

STATE OF MICHIGAN
IN THE SUPREME COURT

Jenny N. Heinze (fka Glaubius),

Plaintiff/Appellee,

v.

John A. Glaubius,

Defendant/Appellant

Supreme Court Docket No. 150206

Court of Appeals No. 318750

Hon. Joel Hoekstra (author), with

Hon. Elizabeth Gleicher and Jane Beckering

Macomb County Circuit Court

Trial Court No. 12-4307-DM

Hon. Kathryn A. Viviano

Liisa R. Speaker (P65728)
Speaker Law Firm, PLLC
Attorney for Plaintiff/Appellee
230 N. Sycamore Street
Lansing, MI 48933
(517) 482-8935
lspeaker@speakerlaw.com

Scott Bassett (P33231)
Attorney for Defendant/Appellant
2407 89th Street NW
Bradenton, FL 34209-9443
(248) 232-3840
sgbassett@gmail.com

Jeanne M. Hannah (P38227)
Law Office of Jeanne M. Hannah
Co-Counsel for Plaintiff/Appellee
5922 Deer Trail Dr.
Traverse City, MI 49684
(231) 275-5600
jeannemhannah@charter.net

150206' **APPELLEE'S BRIEF IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL**

**THIS APPEAL INVOLVES
THE CUSTODY OF A MINOR CHILD**

FILED

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COUNTER-STATEMENT OF JURISDICTION

Appellee agrees that the Michigan Supreme Court has jurisdiction over this Application. MCR 7.301(A)(2). Appellee disagrees, however, with Appellant's statement regarding jurisdiction in the Court of Appeals. The Court of Appeals properly noted that the Trial Court's October 4, 2013 Opinion and Order was a post judgment order affecting custody, for which an appeal by right was available. MCR 7.202(6)(a)(iii). (07/15/14 COA Opinion, p. 2 n. 1, attached to Answer at **Tab 1**; 10/04/13 Trial Court Opinion, attached at **Tab 2**).

Moreover, a decision under the Revocation of Paternity Act directly "affects the custody of a minor child." If a presumed father's paternity were revoked because the child was determined to be "born out of wedlock" under the Revocation of Paternity Act, the consequence of that finding would be that this father would no longer be eligible for legal or physical custody of the child at issue. Just like a trial court's denial of a motion to change custody or denial of a motion to change domicile, the trial court's denial of a motion to revoke paternity is appealable by right because it is a final order affecting custody – each denial forecloses the possibility of a change in both legal and physical custody. See e.g., *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012); *Rains v Rains*, 301 Mich App 313, 323-24; 836 NW2d 709 (2013). The Court of Appeals noted that in this case, Plaintiff-Mother's motion to revoke paternity "specifically requested that defendant's award of custody and parenting time as set forth in the judgment of divorce be vacated." (07/15/14 COA Opinion, p. 2 n.1). There is no doubt that the Trial Court order denying the motion is one "affecting custody." MCR 7.202(6)(a)(iii).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals correctly interpret the Revocation of Paternity Act when it concluded that a “presumed father” does not convert into an “affiliated father” merely by entry of a judgment of divorce, such that Plaintiff-Mother properly pursued her revocation of paternity action under Section 11 (MCL 722.1441) of the Revocation of Paternity Act?

Plaintiff-Mother answers: Yes.

Defendant-Glaubius answers: No.

Trial Court answers: No.

Court of Appeals answers: Yes.

II. Did the Court of Appeals correctly interpret the Revocation of Paternity Act when it concluded that a motion to revoke paternity could be filed after the entry of a judgment of divorce, such that the judgment of divorce did not pose a res judicata bar to an action under the Revocation of Paternity Act?

Plaintiff-Mother answers: Yes.

Defendant-Glaubius answers: No.

Trial Court answers: No.

Court of Appeals answers: Yes.

III. Did the Court of Appeals correctly remand this case to the Trial Court to continue with proceedings under Section 11 of the Revocation of Paternity Act?

Plaintiff-Mother answers: Yes.

Defendant-Glaubius answers: No.

Trial Court answers: No.

Court of Appeals answer: Yes.

STATEMENT AS TO WHY LEAVE SHOULD BE DENIED

Even though this appeal resulted in a published opinion as a case of first impression, this Court should deny leave to appeal for two principal reasons. First, the published opinion of the Court of Appeals is binding on the lower courts, and this Court is not needed to elucidate on this topic as the Court of Appeals admirably conducted its statutory interpretation of the Revocation of Paternity Act. The Court of Appeals' opinion is well-reasoned and closely follows the statutory language to reach a decision that is fully supported by the Legislature's intent as reflected in the text of the statute. The Court of Appeals' opinion is clear and easy for the trial courts to follow. While the decision does not preclude a motion for revocation of paternity after the entry of a judgment of divorce, it does not permit such a motion in all post judgment cases, particularly where the issue of paternity had been disputed and decided in the divorce proceedings. The Court of Appeals' opinion is also very narrowly tailored to the class of cases where paternity was established by way of the marital presumption and where the husband and wife have since divorced.

Second, although this Court has taken a keen interest in recent decisions interpreting the Revocation of Paternity Act, this case does not merit this Court's review – in contrast to the Court of Appeals' decision in *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), *rev'd by* 495 Mich 944; 834 NW2d 220 (2014), and *Helton v Beaman*, 304 Mich App 97; 850 NW2d 515 (2013), *lv granted in* 853 NW2d 96 (2014). Both *Moiles* and *Helton* involve acknowledged fathers, which is a different section (Section 7) of the Revocation of Paternity Act than the instant case (Section 11).



This Court peremptorily reversed the Court of Appeals' decision in *Moiles* because the "parties' knowledge of the possibility that respondent was not the biological father of the child was [not] sufficient to demonstrate either fraud or misrepresentation under [the Act.]" *Moiles*, 495 Mich 944. This Court concluded that the acknowledged father's affidavit filed in support of his petition to revoke the acknowledgment of parentage did not satisfy the requirements of MCL 722.1437(2), which requires the movant to state facts that constitute one of five specific grounds for revocation. MCL 722.1437(2). Each one of these five grounds are similar to grounds to vacate a judgment under MCR 2.612. MCL 722.1437(2). Thus, this Court held that the Court of Appeals erred in addressing the best interest factors because the elements of Section 7 were not satisfied. *Id.*

In *Helton*, this Court granted leave to address several unresolved questions from *Moiles*, including the applicability of the best interests test in acknowledgment of parentage cases. *Helton*, 853 NW2d 96. In addition to those unresolved questions, the Court of Appeals' decision in *Helton* screamed out for review. The Court of Appeals' published decision was a plurality, with a single judge writing the decision (Hon. Peter O'Connell), another judge concurring with the result for entirely different reasons (Hon. Kirsten Frank Kelly), and a third judge dissenting (Hon. David Sawyer). *Helton*, 304 Mich App 97. Moreover, the *Helton* majority opinion was, in large part, based on the prior binding authority of *Moiles*, which was still good law when the Court of Appeals decided *Helton*. *Cf Helton*, 304 Mich App 97 (decided February 4, 2014), *with Moiles*, 834 NW2d 944 (decided February 21, 2014). Moreover, unlike the Court of Appeals' decision in *Glaubius*, the Court of Appeals' majority opinion in *Helton* is unclear and difficult for the trial courts to

implement in a rational way.

The bottom line is that, as much as Defendant-Glaubius would like to criticize the life choices of Plaintiff-Mother for having an affair resulting in the birth of ZG, the outcome of the Court of Appeals' decision is correct both legally and factually. Legally, the Court of Appeals' decision presents a workable framework for trial courts and is consistent with the Legislature's intent. Factually, ZG is being raised by her two biological parents, her parents are married to each other, and the three of them live together as a family.

INTRODUCTION

In the instant case, Plaintiff-Mother, Defendant-Glaubius, and the Trial Court struggled to reconcile the recently passed Revocation of Paternity Act with the facts at hand. Each of these parties had a different interpretation of the Act. Tragically, it is a little girl, ZG, who has suffered because of the Trial Court's erroneous interpretation of this recently enacted legislation. The Court of Appeals' opinion has corrected this legal error by interpreting the statute to permit Plaintiff-Mother to proceed with her revocation of paternity motion after entry of the judgment of divorce.

Under the Revocation of Paternity Act, any man granted paternity over a child because the child was born or conceived during his marriage to the mother is labeled the "presumed father." MCL 722.1433(4). Defendant-Glaubius is the presumed father of ZG. Unfortunately, Plaintiff-Mother did not discover that the child was not issue of the marriage until a DNA test was performed a few months after a Judgment of Divorce entered. The Trial Court felt compelled to dismiss Plaintiff-Mother's motion under the Revocation of Paternity Act because, even though Plaintiff-Mother satisfied the conditions of Section 11

of the Act, the Trial Court determined that Plaintiff-Mother was barred from bringing the action under a theory of *res judicata* because a Judgment of Divorce had already ended her marriage to Defendant-Glaubius.

The result of the Trial Court's impermissible construction of the Revocation of Paternity Act is that Defendant-Glaubius would maintain all of the legal rights of fatherhood to ZG even though he is not her biological father, he is not married to her mother, he lives in Lincoln, Nebraska, about 800 miles away, he has extremely limited contact with ZG (until ZG reaches the age of five, Defendant-Glaubius has parenting time once per month for 2 days), and he is not providing any child support. Also as a result, ZG's biological father, who is now married to Plaintiff-Mother and in fact lives in an intact family with Plaintiff-Mother and ZG, has no legal rights as ZG's father. The Legislature enacted the Revocation of Paternity Act to avoid situations exactly as that which is present here: a biological father who is actively raising his child, but has no lawful parental rights, and an ex-husband with whom the child has minimal contact but who retains all of the legal parental rights to the child due to the marital presumption. The Trial Court's and Defendant-Glaubius's interpretation would permit the unthinkable to occur: If Plaintiff-Mother were to die, this child would most certainly lose her contact with her biological father who is a constant in her life, to be raised by a person who can be little more than a stranger to her because Michigan law would automatically place her with her "legal parent." This possibility is but one of the inherent problems that the Legislature sought to remedy in its enactment of the Revocation of Parentage Act. The Court of Appeals' interpretation of the statute respects the Legislature's intent. Leave to appeal should be denied.

STATEMENT OF FACTS

Background.

The child at issue in this appeal, ZG, is the only daughter of Jenny Heinze (formerly Jenny Glaubius) (“Plaintiff-Mother”). (02/13/13 Settlement Hearing Tr, p. 8). ZG was born on May 18, 2011, during Plaintiff-Mother’s marriage to John Glaubius (“Defendant-Glaubius”). Plaintiff-Mother and Defendant-Glaubius reached a divorce settlement in December 2012 that was not fully executed until February 13, 2013—the same date that a Default Judgment of Divorce was entered. (02/13/13 Settlement Hearing Tr, p. 4). This Default Judgment of Divorce incorporated the terms of the settlement. (02/13/13 JOD). At the time of the entry of the Default Judgment, ZG was 22 months old. (02/13/13 Settlement Hearing Tr, p. 8).

Less than four months later, Plaintiff-Mother filed a Verified Motion for Revocation of Parentage. (06/10/13 Motion for Revocation, p. 1, **attached at Tab 3**). In her Motion, Plaintiff-Mother explained that after the Judgment of Divorce entered, a family member mentioned to her that ZG bore no physical resemblance to Defendant-Glaubius. (06/10/13 Motion for Revocation, p.1, ¶¶ 6-7). This motivated her to seek DNA testing to resolve the question of ZG’s parentage because during the marriage, Plaintiff-Mother was involved in a relationship with Joseph Witt. (06/10/13 Motion for Revocation, p.1, ¶¶ 6-7). After Mr. Witt submitted to genetic testing, it was determined with a probability of 99.999% that Mr. Witt is the biological father of ZG. (06/10/13 Motion for Revocation, p. 1, ¶¶ 9-10).

The Trial Court Refuses to Revoke Paternity.

The Trial Court submitted its Opinion and Order, refusing to revoke paternity as to Defendant-Glaubius. (10/04/13 Op & Ord). The Trial Court determined that due to the “existence of the valid final judgment of divorce,” the issue of paternity had previously been adjudicated, and therefore, Plaintiff-Mother “must first establish that she is entitled to relief from the judgment of divorce.” (10/04/13 Op & Ord, p. 3). The Trial Court ruled that Plaintiff-Mother failed to allege and demonstrate that she is entitled to relief from the Judgment of Divorce pursuant to MCR 2.612. (10/04/13 Op & Ord, p. 4).

The Trial Court then addressed Plaintiff-Mother's argument that Defendant-Glaubius's paternity should be revoked pursuant to the Revocation of Paternity Act. (10/04/13 Op & Ord, p. 4). It held that Plaintiff-Mother had failed to “identify any provision of the Revocation of Paternity Act supporting her contention and has not directed the Court's attention to any case law supporting her interpretation of the [] Act.” (10/04/13 Op & Ord, p. 4). The Trial Court further held that “there are no provisions in the Act which even arguably provide for setting aside a judgment of divorce or an adjudication of paternity contained within a judgment of divorce.” (10/04/13 Op & Ord, p.4). Finally, the Trial Court also rejected Plaintiff-Mother's arguments regarding the best interests of ZG and her standing to bring an action under the Revocation of Paternity Act due to its conclusion that the Act did not apply to the case of a paternity decision made by execution of a Judgment of Divorce. (10/04/13 Op & Ord, pp.5-6). Therefore, the Trial Court ruled that Plaintiff-Mother was not entitled to relief. (10/14/13 Op & Ord, p.5).

The Court of Appeals Reverses the Trial Court.

In a published opinion, authored by the Honorable Joel Hoekstra, the Court of Appeals reversed the Trial Court's decision and remanded for further proceedings. (07/15/14 COA Op). The Court of Appeals made several key holdings in its decision:

First, by reviewing the text of the statute and the definitions supplied by the Legislature, the Court of Appeals determined that Defendant-Glaubius is a "presumed father" under MCL 722.1433(4). (07/15/14 COA Opinion, pp. 4-7). In so doing, the Court of Appeals rejected Defendant-Glaubius's argument that he should be considered an "affiliated father" once the judgment of divorce was entered because the issue of his paternity was not disputed by the parties or resolved by the Trial Court in the divorce proceedings. (07/15/14 COA Opinion, p. 5). The statements in the Judgment of Divorce that the parties were the parents of the minor child merely adhered to the marital presumption of paternity as opposed to making a determination of paternity. (07/15/14 COA Opinion, p. 6).

Second, the Court of Appeals held that the "nothing in the plain language of [MCL 722.1441(1)(a)] required plaintiff to challenge the presumption of legitimacy in the divorce proceedings or prevents plaintiff from now seeking to challenge defendant's paternity after entry of the judgment of divorce." (07/15/14 COA Opinion, p. 7). Instead, the only time constraint is that the action be filed within 3 years after ZG's birth or within 1 year after the effective date of ROPA. (07/15/14 COA Opinion, p. 7). Basing its holding on the language of MCL 722.1443(1), the Court of Appeals stated that a ROPA action may be brought "at any stage of the proceedings" in an existing support, parenting time, or custody case, including post-judgment proceedings. (07/15/14 COA Opinion, p. 8).

Finally, the Court of Appeals held that res judicata did not bar Plaintiff-Mother's ROPA action. (07/15/14 COA Opinion, pp. 8-10). Relying on the plain language and purpose of ROPA, the Court of Appeals concluded that the text of the statute precluded the use of res judicata as a "categorical bar to all litigation of paternity where paternity had been previously determined by a court." (07/15/14 COA Opinion, p. 9). The Court of Appeals noted that ROPA replaced the common law in the specific situations set forth in the Act and that the application of the doctrine of res judicata would improperly thwart the intent of the Legislature. (07/15/14 COA Opinion, pp. 9-10).

The Court of Appeals, therefore, reversed and remanded to the Trial Court for further proceedings. (07/15/14 COA Opinion, p. 10). The Trial Court was directed on remand to decide whether Plaintiff-Mother had met the requirements to prove that ZG was born out of wedlock under MCL 722.1441(1)(a).¹ (07/15/14 COA Opinion, p. 8 n4). Defendant-Glaubius appealed from this decision.

STANDARD OF REVIEW

Conclusions of law, issues of statutory interpretation, and issues of statutory application under the Revocation of Paternity Act are reviewed *de novo*. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014).

¹ This determination includes the issue of whether "[t]he presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child." MCL 722.1441(1)(a)(ii).

ARGUMENT

- I. **The Court of Appeals properly performed its statutory construction of the Revocation of Paternity Act when it concluded that the Legislature intended the statute to apply to motions to revoke paternity filed post-judgment of divorce.**

- A. **Background and Purpose of the Revocation of Paternity Act.**

The Trial Court wholly ignored the intent and language of the Revocation of Paternity Act when it determined that common law rules governing paternity, pre-dating the Act, governed the paternity of ZG. Prior to 1977, any time that a husband and wife were married, if a child was conceived during that marriage, the husband was deemed the father of the child, and he was unable to present evidence to a court of law to prove that he was not the child's father. *Serafin v Serafin*, 401 Mich 629, 632-33; 258 NW2d 461 (1977). This was known as Lord Mansfield's rule, which had origins dating back to English common law. *Id.* at 632. Michigan law recognized Lord Mansfield's rule in *Egbert v Greenwalt*, 44 Mich 245, 248; 6 NW 654 (1880). This rule created a "virtually irrebuttable presumption that a child born while the parties were married was the issue of the husband." *Thompson v Thompson*, 112 Mich App 116, 117; 315 NW2d 555 (1982).

The rule remained in effect in Michigan until 1977, when the Michigan Supreme Court decided *Serafin v Serafin*. Under *Serafin*, the Michigan Supreme Court determined that a husband or wife could raise the issue of paternity of the children born to the wife during the marriage and present evidence of "non-access" to each other. *Serafin*, 401 Mich at 636. This became known as a "*Serafin* action." If a trial court determined that the husband was not the father of the child (for example, due to the husband's lack of access to the mother at the time of conception), then it could enter an order determining that the

child was born out of wedlock. *Id.* at 634. From 1977 until June 2012, this was the only way for a husband or wife to rebut the presumption of paternity for a child born to a married woman. See *Spielmaker v Lee*, 205 Mich App 51, 53; 517 NW2d 558 (1994); *Girard v Wagenmaker*, 437 Mich 231, 242-43; 470 NW2d 372 (1991); *Barnes v Jeudevine*, 475 Mich 696, 705, 707; 718 NW2d 311 (2006).

Then, in 2012, the Revocation of Paternity Act went into effect. It specifically laid out procedures to rebut the presumption of paternity to a child born to a married woman. MCL 722.1441. Notably, the Legislature codified in the Act that “[a] common law action that was available before the effective date of this act to set aside a paternity determination or to determine that a child is born out of wedlock remains available until 2 years after the effective date of this act but is not available after this date.” MCL 722.1443(10). With certainty, the Legislature expressed that the Revocation of Paternity Act would obliterate the need for *Serafin* hearings, and that any time a husband or wife wished to rebut the presumption of paternity of a child born during their marriage, they could do so, as long as the husband or wife met the criteria of MCL 722.1441. Furthermore, the Act resolved a recurring problem by granting legal recourse to a biological father (known as an “alleged father” in the Act) who wished to assert his paternity against the legal father. See e.g., *Spielmaker*, 205 Mich App at 59-60. In fact, under certain fact patterns, even Section 11 of the Act (MCL 722.1441) grants standing to an alleged father so long as his action to revoke a presumed father’s parentage occurs by complaint or motion in an existing action. MCL 722.1441(3).

The Act begins by defining the various parties in play. It sets forth four different

“types” of fathers – acknowledged fathers, affiliated fathers, alleged fathers, and presumed fathers—each with specific characteristics and each having relief specific to his status. MCL 722.1433. An “acknowledged father” is a man who “has affirmatively held himself out to be the child’s father by executing an acknowledgment of parentage.” MCL 722.1433(1). An “affiliated father” is a man “who has been determined in a court to be the child’s father.” MCL 722.1433(2). An “alleged father” is a “man who by his actions could have fathered the child.” MCL 722.1433(3). This is the biological father. A “presumed father” is “a man who is presumed to be the child’s father by virtue of his marriage to the child’s mother at the time of the child’s conception or birth.” MCL 722.1433(4). This is the mother’s husband.

There are three substantive sections of the Revocation of Paternity Act, each applicable in different circumstances, by which a determination of parentage may be vacated. Section 11 applies to the case at bar and was the vehicle by which Plaintiff-Mother sought a determination that ZG was born out of wedlock. The applicability of Section 11 by which a prior order or judgment may be set aside is clearly and unambiguously stated in MCL 722.1435(3) as follows: “Section 11 governs an action to determine that a presumed father is not a child's father.” Section 11, MCL 722.1441, gives standing to the following: the mother (Section 11(1)), the presumed father (Section 11(2)), the alleged father (section 11(3)), and DHS (section 11(4)). Each of these parties can utilize the Act to seek a determination that a child was born out of wedlock by filing a motion within a pending action or by filing a separate complaint when no divorce action has been filed. Section 11 provides the only avenue of relief for these specifically designated parties under the specific circumstances set out in Section 11. Each one of these parties

is accorded the “savings clause” discussed *infra* in I-C. Section 11 clearly does not apply to an “affiliated father” as Defendant-Glaubius would have this Court believe. The expression of one thing in a statute means the exclusion of other similar things. *Alan v Wayne County*, 388 Mich 210, 253; 200 NW2d 628 (1970).

Instead, Section 9 applies only to an “affiliated father” whose paternity was established without his participation in the lawsuit. MCL 722.1439. Section 9 provides that the mother, an alleged father, or the affiliated father may file a motion within an existing action to set aside the order of filiation. When a child has an affiliated father, a motion can be filed under the Act “within 1 year after the date of the **order of filiation.**” MCL 722.1439(2) (emphasis added). The Act defines “order of filiation” as “a judicial order establishing an affiliated father.” MCL 722.1433(5). Orders of filiation are further defined in the Paternity Act as a declaration of paternity made under that act. MCL 722.714(12); 722.717(1). In interpreting the statute, the Court of Appeals concluded that a judgment of divorce would not serve as an “order of filiation” unless paternity had been disputed and resolved in the divorce proceedings:

Applying this basic definition [of “determine”], it follows that **an affiliated father exists where, in a court of law, a dispute or question over a man’s paternity has been settled or resolved**, and it was concluded by the court, based on reasoning or observation, that the man is the child’s father. Given this understanding, **it seems plain that the Legislature intended to recognize an affiliated father where there was an actual determination of paternity; that is, where there was a dispute or question presented regarding the man’s paternity and the matter was in fact resolved by a court.** A judicial order establishing this determination would constitute an “order of filiation” for purposes of the Revocation of Paternity Act...**Where the parties to a divorce action have proceeded in keeping with this presumption of legitimacy,**

and do not contest the issue of paternity in the course of the divorce, in our judgment, the resulting judgment of divorce does not signify a determination, in court, that the husband is the father of the child for purposes of the Revocation of Paternity Act. Rather, **the judgment of divorce merely recognizes the continued adherence to the presumption of legitimacy without answering the distinct question of whether the husband is the child's father.**

(07/15/14 COA Opinion, pp. 5-6) (emphasis added). Section 9 of the Act can only apply when an "affiliated father" achieved his legal status over the child during a proceeding in which paternity is disputed and resolved, such that Section 9 does not apply in the instant case. (07/15/14 COA Opinion, p. 6).

Section 7 applies only to cases where the mother, the acknowledged father, an alleged father, or a prosecuting attorney on behalf of DHS seeks to set aside an acknowledgment of parentage signed by the "acknowledged father." MCL 722.1437. The conditions upon which an acknowledgment of parentage may be set aside are similar to grounds for vacating a judgment of divorce under MCR 2.612. But the case at bar has nothing to do with Section 7, and any attempt to claim that a motion should have been filed under MCR 2.612 is improper (*see infra*, discussion at I.C).

B. The Court of Appeals correctly concluded that Defendant-Glaubius is a "presumed father" according to the Revocation of Paternity Act because of the marital presumption, thus rejecting Defendant-Glaubius's argument that he converted to an "affiliated father" upon entry of the Judgment of Divorce. [Responding to Application Issue A].

Because Defendant-Glaubius was married to Plaintiff-Mother at the time of ZG's conception and birth, according to the marital presumption, he is ZG's presumed father. The Revocation of Paternity Act also defines him as a "presumed father." MCL

722.1433(4). Therefore, Plaintiff-Mother moved to revoke Defendant-Glaubius's paternity to ZG under Section 11 of the Act, which governs determinations of a child born out of wedlock. MCL 722.1441.

Plaintiff-Mother is able to satisfy all four provisions of MCL 722.1441(1)(a). (See Motion for Revocation, ¶¶14-16). In the Trial Court, Defendant-Glaubius did not dispute this. (See 08/06/13 Supplemental Brief; 06/20/13 Response to Motion, ¶¶ 12, 16). Instead, he disputed that Plaintiff-Mother should be able to file a motion to revoke his paternity under Section 11 in the first place because the parties already had a valid Judgment of Divorce. (See 08/06/13 Supplemental Brief, pp. 5-7; 06/20/13 Response to Motion, ¶¶ 12-12, 16). He argued that Plaintiff-Mother should only be able to revoke paternity under Section 9 of the Act. MCL 722.1439. (08/13/13 Tr, pp. 40-42).

Defendant-Glaubius essentially asks this Court to find that he did not become the father of ZG by way of the marital presumption, but instead, that he earned his legal rights as father by way of the judgment of divorce. In so doing, he is asking this Court to make a finding that he, and all other men like him, falls into two ROPA categories: Section 11 and Section 9, depending upon where the parties are in the divorce process. Had the Legislature so intended, it would have clearly expressed that intent.

A review of the Act as a whole reveals that there is no other section of the Act that addresses revocation of parentage of a presumed father whose paternity was established by virtue of the marriage other than Section 11. It is a long-understood tenet of statutory construction that "provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the legislature." *Farrington v Total Petroleum*, 442 Mich 201, 209; 501 NW2d 76 (1993), citing *Dagenhardt v Special Machine*



& *Engineering, Inc*, 418 Mich 520; 345 NW2d 164 (1984), and *Workman v DAIIE*, 404 Mich 477, 507; 274 NW2d 373 (1979). Additionally, though Defendant-Glaubius correctly asserts that this Court held in *Rusinek v Schultz*, 411 Mich 502, 508; 309 NW 2d 163 (1981), that statutes in derogation of common law must be narrowly construed, this Court also held in that decision that "[t]he statute, however, must be construed sensibly and in harmony with the legislative purpose." *Id.*

Section 11, subsection 1, of the Act, MCL 722.1441(1), grants standing only to the mother of a child conceived or born during a marriage to revoke parentage of her husband who is not the biological father of that child. This mother's standing may arise in either of two specific situations:

(a) All of the following apply:

(i) The mother identifies the alleged father by name in the complaint or motion commencing the action.

(ii) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.

(iii) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.

(iv) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

MCL 722.1441(1)(a). The second situation, found under Section 722.1441(1)(b), is inapplicable here because it involves a presumed father who has failed to support the child

for two years.

Section 11 also provides standing for a presumed father—the man to whom the mother is married at the time of conception or birth—to file an action to revoke parentage that is foisted upon him by the marital presumption. In that regard, MCL 722.1441(2) states as follows:

(2) If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity **if an action is filed by the presumed father within 3 years after the child's birth OR if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother.** *The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.*

MCL 722.1441(2) (emphasis added).

Note that MCL 722.1441(2) does not limit a presumed father's filing of an action to a point in time that is prior to the entry of a judgment for divorce. Rather, so long as the presumed father files his action prior to the time the child reaches the age of 3, he has standing under Section 11(2). A presumed father is also granted standing to revoke his parentage if he filed "an action" "on or before 1 year after the effective date of this act." Clearly, a presumed father—a "duped dad"—is allowed to revoke parentage of a child older than three years of age so long as he files "an action" to do so on or before 1 year after the effective date of this act (June 12, 2012).

A mother's standing granted by Section 11(1) should not be interpreted as different in scope from a presumed father's standing. *Cf* MCL 722.1441(1)(a)(iii) *and* MCL 722.1441(2). It is presumed that a statute will be interpreted so as to be internally

consistent. A particular section of the statute shall not be divorced from the rest of the act. The *ejusdem generis* rule applies to resolve the problem of giving meaning to groups of words where one of the words is ambiguous or inherently unclear. *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004). The Legislature did not intend to grant a right of revocation greater in scope to a presumed father than to a mother.

The Legislature made no delineation in the statute as to when the presumption of paternity ends. It merely states that Section 11 applies when the father is presumed to be the father by virtue of the marriage. This marital presumption applies to Defendant-Glaubius. But for his marriage to Plaintiff-Mother, he would not have been able to exercise any custodial rights as to ZG.

Defendant-Glaubius has presented no arguments employing a statutory interpretation that could maintain the Legislature's intent while also not rendering either Section 11 or Section 9 nugatory. Statutes are to be read as a whole and courts are to avoid a construction that renders any part of the statute surplusage or nugatory. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

Because the Revocation of Paternity Act does not explicitly require any of the potential litigants—an alleged father, a presumed father, the mother, or the Department of Human Services—to move to revoke the marital presumption during the divorce proceedings, there are two possible outcomes for scenarios like the case at bar. Under Defendant-Glaubius's view, the presumed fathers, alleged fathers, and mothers would be left with no relief after a divorce judgment enters. This interpretation leaves a huge hole through which many alleged fathers would fall and lose their ability to assert biological

parentage. Under Plaintiff-Mother's view, the Legislature intended to allow for any determinations of paternity that flow from the marital presumption to be set aside so long as the moving party satisfies the requirements of Section 11. The latter is the most logical reading of the statute because it is the only reading of the statute that allows for an alleged father to assert his rights to his biological child after a mother and her husband have been divorced.

Defendant-Glaubius attempts to fall within the definition of "affiliated father," which is specifically defined by the Act as a man who has been determined in a court to be the child's father. MCL 722.1433(2). However, the Act breaks down potential fathers into four distinct definitions, each with specific characteristics and each having relief specific to his status. See MCL 722.1433. An "affiliated father" has standing to set aside an order of filiation only by way of Section 9. MCL 722.1439. The rights of an affiliated father have no relevance to the issues before this Court. It is clear that a man with Defendant-Glaubius's characteristic fits only within the scheme of Section 11 of ROPA, which applies only to "presumed fathers" (such as Defendant-Glaubius) and "alleged fathers." See MCL 722.1439. The rights of an affiliated father thus have no relevance to the issues before this Court. Where the Legislature has specifically defined a term, as here, this definition controls for the purpose of applying ROPA. *Mich Educ Ass'n v Sec'y of State*, 488 Mich 18, 28; 793 NW2d 568 (2010). The language of the statute is unambiguous and the Legislature is presumed to have intended the meaning expressed. *Tryc v Mich Veterans' Facility*, 451 Mich 129,135; 545 NW2d 642 (1996).

Accepting Defendant-Glaubius's interpretation that a judgment of divorce creates

an “affiliated father” under ROPA necessarily precludes alleged fathers, mothers, and presumed fathers from challenging paternity after entry of a judgment of divorce, even though the explicit terms of the statute provide a mechanism for each of those actors to revoke paternity. The Legislature’s impetus in enacting ROPA was to address *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), involving an alleged father who was denied the ability to assert paternity because the mother was married to someone else. (See Application, p. 23 and Plaintiff-Mother’s COA Brief, p. 22). Defendant-Glaubius’s interpretation of the statute would obliterate the Legislature’s intent to give relief to various classes of parents unless they discover the issue of parentage prior to entry of the judgment of divorce. Given the Legislature’s stated intent of the Act, the Court of Appeals’ interpretation of the statute is the only proper interpretation, and Plaintiff-Mother must prevail.

C. The Court of Appeals correctly concluded that the Judgment of Divorce does not pose a res judicata bar to a subsequent motion for revocation of paternity because the Revocation of Paternity Act permits the filing of a motion to revoke paternity after the entry of the judgment of divorce. [Responding to Application Issues B and D].

The Trial Court improperly interpreted the Revocation of Paternity Act when it determined that the Act does not apply once the Judgment of Divorce has entered. The Trial Court determined that the Revocation of Paternity Act did not function to revoke paternity that has been assigned *de facto* by a Judgment of Divorce. The Court of Appeals held that the plain language and purpose of ROPA preclude the application of res judicata as a “categorical bar to all litigation of paternity where paternity had been previously

determined by a court,” such that applying res judicata would subvert the Legislature’s intent to allow reconsideration and relitigation of paternity in the situations set forth specifically by the Legislature. (07/15/14 COA Opinion, p. 9). Essentially, the Court of Appeals held that ROPA replaced the common law in the specific situations set forth in the Act. (07/15/14 COA Opinion, pp. 9-10). Additionally, it held that “as a continuation of divorce proceedings,” res judicata would not bar the motion here because the plain language of ROPA allows a motion at any stage of the proceedings in an action for support, parenting time, or custody pursuant to MCL 722.1443(1). (07/15/14 COA Opinion, p. 10).

The Legislature drafted the Revocation of Paternity Act for the express purpose of re-examining legal relationships. In enacting the Revocation of Paternity Act, the Legislature intended to provide a method to avoid the res judicata effect of a prior order or judgment that determined paternity. Indeed, the entire purpose and effect of the Act was to circumvent what would otherwise be barred by res judicata, by permitting a court to set aside orders of filiation under appropriate circumstances, and by allowing a court to set aside the marital presumption as reflected in a judgment of divorce. See Revocation of Paternity Act, Act 159 of 2012. The Trial Court’s approach obliterates the intent of the Legislature, which is contrary to its duty as an arbiter of law. *Heinz v Chicago Road Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996) (“The primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature.”).

The legislative intent stated clearly in Act 159 of 2012, effective June 12, 2012 as follows:

AN ACT to provide procedures to determine the paternity of

children in certain circumstances; to allow acknowledgments, **determinations, and judgments relating to paternity to be set aside in certain circumstances**; to provide for the powers and duties of certain state and local governmental officers and entities; and to provide remedies.

Revocation of Paternity Act, Act 159 of 2012 (emphasis added). This preamble to ROPA is not binding authority for interpreting a statute, but it may be considered. *Malcolm v City of East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991). The Court of Appeals considered the preamble, quoting it in the opinion:

As the preamble makes clear, central to the purpose of the Revocation of Paternity Act is the creation of the ability to revisit and set aside prior determinations of paternity in specific circumstances. To effectuate this purpose, as we have discussed, the Revocation of Paternity Act allows for the revocation of acknowledgements, and the setting aside of judicial orders related to paternity. * * * While we do not suggest that parties may repetitively litigate the question of paternity without end, it would nevertheless clearly subvert the Legislature's intent if we employed res judicata as a categorical bar to all litigation of paternity where paternity had been previously determined by a court, or could have been previously decided.

(07/15/14 COA Opinion, p. 9).

It is clear from the Preamble of ROPA as well as from the content of the Act, that ROPA is remedial legislation intended to dispense with the legal fiction of Lord Mansfield's Rule set forth in 1777, more than two hundred years ago. It is well-established that construction of remedial legislation is governed first and foremost by the express language of the statute and that, when this language conflicts with the common law, the unambiguous statutory language must take precedence. *Barker Bros Const v Bureau of Safety and Regulation*, 212 Mich App 132, 140; 536 NW2d 845 (1995).

In fact, the legislature's intent that ROPA is remedial and intended to replace common law actions is made crystal clear by Section 13(10): "A common law action that was available before the effective date of this act to set aside a paternity determination or to determine that a child is born out of wedlock remains available until 2 years after the effective date of this act but is not available after that date." MCL 722.1441 Because this case involves a statutory cause of action—in other words, a cause of action created by the Legislature in MCL 722.1441—it is inappropriate to apply the common-law doctrine of *res judicata*. See *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). This is particularly true in light of the remedial purpose of the Act and also in light of the savings clauses (discussed *infra*) that proliferate in the Act and also the fact that the Act specifically makes any relief under the common law impossible after June 12, 2014 (two years after enactment of ROPA). MCL 722.1443(10). In fact, the Court of Appeals clearly rejected application of the doctrine on those grounds, stating that: "the Legislature intended to authorize postjudgment challenges to paternity, including those where paternity was or could have been litigated. Further, we are persuaded that this legislative intent would be improperly thwarted by the application of *res judicata* to bar actions otherwise authorized by the Revocation of Paternity Act." (07/15/14 COA Opinion, p. 9).

Yet under the Trial Court's reading of the Act, the Act would only serve to modify legal paternity by setting aside an order of filiation pursuant to the scheme in MCL 722.1439. However, the text of the Act indicates that it operates to allow a trial court to set aside or revoke any and all orders that flow from a paternity finding or the marital presumption. Revocation of Paternity Act, Act 159 of 2012; MCL 722.1443(2).

Interestingly, prior to the Court of Appeals' decision in the instant case, another panel addressed the Revocation of Paternity Act without treating the post-judgment motion as a bar. In *Parks v Parks*, 304 Mich App 232; 850 NW2d 595 (2014), this Court held that there was insufficient evidence that the mother, the alleged father, and the presumed father "mutually and openly acknowledged a biological relationship between the alleged father and the child." *Parks*, supra at 240-241. Even though *Parks* arose from a revocation action following a judgment of divorce, and even though the issue was raised, the trial court and Court of Appeals apparently did not view the divorce judgment as a bar to the litigation. In addition, although *Sprenger v Bickle*, ___ Mich App __; ___NW2d ___ (October 23, 2014), was decided after *Glaubius* and pertained to a different subsection of Section 11 (regarding an alleged father demonstrating that he did not know the mother was married at the time of conception), the parties did not raise in the trial court or on appeal that the judgment of divorce presented a res judicata bar in that case.

Defendant-Glaubius argues that, rather than filing a motion to revoke paternity under ROPA, Plaintiff-Mother should have filed a Motion for Relief from Judgment under MCR 2.612. (Application, p. 33; see also 10/04/13 Op & Ord, pp. 3-4). This is legally incorrect. A motion under MCR 2.612 would be an improper method of circumventing the statutory scheme in the Revocation of Paternity Act because the Act applies to setting aside the marital presumption by determining that a presumed father is not the child's father. MCL 722.1435; MCL 722.1441. A motion for post-judgment relief is not required because the Revocation of Paternity Act provides the mechanism by which this issue is raised, not MCR 2.612. On issues of substantive law, statutes take precedence over court rules. *Smith v*

Smith, 443 Mich 606, 619-621; 447 NW2d 715 (1989). To the extent that a statute conflicts with an existing court rule on an issue of substantive law, then the statute supersedes the court rule. *Smith, supra* at 621. The Legislature has explicitly permitted a party to rebut the marital presumption. MCL 722.1435(3).

In the instant case, Defendant-Glaubius was a presumed father prior to entry of the Judgment of Divorce and he continued to be a presumed father after the entry of Judgment of Divorce by operation of law due to the marital presumption. The Revocation of Paternity Act does not need to state that it applies to judgments of divorce because it explicitly applies to the marital presumption. Defendant is a “presumed father” by operation of law, and his parentage can be revoked by operation of law. The fact that there is a presumption that a child born or conceived during the marriage is a child of the marriage does not expire upon the end of the marriage. By explicitly addressing the marital presumption, the Revocation of Paternity Act does apply to the marital presumption during the marriage and after divorce. There are several textual indications that the Legislature meant for the Act to allow the marital presumption from a Judgment of Divorce to be set aside.

1. ROPA allows an action “at any stage of the proceedings.”

First and most notably, if there is an existing support or custody case, then the Act requires that a motion be filed in the existing action, at any stage of the proceedings. The Legislature clearly contemplated that the motion would be brought post-judgment of divorce, stating:

If an action for the support, custody, or parenting time of the child exists **at any stage of the proceedings** in a circuit court of this state or if an action under section 2(b) of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, is pending in a circuit court of this state, **an action under this act shall be brought by motion in the existing case** under rules adopted by the supreme court.

MCL 722.1443(1). Acknowledging that an action for support, custody, or parenting time may exist or a valid order from such action may be in place recognizes that the Act grants trial courts the authority to invalidate such orders affecting the child if the man's parentage is revoked, regardless of how parentage was established, such as by operation of law through the marital presumption. The divorce judgment in this case awarded custody, parenting time, and support. A divorce judgment is clearly contained within this legislative mandate and the revocation action must be filed in the divorce case "at any stage of the proceedings," which includes post-judgment of divorce.

Consistent with this plain language of ROPA, the Court of Appeals held that "at any stage of the proceedings by a motion in the existing case" includes post-judgment of divorce. (COA Opinion, p. 8, citing MCL 722.1443(1)). The Court of Appeals' interpretation of the statutory language "at any stage of the proceedings" is also consistent with the continuous jurisdiction under MCL 722.1201 – the Uniform Child Custody Jurisdiction and Enforcement Act. The trial court retains exclusive, continuing jurisdiction over the child's custody until the child reaches the age of majority unless either MCL 722.1202(1)(a) or (b) can be met. *See also White v Harrison-White*, 280 Mich App 383, 393; 760 NW2d 691 (2008).

The court rules provide that when a circuit court has continuing jurisdiction over a

matter because of a prior action, “[a] new action concerning support, custody, or parenting time of the same child must be **filed as a motion in the earlier action**[.]” MCR 3.204(A)(1) (emphasis added). This rule makes it clear that when “subsequent proceedings” occur, **the earlier action remains existent** and those further proceedings are **part of the earlier action**. MCR 3.204(A)(1). Indeed, the requirement that actions under the ROPA be filed as motions in an already existing case appears to directly flow from the general statutory provision regarding continuous jurisdiction. *Cf.* MCL 722.1443(1) and MCL 552.17. By seeking to modify a judgment of divorce to revoke paternity, Plaintiff-Mother invoked the continuous jurisdiction of the Trial Court. Thus, the Legislature intended that ROPA motions be filed in the existing action, whether pre- or post-judgment.

This interpretation of ROPA is also consistent with the way in which courts handled these kinds of actions prior to ROPA. For example, in *Sinicropi v Mazurek*, 273 Mich App 149, 153; 729 NW2d 256 (2006), a child was born to an unmarried couple, the acknowledged father filed a custody action, and the parties agreed to a consent order giving them joint custody. *Id.* In post-judgment proceedings, the acknowledged father sought sole custody of the child. *Id.* The mother then moved to revoke the acknowledged father’s paternity on the ground that another man whom she had dated was the child’s biological father. *Id.* She filed her motion as part of the ongoing custody proceedings, even though they were post-judgment proceedings. *Id.* The trial court dismissed the motion on other grounds, but the Court of Appeals reversed and remanded the case for consideration of the revocation of paternity issue. *Id.* at 185-186.

2. **The Legislature recognized the continuous jurisdiction of the court by allowing a motion to be filed in an existing proceeding, even if a post judgment motion is labeled an “ancillary proceeding.”**

Second, the Legislature’s intent that a motion under the Revocation of Paternity Act not be prevented by a res judicata is highlighted by the number of the times the Legislature explicitly envisions the action being filed as a motion and not just as an original complaint – thus recognizing that such a motion might very well be a post-judgment motion. See MCL 722.1437(5); 722.1439(1); 722.1443(A)(a)(i); MCL 722.1441(1)(a)(i); MCL 722.1441(1)(b)(i); MCL 722.1441(5); MCL 722.1443(1).

As it relates to this case, the text of MCL 722.1441(5) also supports the contention that so long as the requirements for standing are met, any party may motion to revoke paternity, regardless of a Judgment of Divorce being in place. For example, MCL 722.1441(5) states that an action under Section 11 “may be brought by a complaint filed in an original action or by a motion filed in an existing action,” which indicates that mothers, presumed fathers, and alleged fathers are not limited to bringing these claims for determinations that the child was born out of wedlock prior to the entry of a Judgment of Divorce. In fact, the only mention of bringing one of these claims during divorce proceedings is under MCL 722.1441(2), which allows for a presumed father to motion for relief under the Act either within the first three years of the child’s birth or that he may raise the issue “in an action for divorce or separate maintenance” between himself and the mother. Indeed, MCL 722.1441 never explains at what point in a divorce judgment a mother is **required** to raise any questions of paternity, so the Trial Court was not free to read such a requirement into the statute. *Girard v Wagenmaker*, 437 Mich 231, 377; 470

NW2d 372 (1991) (holding the Court must construe a statute on the basis of its plain language and construct them in such a manner that “will give effect to all its parts as a whole.”). On its plain language, the Act does not require any party to raise the issue during the pendency of divorce proceedings. Instead, the Act outlines the timeline during which a presumed father, mother, or alleged father *may* move to rebut the presumption that a child born in a marriage is issue of that marriage, and then subsequently, the relief that a trial court may grant them should they have standing. MCL 722.1441; MCL 722.1443.

Defendant-Glaubius attempts to distinguish between actions “for the support, custody or parenting time of the child” and “proceedings that are ancillary or subsequent to the aforementioned actions.” (Application, p. 43-44). According to Defendant-Glaubius, once a divorce judgment is entered, that divorce action no longer exists and any further proceedings are not a part of that action. (Application, p. 43). However, this distinction between a divorce action and “subsequent proceedings” is untenable, particularly in light of the court’s continuous jurisdiction in a case involving custody of a child. See MCL 552.17 (“[A]fter entry of a judgment concerning annulment, divorce, or separate maintenance and on the petition of either parent, the court may revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children...”); *Dittenber v Rettelle*, 162 Mich App 430, 435; 413 NW2d 70 (1987) (“[T]he trial court has continuing jurisdiction in connection with custody and support to revise, alter, or amend the original judgment of divorce.”).

The Legislature inherently intended the Act to apply to a post-judgment proceeding. The statute’s provisions allowing the revocation motion to be filed in an “existing case” ties into the trial court’s continuing jurisdiction over matters of support, custody, and parenting

time. Under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), a "child custody proceeding" is defined as follows:

"Child-custody proceeding" means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under article 3.

MCL 722.1102(d).

The child-related provisions in the parties' Judgment of Divorce were a "child-custody determination," which means that those provisions were "**a judgment**, decree, or other court order **providing for legal custody, physical custody, or parenting time with respect to a child**. Child-custody determination includes a permanent, temporary, initial, and modification order. MCL 722.1102(c) (emphasis added).

The Michigan trial court's statutory authority to modify the parties' child custody determination contained within the Judgment of Divorce is defined as follows in the UCCJEA:

"Modification" means **a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous child-custody determination concerning the same child**, whether or not it is made by the court that made the previous child-custody determination.

MCL 722.1102(k) (emphasis added). Significantly, the UCCJEA provides for exclusive continuing jurisdiction in the Michigan Court for the purposes of modification, as stated in MCL 722.1202:

Sec. 202. (1) Except as otherwise provided in section 204, **a court of this state that has made a child-custody determination consistent with section 201 or 203 has exclusive, continuing jurisdiction over the child-custody determination** until either of the following occurs:

(a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

(b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.

(2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under section 207.

(3) A court of this state that has made a child-custody determination and that does not have exclusive, continuing jurisdiction under this section may modify that child-custody determination only if it has jurisdiction to make an initial child-custody determination under section 201.

MCL 722.1202.

Thus, it is clear that under Michigan law, including Michigan's enactment of the UCCJEA, that the Legislature contemplated modification of prior judgments that included modification of child custody determination.

Statutes are to be read as a whole to ascertain the intent of the Legislature, and any provisions that are apparently inconsistent are interpreted to produce a harmonious whole, if reasonably possible. *Macomb County Prosecutor v Murphy*, 464 Mich 149, 160; 627 NW2d 247 (2001); *Bailey v Oakwood Hosp & Med Ctr*, 472 Mich 685, 693; 698 NW2d 374

(2005); *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002). Statutes that are *in pari materia* – relating to the same subject – are to be read and construed together. *In re MCI Telecomm Complaint*, 460 Mich 396, 417; 596 NW2d 164 (1999).

Because a trial court has continuing jurisdiction over the care and custody of a child even after a divorce, then in practice, *res judicata* cannot bar litigating the issue of paternity after a judgment divorce, particularly in light of the remedial legislation that is ROPA. MCL 552.17a(1); MCL 722.27(1)(c). Therefore, the Trial Court has the authority to modify the provisions of the Judgment of Divorce if those provisions relate to the child.

The authorities that Defendant-Glaubius cites to support his argument that a divorce action ceases to exist once a divorce judgment is entered are unavailing. Notably, the case law upon which Defendant-Glaubius relies for this assertion do not arise out of domestic relations law, ignore the plain language of Michigan's UCCJEA with its concomitant provisions for continuing exclusive jurisdiction, and also significantly, for modification of judgments that include or supersede initial custody determinations, and do not inform this Court about the meaning of the phrase “at any stage of the proceedings” as it was employed by the Legislature when it enacted ROPA. (Application, pp. 43-44).

Defendant-Glaubius first cites *People v Kissner*, 292 Mich App 526, 536; 808 NW2d 522 (2011), for the proposition that a “proceeding” ends at the time of judgment. However, in *Kissner*, the argument being made was for a much more narrow definition of “proceeding,” not a definition of “proceeding” that extends beyond the time of judgment.

Id. This Court in *Kissner* held that “proceeding” has a much broader definition:

It appears that defendant's understanding of the term ‘official proceeding,’ as used in the statute, is more restrictive than the

Legislature intended. MCL 750.483a(11)(a) defines 'official proceeding' as 'a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.' Although defendant appears to argue that his signing of the motion and affidavit constituted the 'proceeding' in question, Black's Law Dictionary (7th ed) indicates that the definition of 'proceeding' is much broader. Black's defines 'proceeding,' in pertinent part, as '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment,' and as '[a]ny procedural means for seeking redress from a tribunal or agency.' Accordingly, the term 'proceeding' encompasses the entirety of a lawsuit, from its commencement to its conclusion.

Id.

Further, Defendant-Glaubius's citation to *Harbor Telegraph 2103 v Oakland County Board of Commissioners*, 253 Mich App 40, 60; 654 NW2d 633 (2002), does not provide support for his contention that a post-judgment action cannot be part of the original legal proceeding. In *Harbor Telegraph*, the Court of Appeals addressed the validity of the veto of a county's executive that overrode a detachment resolution made by a city's board of commissioners. See generally *id.* The pinpoint citation to which Defendant-Glaubius directs this Court discusses the definition of "proceeding" for the purposes of the statute governing detachment petitions, specifically whether a county executive's veto constituted a "proceeding." *Id.* at 60. The Court of Appeals' discussion of a proceeding under the detachment statute is irrelevant to the discussion before this Court. *Id.* Moreover, the Court of Appeals' brief and general discussion of the word "proceeding" in that case is not helpful to Defendant-Glaubius. As the Court of Appeals stated,

According to Black's Law Dictionary (7th ed), the term

"proceeding" refers to "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment," or "any procedural means for seeking redress from a tribunal or agency." [Emphasis added.] . . . [T]he further, more general meanings of "proceeding" includes "an act or step that is part of a larger action," *id.* . . .

Id. The Court of Appeals then stated the general definition was not relevant in that case because of this Court's prior interpretations of the detachment statute. *Id.* However, the definitions that the Court of Appeals discussed do not preclude post-judgment actions as being part of proceedings, as the Court of Appeals did not adopt any of the definitions in particular, but used all three in its analysis. *See id.*

The other cases Defendant-Glaubius cites, *Ballog v Knight Newspapers, Inc.*, 381 Mich 527, 534; 164 NW2d 19 (1969), and *State v Iron Cliffs County*, 54 Mich 350, 408; 20 NW 493 (1884), have nothing to do with the issue of when "proceedings" are complete and no longer ongoing. *Ballog* pertains to which law applies to a case—the law that was in effect when the action was filed or when the judgment was rendered. *See Ballog, supra* at 534. *Iron Cliffs* pertains to whether the Legislature has the power to force the sale of land because of delinquent taxes. *See Iron Cliffs, supra* at 408. Neither case helps to resolve the issue before this Court.

Similarly, Defendant-Glaubius also cites MCR 3.201, which simply states that subchapter 3.200 applies to both actions for divorce and subsequent and ancillary proceedings. MCR 3.201(A). Defendant-Glaubius places much emphasis on the word "ancillary" and even announces that this Court held that the post-judgment motion to revoke paternity was an "ancillary proceeding," presumably because this Court stated that

the Trial Court's order was a "post-judgment order affecting custody" for purposes of appellate jurisdiction. (Cf. COA Opinion, p. 2, n 1 and Recon Motn, ¶ 10). The Court of Appeals did not classify the action as "ancillary," but based on the court rules, statutes, and case law discussed above, it does not appear that such a classification would make a difference—the post-judgment proceedings here are still part of the Trial Court's continuing jurisdiction under MCL 552.17 and also under MCL 722.1101 *et seq.*, and were filed "at any stage of the proceedings" when Plaintiff-Mother filed the motion to revoke paternity post-judgment of divorce.

3. The Act's "savings clause" provides the time limit in which a party can pursue the motion, none of which relate to the entry of a judgment of divorce.

Third, there are numerous savings clauses that are applicable to each party with standing under section 7, 9, and 11 of ROPA that offer further evidence of the legislative intent that *res judicata* not apply to motions or complaints filed under ROPA. In each of the three sections by which a party may seek relief, Section 7, Section 9 and Section 11, the filing party receives the benefit of a "savings clause" that states: "The requirement that an action be filed within 3 years after the child's birth or within 1 year after the date of the order of filiation does not apply to an action filed on or before 1 year after the effective date of this act." See MCL 722.1437(1); MCL 722.1439(2); MCL 722.1441(1)(a)(iii); MCL 722.1441(1)(b)(ii)(B); MCL 722.1441(2); MCL 722.1441(3)(a)(iii); MCL 722.1441(3)(b)(ii)(B); MCL 722.1441(3)(c)(ii); MCL 722.1441(4)(a)(ii). If the effect of the marital presumption were deemed to expire upon divorce, there would have been no need

for the Legislature to have inserted these “savings clauses” that proliferate in the Act. Application of the doctrine of res judicata would render those statutory provisions nugatory and would thus be an erroneous interpretation of the Act. *Mich Props, LLC, supra*.

These savings clauses, combined with the requirement that a ROPA proceeding be commenced either by a complaint or by a motion filed within an existing case, clearly indicate that the Legislature intended that res judicata would not apply to any proceedings filed under Section 11 to establish that a child was born out of wedlock allowing the revocation of a presumed father's status arising by operation of law under Lord Mansfield's Rule, or the setting aside of an order or a judgment establishing parentage established in the presumed father. Nor would res judicata apply to those actions filed under Section 9 to set aside an order of filiation for an “affiliated father” whose parentage arose from a default judgment. Nor would res judicata apply to those actions filed under Section 7 to vacate any orders determining parentage of an acknowledged father.

The “savings clause” seems calculated to apply to post-divorce motions challenging parentage of older children. The logic behind 3 years of age is to avoid destroying a strong, established parent-child relationship with a presumed father. There is no reason for the savings clause to exist other than to make the Act apply to older children who were deprived of a biological father because at the time of a divorce there could be no challenge to a presumed father in a divorce.

Indeed, the numerous savings clauses contained in the Act are essentially the Act's retroactivity provision – the Act applies retroactively to any case as long as it filed within one year of the effective date of the Act – or by June 12, 2013. By its own terms, ROPA specifically allows for the setting aside of judgments and orders. ROPA is clear with the

savings clauses (everybody gets the savings clause, including the mother and not just the alleged father or the presumed husband): not only must it be a motion within the existing action, but it can be filed before the child is 3 or within 1 year of enactment. That means that until June 12, 2013, even children in an existing marriage could have been the subject of a motion to establish parentage under ROPA – kids 1 day, 3 years, and all the way to 18 years of age!

4. The Legislature could have, but did not, exclude filing a motion to revoke paternity after a judgment of divorce.

The Revocation of Paternity Act does not state that the issue of paternity is decided with finality by a Judgment of Divorce, nor does it expressly require that a mother bring the action during divorce proceedings. Instead, MCL 722.1441(1)(a)(iii) requires only that the mother bring the action within three years of the child's birth. This, in fact, *limits* the rights of the mother to disclaim paternity of her husband. The Legislature limited the rights of the alleged father, the mother, and DHS so that they could only assert that the child was born out of wedlock during the first three years of the child's life or if the presumed father is not providing support payments. See MCL 722.1441(1)(a)(iii); (3)(a)(iii); (3)(b)(ii); (4)(a). The Legislature preserved the right of the presumed father to allege that the child is not issue of the marriage beyond the child's third birthday only in a divorce or separate maintenance action, presumably to respond to the criticism of the former rule that required an ex-husband to support a child that was not his. See *Thompson*, 112 Mich App at 120. The Legislation also provided a narrow expansion of a presumed father's right to bring a court action – contained in the "savings clause" of Section 11(2). This "savings clause" allows

a presumed father to bring a revocation of paternity action within one year of the Act's effective date. Using the savings clause, a presumed father could presumably file the action following a divorce and even if the child was older than 3 years old, so long as the presumed father filed before June 12, 2013.

Furthermore, the Legislature outlined various situations in which no one could motion to revoke paternity, and it plainly did not include that the remedies of the Act were unavailable after entry of a Judgment of Divorce. Indeed, the Legislature delineated the only situations where a trial court could not revoke paternity:

- if such a finding would “set[] aside a judgment or determination of a court or administrative agency of another state;”
- if such a finding would terminate an adoption;
- if such a finding would vacate a judgment establishing paternity under a surrogate parentage contract provided for under MCL 722.853;
- “if the child [was] conceived as a result of acts for which the alleged father was convicted of criminal sexual conduct” under certain penal codes; or
- if the child is under jurisdiction of the court and a petition has been filed to terminate the parental rights to the child.

MCL 722.1443(6), (7), (8), (9), (14), (15). According to the doctrine of *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), items not on the list are impliedly assumed not to be covered by the statute. *Rory v Cont’l Ins*, 473 Mich 457, 503; 703 NW2d 23 (2005). Here, the Legislature’s failure to include a provision barring actions under the Act after entry of a judgment of divorce indicates that it did not intend to bar actions simply because a divorce judgment had been entered. Otherwise,

it would have listed this exception from the Act in Section 13.

The Trial Court erroneously reasoned that if the Act allowed for modifying the provisions of a Judgment of Divorce, the Legislature would have included this language, and its failure to do so indicates that it is barred. (Op & Ord, p.5 n. 2). This argument does not hold water because the Act **begins** by stating its purpose as granting the trial court broad powers “to allow acknowledgments, determinations **and judgments** relating to paternity to be set aside in certain circumstances.” Revocation of Paternity Act, Act 159 of 2012 (emphasis added). This aligns with an explanation that the Act gives trial courts the right to set aside judgments that relate to paternity. Defendant-Glaubius and the Trial Court simply cannot defend their interpretation of the statute that it excludes judgments of divorce from consideration.

The Trial Court obliterated the intent of the Act by dismissing Plaintiff-Mother's action on *res judicata* grounds. The entire purpose of the Act is to create an exception to the general rule of *res judicata*. By definition, the term revocation means “an annulment, cancellation, or reversal.” Black’s Law Dictionary (9th ed. 2009). Therefore, the Trial Court’s reasoning that the action was blocked simply because of the entry of the Judgment of Divorce is clearly an erroneous interpretation of the statute, and the Court of Appeals properly corrected the lower court’s ruling.

D. Defendant-Glaubius's other arguments are unavailing because they utilize old case law and other tools in an attempt to avoid the language of the Revocation of Paternity Act.

1. Case law that pre-dates ROPA does not elucidate legislative intent in enacting ROPA. [Responding to Application Issue A]

Defendant-Glaubius relies on common law by citing numerous cases (such as *Hackley*, *Baum*, and *Cogan*), all of which pre-date and are superseded by the plain language of the Revocation of Paternity Act. The Court of Appeals agreed, and correctly disregarded the cited case law as it contravened the Revocation of Paternity Act:

However, these cases were decided before the enactment of the Revocation of Paternity Act, meaning they were decided on judicial principles of *res judicata* without consideration of whether the Revocation of Paternity Act legislatively authorized post-divorce challenges to paternity. Considering the Revocation of Paternity Act, we conclude that, in the particular circumstances described in the statute, the Legislature intended to authorize postjudgment challenges to paternity, including those where paternity was or could have been litigated.

(07/15/15 COA Opinion, p. 9).

The text of ROPA clearly overrules this purported "rule" from *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977). Under Defendant-Glaubius's view, ROPA merely supplements, rather than replaces, the common law remedies that are available to parents seeking to revoke a presumption of paternity made by marriage. This view is obviously inaccurate because the text of the Act itself states "[a] common law action that was available before the effective date of this act to set aside a paternity determination or to determine that a child is born out of wedlock remains available until 2 years after the effective date of this act but is not available after this date." MCL 722.1443(10). Plainly, the Revocation of Paternity Act replaces the common law (e.g., a "*Serafin* action") as it

applies to presumptions of paternity and setting aside paternity determinations.

The Legislature enacted a mechanism by which parties could avoid res judicata effect of a prior judgment, so long as the petitioner (here, a mother seeking to revoke the paternity of her ex-husband that was established through the presumption of marriage) meets the statutory requirements (here, each of the four prongs under MCL 722.1441(1)(a) to revoke the paternity of a presumed father). The case law appearing prior to the Legislature's enactment of ROPA has little or no bearing on the outcome of the interpretation of ROPA.

2. Equitable principles, such as judicial estoppel and equitable estoppel, do not apply because ROPA delineates where equity applies.
[Responding to Application Issue B]

Defendant-Glaubius claims that the judicial estoppel and equitable estoppel should serve to bar Plaintiff-Mother's revocation of paternity claim. (Application, pp. 37-38). These equitable arguments do not inform this Court as to the statutory construction of ROPA. If equity plays into the statutory scheme at all, it does so only where the Legislature instructs. The Legislature incorporated equitable concepts into certain parts of the statute, but did not impose such a requirement on a mother seeking to set aside the marital presumption.

For example, the Legislature incorporated equity into its best interests component. See MCL 722.1443(4). In that section, the Legislature permits a trial court to refuse to enter an order revoking paternity – even though the applicant has otherwise satisfied the statutory requirements – so long as the trial court “finds evidence that the order would not be in the best interests of the child.” MCL 722.1443(4). The Legislature further included

a list of statutory criteria to evaluate in deciding the best interests of the child. These factors encompass several equitable considerations, such as “whether the presumed father is estopped from denying parentage because of his conduct” and “other factors that may affect the equities arising from the disruption of the father-child relationship.” MCL 722.1443(4)(a), (g). The Legislature also invoked equity with respect to a trial court allowing a late motion to revoke paternity, which provision states that the moving party must prove that “granting relief under this act will not be against the best interests of the child considering the equities of the case.” MCL 722.1443(13).

In contrast, the section under which Plaintiff-Mother petitioned only requires that (1) the mother identify the alleged father in her motion; (2) the presumed father, the mother, and the alleged father have “mutually and openly acknowledged” the alleged father’s biological relationship with the child, (3) the mother files the action within three years of the child’s birth or within one year of June 12, 2012, and (4) the trial court determines the child’s paternity. MCL 722.1441(1)(a). Thus, contrary to Defendant-Glaubius’s argument in his motion, this Court did exactly as the Legislature instructed in its enactment of ROPA. Equity applies only to the extent that the Legislature said it does. Based on the plain language of the statute, Defendant-Glaubius’s arguments regarding equitable and judicial estoppel must fail.

The following list summarizes the statutory provisions contained in the Revocation of Paternity Act that encompass equitable principles:

- Best interest factor (a) – “Whether the presumed father is estopped from denying parentage because of his conduct.” MCL 722.1443(4)(a);
- Best interest factor (b) – “The length of time the presumed father was on



notice that he might not be the child's father." MCL 722.1443(4)(b) (relating to laches);

- Best interest factor (g) – “Other factors that may affect the equities arising from the disruption of the father-child relationship.” MCL 722.1443(4)(g);
- Best interest factor (h) – “Any other factor that the court determines appropriate to consider.” MCL 722.1443(4)(h) ;
- Results of blood or tissue typing or DNA identification are not binding on a court in making a determination. MCL 722.1443(5);
- Common law actions to set aside paternity determination or to determine that a child is born out of wedlock remain available until 2 years after the effective date of the Act, but not available after that date. MCL 722.1443(10);
- Court’s discretion whether to award attorney fees and costs of prevailing party. MCL 722.1443(11);
- Late motion to revoke paternity. MCL 722.1443(12)-(13); and
- To proceed with an action under ROPA, if child is under court jurisdiction under the probate code and a petition has been filed to terminate parental rights, the probate court must first find that allowing an action under the ROPA is in the best interests of the child. MCL 722.1443(15).

These numerous provisions included by the Legislature in enacting ROPA provide further evidence that the Legislature intended ROPA to be the sole vehicle for asserting equity as it related to revoking paternity.

3. Defendant-Glaubius's argument regarding release and waiver in the Judgment of Divorce contravenes the statutory scheme for continuing jurisdiction in all custody-related matters. [Responding to Application Issue B]

Defendant-Glaubius asserts that Plaintiff-Mother's motion for revocation of paternity should be precluded by the waiver and release language in the parties' judgment of divorce. (Application, p. 38). Defendant-Glaubius quotes the broad and general language in the Judgment of Divorce where the parties "release the other from any cause of action that either may have against the other for any incident which may have occurred prior to the entry of the Judgment of Divorce." (JOD, p. 19). Notwithstanding this language, the trial court always has continuing jurisdiction over custody-related matters, as discussed *supra*. MCL 552.17. Moreover, subject matter jurisdiction to modify a judgment regarding custody and parenting time can never be waived. MCL 722.1202(1) (The UCCJEA specifically states that the trial court has exclusive and continuing jurisdiction). The cases cited by Defendant-Glaubius are inapposite and do not involve custody. See *Sweebe v Sweebe*, 474 Mich 151, 156; 712 NW2d 708 (2006) (enforcing a waiver provision in a divorce judgment regarding a life insurance policy); *Shay v Aldrich*, 487 Mich 648, 660-661; 790 NW2d 629 (2010) (refusing to enforce release language for a settlement of a civil assault case as against non-parties to the settlement who had also assaulted plaintiff). Unlike custody matters, the parties can waive or release certain claims, such as modifiable spousal support. See *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). No parent or party may waive subject matter jurisdiction in a child custody matter and child custody is always modifiable.

Despite Defendant-Glaubius's assertion that *Holmes v Holmes*, 281 Mich App 575;

760 NW2d 300 (2008), stands for the proposition that provisions in a judgment of divorce are contracts even if the provision affects children, he ignores the specific circumstances of that case. In *Holmes*, the Court of Appeals held that a provision in the parties' consent Judgment of Divorce that required the husband to pay 25% of any net bonus he received to support the children in addition to his standard child support obligation was an enforceable contract provision. *Id.* at 592-98. The Court of Appeals noted that the bonus amount for support of the children was above and beyond the statutory obligation, therefore not depriving the children of any of their rights to support. *Id.* at 592. Further, the Court of Appeals stated that even this obligation may not be enforced if there was a "compelling reason to forbear." *Id.* That certain terms of a Judgment of Divorce may provide more monetary support than is statutorily required and be treated as a contract provision does not support the argument that a statutory right to seek revocation of a presumed father's parentage can be waived by general language in a Judgment of Divorce.

Release and waivers also do not apply to issues pertaining to a child. A parent cannot release or compromise a child's claim in a paternity suit. *Beard v Skipper*, 182 Mich App 352, 353-354; 451 NW2d 614 (1990), citing *Faske v Bonanno*, 137 Mich App 202, 203-204; 357 NW2d 860 (1984). A parental agreement not to require child support would not bind the court in a subsequent support proceeding. *Ydrogo v Ydrogo*, 332 Mich 530, 533; 52 NW2d 345 (1952). Even in a case custody where parents stipulate to waive submitted the child to an interview with the trial court regarding the child's reasonable preference, the trial court commits error by not considering that preference. *Kubicki v Sharpe*, ___ Mich App __; ___ NW2d ___ (August 28, 2014). This Court has also held that

“a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child.” *Woodman v Kera LLC*, 486 Mich 228, 258; 785 NW2d 15 (2010).

4. The Court of Appeals’ Remand instructions were appropriate and consistent with the statute. [Responding to Application Issue C]

Appellant wrongly states that the Court of Appeals erred by not remanding the case to determine whether Plaintiff-Mother otherwise satisfies the statutory requirements for a revocation of paternity. Plaintiff-Mother’s appeal, like the Court of Appeals’ decision, was narrowly tailored as a challenge to the Trial Court’s ruling that Plaintiff-Mother could not pursue relief under the Revocation of Paternity Act once the judgment of divorce had entered. (02/07/14 Plaintiff-Mother’s COA Brief). The Court of Appeals noted that “On remand, the trial court may determine that the minor child was born out of wedlock if plaintiff has satisfied MCL 722.1441(1)(a).” (COA Opinion, p. 8, no 4). Inherent in this statement is the Court of Appeals’ recognition that the Trial Court’s work is not done. Now that the Court of Appeals has ruled that Plaintiff-Mother has standing to pursue a revocation of paternity post-judgment of divorce, the Trial Court must decide whether Plaintiff-Mother satisfied the elements of MCL 722.1441(1)(a). Then if she did, the Trial Court must then examine the best interests of the child under MCL 722.1443(4). (COA Opinion, p 8, n4). The Court of Appeals properly “reversed and remanded further proceedings.” (COA Opinion, p. 10).

CONCLUSION

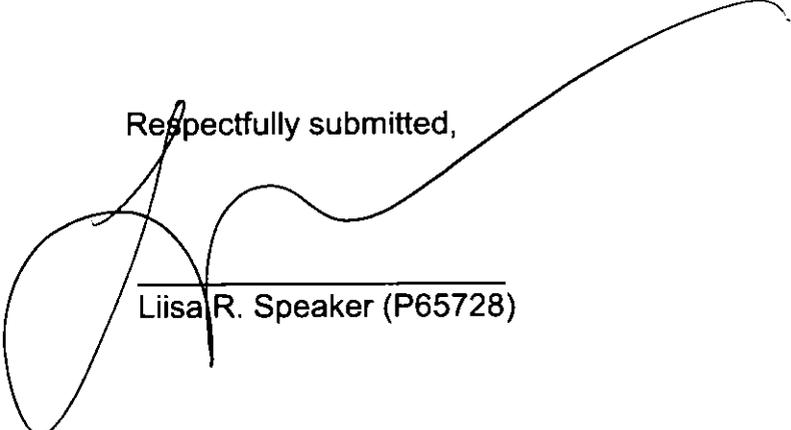
The Court of Appeals correctly held that Defendant-Glaubius was a “presumed father” because his paternity was established by way of the marital presumption. The Court of Appeals also correctly held that Plaintiff-Mother’s motion to revoke paternity was not barred by res judicata because the issue of paternity was not disputed or resolved in the parties’ Judgment of Divorce. The Trial Court reached its decision by failing to consider the statutory scheme as a whole, including the plain language of the statutory provisions that clearly apply to the instant case, and which worked an injustice on ZG, a two-year old girl. There is a strong preference for biological parents to exercise legal care and custody of their children. The Trial Court erred in its interpretation of the Revocation of Paternity Act and denied ZG a traditional family where she is being raised by two biological parents who also both have legal rights to her care and custody.

REQUEST FOR RELIEF

Plaintiff-Mother respectfully requests this Court deny leave to appeal, or in the alternative, affirm the Court of Appeals’ decision.

Dated: November 4, 2014

Respectfully submitted,



Liisa R. Speaker (P65728)