

STATE OF MICHIGAN
COURT OF APPEALS

DAVID DEWAYNE HICKOX,

Plaintiff-Appellant,

v

MEGAN MARIE VANDERARK,

Defendant-Appellee.

UNPUBLISHED

August 13, 2009

No. 289715

Kent Circuit Court

LC No. 08-012729-DP

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Plaintiff, David D. Hickox, appeals as of right a December 12, 2008 trial court order dismissing his complaint to establish paternity of the parties' minor child Tristan T. Vander Ark for lack of standing. We reverse, and remand for further proceedings.

Tristan was born to the parties during the marriage of defendant Megan M. Vander Ark and Adam T. Vander Ark. After Adam filed for divorce in October 2008, Hickox filed a complaint to establish paternity of Tristan. On December 10, 2008, the trial court entered a written order in the divorce proceeding, which stated in part:

IT IS ORDERED that, by Plaintiff's, Adam T. VanderArk [sic], signature hereto, he stipulates and agrees that he is not the biological father of the minor conceived and born during the marriage of the parties *and the court determines that Tristan Thomas Vander Ark is not the issue of the marriage between Adam and Megan Vander Ark.* [Emphasis added.]

Both Adam and Megan stipulated to entry of the order. Thereafter, Hickox amended his complaint to reference the order to establish that Tristan was born "out of wedlock" within the meaning of the Paternity Act, MCL 722.11 *et seq.* Hickox also moved to intervene in, or, alternatively, to consolidate his paternity action with the divorce proceedings. Following a hearing, the trial court dismissed Hickox's complaint on the basis that he lacked standing under the Paternity Act. The trial court held that, because its December 10 order was a temporary order, it did not amount to a determination regarding the legitimacy of Tristan for purposes of standing under the Paternity Act. On appeal, Hickox argues that the trial court erred in finding he lacked standing under the Paternity Act. We agree.

Whether a plaintiff has standing to commence proceedings under the Paternity Act involves a question of law this Court reviews de novo. *Barnes v Jeudevine*, 475 Mich 696, 702; 718 NW2d 311 (2006). Statutory interpretation also involves a question of law this Court reviews de novo. *State Farm Fire & Casualty Co v Corby Energy Service, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

Under the Paternity Act, only a father of a child born “out of wedlock” has standing to bring an action to establish paternity. *Barnes, supra*. The act defines “out of wedlock” as:

a child begotten and born to a woman who was not married from the conception to the date of birth of the child, *or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.* [MCL 722.711(a) (emphasis added).]

The second method of establishing that a child was born “out of wedlock” requires a “prior court determination” that the subject child is not the issue of the marriage. *Barnes, supra* at 703, citing *Girard v Wagenmaker*, 437 Mich 231, 243; 470 NW2d 372 (1991). In *Barnes, supra* our Supreme Court explained that a “prior determination” that a child is not the issue of a marriage requires a court to “settle with finality a controversy regarding the child’s legitimacy.” *Id.* at 704. The Court explained:

[A] court determination under MCL 722.11(a) that a child is not “the issue of the marriage” requires that there be an affirmative finding regarding the child’s paternity in a prior legal proceeding that settled the controversy between the mother and the legal father. [*Id.* at 705.]

In this case it is undisputed that Tristan was born while his mother Megan was married to Adam. Thus, to show that Tristan was born “out of wedlock,” Hickox had to establish that a court has made a “prior determination” that Tristan was not the issue of the Vander Ark marriage. *Id.* We find the trial court made this determination in its December 10 order. That the order was titled “temporary,” is not dispositive. A “prior determination” regarding legitimacy is made where a court makes an “affirmative finding,” in a “prior legal proceeding,” that “settled the controversy” as to the legitimacy of the subject child. *Id.* at 704-705. In this case, the trial court’s plain language in the order unequivocally resolves any controversy regarding the legitimacy of Tristan and it was made at a legal proceeding. Therefore, we hold that Tristan was born “out of wedlock” within the meaning of the MCL 722.711(a). In addition, we find that the trial court’s ruling that standing cannot be based on an amended complaint is erroneous. See *Tingley v 900 Monroe LLC (On Remand)*, 274 Mich App 335, 338, 345-350; 733 NW2d 440 (2007).

In light of our resolution of the issue with respect to standing, we find it unnecessary to address Hickox’s constitutional argument. Further, we decline to address whether the trial court abused its discretion in denying Hickox’s motion to consolidate this case with the divorce action pending between Megan and Adam. The trial court did not decide the motion; thus, it did not exercise its discretion. On remand, the trial court shall determine whether this case is appropriate for consolidation with the divorce action.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Elizabeth L. Gleicher