STATE OF MICHIGAN

COURT OF APPEALS

SCOTT STANLEY KAISER, Plaintiff-Appellant, v EMILY MARIE SCHREIBER, Defendant-Appellee.	FOR PUBLICATION September 9, 2003 9:00 a.m. No. 244428 Kent Circuit Court LC No. 01-006255-DC Updated Copy November 7, 2003

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

SAWYER, J.

Plaintiff Scott S. Kaiser appeals from an order of the circuit court granting defendant Emily M. Schreiber summary disposition regarding plaintiff 's child custody action. We reverse.

It is undisputed that the parties are the biological parents of Maria Jacqueline Schreiber, born on June 16, 1998. Both parties were married to other people at the time of Maria's conception and birth. On June 19, 2001, plaintiff filed the instant action seeking joint legal and physical custody of Maria. Defendant answered through counsel, admitting that plaintiff was Maria's father. The parties then stipulated a temporary order of custody, which granted the parties joint legal custody, defendant physical custody, and provided parenting time for plaintiff. Defendant, however, almost immediately resisted complying with the temporary order. Defendant's counsel withdrew after defendant began filing motions in propria persona to change the terms of the temporary order. Defendant retained new counsel, who moved for summary disposition on the basis that the trial court lacked authority to entertain a custody action where the mother was married at the time of the child's birth.[1] Plaintiff filed a motion for summary disposition, as well as a motion to amend his pleadings to add a claim under the Paternity Act, MCL 722.711 *et seq*. The trial court granted summary disposition in favor of defendant.

At issue is the applicability of *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991). In *Girard*, the Supreme Court concluded that the Paternity Act grants standing to a

[1] Specifically, defendant moved for summary disposition under MCR 2.116(C)(4) (lack of subject matter jurisdiction), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact).

putative father to determine the paternity of a child born out of wedlock and that a child is not born out of wedlock if the mother was married at any time from conception to birth unless a court has determined, before the paternity action is filed, that the child is not issue of the marriage. *Id.* at 242-243.[2] Although the Paternity Act was amended after the *Girard* decision, the amendments do not supply a basis for concluding that *Girard* is no longer applicable.

Another aspect of *Girard* that must be considered is the holding that a putative father may not seek a determination of paternity under the Child Custody Act, MCL 722.21 *et seq.* *Girard* addresses this only briefly and relies on this Court's decision in *Pizana v Jones*, 127 Mich App 123, 127; 339 NW2d 1 (1983), for the proposition that "a proper action to determine paternity should be brought under and governed by the provisions of the Paternity Act." *Girard, supra* at 251. The *Girard* Court concluded that because the plaintiff did not have standing under the Paternity Act to contest paternity, he could not obtain a determination under the Child Custody Act that he was the father of the child. The Court further determined that because the plaintiff could not obtain a determination that he was the father of the child, he must be considered a nonparent under the Child Custody Act and his custody claim was barred. *Id.*

Interestingly, the Court in *Pizana, supra*, upheld the trial court's determination of paternity made under the Child Custody Act. Thus, although the *Pizana* Court stated that a determination of paternity should be litigated under the Paternity Act, it nevertheless affirmed the trial court's determination of paternity expressly made under the Child Custody Act.

In any event, what we can conclude is that if defendant had, in lieu of filing an answer in the case at bar, moved to dismiss plaintiff 's complaint for a lack of standing in light of *Girard*, the trial court would have been obligated to grant that motion and dismiss the complaint. Plaintiff would have been unable to establish his paternity under the rule in *Girard* and would have been precluded from maintaining a custody action. However, that is not what happened.

Plaintiff 's custody complaint alleged that he was Maria's father:

> 3. That the Plaintiff is the father, and the Defendant is the mother, of MARIA JACQUELINE SCHREIBER, born June 16, 1998.

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[2] The continuing validity of *Girard* is not an issue in this case. The Supreme Court recently considered whether a putative father could intervene in a child protective proceeding after the legal father's parental rights were terminated, the legal father having been married to the mother at the time of conception and birth of the child. *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003). Although the majority in *CAW* did not specifically consider the *Girard* case, its reasoning was essentially the same as that in *Girard*. However, other than indicating that a majority of the justices still subscribe to the reasoning in *Girard*, the *CAW* decision is not applicable to the case at bar.

Defendant answered stating "Admitted, upon information and belief."[3] A stipulated temporary order was entered. The order included references to the parties as having "temporary joint legal custody of their minor child" and references to "the other parent."

We conclude that because defendant admitted in her answer that plaintiff was the father, the trial court had jurisdiction to entertain the custody action. In reaching this decision, we are guided by this Court's decision in *Altman v Nelson*, 197 Mich App 467; 495 NW2d 826 (1992). In *Altman*, the putative father filed an action under the Paternity Act seeking a determination that he was the biological father of the child born to the defendant mother. The defendant alleged in her answer that she was married at the time of the child's conception and birth, but did not seek dismissal of the complaint. After the completion of blood tests, an order was entered declaring that the plaintiff was the legal father of the child. Custody and visitation issues were resolved. The parties stipulated transferring custody of the child to the plaintiff. Thereafter, the defendant sought to have the entire custody matter dismissed for lack of jurisdiction pursuant to the decision in *Girard*. The trial court agreed that the plaintiff did not have standing in the paternity action and that the trial court had erred in failing to consider the defendant's marital status and its effect on the plaintiff 's standing before entering the order of filiation. The trial court declared its earlier orders of filiation and custody to be void ab initio for lack of jurisdiction, vacated the prior orders, and ordered that the child be immediately returned to the defendant.

This Court reversed, disagreeing with the trial court that it was an issue of jurisdiction:

> Subject-matter jurisdiction and standing are not the same thing. Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938); *In re Waite*, 188 Mich App 189, 199; 468 NW2d 912 (1991). The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938); *Waite*, *supra* at 199. Jurisdiction always depends on the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that it has been denied a certain right, and the law has given the tribunal the power to enforce that right if the adversary has been notified, the tribunal must proceed to determine the truth or falsity of the allegations. The truth of the allegations does not constitute jurisdiction. *Id.*
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> There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void,

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[3] Additionally, in her motion for summary disposition, defendant admitted to an illicit sexual relationship with plaintiff and that paternity testing in 2000 established that plaintiff is Maria's biological father. Defendant also admits in her brief on appeal that paternity testing established plaintiff as the biological father.

although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases. *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935); *Bowie, supra* at 49. When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction. Consequently, its proceedings may be questioned collaterally as well as on direct appeal. *Jackson, supra*.

Where jurisdiction of the subject matter and the parties exist, errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. Once jurisdiction of the subject matter and the parties is established, any error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made. *Jackson, supra* at 545-546; *Waite, supra* at 200.

If the court has jurisdiction of the parties and of the subject matter, it also has jurisdiction to make an error. *Buczkowski v Buczkowski*, 351 Mich 216, 221; 88 NW2d 416 (1958).

* * *

Subject-matter jurisdiction over paternity actions has been conferred by statute on the circuit court. MCL 722.714(3); MSA 25.494(3). *Syrkowski v Appleyard*, 420 Mich 367, 375; 362 NW2d 211 (1985). The circuit court also has subject-matter jurisdiction of custody disputes pursuant to the Child Custody Act. MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*; *Bowie, supra* at 52. [*Altman, supra* at 472-474.]

The *Altman* decision then distinguished jurisdiction from an issue of standing:

In contrast, standing relates to the position or situation of the plaintiff in relation to the cause of action and the other parties at the time the plaintiff seeks relief from the court. Generally, in order to have standing, a party must merely show a substantial interest and a personal stake in the outcome of the controversy. *Rogan v Morton*, 167 Mich App 483, 486; 423 NW2d 237 (1988). However, when the cause of action is created by statute, the plaintiff may be required to allege specific facts in order to have standing. Such is the case in a paternity action. *Girard, supra*. In order to have standing to seek relief under the Paternity Act, plaintiff must allege that the child was born out of wedlock. MCL 722.714(6); MSA 25.494(6). "Child born out of wedlock" is defined 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 which 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); MSA 25.491(a). [*Altman, supra* at 475-476.]

The *Altman* Court then explained why the plaintiff adequately invoked the trial court's jurisdiction:

> In his complaint, plaintiff alleged that he was the biological father of the female child born to defendant when she was not married. He petitioned for an order of filiation under the Paternity Act. By making such assertions and seeking such relief, plaintiff requested the circuit court to exercise its subject-matter jurisdiction in paternity actions. Plaintiff's failure to plead or prove sufficient facts to support his standing did not deprive the circuit court of subject-matter jurisdiction. [*Id.* at 476.]

The *Altman* Court distinguished that case from *Girard, supra*. The Court noted that in *Girard*, the defendant mother had argued that the plaintiff did not have standing because there had not been a prior determination that the child was born out of wedlock. By contrast, the *Altman* Court noted that the trial court in *Altman* had not resolved the issues of marital status and standing before entering the order of filiation and that the defendant mother had not appealed that decision, raising it three years later. The Court concluded that the plaintiff's allegations were sufficient to invoke the jurisdiction of the trial court and, although the trial court erroneously exercised that jurisdiction, its actions were not void. *Id*. at 477.

Thus, for the reasons discussed in *Altman*, the trial court in the case at bar erroneously granted summary disposition to defendant under MCR 2.116(C)(4).

Turning to the issue of standing, this case differs somewhat from *Altman* in that there the orders of filiation and custody were final orders and too much time had passed to allow relief from judgment on the basis of mistake. *Id.* However, we nevertheless conclude that defendant's admission in her answer that plaintiff is Maria's father is sufficient to confer standing under the Child Custody Act for plaintiff to maintain an action. In doing so, we must look more closely at who may maintain an action under the Child Custody Act and whether parentage must first be established under the Paternity Act, even where parentage is undisputed.

We begin by noting that the Child Custody Act does not specifically limit standing to bring a custody action to parents or any other class of individuals. Rather, it limits the standing of guardians, MCL 722.26b, and third persons, MCL 722.26c, in bringing custody actions. Defendant essentially argues that plaintiff is a "third person" under the custody act and fails to meet the requirements of MCL 722.26c to bring a custody action as a third person. Assuming that plaintiff is a "third person" under the Child Custody Act, defendant's argument is correct.[4]

However, defendant's argument does assume that plaintiff is a "third person" under the Child Custody Act and, in doing so, assumes too much. MCL 722.22(g) defines "third person" as "an individual other than a parent." The term "parent" is left undefined. In any event,

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[4] Because the child was not placed for adoption with plaintiff, plaintiff could not establish standing under MCL 722.26c(1)(a), and because defendant is not dead or missing, plaintiff cannot establish standing under MCL 722.26c(1)(b).

plaintiff's complaint alleged that he was Maria's parent, specifically her father. Defendant's answer admitted that he was. Accordingly, plaintiff's status was established by admission and he is not a "third person" under the Child Custody Act and, therefore, does not need to establish his standing under MCL 722.26c.

This conclusion is not inconsistent with our decision in *Pizana, supra*, and, by implication, with the Supreme Court's decision in *Girard, supra*. Both those cases involved situations where parentage was disputed, not admitted. To require under the Paternity Act that parentage be established where parentage is undisputed would constitute a waste of judicial resources. More importantly, it would impose a requirement under the Child Custody Act that simply does not exist. Nowhere in the Child Custody Act is there a requirement that parentage be established first under the Paternity Act even if parentage is undisputed. We do not believe that this Court in *Pizana*, or the Supreme Court in *Girard*, was endeavoring to rewrite the Child Custody Act to impose a requirement of first seeking relief under the Paternity Act where the parties were not married to each other but did not disagree regarding the child's parentage. Rather, we believe that the holding in *Pizana* and *Girard* is that, *where the child's parentage is disputed*, that dispute must first be resolved under the Paternity Act and then, assuming a resolution favorable to the father, the parties may proceed to resolve the custody issues under the Child Custody Act.

In applying this rationale to the case at bar, had defendant disputed plaintiff's claim that he is Maria's father, then, under *Pizana* and *Girard*, the paternity issue would have to have been resolved under the Paternity Act. Then, applying the *Girard* decision, the trial court would have determined that plaintiff lacked standing to establish his paternity under the Paternity Act and the action would have been dismissed. However, once defendant admitted in her answer that plaintiff was Maria's father, that admission removed plaintiff from the definition of "third person" under the Child Custody Act and, therefore, conferred standing under that act to plaintiff to seek custody. Or, more precisely, plaintiff's allegation in his complaint that he was Maria's father of necessity constituted a pleading that he had standing under the Child Custody Act to seek custody and defendant's admission in her answer confirmed that standing.

Moreover, even if defendant were now to challenge plaintiff's status as Maria's father and plaintiff must resort to making a claim under the Paternity Act, or if establishment of parentage under the Paternity Act were required for any other reason, plaintiff now has standing to do so. *Girard* held that the Paternity Act grants standing to a putative father to establish parentage only if the child was born out of wedlock; where the mother is married at any time from conception to birth, the child is deemed born out of wedlock only if a court has determined that the child is not issue of the marriage. That determination must be made before the commencement of proceedings under the Paternity Act. In the case at bar, that determination was made. Plaintiff alleged in his complaint that he is Maria's father, defendant admitted in her answer that plaintiff is Maria's father, and the trial court entered a temporary order that refers to Maria as "their minor child" and refers to each party relative to each other as "the other parent." Such language in the

order reflects the court's determination that Maria is plaintiff's daughter, which, of necessity, reflects a determination that Maria is not issue of defendant's marriage to her husband.[5]

Additionally, plaintiff argues that defendant waived the issue of standing by failing to raise it in her first responsive pleading. If standing must be raised under MCR 2.116(C)(5) (lack of capacity to sue), then defendant clearly waived the issue. A motion under (C)(5) *must* be raised in the party's first responsive pleading or by a motion filed before the first responsive pleading. MCR 2.116(D)(2). Not only did defendant not comply with MCR 2.116(D)(2), defendant did not even move for summary disposition under MCR 2.116(C)(5) (perhaps recognizing that it was too late to do so). Rather, defendant argues that standing may be raised under MCR 2.116(C)(8) (failure to state a claim) as well, citing *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000). While it is true that summary disposition in *McHone* was granted under both MCR 2.116(C)(5) and (8) and that this Court affirmed that grant of summary disposition, the issue whether standing was properly challenged in a (C)(8) motion was not discussed by the Court. The opinion does not reveal whether the Court believed that the plaintiff lacked the capacity to sue or failed to state a claim. Rather, it merely concluded that the plaintiff lacked standing. *McHone, supra* at 680.

It does appear that the *Girard* case was originally decided in the trial court by way of a motion for summary disposition under MCR 2.116(C)(8). See *Girard v Wagenmaker*, 173 Mich App 735, 738; 434 NW2d 227 (1988). However, the issue of which summary disposition subrule should be used to challenge standing was not specifically determined by either this Court or the Supreme Court.[6] Issues of standing are more commonly considered under MCR 2.116(C)(5). See, e.g., *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 411; 478 NW2d 693 (1991), *Altman, supra* at 471, and *Kuhn v Secretary of State*, 228 Mich App 319, 332; 579 NW2d 101 (1998). Furthermore, a conclusion that standing is an issue most properly raised in a motion brought under MCR 2.116(C)(5) is consistent with our decision in *Altman, supra*.[7]

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[5] Although the Paternity Act requires a prior court determination that a child is not issue of a marriage, it does not specify any particular form or proceeding in which that determination is made.

[6] And, for that matter, the defendant in *Girard* raised the issue by way of a motion filed before the first responsive pleading. *Girard, supra*, 173 Mich App at 738.

[7] Arguably, *Girard* and *McHone* can be read consistent with using a (C)(8) motion to address this issue for an action under the Paternity Act. That is, if *Girard* is read as holding that, in order to state a valid claim under the Paternity Act, the putative father must allege in his complaint that the child was born out of wedlock, then the failure to do so fails to state a claim (and such a plaintiff cannot truthfully do so where the mother was married to another and there has been no prior court determination that the child was not the issue of that marriage). However, such rationale would still not benefit defendant in the case at bar as it would only make a (C)(8) motion viable for a Paternity Act claim and plaintiff filed his action under the Child Custody Act, for which standing should properly be raised in a (C)(5) motion. Moreover, even allowing a *Girard* standing issue in an action under the Paternity Act to be raised by way of a (C)(8) motion
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Ultimately, however, it appears that we need not resolve the issue whether standing may be challenged under MCR 2.116(C)(8). Plaintiff did, in fact, state a claim on which relief can be granted. A (C)(8) motion tests the legal sufficiency of the claim as pleaded, accepting as true all factual allegations.[8] *McHone*, *supra* at 676. Plaintiff pleaded that he is Maria's father and that it was in Maria's best interests for the parties to have joint legal and physical custody or, in the alternative, for plaintiff to have sole physical custody of Maria. That allegation states a claim on which relief may be granted. As discussed above, the Child Custody Act does not impose requirements that a plaintiff must meet in order to establish standing, but merely imposes restrictions on when guardians and third persons may bring custody actions. Therefore, plaintiff did not have to specifically plead the existence of standing nor do the allegations in his complaint clearly establish a lack of standing. Accordingly, plaintiff 's complaint survives a motion under MCR 2.116(C)(8) and defendant is left to raising the issue of standing under a (C)(5) motion, which defendant failed to do.

To summarize, the effect of plaintiff 's allegations in his complaint, defendant's admissions in her answer, and the trial court's temporary order is to establish that Maria is not the issue of defendant's marriage to her husband and that plaintiff is her father and not a "third person" under the Child Custody Act. This confers standing upon plaintiff under the Child Custody Act and, if need be, under the Paternity Act, despite the restrictive language of the Paternity Act and the *Girard* decision, to seek custody of Maria and establish his paternity. Furthermore, consistent with our holding in *Altman*, the mere fact that defendant could have successfully defeated plaintiff 's standing under both the Child Custody Act and the Paternity Act by disputing plaintiff 's allegation of fatherhood is irrelevant. By defendant admitting rather than disputing plaintiff 's allegation of fatherhood, plaintiff had standing under the Child Custody Act. Furthermore, the trial court's temporary order of custody constituted a determination that Maria is not the issue of defendant's marriage and, therefore, conferred standing upon plaintiff to commence proceedings, if necessary, under the Paternity Act.

Turning to the points raised in the dissent, our colleague, for the most part, merely disagrees with our view of the effects of the allegations in the complaint, defendant's admissions in the answer, and the stipulated temporary order. Some points, however, do merit additional comment. First, the dissent argues that the effect of our opinion is to create two legal fathers for the child. This is simply not true. Once plaintiff was established as the father by operation of the allegations in the complaint, the admission in the answer, and the stipulated order, the

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would allow the issue to be raised for the first time after the defendant's first responsive pleading. However, that would not benefit defendant in the case bar. As discussed above, by the time defendant did raise the issue, there had already been a determination that Maria was not the issue of defendant's marriage and, therefore, plaintiff could now state a claim under the Paternity Act.

[8] This standard shows why it is tenuous, at best, to allow a standing issue to be addressed in a (C)(8) motion. Because such a motion accepts the factual allegations as true, a plaintiff can easily plead the facts necessary to establish standing and, because allegations will be accepted as true for purposes of a (C)(8) motion, the plaintiff would prevail under such a motion challenging standing. Therefore, the defendant in such a case would still have to proceed under a (C)(5) motion in order to factually challenge the facts surrounding the existence of standing.

presumption of fatherhood in favor of defendant's husband was rebutted. In other words, once the actual father is established by the court, there is no longer a basis for the presumption.

Next, the dissent examines the definition of "parent" in two other statutes. But we are not persuaded that it is appropriate to rely on those definitions to resolve the issues present in this case. First, the dissent reviews MCL 700.2114(1)(a), which is part of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, and which provides that where a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of that child. The statute, however, explicitly provides that this presumption only applies for purposes of intestate succession. Not only does it violate the plain terms of the statute to apply that definition to the Child Custody Act, it also ignores why EPIC would have its own particularized rules regarding the establishment of a parent and child relationship and its own rules regarding contesting or establishing the existence of such a relationship. As a practical matter, the provisions of MCL 700.2114(1)(a) will most likely be relevant only after one or more of the individuals (parent or child) are dead. Thus, the establishment of parentage under EPIC is more complicated than in a custody dispute where the parents and child are most likely alive. From a policy standpoint, the issues involved are significantly different. Under EPIC, the issues are purely financial: how to divide the decedent's assets in the absence of a will (and where there is a motive to claim parentage where none may exist). In a custody dispute, while there are certainly financial components, there are also significant nonfinancial components such as parenting time, participation in decisions affecting the child, etc. Therefore, it is not unreasonable for the Legislature to treat the issue of establishing parentage differently in the two situations and it is inappropriate to rely on EPIC for guidance in determining the definition of "parent" under the custody act.

Second, the dissent examines § 1(b) of the minors act, MCL 722.1 *et seq.*, which defines "parents" as including "natural parents, if married prior or subsequent to the minor's birth . . . ." But again, this statute serves a different purpose than the Child Custody Act. The minors act deals with the legal status of minors, the emancipation of minors, and the rights and obligations of parents in the absence of a custody or paternity dispute. It is not unreasonable for this statute to take a different view of the definition of "parent" than where there is a dispute over custody or parentage. Moreover, the statute does not support the dissent's position. MCL 722.1(b) uses the term "natural parents." A husband who is presumed to be the father of his wife's child under Lord Mansfield's Rule as modified by *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977), is not necessarily the child's "natural parent."

The minors act does not define "natural parents." Accordingly, we turn to the dictionary for a definition. Black's Law Dictionary (5th ed), defines "natural" as follows:

> The juristic meaning of this term does not differ from the vernacular, except in cases where it is used in opposition to the term "legal;" and then it means proceeding from or determined by physical causes or conditions, as distinguished from positive enactments of law, or attributable to the nature of man rather than to the commands of law, or based upon moral rather than legal considerations or sanctions.

Similarly, under the definition of "child," Black's defines "natural child" as follows:

> Child by natural relation or procreation. Child by birth, as distinguished from a child by adoption. Illegitimate children who have been acknowledged by the father.

Turning to more general usage, the *Random House Webster's College Dictionary* (2000), defines "natural," in part, as "existing in or formed by nature" and "related by blood rather than by adoption." Thus, a legal parent is not necessarily a natural parent. And more to the point, because defendant's husband is not the biological father of Maria, he is not her natural parent.

Moreover, the definition in the statute includes the situation where the "natural parents" marry after the birth of the child. That is, if the mother is unmarried throughout gestation, but marries the child's father after the child's birth, then the father is a "parent" under MCL 722.1(b) because the natural parents were married after the child's birth. Under *Serafin, supra*, no presumption of fatherhood arises when the marriage occurs after birth. Thus, the two concepts simply do not work together.

In short, reliance on the minors act actually weakens the dissent's position rather than strengthens it.

Finally, the dissent views this Court's decision in *Terry v Affum*, 233 Mich App 498; 592 NW2d 791 (1998), as rebutting plaintiff's argument that defendant waived her right to challenge plaintiff's standing by failing to raise the issue in her first responsive pleading. *Terry*, however, does not address the issue whether a challenge to standing must be raised in the first responsive pleading and, therefore, does not counter plaintiff's argument that it must be. Moreover, the dissent incorrectly concludes that the reasoning in *Terry* applies to the case at bar. In *Terry*, the parties stipulated visitation by persons who had no legal right to seek visitation. Therefore, the *Terry* Court merely concluded that once the stipulated visitation agreement was revoked, there was nothing for the trial court to enforce because it had no independent basis on which to order third-party visitation. In the case at bar, contrary to the dissent's statement, we do not conclude that defendant *stipulated* that plaintiff was the father and thereafter terminated that stipulation. Rather, we conclude that defendant admitted that plaintiff was the father and thereafter stipulated a temporary custody order. Even if defendant now seeks to change that stipulated order, that does not negate her admission that plaintiff is the father or, that the temporary order had the effect of a determination by the trial court that the child was born out of wedlock.

The grant of summary disposition in favor of defendant is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. On remand, the trial court shall grant summary disposition in favor of plaintiff on the issue of standing. Further, if the trial court determines that resolution of the issue of paternity is necessary under the Paternity Act despite defendant's admission in her answer, it shall grant plaintiff leave to amend his complaint to add a claim under the Paternity Act. The trial court shall then proceed to resolve the parties' dispute regarding custody, parenting time, and related issues. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer