Michigan Legal Milestone: The Child Custody Act is Born

In 1967, St Clair County circuit Judge Halford I. Streeter considered the case of a Caucasian man, Frank Damaschke, seeking permanent custody of a biracial child, birthed by his Caucasian ex-wife during her hospitalization in an asylum (the biological father was undoubtedly one of the orderlies at the asylum, but was never identified) and unquestionably conceived during the marriage, although born after entry of the judgment of divorce. The child was immediately after birth taken in by Mr. Damaschke and his new wife and treated as their own, given unexceptionable love and care with Mr. Damaschke's other, biological (but white) children.

At that time, Michigan still followed Lord Mansfield's Rule, first engrafted onto Michigan jurisprudence by *Egbert v Greenwalt*, 44 Mich 245, 248; 6 NW 654; 38 Am Rep 260 (1880). Under the Rule, a child conceived during a marriage but born after marriage could not be bastardized by testimony that, at the time of conception, the husband had no access "[T]he declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage"[1] "[I]t is a rule, founded in decency, morality, and policy that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious"[2].

Alas, Judge Streeter harbored antiquated notions of racial propriety. Rather than award custody of a biracial child to its legal but white father—an upstanding citizen who already had custody of two previous children of the marriage—Judge Streeter, egged on by an equally clueless prosecutor and assisted by a toadying friend of the court, all cut from the same atavistic mold, decided to make the child a ward of the state and bestow jurisdiction over it upon the probate court.

Fortunately, then as always, there were people of backbone practicing law who knew an injustice when they saw one. A rising young star of the domestic relations bar, Henry Baskin, took on Frank Damaschke as a client and took his case to the Court of Appeals. There his case, after an initial procedural remand that predictably had no effect on a troglodyte of Judge Streeter's ilk, was heard on its second appellate round by a stellar judicial panel consisting of Charles Levin, a blue-blood of the black robe who ultimately served on both the Court of Appeals and the Supreme Court for more than 3 decades, Thomas M. Burns of Saginaw, a fearless foe of injustice, and Robert J. Danhof, a recent appointee to the Court by then Governor George Romney and later Chief Judge of the Court of Appeals. This distinguished judicial assemblage not only saw through the charade orchestrated by the lower court, but firmly resolved to brook no further shenanigans, and so took the unusual step of changing the custody award itself, without permitting additional input by the lower court. In *Damaschke v Damaschke*, 21 Mich App 80, 82; 174 NW2d 608 (1970) the Court of Appeals ruled definitively for the father:

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[1] *Goodright v Moss*, 2 Cowp 591; 98 Eng Rep 1257 (1777).
[2] *Serafin v Serafin*, 401 Mich 629, 462; 258 NW2d 461 (1977).

> The social worker testified that in her professional opinion the child's best interest would be served by leaving the child in the plaintiff's home and that irreparable injury would be suffered by the child if he were taken from that home. The child, now 3 years old, has lived with the plaintiff and his present wife since he was 3 months old. Both the plaintiff and his present wife desire that the plaintiff be awarded permanent custody. There is no testimony which would tend to rebut the evidence that the best interests of the child would be served by awarding his permanent custody to the plaintiff. The best interest of the child is our main concern; on this record we find that the trial judge clearly erred in denying permanent custody to the plaintiff. The circuit court had jurisdiction to determine the custody of this minor child and should have granted it to the plaintiff. *In Re Mark T (*1967), 8 Mich App 122, 142, *et seq*.; 154 NW2d 27.
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> Reversed. Judgment for plaintiff granting him permanent custody. Costs to plaintiff.

The ruling was well received throughout the domestic relations practicing bar, but reflected that there was little predictability or order to the process of resolving child custody disputes. Judicial discretion was the watchword of that day, and appellate judges, with only cold records to review, usually recognized that they were singularly ill-positioned to second guess a trial court's decision. But that meant that stereotypes and prejudices too often controlled the outcome—bad mothers tended to gain custody of daughters, and bad fathers of sons, merely because it seemed "natural" that children should be cared for by a parent of the same gender. Other times, it was assumed that mothers must be superior caretakers, and that fathers should be at work too many hours of the day to parent their children, even though other information was present in abundance to suggest that the mother was especially unsuited to become the main custodian.

The *Damaschke Case* gained such notoriety that the Legislature recognized that the time had come to inject more rationality and predictability into the process of choosing child custodians. The chair of a legislative committee asked Mr. Baskin to draft a statute to address issues of child custody, and so the 12-factor "best interests of the child" test of MCL 722.23(a)-(l) was born, 1970 PA 91. The Child Custody Act of 1970, with amendments here and there, continues to serve as the bedrock for such disputes, and 45 years on it has fulfilled its purposes admirably.