

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE GIRARD,
Plaintiff-Appellee,

UNPUBLISHED
January 25, 2011

v

DUANE MONTGOMERY, JR.,
Defendant-Appellant.

No. 299291
Oakland Circuit Court
Family Division
LC No. 2010-769976-DO

DUANE MONTGOMERY,
Plaintiff-Appellant,

v

MICHELLE GIRARD,
Defendant-Appellee.

No. 299531
Oakland Circuit Court
Family Division
LC No. 2010-770098-DC

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In Docket No. 299291, defendant, Duane Montgomery, Jr. (hereinafter referred to as "Montgomery"), appeals as of right a judgment of divorce from plaintiff, Michelle Girard (hereinafter referred to as "Girard.") In Docket No. 299531, Montgomery, the plaintiff in that case, appeals as of right from an order dismissing his complaint for custody in a dispute with Girard. We affirm in both cases.

In Docket No. 299291, Montgomery first argues that the trial court failed to disclose the contents of what Montgomery terms a "doctor's excuse" note, and that this constituted an inappropriate ex parte communication. We disagree.

Montgomery did not preserve this issue below, and therefore, we review for plain error affecting substantial rights. *Liparoto Constr Inc v Gen Shale Brick Inc*, 284 Mich App 25, 31;

772 NW2d 801 (2009). With respect to ex parte communications, Canon 3(A) of the Michigan Code of Judicial Conduct states in pertinent part:

(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge *outside the presence of the parties* concerning a pending or impending proceeding, except as follows:

(a) A judge may allow ex parte communications for *scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits*, provided:

(i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision *promptly to notify all other parties* and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond. [Mich Code Judicial Conduct 3 (emphasis added).]

Generally:

Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge ‘may be incomplete or inaccurate, the problem can be incorrectly stated.’ At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption. [*Grievance Adm’r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000) (quoting Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* (3d ed), §501, pp 159-160).]

Montgomery asserts that, at a hearing on April 14, 2010, the trial court announced that Girard had sent a doctor’s note explaining that she could not be in attendance. Although Montgomery requested a copy of the letter and the trial court said it would be filed with the court clerk, Montgomery contends that it was not. Montgomery argues that he was prejudiced in the divorce action by the court’s failure to provide a copy of the doctor’s excuse letter because this letter may have provided proof, or led to the discovery of additional proof, that Girard was pregnant with a child that was conceived during the marriage. This was crucial, according to Montgomery, because, in an order entered on May 13, 2010, the trial court denied his motion for custody of the newborn child because he could not prove that Girard was pregnant or had given birth to a child. However, Montgomery notes that the death certificate shows that the newborn child, Zamaria Kyung Davis, was born on April 5, 2010. Montgomery concludes that, on the basis of the doctor’s excuse note, the trial court was aware that the child was born and deliberately withheld the note, resulting in prejudice to defendant. We disagree.

It should first be noted that the trial court adhered to Canon 3(A)(4)(a)(ii) by promptly revealing the contents of the letter, which had been faxed on the morning of the hearing, to Montgomery. Further, Montgomery never objected to the doctor’s note as inappropriate, nor did

he ever bring it to the court's attention that he failed to obtain a copy of it. Moreover, Montgomery cannot show prejudice from failure to obtain the letter. The letter from Girard's doctor was clearly intended for scheduling purposes because, as the trial court indicated on the record, the note merely stated that Girard was physically unable to attend the hearing and did not contain any substantive information relevant to the divorce or custody proceeding. The court later elaborated on the contents of the letter, indicating that it stated that Girard, "had a medical procedure and was physically unable to attend," but the court specifically stated that it did not "know what that means in terms of the birth of the child." Therefore, Montgomery's claim that the court deliberately withheld information and the letter would have provided proof of the birth of a child and enabled him to seek custody is not supported by the record. Thus, his failure to obtain the letter did not result in prejudice.

Montgomery also references the death certificate of the newborn child, implying that it was an improper ex parte communication because he was denied a copy of it, although he offers no coherent argument in support of this position. "[A]ppellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009), quoting *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW 2d 479 (2008). At any rate, we conclude that the death certificate was *not* an ex parte communication because Girard brought it to a hearing where Montgomery was present, at which time he was allowed to inspect it, and therefore, he suffered no prejudice.

Montgomery next argues that the trial court abused its discretion in denying his motion to compel discovery because this denial made it impossible for Montgomery to prove that the newborn child was born on April 5, 2010, during the marriage. We disagree.

"This Court reviews rulings on motions to compel discovery for an abuse of discretion." *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Pursuant to MCR 2.302(B)(1):

In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Michigan has long supported a policy of far-reaching, open and effective discovery practice. Discovery rules must be liberally construed to further the ends of justice." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003) (citation omitted). "The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy." *Hamed v Wayne County*, 271 Mich App 106, 109; 719 NW2d 612 (2006). Nevertheless, "the court rules

also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests.” *Id.* at 110.

MCR 2.302(A)(1) states that, “[a]fter commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.” However, “[a] motion for discovery may not be filed unless the discovery sought has previously been requested and refused.” MCR 2.302(A)(2). As noted by the trial court, there is no evidence in the record that Montgomery requested the sought-after information from either Girard or her doctor before he filed a motion to compel discovery, and therefore, the trial court did not abuse its discretion in denying the motion.

Montgomery next argues that the trial court erred in determining that he did not have standing to seek custody of Girard’s minor children.¹ We disagree.

There are three standards of review in a child custody case:

Three standards of review are relevant to child custody appeals. This Court must affirm all custody orders unless the trial court’s findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Findings of fact should be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court’s discretionary decisions, such as its custody awards, are reviewed for an abuse of discretion. Lastly, questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*In re Anjoski*, 283 Mich App 41, 49-50; 770 NW2d 1 (2009) (internal citations and punctuation omitted).]

Pursuant to MCL 552.16(1): “Upon annulling a marriage or entering a judgment of divorce or separate maintenance, the court may enter the orders it considers just and proper concerning the care, custody, and, as prescribed in section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605, support of *a minor child of the parties*.” (Emphasis added.) Otherwise, a third party with no legal connection to the child lacks standing to initiate a child custody suit “if it does not meet one of the statutory standing requirements in the Child Custody Act, MCL 722.21, et seq.” *Anjoski*, 283 Mich App at 44.

Montgomery argues that he has standing to initiate a custody proceeding for E.G., age nine, and E.D., age seven, because a trial court may award custody of a child to others if it is in the child’s best interests, even those who do not have standing. According to Montgomery, the children’s biological father lacks the moral fitness to be awarded custody of the minor children

¹ Although Montgomery’s brief on appeal mentions the newborn child, as will be discussed below, the child is deceased, and therefore, any matters relating to a custody proceeding are moot.

because he has twice been convicted of aggravated assault and once for larceny. He has also had his real estate license revoked. Montgomery also cites Girard's lack of moral fitness to continue custody of the minor children, MCL 722.23(f), and Girard's lack of a permanent custodial home, MCL 722.23(e). We disagree.

Montgomery brought his claim for custody of the minor children during the divorce action. However, by his own admission, E.G. and E.D. are not children of the parties to the divorce, pursuant to MCL 552.16(1), that is, they are not Montgomery's and Girard's children; rather, they are Girard's. Therefore, the trial court properly concluded that the issue of custody of these children was not before it in the divorce proceeding. The Divorce Act does not give "standing to create a custody dispute to a third party who does not possess a substantive right to custody." *Sirovey v Campbell*, 223 Mich App 59, 71; 565 NW2d 857 (1997).

Moreover, Montgomery does not have third-party standing to bring a child custody action regarding E.G. and E.D.:

Generally, a party has standing if it has some real interest in the cause of action, . . . or interest in the subject matter of the controversy. However, this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent. For example, a third party does not have standing by virtue of the fact that he or she resides with the child and has a personal stake in the outcome of the litigation. *Nor may a third party create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the child's best interests.* Rather, under the Child Custody Act the Legislature has limited standing for third parties to two circumstances. [*Anjoski*, 283 Mich App at 50-51 (emphasis added, citations and quotations omitted).]

In the first such circumstance, "[p]ursuant to MCL 722.26b, third-party guardians have standing to bring an action for the custody of a child." *Anjoski*, 283 Mich App at 51. In this case, Montgomery presents no evidence that he was ever made a guardian of Girard's children, therefore, he does not have standing under this section. With respect to the second circumstance, MCL 722.26c(1)(b) provides that a third person may bring an action for custody of a child if the court finds *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.

In this case, while it is alleged that Girard was never married to her older children's father, and it is true that Montgomery was related to the children by marriage, it is also clear that Girard, the parent who has custody of the children, is not dead or missing. Therefore, Montgomery does not have standing to bring a child custody suit for E.G. and E.D.

Finally, it is true that “the plain language of MCL 722.27(1)(a) permits a trial court to award custody to a third party who lacks standing.” *Anjoski*, 283 Mich App at 44. MCL 722.27(1)(a) provides, in relevant part:

If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may . . . :

(a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support [Emphasis added.]

In this case, however, there was no child custody dispute pending, because, as stated above, custody was not at issue in the divorce action. “It is a threshold requirement of MCL 722.27(1) that a custody dispute be properly initiated before the trial court can make any award.” *In re Anjoski*, 283 Mich App at 63. Therefore, the trial court did not err in refusing to consider awarding custody of E.G. and E.D. to Montgomery.

In Docket No. 299531, Montgomery first argues that the trial court committed legal error when it denied his motion for an order of filiation regarding the newborn child. We disagree.

“We review the trial court’s findings of fact in a bench trial for clear error and conduct a review de novo of the court’s conclusions of law.” *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009). “A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. The trial court’s findings are given great deference, as it is in a better position to examine the facts.” *Chelsea Inv Group LLC v City of Chelsea*, __ Mich App __; __ NW2d __ (Docket No. 288920, issued April 27, 2010), slip op, p 5 (citation omitted). In addition, “regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). Finally, this Court reviews questions of statutory construction de novo. *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009).

On March 26, 2010, Montgomery filed a complaint for sole legal and physical custody of Girard’s then-unborn child. This custody action (Docket No. 299531, from which this issue on appeal stems) was separate from the divorce action (Docket No. 299291), and it seems that the court actually dismissed the custody suit at a motion hearing held on April 14, 2010. The court explained:

The court has reviewed the complaint for custody and it indicates in other pleadings that the parties are currently married, that the plaintiff wife is pregnant. As I indicated previously, when the parties are married and a child is conceived or born during the course of the marriage, there is a presumption that the husband is the father of the child.

* * *

Therefore, the complaint under the child custody act is not appropriate. *Custody will be addressed after the birth of the child through the divorce action. So I’m*

going to sua sponte dismiss the custody complaint and we'll proceed on all these issues through the divorce action.

Unfortunately for all concerned, the trial court never entered a written order dismissing the custody action of the unborn child. "The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

Subsequently, in the divorce action, at the trial on June 18, 2010, Girard testified that she had been pregnant and gave birth, but sadly, the child died. Girard, however, did not possess the child's death certificate at that time. Girard further stated that defendant knew the child was not his and had admitted it. Girard informed the court that she had e-mails sent by Montgomery that confirmed this statement. Thus, the divorce judgment, entered on June 18, 2010, did not address custody. Rather inexplicably, however, instead of definitively dismissing the custody action, the court confirmed that a settlement conference for the custody action was scheduled for July 30, 2010.²

Then, on June 30, 2010, Montgomery filed a motion for order of filiation declaring him the father of the deceased child. On July 7, 2010, the trial court entered an order denying Montgomery's motion, on the grounds that none of the circumstances listed in MCL 722.717³ had been established. At the July 30, 2010, settlement conference, Girard produced a certified copy of the child's death certificate and the trial court entered an order dismissing the custody action, on the ground that the child was dead and the issue was moot.

² The court appeared to believe that it was still dealing with Montgomery's motion for custody of E.G. and E.D. (which had already been dismissed), rather than the motion for the then deceased child of the marriage.

³ Regarding an order of filiation, pursuant to MCL 722.717(1):

In an action under [The Paternity Act, MCL 722.711 *et seq.*], the court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:

- (a) The finding of the court or the verdict determines that the man is the father.
- (b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.
- (c) The defendant is served with summons and a default judgment is entered against him or her.

On appeal, Montgomery argues that the newborn child was born during the marriage, and therefore, Montgomery was entitled to an order of filiation, as well as a correction of the birth certificate and death certificate of the newborn child to show that he was the father. We disagree.

As noted, this case, which began as a custody action pursuant to the Child Custody Act, was not appropriate because the child was born during the marriage and, as explained above, pursuant to the Divorce Act, MCL 552.1 *et seq.*,”[u]pon annulling a marriage or entering a judgment of divorce or separate maintenance, the court may enter the orders it considers just and proper concerning the care, custody, and, as prescribed in section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605, support of a minor child of the parties.” MCL 552.16(1). At any rate, because the child died, custody was not addressed in the divorce action and the trial court properly dismissed the custody suit as moot.

Prior to the dismissal, however, Montgomery brought a motion for order of filiation pursuant to the Paternity Act, MCL 722.711 *et seq.*, and it is the court’s order denying this motion that he challenges here. In matters of statutory interpretation:

Statutory language should be construed reasonably, keeping in mind the purpose of the act. The purpose of judicial statutory construction is to ascertain and give effect to the intent of the Legislature. In determining the Legislature’s intent, we must first look to the language of the statute itself. Moreover, when considering the correct interpretation, the statute must be read as a whole. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all existing laws. [*In re MKK*, 286 Mich App at 556-557 (citations and quotations omitted).]

Proceeding under the Paternity Act was similarly improper because, had there been a child, its paternity would have been decided in the divorce proceedings (discussed below). Moreover, pursuant to the Paternity Act, “[a]n action under this act may be commenced during the pregnancy of the child’s mother or at any time before the child reaches 18 years of age.” MCL 722.714(3). Thus, the plain language of this statute applies to a live fetus or child, and Montgomery cites no authority supporting an action under the paternity act for a retroactive determination of paternity for a deceased child. As noted above, “appellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority.” *McIntosh*, 282 Mich App at 485, quoting *VanderWerp*, 278 Mich App at 633.

Even if an action under the Paternity Act could properly be brought when a child is deceased, in this case, Montgomery did not have standing to bring a paternity action. “In order to have standing to seek relief under the Paternity Act, a plaintiff must allege that a child was born out of wedlock. *Department of Social Servs v Carter*, 201 Mich App 643, 646-647; 506 NW2d 603 (1993); *Altman v Nelson*, 197 Mich App 467, 476-477; 495 NW2d 826 (1992). MCL

722.711(a) defines ‘child born out of wedlock’ to be ‘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.’ See also MCL 722.711(b). In this case, Montgomery is alleging that the child was born *in* wedlock and *was* an issue of the marriage, and therefore, he did not have standing to proceed under the Paternity Act. Thus, although the trial court erroneously considered whether Montgomery’s motion met the requirements of the Paternity Act, it properly denied Montgomery’s motion for an order of filiation. This Court “will not reverse the lower court when it reaches the correct result, albeit for the wrong reason.” *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

On the other hand, as part of its jurisdiction over divorce proceedings, a trial court has the power to determine the paternity of a party’s child. *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). As the trial court had earlier noted, pursuant to MCL 552.29, “[t]he legitimacy of all children begotten before the commencement of any action under this act shall be presumed until the contrary be shown.” This “presumption of legitimacy can be overcome only by a showing of clear and convincing evidence.” *Barnes v Jeudevine*, 475 Mich 696, 703; 718 NW2d 311 (2006). However, at the time the divorce trial occurred, the child had died (although no death certificate had yet been produced), and therefore, not surprisingly, the court did not undertake a determination of paternity. Nevertheless, as discussed above, in Girard’s brief testimony, she stated that the child was not Montgomery’s and he knew it, and she offered to provide proof to the court in the form of e-mail conversations between the two of them. Montgomery did not offer any testimony to the contrary. For these reasons, it would be inappropriate to remand this case for a correction of the birth and death certificates.

Finally, Montgomery argues that the trial court erred in dismissing the custody action despite the fact that a default had been entered. We disagree.

Montgomery did not preserve this issue, and therefore, we review for plain error affecting substantial rights. *Liparoto Constr Inc*, 284 Mich App at 31. Pursuant to MCR 2.603(A):

- (1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.
- (2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.
 - (a) In the district court, the court clerk shall send the notice.
 - (b) In all other courts, the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

(3) Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

When considering a court rule:

When construction of a court rule is required, the legal principles that govern the construction and application of statutes are utilized. . . . The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by examining the plain language of the statute. [*ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003) (citations omitted).]

In this case, a default was entered on May 21, 2010, and Montgomery sent notice to Girard. There is no evidence in the record that Girard ever filed a motion to set aside the default. Regardless, the trial court did not commit a legal error in dismissing the case, because, as noted by the trial court, defendant's action sought custody of a child that was dead, and therefore, the issue was moot because, even if the court were to find in Montgomery's favor, it would have been impossible for the court to grant relief. *City of Warren v City of Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004).

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering