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.

WILDER, J. *(dissenting).*

I respectfully dissent.

Plaintiff Scott S. Kaiser filed a complaint seeking joint legal and physical custody of defendant Emily M. Schreiber's then three-year-old minor child. Plaintiff alleged, and defendant agreed in her answer and concedes on appeal, that paternity testing established that plaintiff is the child's biological father. The parties also agree that they have never been married and that when the minor child was conceived and born, defendant was married to someone other than plaintiff. After the complaint for custody was filed, the parties, through their counsel, stipulated the entry of a temporary order granting plaintiff and defendant joint legal custody, granting defendant primary physical custody, and granting plaintiff certain visitation rights. Shortly thereafter, defendant apparently reconsidered her agreement to cede joint legal custody to plaintiff and resisted complying with the temporary order. Defendant's counsel withdrew, and, thereafter, defendant filed pleadings in propria persona attempting to terminate the temporary order. These efforts were unsuccessful.

Defendant obtained new counsel. Defendant's new counsel filed a motion for summary disposition seeking dismissal of plaintiff's complaint pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10).[1] In this motion, defendant acknowledged that during her marriage she had an affair with

[1] During oral argument on the motion, defendant's counsel requested summary disposition under MCR 2.116(C)(8) for plaintiff's failure to state a claim, and MCR 2.116(C)(5) for plaintiff's lack
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plaintiff, and that plaintiff was the biological father of a daughter born to her during her marriage. Nevertheless, defendant asserted that plaintiff could not maintain a custody action. Defendant noted that plaintiff could not produce a notarized acknowledgement of paternity or a valid order of filiation, and therefore was a third party who was not entitled to bring an action for custody under MCL 722.26c of the Child Custody Act, MCL 722.21 *et seq.* or obtain an order of custody under MCL 722.1004 of the Acknowledgement of Parentage Act, MCL 722.1001 *et seq.* Defendant further argued from these undisputed facts that plaintiff could not show that the child was "a child born out of wedlock" within the meaning, MCL 722.711(a) of the Paternity Act, MCL 722.711 *et seq*. After oral argument, the trial court agreed and granted defendant's motion for summary disposition. The trial court's order specifies that the motion was granted pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10).

We review the trial court's grant of summary disposition de novo on appeal. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). A motion contesting the trial court's jurisdiction under MCR 2.116(C)(4) may be supported or opposed by documentary evidence, MCR 2.116(G)(2), and whether the court has jurisdiction presents an issue of law reviewed de novo, *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone and may not be supported by other evidence. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court must grant a motion for summary disposition under MCR 2.116(C)(8) if no factual development could justify plaintiff's claim for relief. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Spiek, supra*. The trial court must consider the evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the moving party meets its initial burden, the party opposing the motion must present evidence that a genuine issue of disputed material fact exists, or summary disposition is properly granted. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff first argues that the trial court erred by confusing standing with jurisdiction. I agree with the majority that the trial court had subject matter jurisdiction over the claims asserted here, and that the trial court erred by citing MCR 2.116(C)(4) as an alternative basis for granting summary disposition in favor of defendant. Nevertheless, I would conclude that this error does not warrant reversal because the trial court reached the right result. *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).

Next, plaintiff argues that defendant waived the right to challenge his standing to bring this custody action because defendant failed to assert that plaintiff lacked capacity to sue as an

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of standing to bring a custody action. Plaintiff did not orally request relief based on MCR 2.116(C)(4).

affirmative defense in her first response pleading. MCR 2.111(F)(2); MCR 2.116(D)(2). I disagree. In *Terry v Affum*, 233 Mich App 498, 503-504; 592 NW2d 791 (1999), the plaintiff, the father of the minor child, and the defendants, the child's maternal aunt and uncle, stipulated that the defendants would have visitation rights with the child following the sudden death of the child's mother. Subsequently, plaintiff moved to amend the visitation order and to terminate the defendants' rights to visitation on the basis that defendants had no legal right to visitation. The trial court found that the defendants had standing to pursue visitation on the basis of their relationship to the child's mother, who before her death had had sole custody of the child. The trial court further concluded that termination of visitation would not be in the best interests of the child.

On appeal, this Court reversed, stating, in relevant part:

> Defendants make much of the fact that the parties originally stipulated defendants' visitation rights with the minor child. Specifically, defendants contend that once the parties agreed to allow defendants visitation, the trial court had the authority to approve the stipulation and incorporate it into an order. However, as our Supreme Court noted in *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), citing 59 Am Jur 2d, Parties, § 30, p 414,
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> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as 'standing.'"
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> Upon plaintiffs' decision to terminate defendants' visitation rights, defendants were without standing to pursue visitation, irrespective of the prior agreement of the parties. In our opinion, once a decision was made to terminate visitation, the stipulation was of no moment and did not confer on defendants a "legal or equitable right, title, or interest in the subject matter of the controversy," which was not otherwise present. *Id.* [*Id.*]

In my judgment, the legal reasoning of *Terry* applies to the instant case. Clearly, at the time plaintiff's complaint was filed, he lacked standing to initiate the action. Once defendant decided to terminate her stipulation that plaintiff was the father of the child and sought instead to dismiss the action on the basis of plaintiff's lack of standing, as a matter of law, the revoked stipulation could not confer upon plaintiff any "legal or equitable right, title, or interest in the subject matter of the controversy." *Id.* Thus, I would conclude that the trial court correctly dismissed this action for lack of standing.

Even if the majority is correct in finding that the defense of standing was waived by the defendant, I would find that the trial court properly dismissed plaintiff's complaint for failure to state a claim, pursuant to its application of § 6c of the Child Custody Act and § 4 of the Acknowledgment of Parentage Act.

I disagree with the majority's conclusion that defendant's answer and the trial court's temporary order were sufficient to establish that plaintiff is the child's "father" and therefore not a third person under the Child Custody Act. Because defendant was married at the time the child was born, her husband is legally *presumed* to be the father of the child. *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). In addition, MCL 700.2114(1)(a) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, states that where a child is born or conceived during a marriage, both spouses are presumed to be the natural parents for purposes of intestate succession. MCL 722.2 of the minors act, MCL 722.1 *et seq.*, also states that the "parents" of a minor child are equally entitled to custody of the child unless otherwise ordered by a court. "Parents" is defined to mean "natural parents, *if married* prior or subsequent to the minor's birth . . . or *the mother*, if the minor is illegitimate." MCL 722.1(b) (emphasis added). While the above-cited statutes are not part of the Child Custody Act, these statutes share with the Child Custody Act the purpose of promoting the best interests of children, and therefore may be interpreted consistently with each other, or in pari materia. *Deschaine v St Germain*, 256 Mich App 665; ___ NW2d ___ (2003). Because plaintiff is not a parent within the meaning of MCL 722.2 or MCL 700.2114(1)(a), and because he has not established paternity under MCL 722.1004, I would conclude that defendant's answer and the trial court's temporary order (entered by stipulation of the parties with no hearing or findings having been made by the trial court) are insufficient to establish that plaintiff is a "parent" within the meaning of the Child Custody Act,[2] and that plaintiff's assertion in his complaint that he is the minor child's "father" is insufficient, on these facts, to state a claim under the act. I would also find that plaintiff must establish his entitlement to custody as a third party under § 6c of the Child Custody Act.

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[2] The majority's finding to the contrary establishes a precedent that was not contemplated by the Legislature in my judgment. As noted by our Supreme Court:

> There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage. . . . It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes . . . . [*In re CAW*, 469 Mich 192, 199-200; 665 NW2d 475 (2003) (citations omitted).]

The majority opinion runs afoul of these values by negating the presumed legitimacy of the child. Defendant's husband has never been a party to any proceeding challenging his paternity, and there has been no judicial finding (based on admissible evidence) that defendant's husband is *not* the legal father of the minor child. Thus, by virtue of the majority's opinion, either the child will now have two legal fathers, or the defendant's husband, who by his marital status enjoyed a legal presumption that he was the child's father before these proceedings, will have been stripped of this presumption without any notice or opportunity to be heard. While there does not appear to be collusion between plaintiff and defendant in this case (I note, however, that although paternity was not challenged by defendant, plaintiff did not attach evidence of the paternity test results to his complaint), the majority's ruling provides no bar to such collusion between a claimed putative father and a woman married to someone else, who, for whatever reason, wish to rebut, without notice, the legal presumption of fatherhood bestowed on the husband.

MCL 722.26c states, in pertinent part:

> (1) A third person may bring an action for custody of a child if the court finds either of the following:
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> (a) Both of the following:
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> (i) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in effect at the time the action is filed.
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> (ii) After the placement, the child has resided with the third person for a minimum of 6 months.
>
> (b) All of the following:
>
> (i) The child's biological parents have never been married to one another.
>
> (ii) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.
>
> (iii) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

Plaintiff cannot establish a claim under § 6c. Subsection 6c(1)(a) indisputably does not apply here, because the child was not placed for adoption. Furthermore, even though plaintiff has clearly established that he is related to the child by blood and that he and defendant, as the child's biological parents, have never been married, his complaint fails to and cannot plead that the child's mother, defendant, is deceased or missing.

Section 4 of the Acknowledgment of Parentage Act, states:

> An acknowledgement signed under this act establishes paternity, and the acknowledgement may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act . . . . The child who is the subject of the acknowledgement shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth. [MCL 722.1004.]

As noted above, plaintiff admits that there is no acknowledgment of paternity complying with § 4. Thus, plaintiff is unable to state a claim under this statute as well. I would conclude, therefore, that the trial court properly granted summary disposition to defendant and dismissed

plaintiff's complaint under MCR 2.116(C)(8), because plaintiff failed to plead facts establishing a claim for custody under which relief could be granted.[3]

Next, plaintiff argues that the undisputed facts establish that the child was born out of wedlock and that, accordingly, the trial court erred by denying plaintiff's motion for leave to amend his complaint to state a paternity action. I disagree.

A putative father lacks standing to bring an action under the paternity act when the child is born during the mother's marriage to another man, unless the putative father has obtained a *prior* determination that the mother's husband is not the father. *Girard v Wagenmaker*, 437 Mich 231, 235; 470 NW2d 372 (1991). Plaintiff conceded below and on appeal that there was no prior court order finding that defendant's husband was not the father of the child, and that there was no order of filiation or acknowledgment of paternity establishing plaintiff as the father before the filing of the complaint. Thus, on the facts presented here and to the trial court at the time plaintiff sought leave to amend his complaint, plaintiff is unable to establish that he could overcome the legislative "preference to avoid a challenge to a presumed legitimate birth until a prior determination rebuts legitimacy . . . ." *Id*. at 250. The trial court properly denied plaintiff's motion to amend his complaint as futile. MCR 2.116(I)(5); *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 696-697; 588 NW2d 715 (1998).

I would affirm.

/s/ Kurtis T. Wilder

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[3] I note that unlike a motion to dismiss for lack of standing under MCR 2.116(C)(5), a motion for summary disposition for failure to state a claim under MCR 2.116(C)(8) may be raised at any time, MCR 2.116(D)(3); *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich App 241, 248; 657 NW2d 143 (2002), in light of the guiding principle that a party should not be required to defend against a claim that is not recognized in the state. *Id*.