



Addressing  
**PUTATIVE FATHERS**  
in Child Protective Proceedings  
Is "John Doe" Still Alive?

By Frank E. Vandervort and William Lansat

Michigan law protects the interests of legal fathers in their presumed offspring in the face of a challenge by a man asserting biological fatherhood.<sup>1</sup> For this reason, in *Girard v Wagenmaker*, the Michigan Supreme Court held that a man wishing to assert biological paternity of a child born while the mother was married to another man is precluded from doing so unless a court order finding that the child was born out of wedlock is first obtained. Until recently, when handling child protective proceedings, Michigan courts applied a different rule that focused on the child's biological rather than legal father.

In *re Montgomery*<sup>2</sup> involved a request to terminate parental rights. In that case, at the time of the child's birth, the mother was married to a man who was not the child's biological father. The court held that the legal father lacked standing to contest termination of his parental rights because he was not the biological father. Thus, paternity issues in child protective proceedings were handled as an exception to the general rule protecting the rights of legal rather than biological fathers. In 2004, the Michigan Supreme Court decided *In re KH*,<sup>3</sup> which eliminated this exception and established a single doctrine applicable when paternity is at issue.

In practice, it seems, *KH* is not widely understood. Child protection petitions for temporary custody continue to name multiple men as the "father" of a child when there is a legal father. Some courts insist on terminating the parental rights of "John Doe" when no man has established paternity. After *KH*, are such actions necessary? Are they permissible?

## Background

In *KH*, Child Protective Services (CPS) filed a petition requesting that the parental rights of Tina and Richard Jefferson to four children be terminated. The Jeffersons were married at all relevant times; thus, the children had a "legal father." CPS, however, named three additional "putative fathers": Larry Lagrone, Fredrick Herron, and "John Doe."

During the proceedings before a family court referee, Mrs. Jefferson testified that Herron was the biological father of one of the children, Lagrone the biological father of the other three, and Mr. Jefferson the biological father of none of the children. The referee indicated that because the children had a legal father, there was no reason for either biological father to participate in the proceeding.

Subsequent DNA testing established Lagrone as the biological father of three of the children. Mr. Jefferson indicated that he was not the father of the children and did not wish to participate in the proceedings. The referee, relying on the DNA tests, found that Lagrone was the biological father of the three children. As a result, Lagrone sought a determination from the court that Mr. Jefferson was not the "father" of the three children as defined in the court rules.<sup>4</sup> Lagrone's counsel argued that the family court had the authority to make a finding of paternity. Mrs. Jefferson objected, arguing that Lagrone lacked standing. The family court ruled that Lagrone did have standing to raise the issue and granted his motion. It did so in reliance on *Montgomery*. In essence, the family court made a finding of "paternity" with respect to the putative father, nullifying the status of the legal father. The judge stated that she was

"troubled" by the effect of this ruling because the putative father would have standing to request a paternity determination in the child protective proceeding although he lacked standing under the Paternity Act. The judge also noted the absence of statutory authority permitting such a result, but indicated that this result was mandated by court rule and *Montgomery*.

The lawyer-guardian ad litem sought an appeal. After it decided *In re CAW*,<sup>5</sup> the Supreme Court granted leave to appeal in *KH* regarding the following issues:

- Does a putative father have standing in a child protective proceeding to request a paternity determination when the children involved already have a legal father?
- In this case, what is the legal significance of the family court's finding that the putative father is the biological father of three of the children?
- Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act?
- Given that MCR 3.921(C)(2)(b), formerly MCR 5.921, authorizes a family court judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father, or must a putative father file a complaint under the Paternity Act?
- Does *CAW* apply to this case?

## The Supreme Court's Ruling

The *KH* Court began its analysis by noting that the juvenile code does not address the question of paternity.<sup>6</sup> The Court then considered the applicable court rules. It noted that the court rules define "father" in such a way that a putative father may be named only if the child lacks a legal father. If the child has a legal father, a putative father cannot "be identified as a respondent or otherwise given notice."<sup>7</sup>

The Court then analyzed the Paternity Act. It first observed that Lagrone had attempted to establish paternity within the child protective proceeding "rather than through the legislatively provided mechanism designed to govern the establishment of paternity claims—the Paternity Act."<sup>8</sup> Relying on *Girard v Wagenmaker*,<sup>9</sup> the Court found that Lagrone would have lacked standing under the Paternity Act. The Court went on to "conclude, consistently with



## FAST FACTS

When handling a child protective proceeding, the family court cannot adjudicate paternity.

A child's mother and legal father have standing to raise the issue of the child's paternity; the alleged biological father does not.

Once a putative father is notified and ordered to establish paternity, his failure to do so should result in a finding that the natural father has waived all rights to further notice pursuant to MCR 3.921(C)(3).

the language of the Paternity Act, that a determination that a child is born out of wedlock must be made by the court before a biological father may be identified in a child protective proceeding.”<sup>10</sup> In *Barnes v Judevine*,<sup>11</sup> the Michigan Supreme Court recently reaffirmed the need for a specific judicial finding supported by clear and convincing evidence that a child conceived during a marriage was not the issue of that marriage, concluding that entry of a default judgment stating that “no children were born of this marriage and none are expected” is insufficient. A finding that a child was born out of wedlock may be made in a child protective proceeding,<sup>12</sup> but it does not confer standing on the putative father<sup>13</sup> because “[n]othing in the . . . court rules permits a paternity determination to be made in the midst of a child protective proceeding.”<sup>14</sup> Rather, a finding in a child protective proceeding that a child is born out of wedlock merely serves as the prior finding required under the Paternity Act<sup>15</sup> or the Acknowledgment of Parentage Act<sup>16</sup> to provide an alleged biological father standing to seek to establish paternity.

### Resolution

The Court noted that “where a legal father exists, a biological father cannot properly be considered even a putative father,”<sup>17</sup> and held that Lagrone lacked standing to participate in the proceedings. The family court’s finding that the mother said her husband was not the biological father, the fact that the children’s legal father did not wish to be considered a party or to assert his rights, and the family court’s finding that Lagrone was the biological father laid the groundwork for the finding that the children were born out of wedlock. The Court remanded the case to permit the family court to make this finding. Lagrone could then pursue his paternity claim separately.

Because *Montgomery* was overruled,<sup>18</sup> paternity determinations are now handled uniformly across all family law applications.

### Practice Implications

Understanding and properly applying *In re KH*—and *In re CAW*—is critically important. When paternity is an issue, the court should first determine whether there is a legal father. The juvenile court rules define “father” to include “[a] man judicially determined to have parental rights.”<sup>19</sup> A legal father who is not a biological father may retain parental rights even over the mother’s objection if he is an “equitable parent.”<sup>20</sup> A legal father is an equitable parent if (1) the father and the child mutually acknowledged their relationship as father and child and the wife cooperated in fostering that relationship over a period of time, (2) the husband desires to have the rights of a father, and (3) the husband is willing to accept support obligations. In such a case, the court should find that the child has a “father” as defined by MCR 3.903(A)(7).

Who has standing to challenge paternity? It is clear that either the mother or the legal father may challenge the husband’s parental status. It is also clear that a biological father lacks standing to challenge paternity in the child protective proceeding despite his biological relationship if there is a legal father. A biological father does not have a due process right to challenge the paternity of a child who has a legal father.<sup>21</sup> It is unclear whether the child has standing to chal-

lenge paternity if there is a legal father. In *Michael H v Gerald D*,<sup>22</sup> the United States Supreme Court held that the Fourteenth Amendment’s Due Process clause does not guarantee a child the right to do so. That case, however, involved a child custody proceeding. Unlike divorce or child custody proceedings, the child is a party to a child protective proceeding,<sup>23</sup> which may confer standing to raise the issue of paternity, although the question has not been squarely addressed by any Michigan appellate court.

If a party with standing contests the legal father’s paternity, the court should hold a hearing pursuant to MCR 3.921(C). If the court finds that the child was born out of wedlock, it should make a finding that the child does not have a “father” as defined in MCR 3.903(A)(7). In such a case, the legal father is excused from the proceeding, and the court may hold a hearing to determine the identity of the child’s biological father. The court may need to provide notice to a putative father.<sup>24</sup> If the court determines that an identifiable individual is the child’s father, the court may order that he establish paternity.<sup>25</sup> If the putative father fails to appear after notice, or if he is ordered to establish paternity but fails to do so, the court should find that he has waived his right to further notice of the proceedings, including notice of a supplemental termination petition.<sup>26</sup> Finally, if no putative father can be identified after “diligent inquiry,” the court should so find.<sup>27</sup>

Should the court permit the legal father to simply release his rights? In *In re CAW*,<sup>28</sup> the Supreme Court held that a decision to terminate the parental rights of a child’s legal father does not constitute a prior finding that the child was born out of wedlock and does not provide standing to the alleged biological father to enter the case. The logic of *KH* and *CAW* suggests that if the legal father of the child is permitted to release his parental rights, that release will not constitute the prior finding that would give the biological father standing to establish paternity. He cannot participate in the proceeding. Accordingly, when paternity is contested, the court should *not* allow the legal, nonbiological father to release his parental rights.

### Terminating Putative Fathers’ Rights

Despite the holding in *KH*, some courts and petitioners include the names of putative fathers when there is a legal father or name “John Doe” on termination petitions when the child has no legal father. These courts terminate the rights of individuals who have no rights to terminate. As a general rule, *KH* makes clear that it is no longer necessary to terminate the rights of a putative father or of a “John Doe” and, in fact, chastised the practice of naming “serial men” in termination petitions when there is a legal father. If the putative father of a child with no legal father has been properly noticed and has not established paternity, or if the identity of the child’s father is unknown, the court should make a finding pursuant to MCR 3.921(C) that the child has no legal father as defined by MCR 3.903(A)(7). This general rule is also clearly spelled out in the court rule concerning termination of parental rights.<sup>29</sup> By allowing a proper party to rebut the presumption that a child born during a marriage is the issue of that marriage, Michigan law focuses on terminating the parental rights of only legally established fathers. “If the legal relationship is not established, a biological father

may not be named as a respondent on a termination petition, the genetic relationship notwithstanding.”<sup>30</sup> If no man has legally established paternity, it is not necessary to terminate the parental rights of a straw man to ensure that the child is freed for adoption.

There may be one exception to the general rule excluding putative fathers. In *Stanley v Illinois*,<sup>31</sup> although the children’s parents had never married, they lived together for some 18 years. Stanley lived with and supported his children. When the children’s mother died, the state, acting in accordance with a state law that presumed that an unwed father was unfit, removed the children from Stanley’s custody. Although not legally established as their father, because Stanley had a substantial relationship with his children, the Court held that he was entitled to due process before the state could remove them. Thus, if a father, although merely putative, has a substantial relationship with and has supported his child, he is entitled to a hearing on his fitness before the state may terminate his parental rights. Failure to name such a father in the petition may be reversible error.

### Conclusion

Careful study of *In re KH* makes clear that it is no longer permissible to name putative fathers when there is a legal father. The practice of terminating the rights of putative fathers or naming men who have not established paternity is generally unnecessary. ♦

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### Footnotes

1. See *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991); see, generally, *Michael H v Gerald D*, 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989).
2. *In re Montgomery*, 185 Mich App 341; 460 NW2d 610 (1990).
3. *In re KH*, 469 Mich 621; 677 NW2d 800 (2004).
4. MCR 3.903(A)(7).
5. *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003).
6. *KH*, supra at 633–634.
7. *Id.* at 630.
8. *Id.* at 631.
9. *Supra*, n 1.
10. *KH*, supra at 633.
11. *Barnes v Jeudevine*, 475 Mich 696; 718 NW2d 311 (2006).
12. *Id.* at 637.
13. *Id.* at 633.
14. *Id.* at 633–634.
15. MCL 722.711 et seq.
16. MCL 722.1001 et seq.; see *Aichele v Hodge*, 259 Mich App 146; 673 NW2d 452 (2003).
17. *KH*, supra at 624.
18. *Id.* at 635 n 29.
19. MCR 3.903(A)(7)(d).
20. *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987).
21. *In re CAW (On Remand)*, 259 Mich App 181, 183–184; 673 NW2d 479 (2003).
22. *Michael H v Gerald D*, 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989).
23. See MCR 3.903(A)(18).
24. MCR 3.921(C).
25. MCR 3.921(C)(2)(b).
26. MCR 3.921(C)(3).
27. MCR 3.921(C)(1)(d).
28. *In re CAW*, 469 Mich at 199.
29. MCR 3.977(B).
30. *KH*, supra at 634.
31. *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972).