# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

| | |
|---|---|
| TOHNNI J. JONES, f/k/a TOHNNI REED-GIANNOTTI,<br><br>Plaintiff-Appellant,<br><br>v<br><br>LOUIS P. GIANNOTTI, JR.,<br><br>Defendant-Appellee. | UNPUBLISHED<br>July 17, 2007<br><br><br><br>No. 266568<br>Livingston Circuit Court<br>LC No. 94-021959-DM |

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for a change of custody, parenting time, and domicile of the minor children Brandon Reed and Nicholas Giannotti. We affirm in part and reverse in part.

## I. Basic Facts and Procedural History

Brandon was born to plaintiff Tohnni Jones on June 26, 1992. In January of the following year, Jones filed in the Wayne Circuit Court a complaint to establish paternity and support for Brandon. On July 7, 1993, the Wayne Circuit Court issued an order of filiation adjudging Jeffrey Lennon to be Brandon's biological father. See MCR 3.903(A)(7)(c). The order of filiation also ordered Lennon to pay child support and provided that Jones would retain custody of Brandon until further order of the court. Approximately two weeks later, Jones married defendant Louis Giannotti. Nicholas Giannotti was subsequently born of that union on August 26, 1994.

In November 1994, Jones filed a complaint for divorce from Giannotti in the Livingston Circuit Court. In her complaint, Jones alleged that both Brandon and Nicholas were born of the parties' marriage. The parties subsequently agreed to a consent judgment of divorce awarding the parties joint legal custody of Brandon and Nicholas, but awarding physical custody to Jones.

Approximately nine years later Jones filed a motion for modification of the consent judgment of divorce and/or relief from judgment as to Brandon, asserting that the trial court lacked subject-matter jurisdiction of the issue of Brandon's custody in light of the order of filiation entered by the Wayne Circuit Court. Giannotti subsequently moved for a change of custody, parenting time and domicile of both children.

Following a hearing on the parties' motions, the trial court entered an order for change of custody, parenting time, and domicile. This order provided that Giannotti would have legal custody of Brandon and Nicholas. The order further provided that the parties would have joint physical custody of both children, and made other provisions not relevant here.

## II. Analysis

### A. Subject-Matter Jurisdiction

We first consider whether the trial court had subject-matter jurisdiction over the issue of Brandon's care and custody. In arguing that the Livingston court was without such jurisdiction, and that its orders concerning the care and custody of Brandon are therefore void, Jones relies on the fact that Brandon is not a minor child "of the parties" within the meaning of MCL 552.16, and that the previously filed paternity action affords the Wayne Circuit Court continuing jurisdiction over such matters, MCL 722.720.[1] On review de novo, see *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), we disagree that these facts affect the subject-matter jurisdiction of the Livingston Circuit Court with regard to Brandon's care and custody.

Jurisdiction of the subject matter has been broadly defined by our Supreme Court as "the right of [a] court to exercise judicial power over a class of cases." *Joy v Two-Bit, Corp*, 287 Mich 244, 253; 283 NW 45 (1938) (internal quotation marks omitted). It concerns a court's "abstract power to try a case of the kind or character of the one pending" and, therefore, is not dependent on the particular facts of a case. *Id*. Rather, it focuses on the court as a forum, and on the case as one of a class of cases of which the court has been empowered by constitution or statute to hear and decide. *Id*.; see also *Fox v Martin*, 287 Mich 147, 151; 283 NW 9 (1938). The question whether a court possesses subject-matter jurisdiction in a particular case is not, however, determined solely by reference to the constitutional or legislative grant of such power. As explained by the Court in *Fox*, *supra*,

> "it is not enough that the court's powers may be found broad enough in the abstract to cover the class of litigation to which the case in question belongs. Mere possession of power to act in respect to a specific subject matter is of no consequence unless that power is properly invoked. For jurisdiction of the subject matter of a particular case is something more than the constitutional or statutory power to entertain cases of the general class to which the one in hand belongs; it is that power called into activity, not by the court of its own motion for that would ordinarily be insufficient, but by some act of the suitor concerned and in some mode recognized by law." [quoting, 1 Freeman on Judgments (5th ed.), § 338.]

Thus, whether a court possesses subject-matter jurisdiction in a particular case must also be determined by reference to the allegations listed in the complaint. *Luscombe v Shedd's Food*

---

[1] MCL 722.720 provides that in paternity actions the "court has continuing jurisdiction . . . to increase or decrease the amount fixed by the order of filiation . . . , and to provide for, change, and enforce provisions of the order relating to the custody or support of . . . the child."

*Products Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995). Regardless of the truth or falsity of such allegations, if it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has constitutional or legislative power to act, then subject-matter jurisdiction exists. *Id*. at 541-542; see also *Fox*, *supra* at 152 ("[j]urisdiction does not depend upon the facts, but upon the allegations"). Any subsequent error in the proceedings amounts to error in the exercise of such jurisdiction, "as distinguished from the want of jurisdiction in the first instance." *Id*. at 542. The instant matter involves the former of these jurisdictional situations.

It is well-settled that the circuit courts of this state are empowered to hear causes of action for divorce. See MCL 552.6. Included within this grant of jurisdiction is the power to determine the "care, custody, and . . . support of a minor child of the parties" to such actions. MCL 552.16. By filing the underlying divorce action and alleging that Brandon had been born of her marriage to Giannotti, Jones engaged the Livingston Circuit Court's jurisdiction to hear divorce cases, including its authority to decide issues of child custody and support pertaining to Brandon. *Fox*, *supra* at 151; *Lunscombe*, *supra* at 541-542. That the Livingston Circuit Court in reality lacked the authority to act in this regard because Brandon was not "a minor child of the parties" within the meaning of MCL 552.16 bears no relevance to the question of the court's jurisdiction over the subject-matter of Brandon's custody, which was established by the allegations contained in the complaint for divorce filed by Jones. For this same reason, the continuing jurisdiction over custody and support afforded the Wayne Circuit Court by MCL 722.720 is similarly irrelevant to the question of the subject-matter jurisdiction of the Livingston Circuit Court. Thus, in determining the issue of Brandon's custody, the Livingston Circuit Court did not act "without jurisdiction," but rather in the erroneous exercise of its jurisdiction. *Lunscombe*, *supra* at 542.

As explained by the Court in *Jackson City Bank & Trust v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935), there is a fundamental distinction between the absence of subject-matter jurisdiction and the erroneous exercise of that jurisdiction. Error by a court that otherwise has both subject-matter and personal jurisdiction does not divest the court of jurisdiction so as to render its judgment void and subject to collateral attack. *Id*. at 545; see also *Buczkowski v Buczkowski*, 351 Mich 216, 221, 88 NW2d 416 (1958) (a court having jurisdiction of the parties and the subject matter also has jurisdiction to make an error). In contrast, "[w]hen 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 thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly." *Jackson City Bank*, *supra* at 544. Jones' only alternative was thus to attack the Livingston Circuit Court's exercise of jurisdiction through a timely direct appeal of the judgment of divorce awarding Giannotti joint legal custody and visitation. *Id*. The collateral attack mounted by her in this post-judgment proceeding is not an appropriate method to attack the correctness of the Livingston Circuit Court's decision.

Nonetheless, we agree with Jones that, insofar as MCR 3.205(C)(2) precludes a custody order that is "contrary to or inconsistent" with a prior court's continuing order regarding custody,

the Livingston Circuit Court's order granting Giannotti sole legal and joint physical custody of Brandon is improper and must be reversed.[2] We note, however, that this conclusion does not require that we disturb the Livingston Circuit Court's decision regarding the care and custody of Nicholas. Indeed, Jones does not dispute that Nicholas was a child "of the parties" within the meaning of MCL 552.16, and we are aware of no authority requiring such a result where the trial court's custody decision as to one or more of the parties' minor children is not upheld. Accordingly, we address the remainder of those issues raised by Jones' on appeal that might affect the trial court's decision regarding the care, custody, and support of Nicholas.

B. Change of Custody

Jones argues that the trial court erred in finding proper cause to consider Giannotti's motion for a change of custody. Jones also challenges the trial court's failure to expressly determine whether there was an established custodial environment, or that clear and convincing evidence established that a change was in the best interests of the children, before modifying custody. Additionally, Jones argues that the trial court's conclusions and findings of fact regarding the best interest factors set forth in MCL 722.23(a)-(l) were against the great weight of the evidence. As explained below, we disagree with each of these assertions by Jones and thus affirm the trial court's order as it pertains to Nicholas.

In child custody proceedings, we review the trial court's findings of fact to determine whether they are contrary to the great weight of the evidence, and will affirm the court's factual determinations unless the record evidence "clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The trial court's ultimate decision regarding custody, however, is a dispositional ruling that we review for an abuse of discretion. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

1. Proper Cause

A trial court may not modify a previous custody order unless the moving party demonstrates proper cause or a change of circumstances establishing that modification is in the child's best interest. MCL 722.27(1)(c); *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). "These initial steps to changing custody . . . are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (internal quotation marks omitted). To constitute proper cause meriting a consideration of a

[2] For this same reason, we agree with Jones that the trial court erred in ordering that she dismiss the Wayne Circuit Court paternity action. There is no support in our statutes, court rules, or case law for such action. To the contrary, that MCR 3.205(C)(2) precludes a custody order that is "contrary to or inconsistent" with a prior court's continuing order regarding custody militates against such action.

custody change, there must be appropriate grounds which have or could have a significant impact on the child's life such that a reevaluation of custody should be made. *Id*. at 511.

Here, the trial court acknowledged that "there's not really been a change of circumstance." However, the trial court found that constant changes in Jones's life equated to proper cause:

> The situation is that I for one did not realize how unstable the boys' lives have been under the direction of the mother. . . . So apparently as we've learned throughout this evidentiary hearing her lifestyle has been a pattern from practically day one of changes. Changes in relationships, changes in where she lives, changes in jobs. It's constant changed [sic] and that has not changed and I have become aware of that through these hearings. But by her own admissions . . . on the record . . . is sufficient for me by clear and convincing evidence that there's good cause to change the legal custody and the primary physical custody.

Thus, although the trial court indicated that there's been no change in circumstances, the trial court also found as a fact that Jones's life involved recurrent changes that were not beneficial for the boys. As explained more thoroughly below, the trial court's conclusion in this regard is consistent with the great weight of the evidence. The trial court did not, therefore, err in finding proper cause warranting revisiting of the custody issue.

2. Established Custodial Environment and the Children's Best Interests

A modification of the established custodial environment of a child requires clear and convincing evidence that the change is in the best interest of the child. MCL 722.27(1)(c); *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005). Whether an established custodial environment exists is a question of fact that must be addressed by the trial court before it makes any determination regarding what is in a child's best interests. *Mogle*, *supra* at 197. Where a trial court fails to make a finding regarding an established custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000).

Here, the trial court did not expressly make a finding regarding an established custodial environment. However, we do not find remand to allow the trial court to make a determination in this regard necessary. Indeed, the evidence does not show that there was an established custodial environment with Jones. As noted, the trial court concluded, based on the evidence adduced, that Jones had a great deal of instability and change in her life. These findings of fact are not against the great weight of the evidence. *Phillips*, *supra*. It is undisputed that Jones moved from Michigan to Ohio for only about a year and then to Texas. There was also evidence that Jones had relationships with numerous men, and the trial court reasonably concluded that such circumstances were not conducive to stability and normalcy for the children. The trial court's conclusions are not against the great weight of the evidence, and support the conclusion that there was no established custodial environment with Jones. *Id*.

Jones also argues under this issue that the trial court committed clear error of law by failing to find clear and convincing evidence that a change of custody was in the best interests of the children. However, although the trial court failed to expressly state that a change of custody

was in the best interests of the children, the court clearly found that a change of custody was in the children's best interests. The trial court found that Jones' life was not "normal," but rather "a bizarre soap opera." The court further found that "the children should not be in that environment" because it was not "conducive to [the] children feeling stable and secure in their lives . . . ." Rather, the court concluded, "[t]hey should come back to dad's house where there's structure, normalcy and routine." Contrary to Jones' assertion, the trial court clearly found that a change of custody, from Jones to Giannotti, was in the best interests of the children.

3. Best Interest Factors

Before deciding a custody dispute, a trial court must evaluate each of the twelve factors enumerated in MCL 722.23 to determine the best interests of the child. *Wolfe v Howatt*, 119 Mich App 109, 110-111; 326 NW2d 442 (1982). Regarding the first of these statutory factors, the trial court found that both parents had shown the children love and affection. MCL 722.23(a). The court also found, however, that Jones lacked understanding of the destructive nature of the parties' "fighting," and "has a tendency to not compromise, be inflexible, and think she's always right." In contrast, the court found that Giannotti had been amenable to compromise over the years. Contrary to Jones' assertion on appeal, the trial court's findings in this regard are supported by the record as a whole and are not against the great weight of the evidence. *Phillips*, *supra*.

Regarding the second statutory factor, which concerns the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed," MCL 722.23(b), the trial court found that Jones had a very limited capacity to work with Giannotti and had not followed through on the children's religious education to which they were accustomed. In contrast, the court concluded, Giannotti "tends to be structured and will continue the children with their religious education." The trial court's finding that this factor favors Giannotti is not against the great weight of the evidence. The trial court's findings are based on the record as a whole and Jones points to no evidence contradicting these conclusions.

The trial court also found that the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs," MCL 722.23(c), "very much" favors Giannotti. Specifically, the trial court found that Giannotti was a "good provider" who was "frugal" and has a "decent job" and "a comfortable home." The court found that Jones, however, was "dependant on others" and "has never really stood on her own." These findings regarding the third statutory factor are not against the great weight of the evidence. The record supports the conclusion that Jones has had a great deal of instability in her employment and housing situation, and generally found it necessary to rely on other men with whom she was involved for support and housing.

Regarding the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial court found: "This factor favors Mr. Giannotti greatly. He has stayed put here in Michigan basically in this county. One job change or so in the last 15 years." The court further found that moving back to Michigan would not be "that difficult" for the boys, and that it is familiar ground. The trial court's findings regarding this factor are not against the great weight of the evidence. It is not disputed that Jones only briefly moved to Ohio before then moving to Texas—both times

chasing illusive employment and housing that never adequately materialized. This indicates a lack of stability. The trial court's findings regarding the fourth statutory factor are thus not against the great weight of the evidence.

With respect to the "permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), the trial court found that this factor "[a]gain . . . favors Mr. Giannotti greatly." In so finding, the trial court noted that Giannotti has a core group of stable friends and family members who were often around to help with the children, whereas Jones has had many unstable relationships with various men. The trial court's findings regarding this factor are not against the great weight of the evidence. Clearly, there was a great deal of instability in Jones' home life and relationships with men.

Regarding the "moral fitness of the parties," MCL 722.23(f), the court found that this factor too favors Giannotti. Although noting that Jones had alleged Giannotti to be abusive, the court stated that "she exaggerates on everything. And I just don't see it." Regarding Jones' moral fitness, the trial court found it wanting, stating that Jones "prefabricates, manipulates. She is a con artist, scam artist. You never know what to believe." The trial court's findings regarding this factor are not against the great weight of the evidence. Indeed, as the trier of fact the trial court was the judge of credibility. See *Phillips*, *supra* at 28 ("[q]uestions of credibility are best left to the trier of fact"). The trial court simply found Jones to be incredible, unreliable and generally unreasonable. These findings are supported by the record as a whole.

Regarding the "mental and physical health of the parties," MCL 722.23(g), the trial court found that Jones appeared to be physically healthy but was "a psychopathic liar." Although also finding that Giannotti too has some "issues' to address, including being somewhat bitter, impulsive, and making quick and perhaps immature decisions, the trial court noted that Giannotti was actively getting help in this regard. The trial court's findings regarding this factor are not against the great weight of the evidence. Again, credibility is best left to the trier of fact. *Id*. The testimony of mental health professional Steven Bon supports the trial court's conclusion that Giannotti was essentially mentally healthy.

With respect to the children's "home, school and community record," MCL 722.23(h), the trial court noted that the boys have had lots of problems in school. The trial court attributed much of the boys' problems to Jones, because she was the person with the most influence. The trial court further noted that the boys "have more of a record here in Michigan than they do anywhere else." The trial court's findings regarding this factor are not against the great weight of the evidence. The boys clearly had spent most of their childhoods in Michigan. The only exceptions were relatively brief periods in Ohio and Texas, which represented moves away from their traditional home in Michigan. The trial court's finding that this factor favors Giannotti and his residence in Michigan is not against the great weight of the evidence.

Regarding the "reasonable preference" of the children, MCL 722.23(i), the court noted that the boys did not want to state a preference for either parent. This finding was based on the trial court's private interviews with the children, and there is no indication that it is against the great weight of the evidence.

With regard to the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other

parent," MCL 722.23(j), the trial court was especially critical of Jones' habit of "exaggerate[ing] stories to people in authority in order to get Mr. Giannotti into trouble." The court found that Jones' conduct in this regard was not helpful, but rather wreaked havoc on the family and was very hurtful. The trial court's findings in this regard are based on the record as a whole and are not against the great weight of the evidence.

Regarding "[d]omestic violence," MCL 722.23(k), the trial court stated that this factor favored Jones because there was no evidence Jones had used physical violence against anyone and Giannotti admitted during the hearing to having pushed or shoved Jones at times. These conclusions are not challenged by Jones, and are supported by the record.

The trial court's findings regarding the final statutory factor, which permits consideration of any other matter "considered by the court to be relevant to a particular child custody dispute," MCL 722.23(l), are also supported by the record. The evidence supports the court's conclusion that Jones' life resembles a "soap opera," with various spouses and boyfriends. The record also supports the court's finding that Jones had taken a number of unreasonable positions in this litigation. Thus, the trial court's findings of fact regarding the twelfth factor were not against the great weight of the evidence.

Because the trial court's findings regarding the twelve best interest factors are not against the great weight of the evidence, the trial court did not err in concluding that sole legal custody of Nicholas should be granted to Giannotti, with joint physical custody in both parties.

Affirmed in part and reversed in part.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey

# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| TOHNNI JONES, f/k/a TOHNNI REED-GIANNOTTI,<br><br>Plaintiff-Appellant,<br><br>v<br><br>LOUIS P. GIANNOTTI,<br><br>Defendant-Appellee. | UNPUBLISHED<br>July 17, 2007<br><br><br><br>No. 266568<br>Livingston Circuit Court<br>LC No. 94-21959-DM |

Before: Hoekstra, C.J., and Markey and Wilder, JJ.

WILDER, J. (*concurring in the judgment in part and dissenting in part*)

The majority holds that the trial court had subject matter jurisdiction of the issue of custody of Brandon, but erred in the exercise of that jurisdiction. I would hold that the trial court lacked subject matter jurisdiction of the issue of Brandon's custody. I would also hold that, because this Court is reversing the trial court's order granting Giannotti custody of Brandon, the case should be remanded to the trial court for a re-determination of whether the custody of Nicholas should be granted to Jones or to Giannotti.

I

The following facts supplement the majority's statement of facts. The Wayne circuit court's order of filiation ordered Lennon to pay child support for Brandon, provided that Jones would retain custody of Brandon until further order of the court, and ordered that the domicile or residence of Brandon would not be removed from Michigan or Washington without prior approval of the court.

Jones's complaint in the trial court alleged that both Brandon and Nicholas were born of the parties' marriage. However, the complaint also alleged that Brandon was born on June 26, 1993, almost 13 months *before* the marriage.

On May 9, 2005, Jones filed a motion for modification of judgment of divorce and/or for relief from judgment as to Brandon, asserting that the trial court lacked subject matter jurisdiction of the issue of custody of Brandon, in light of the order of filiation by Wayne circuit court. On May 12, 2005, Giannotti filed a motion to set aside the July 23, 2004 order amending the judgment of divorce, and for change of custody, parenting time and domicile.

Following a hearing, the trial court awarded sole legal custody of Brandon and Nicholas to Giannotti, and continued joint physical custody between Jones and Giannotti. On September 15, 2005, the trial court entered an order for change of legal custody, domicile, parenting time, child support and other relief. This order provided that Giannotti was the equitable father of Brandon, and would have legal custody of Brandon and Nicholas. The order further provided that the parties would have joint physical custody, designated Michigan as the state in which the children were domiciled, and made other provisions not relevant here.

II

A

> "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. The question of jurisdiction does not depend on the truth or falsity of the charges but upon it's nature; it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts." [*Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), citing *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992) (citations omitted).]

The subject-matter jurisdiction of a court arises by law, not by the consent of the parties. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). "The circuit court's jurisdiction over divorce cases is strictly statutory." *Ryan, supra* at 331. The circuit court's jurisdiction to enter custody orders in a divorce case is conferred by MCL 552.16(1); "[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 . . . support of a minor child of the parties." "Parties cannot give a court jurisdiction by stipulation where it otherwise would have no [subject-matter] jurisdiction." *Bowie, supra* at 56 (citation omitted).

"When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void." *Bowie, supra* at 56 (citation omitted). "Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings." *Id*. (citation omitted). A challenge to a court's subject-matter jurisdiction may be raised at any time, including for the first time on appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97-98;693 NW2d 170 (2005).

The majority concludes that the trial court had subject-matter jurisdiction of the issue of custody of Brandon, but that the trial court erred in the exercise of that jurisdiction. The majority relies on the fact that Jones alleged in her complaint in the trial court that Brandon was a child of the parties. But Jones also alleged in the complaint that Brandon was born on June 26, 1993, almost 13 months *before* the marriage. Therefore, the complaint could not have established that the trial court had subject-matter jurisdiction of the issue of Brandon's custody under MCL 552.16.

The majority relies on *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 542; 539 NW2d 210 (1995), for its conclusion that the trial court had subject matter jurisdiction, but erred in the exercise thereof. In *Luscombe*, the issue was whether plaintiff was entitled to have a jury verdict set aside for the reason that the trial commenced before the record was returned by the Court of Appeals to the circuit court following a prior appeal. *Id*. at 538. This Court held: "There is no dispute that the circuit court had subject-matter jurisdiction over this case, which is basically a wrongful discharge action . . . . Its actions before the filing of this Court's remittitur or mandate thus were not void, but merely voidable as the erroneous exercise of jurisdiction. Plaintiff did not object to this erroneous exercise of jurisdiction . . . ." *Id*. at 542. In the case at bar, subject-matter jurisdiction *is* disputed. Therefore *Luscombe* is inapposite.

Jones argues that the Livingston circuit court lacked subject matter jurisdiction over the issue of custody of Brandon, and that instead, because of its order of filiation, the Wayne circuit court had such jurisdiction. I agree with Jones' contention.

"'Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.'" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; ___ NW2d ___ (2006), quoting *Bloomfield Charter Twp v Oakland Co Clerk,* 253 Mich App 1, 10; 654 NW2d 610 (2002). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; ___ NW2d ___ (2006), citing *Willett v Waterford Charter Twp,* 270 Mich App 38, 48; 718 NW2d 386 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *McManamon, supra* at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage . . . ." *Id.*, citing *Pohutski v City of Allen Park,* 465 Mich 675, 684; 641 NW2d 219 (2002).

By the plain language of MCL 552.16, the trial court only had jurisdiction to issue orders concerning the custody of a child *"of the parties."* (Emphasis added). As established by the order of filiation of the Wayne circuit court, Lennon is the legal father of Brandon. Moreover, Giannotti does not contest the fact that Brandon is the biological child of Lennon and Jones, and it is undisputed that Brandon was born 13 months before plaintiff and defendant were married. Accordingly, as a matter of law, Brandon is not a child of the parties within the meaning of MCL 552.16, and the Livingston circuit court therefore lacked subject-matter jurisdiction to determine custody of Brandon in the parties' divorce. *Ryan, supra* at 331.

In addition, MCL 722.720 provides that in paternity actions, the "court has continuing jurisdiction over proceedings brought under this act to increase or decrease the amount fixed by the order of filiation . . . and to provide for, change, and enforce provisions of the order relating to the custody or support of . . . the child." The Wayne circuit court order of filiation determined that Lennon was Brandon's biological father, and granted custody of Brandon to Jones. Thus, under MCL 722.720, the Wayne circuit court had continuing subject-matter jurisdiction of the issue of custody of Brandon.

Our court rules also expressly emphasize the point that subject-matter jurisdiction of Brandon's custody rested with the Wayne circuit court and not with the Livingston circuit court. MCR 3.204(B) provides: "If an action is pending in circuit court for the support or custody of a

minor . . . or the circuit court has continuing jurisdiction over such matters because of a prior action, a subsequent action for support, custody, or visitation with regard to that minor *must* be initiated as an ancillary proceeding." (Emphasis added). "Must" is mandatory. *Old Kent Bank v Kal Kustom Enterprises,* 255 Mich App 524, 532-533; 660 NW2d 384 (2003). An ancillary proceeding is "[a]n action, either at law or in equity, *that grows out of and is auxiliary to* another suit and is filed to aid the primary suit, to enforce a prior judgment, or to impeach a prior decree." *Blacks Law Dictionary*, (8th Ed.), p 1475 (emphasis added). Because the divorce action was not "initiated as an ancillary proceeding" to the Wayne circuit court action, the Livingston circuit court lacked authority to address the issue of custody of Brandon.

In addition, MCR 3.205(C)(2) provides: "A subsequent court *must* give due consideration to prior continuing orders of other courts, *and may not enter orders contrary to or inconsistent with such orders*, except as provided by law." (Emphasis added.) Again, "must" is mandatory. *Old Kent Bank, supra* at 532-533. Here, the trial court, once aware of the Wayne circuit court order, was required to "give due consideration" to the Wayne circuit court order, and was prohibited from entering orders contrary to or inconsistent with the Wayne circuit court order.

Under MCL 552.16, MCL 722.720, and MCR 3.205(B) and (C)(2), it is clear that the Livingston circuit court had no subject-matter jurisdiction of the issue of Brandon's custody, which continued in the Wayne circuit court. However, because the majority reverses the trial court's custody order as to Brandon, I concur in the judgment as regards Brandon's custody.

B

In light of the majority's finding that the trial court had subject-matter jurisdiction of the issue of Brandon's custody, but erred in the exercise of that jurisdiction, I would also vacate the custody ruling as to Nicholas and remand so that the trial court may consider anew the best interest of Nicholas.

III

In my view, the trial court lacked subject-matter jurisdiction of the issue of Brandon's custody, because the Wayne circuit court order established that Brandon is not a child of the parties. I agree with the majority that the trial court erred as a matter of law in ordering Jones to dismiss the Wayne circuit court paternity action. In light of this Court's reversal of the order regarding Brandon's custody, I would also reverse regarding custody of Nicholas, to allow the trial court to revisit that issue. For the reasons stated above, I concur in the majority's decision to reverse the trial court's order regarding Brandon's custody, and dissent from the majority's affirmance regarding Nicholas's custody.

/s/ Kurtis T. Wilder