Legislative Analysis

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

APPORTION PREGNANCY EXPENSES

House Bill 4013 as enrolled
Public Act 253 of 2004
Sponsor: Rep. Gary A. Newell

House Bill 4768 as enrolled
Public Act 204 of 2004
Sponsor: Rep. Doug Hart

House Committee: Judiciary
Senate Committee: Families and Human Services
Second Analysis (9-1-04)

BRIEF SUMMARY: The bill would amend the Paternity Act to permit the court to apportion between both parents the mother's confinement (e.g., hospitalization) and pregnancy expenses for a child born out of wedlock. (Currently, the act apportions necessary confinement expenses only to the father.)

FISCAL IMPACT: The bills would have no significant fiscal impact on the judiciary and no fiscal impact on the Family Independence Agency.

THE APPARENT PROBLEM:

Currently, under the Paternity Act (Public Act 205 of 1956), the parents of a child born out of wedlock are liable for the necessary support and education of the child (in addition to any funeral expenses). The act also says that the father is liable to pay the expenses of the mother's confinement (e.g., hospitalization) and any expenses in connection with her pregnancy as the court deems appropriate.

In recent years, there has been considerable debate over whether the court has the ability to apportion the costs of a mother's confinement between both parents, as well as over whether assigning expenses to one parent alone based solely on gender was constitutional. In 1991, the Michigan Court of Appeals, in *Thompson v. Merritt*, said that under the Paternity Act a father is responsible for paying the necessary expenses of the mother's confinement. [Although in that particular case, the appeals court upheld the decision of a trial court that that father was not responsible for the mother's confinement costs as those costs were unnecessary because she chose to use a facility that was not covered by her health insurance.] Further, the Thompson decision did not find the statute unconstitutional.

The *Thompson* decision was reaffirmed, for the most part, by a later appeals court ruling in *Rose v. Stokely* (2002). In *Stokely*, the court of appeals ruled that the plain language of subsection 712(1) of the Paternity Act allocated liability for the birth-related expenses as

follows: (1) both parents are liable for the child's necessary support and education, (2) both parents are liable for the child's funeral expenses, (3) the father is liable for the expenses of the mother's confinement, and (4) the father is liable for the pregnancy-related expenses, as the trial court deems proper. Further, the court ruled, "[t]he statutory language regarding the circuit court's discretion relates only to those expenses incurred in connection with the mother's pregnancy, and does not relate to the expenses of the mother's confinement."

The *Stokely* court, however, disagreed with the *Thompson* court with respect to the constitutionality of the apportionment of confinement expenses solely to the father, in light of the equal protection clauses of the state and federal constitutions. The *Stokely* court held that the contested provisions of the Paternity Act amount to an impermissible gender-based discrimination that is in violation of the equal protection guarantees. The court was bound to follow the precedent of Thompson, however, and so the statute was not overturned. A special panel was appointed to address the conflicting decisions. The special panel ruled in August 2003 that the provisions do not amount to an equal protection violation. [See Background Information]

Despite the special panel's ruling, legislation was introduced to amend the statute to allow the court to apportion both confinement and pregnancy-related expenses between both parents.

THE CONTENT OF THE BILLS:

House Bill 4013 and House Bill 4768 would amend the same section of the Paternity Act (MCL 722.712) so that a court could apportion the reasonable and necessary expenses of a mother's confinement (e.g., hospitalization) and pregnancy between both parents based on the ability of each parent to pay and on any other relevant factor and in the same manner as medical expenses are divided under the child support formula. The court could require the parent who did not pay the expenses to pay his or her share of the expense to the other parent. If someone other than a parent has paid the expenses of a mother's confinement or pregnancy, the court could order a non-paying parent to pay his or her share of the expenses to that person, if that other person requests the payment. [The provisions apply in the case of a child born out of wedlock.]

Both bills also specify that if the pregnancy or a complication of the pregnancy has been determined in another proceeding to have resulted from a physical or sexual battery by a party to the case, the court would apportion those expenses to the party who was the perpetrator.

Finally, both bills provide that if Medicaid has paid the confinement and pregnancy expenses of a mother, the court could not apportion confinement and pregnancy expenses to the mother. After the bills' effective date, the court could apportion not more than 100 percent of the reasonable and necessary confinement and pregnancy costs to the father, based on his ability to pay and other relevant factors.

In addition to the above provisions contained in both bills, House Bill 4013 also contains three other provisions not included in House Bill 4768. First, House Bill 4013 specifies that if Medicaid has not paid the confinement and pregnancy expenses of the mother, the court would require an itemized bill for the expenses, upon the father's request, before those expenses are apportioned. Secondly, House Bill 4013 also specifies that the court order apportioning the expenses shall also include a provision that if the parents are married after the child is born and documentation is provided to the Friend of the Court, the father's obligation to pay the expenses would be abated, subject to reinstatement for good cause, such as the dissolution of the marriage. Finally, House Bill 4013 provides that each order relating to pregnancy and confinement expenses entered by the court on or prior to the bill's effective date would be considered by operation of law to provide for the abatement of any unpaid confinement and pregnancy expenses if the father marries the mother

[Note: Both bills have an effective date of October 1, 2004. House Bill 4768 (Public Act 204) was enacted prior to House Bill 4013 (Public Act 253), and so the provisions in House Bill 4013 have overridden those in House Bill 4768.]

BACKGROUND INFORMATION:

In *Thompson v. Merritt* (192 Mich App 412), the father argued that in requiring a father to pay the necessary costs of a mother's confinement and the costs related to her pregnancy as the court deems proper, the Paternity Act violated the equal protection guarantees of the federal and state constitutions. The court, in ruling that the act did not violate the equal protection guarantees, noted that "the language does not make gender a necessary consideration in determining which parent pays the costs. Instead, the state gives the court the power to apportion the costs between parents. Consequently, we believe that the challenged language reflects the intent of the Legislature to apportion the financial burdens of parenthood as equally and fairly as possible, keeping in mind the interest of the child and the financial status of the parties. If a differentiation is based on a factor other than sex, there is no sex-based denial of equal protection or due process of law unless it can be found to be a mere pretext to effect an invidious discrimination."

This same question regarding the constitutionality of the act was raised in *Rose v. Stokely* (253 Mich App 236). In *Stokely*, the appeals court panel disagreed with the earlier ruling from a decade ago, noting that the statutory language does, indeed, create a classification based on gender, and that the act, "clearly provides [that] the father of a child born out of wedlock is liable for the mother's confinement expenses." In addition, "[t]he statute does not make the mother and the father jointly liable for these expenses, and does not grant a circuit court discretion to allocate those expenses on the basis of the parties' respective abilities to pay." The court further held that, "the Paternity Act's confinement cost allocation provision constitutes a gender-based classification that violated the Equal Protection Clauses of the Michigan and federal constitutions." Though the appeals court's ruling in *Stokely* regarding the confinement cost allocation provisions ran counter to the court's earlier decision in *Thompson*, it was nonetheless constrained by Michigan Court Rule 7.215(I) [now MCR 7.215(J)] to follow the precedent set in *Thompson*.

MCR 7.215(J) provides that a panel of the court of appeals must follow the rule of law established by a prior published decision of the court issued on or after November 1, 1990 that has not been reversed or modified by the state supreme court or by a special panel to review conflicting opinions. The rule also requires a panel of the court of appeals that follows a prior published decision only because it is required to do so by that rule, to indicate that in its ruling, and explain the disagreement with the prior decision. The court of appeals subsequently convened a special panel to review the two conflicting decisions.

In late August, the special panel of the court of appeals ruled that §§ 2(1) and 7(2) of the Paternity Act are constitutional. (See 258 Mich App 283.) In reviewing the equal protection questions surrounding the Paternity Act, the special panel noted that gender-based classifications schemes are subject to a "heightened scrutiny" review, which requires the court to make two determinations. First, the court must determine "whether the classification serves an *important* governmental interest." Secondly, the court must determine "whether the classification is *substantially* related to the achievement of the important governmental objective."

Citing an earlier state supreme court opinion, the court of appeals noted that "[t]he underlying purposes of the Paternity Act is to ensure minor children born outside a marriage are provided with support and education" and that the provisions of the Paternity Act "seek to express society's concern with the support and education of the 'child born out of wedlock." The court of appeals concluded that the contested provisions, quite clearly, relate to an important governmental objective.

In determining whether the classification is substantially related to the achievement of the important governmental objective, the court of appeals noted that "[t]he objective of the Paternity Act is, again, to ensure that minor children born outside a marriage are supported and educated," and that, "[i]n 1956, and now, encouraging mothers to seek proper medical care is a means to that end; self-evidently, proper medical care during the confinement period before, during, and after the child's birth is an essential form of support for that child. Accordingly, enacting §§ 2(1) and 7(2) of the Paternity Act, the Legislature was concerned with promoting the physical health of the child rather than the financial health of the mother and therefore was not using gender as a proxy for need."

Further, the court of appeals noted that "[t]o encourage unmarried mothers to seek appropriate care by relieving them of the financial burden of confinement expenses, the Legislature allocated this portion of the costs of childbearing to the father. For this reason, the relationship between the gender classification at issue here and the important governmental objective is not only substantial, it is vital. Because the gender classification is substantially related to the important governmental objective of providing support for children born out of wedlock, §§ (2)1 and 7(2) of the Paternity Act do not violate the constitutional guarantee of equal protection."

ARGUMENTS:

For:

The current provision of the Paternity Act regarding confinement costs is antiquated. Placing the onus solely on the father is patently unfair. While one certainly expects the father to be responsible for at least a portion of the confinement costs, it is not reasonable to expect a father to pay all of the confinement costs if he lacks the means to do so. The law, however, still requires a father to pay, regardless of his ability to do so. The current language precludes a court from determining otherwise, even when there is a preponderance of evidence to suggest that a father does not have the means to pay the confinement costs. The bill instead allows the court to equitably apportion confinement costs among both parents based on the ability of each person to pay. Both of the people who had a part in creating the child should be responsible for confinement expenses just as they are for other expenses (such as education and funeral costs). It makes sense in today's world for a court to be allowed to take into account the ability of each party to pay the expenses and to focus on the best interest of the child rather than be forced to rely on an inflexible rule.

Against:

In light of the recent opinion of the special panel of the Michigan Court of Appeals, some people believe that confinement costs should continue to be borne solely by the father. In its ruling, the court of appeals concluded, "[p]erhaps the best way to determine whether the allegedly discriminatory provisions in §§2(1) and 7(2) of the Paternity Act are arbitrary and invidious is to ask whether the roles that these sections assign to the mother and father of a child born out of wedlock could be reversed: could the mother be asked to pay the necessary confinement expenses that the father incurs before, during, and after the birth of that child? To ask the question is to answer it; *no father will ever bear a child and no father will therefore ever be confined before, during, and after childbirth* [emphasis added]. This is an indisputable physiological fact that goes deeper than gender stereotypes; it is one of the few immutable differences between men and women. It has nothing with ability, with merit, or with status, with opportunity or with the lack of it, with patriarchy or matriarchy, with sexism or egalitarianism.

"Consequently, when the Legislature concluded that most expenses for the support and education of a child born out of wedlock could be allocated based upon the parents' respective abilities to pay, it properly granted the circuit court the discretion to make such an allocation. The Legislature recognized - as far back as 1956 and continuing into the new millennium - that there would be difference in the parents' ability to for the child's support and education. It is even conceivable that the Legislature recognized that an unexpected disparity may exist between the parents' ability to pay - that a wealthy woman might give birth to the child of a poor man - and so drafted that other provisions in the Paternity Act for the support and education of the child, a street that can run in both directions.

"However, with respect to the mother's necessary confinement expenses, the Legislature drew the line. It recognized that this is a street that runs in only one direction. Only the mother will bear the physical burden of confinement before, during, and after the birth of the child. This is an immutable difference between the two sexes and the guarantee of equal protection under the law does not require things that are different in fact or opinion to be treated as though there were the same."

Legislative Analyst: Mark Wolf
Fiscal Analyst: Richard Child

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