# STATE OF MICHIGAN

# COURT OF APPEALS

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| PETER JOSEPH MATTEI,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 26, 2012 |
| v | No. 303966<br>Kalamazoo Circuit Court |
| JENNE ELIZABETH OTT,<br><br>Defendant-Appellant. | LC No. 2009-007332-DC |

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| PETER JOSEPH MATTEI,<br><br>Plaintiff-Appellant, | |
| v | No. 304090<br>Kalamazoo Circuit Court |
| JENNE ELIZABETH OTT,<br><br>Defendant-Appellee. | LC No. 2009-007332-DC |

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, both plaintiff and defendant appeal as of right from the trial court's order granting defendant summary disposition, dismissing plaintiff's custody complaint, and holding that defendant's minor child EM was born out of wedlock. We affirm in part and vacate in part.

On May 10, 2005, defendant gave birth to EM while she was married to Kyle Ott. Plaintiff and defendant executed an affidavit of parentage wherein they both acknowledged that plaintiff was the biological father of EM. EM's birth certificate was revised to list plaintiff as the biological father. Shortly thereafter, defendant and Kyle were divorced. Neither the judgment of divorce nor the divorce proceeding transcript referred to EM. Kyle died sometime after the divorce was finalized but before plaintiff commenced this custody action.

On September 29, 2009, plaintiff filed a complaint and sought to obtain full physical custody of EM. The trial court held an evidentiary hearing wherein both plaintiff and defendant testified that plaintiff was the father of EM. Specifically, defendant explained that the parties executed the affidavit of parentage after deoxyribonucleic acid (DNA) testing proved that plaintiff was the biological father of EM. Following the hearing, the trial court held that defendant would retain physical custody of EM and that plaintiff would have parenting time. However, before the court entered a written order, it held a motion hearing and stated that it was concerned plaintiff did not have standing because there was no prior judicial determination that EM was not an issue of the Ott marriage. Defendant then moved for summary disposition on the ground that plaintiff lacked standing to bring the instant action, and the trial court granted the motion and dismissed the case. However, in doing so, the court held that there was clear and convincing evidence on the record that EM was not an issue of the Ott marriage.

Defendant contends that the trial court erred in ruling that EM was not an issue of the Ott marriage because, under the Paternity Act, MCL 722.711 *et seq.*, such a determination can only be made in a proceeding involving *both* the mother and her husband. We review questions involving the interpretation and application of the Paternity Act de novo. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 311; 805 NW2d 226 (2011).

Standing to bring an action under the Paternity Act is conferred to a mother or father of a "child born out of wedlock." *Coble v Green*, 271 Mich App 382, 388; 722 NW2d 898 (2006). The act defines "child born 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).]

"[I]n order for a biological father to establish standing under the Paternity Act, there must be a 'prior court determination that a child is born out of wedlock.'" *Barnes v Jeudevine*, 475 Mich 696, 703; 718 NW2d 311 (2006), quoting *Gerard v Wagenmaker*, 437 Mich 231, 243; 470 NW2d 372 (1991). A prior court determination must 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. This requirement ensures that Michigan's presumption of legitimacy involving children born or conceived during a marriage remains intact. See *id*. at 703-704. "By requiring a previous determination that a child is born out of wedlock, the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue in a prior proceeding—the mother and the legal father." *In re KH*, 469 Mich 621, 635; 677 NW2d 800 (2004). "If the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered to be the issue of the marriage despite lacking a biological relationship with the father." *Id.*

In *Barnes*, 475 Mich at 705-706, the Michigan Supreme Court held that a circuit court's statement in a judgment of divorce that it appeared no children were born or expected of the marriage did not equate to a prior determination that the subject child was not an issue of the marriage. Rather, such a determination requires a clear and definite "affirmative finding" that

the subject child is not an issue of the marriage. *Id*. When a child is born during a marriage, and there is no such prior judicial determination, a party does not have standing to commence an action under the Paternity Act. *Id*. at 707.

In *Pecoraro*, 291 Mich App at 312-313, this Court held that a New York court's determination that the plaintiff was the biological father of the subject child was not binding on a Michigan circuit court where the New York court did not have personal jurisdiction over the mother's husband. This Court explained:

> In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage, and the mother's husband is the child's father as a matter of law. *A third party may not rebut this legal presumption unless there first exists a judicial determination arising from a proceeding between the husband and the wife* that declares the child is not the product of the marriage. [*Id*. at 306 (emphasis added).]

Here, when plaintiff filed his complaint, EM was not a "child born out of wedlock." It is undisputed that EM was conceived and born to defendant during her marriage to Kyle Ott. Also, there was no prior judicial determination that EM was not the issue of the Ott marriage. *Barnes*, 475 Mich at 705. Therefore, plaintiff did not have standing to bring an action under the Paternity Act, and, consequently, he lacked standing to bring the instant custody action. See *Pecoraro*, 291 Mich App at 313-314. Furthermore, once this suit was commenced, plaintiff could not rebut the presumption of legitimacy because the suit did not involve EM's mother *and* her husband Kyle Ott. *Id*. at 312. Therefore, we vacate that part of the trial court's order finding otherwise. See *Mitchell v Detroit*, 264 Mich App 37, 43-44; 689 NW2d 239 (2004), and MCR 7.215(J)(1) (published opinions of this Court are binding on subsequent panels of the Court).

Next, plaintiff contends that defendant waived the issue of standing because she failed to raise it in her initial pleading in accordance with MCR 2.116(C)(5) and MCR 2.116(D)(2). "Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) (citation omitted). We review questions of law de novo, while a trial court's findings of fact are reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Defendant did not waive the issue of standing by failing to raise it in her initial pleading. A party is not required to raise the issue of standing under MCR 2.116(C)(5), a rule that concerns a party's "legal capacity to sue," because standing and legal capacity to sue are not the same concepts. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (standing inquiry addresses whether a litigant has an interest in an issue such that he is a proper party to pursue it), and *Leite v Dow Chem Co*, 439 Mich 920; 478 NW2d 892 (1992) (discussing the legal-capacity-to-sue defense). A standing issue such as the present one can be raised in a motion brought under MCR 2.116(C)(8) or MCR 2.116(C)(10). See *Leite*, 439 Mich at 920. A motion brought under either of these sub-rules can be raised at any time during the

proceedings unless a scheduling order provides otherwise. MCR 2.116(D)(4).[1] Here, defendant did not waive the issue of standing when she failed to raise it in her initial pleading because she could raise it at any time during the proceedings.

Finally, plaintiff contends that the trial court violated his constitutionally-protected right to maintain a relationship with EM. Plaintiff's argument is unavailing because this Court has previously held that a putative father of a child born in wedlock does not have a constitutionally protected right to a relationship with that child. See *Sinicropi v Mazurek*, 273 Mich App 149, 170; 729 NW2d 256 (2006), *Aichele v Hodge*, 259 Mich App 146, 168; 673 NW2d 452 (2003), and *McHone v Sosnowski*, 239 Mich App 674, 678-680; 609 NW2d 844 (2000).

Affirmed in part and vacated in part.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

[1] Given our conclusion that defendant did not waive the issue of standing, we need not address plaintiff's argument that the trial court improperly raised the issue sua sponte. However, even if we were to address the argument, we have previously held that a trial court may raise the issue of standing on its own accord. See *46th Cir Trial Court v Crawford Co*, 266 Mich App 150, 177-178; 702 NW2d 588 (2005), rev'd on other grounds 476 Mich 131 (2006).