because the statute is intended to identify fathers of children born out of wedlock to provide for those children. *Girard*, 437 Mich at 240. The presumption that children born while the husband and wife are married are the children of that marriage is designed to preserve the sanctity of that marriage. *Id.* While this classification is not perfectly tailored to the Paternity Act, it is enough that there is a substantial basis for the classification. *Virginia*, 518 US at 533. If a classification is substantially related to a goal, it is also rationally related to that goal because the substantial relationship test is a stricter test with a higher level of scrutiny. The classification meets both tests.

Plaintiff is excluded, not because he is a man, but because his child was not born out of wedlock. The classification is based on the child’s status: born out of wedlock or not born out of

wedlock. The classification does not discriminate against plaintiff, and plaintiff's equal protection rights have not been violated.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad