STATE OF MICHIGAN

COURT OF APPEALS

JESSE JONET, Plaintiff-Appellant,	UNPUBLISHED May 17, 2016
v	No. 326332 Iron Circuit Court Family Division
BARBARA AUTIO and KENNETH AUTIO, Defendants-Appellees.	LC No. 14-005014-DP

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Plaintiff, Jesse Jonet, appeals as of right the trial court order denying his motion to establish paternity. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of plaintiff's relationship with defendant Barbara Autio,[1] which resulted in the conception of DA in October 2010. Barbara has been married to defendant Kenneth Autio since 2007.

Plaintiff met Barbara in November 2009 at a bar where she worked as a bartender. At the time, plaintiff was aware that Barbara was married. In the fall of 2010, plaintiff met Barbara again. When he asked about her husband, she indicated that he was "no longer around." Shortly thereafter, plaintiff and Barbara engaged in a sexual relationship that lasted for approximately two months.

In November 2010, plaintiff moved to Green Bay, Wisconsin. Around the same time, Barbara informed him that she was pregnant with his child. However, she then told plaintiff that she miscarried his child and was pregnant with a child fathered by Kenneth. Barbara later acknowledged that she believed that the child, DA, was fathered by plaintiff. Plaintiff purchased a paternity test and submitted samples taken from himself, Barbara, and DA for DNA analysis.

[1] In the interest of clarity, we will refer to the defendants in this case by their first names.

The results of the test did not exclude plaintiff as DA's biological father, and Barbara periodically allowed plaintiff to exercise parenting time with DA, despite the conflict that this caused with Kenneth.

In July 2014, plaintiff initiated this action in the trial court and filed a motion to determine paternity. In particular, he requested that the court establish that DA was born out of wedlock and declare that he is DA's father. Plaintiff contended that he and defendants have mutually and openly acknowledged that he is DA's biological father since her birth, and that he has remained involved in DA's life by exercising parenting time and providing financial assistance. He also claimed that DA refers to him as her father.

In response, Barbara stated, *inter alia*, that she has been married to Kenneth since November 2007, and that plaintiff knew that she was married when DA was conceived, identifying various instances during which he was aware that she still was living with her husband. She admitted that she and plaintiff performed a DNA test, and that the results did not exclude plaintiff as DA's father, but she explained that it was only a "store-bought test." She also acknowledged that she had allowed plaintiff to exercise limited parenting time with DA. Ultimately, she requested that the court deny plaintiff's motion because DA is considered her husband's child and it was not in DA's best interests to allow plaintiff to remain in her life.

In addition to the arguments presented by Barbara, Kenneth stated in his response that he had been married to plaintiff for 7 years, and they never had been separated. He contended that he is DA's father and that he is not convinced that the previous DNA test was accurate because he was excluded from that test.

At the hearing on plaintiff's motion, the parties stipulated that plaintiff and both defendants acknowledged at some point in time that plaintiff is DA's biological father. However, given the parties' dispute as to whether plaintiff was aware that Barbara was married when DA was conceived, the trial court took testimony from numerous witnesses regarding incidents during which plaintiff was informed that Barbara was still married and instances during which plaintiff should have been aware of the ongoing marriage under the circumstances. Plaintiff requested that the parties stipulate to the performance of a new DNA test, but Barbara refused, and the trial court agreed with Barbara that it was first necessary to determine whether plaintiff knew or had reason to know that she was married at the time of conception. Later, plaintiff attempted to admit the results of the previous DNA test, but the trial court declined to admit the results, reiterating that the issue before it was limited to whether plaintiff was aware of the continuing marriage.

Following the testimony, the trial court ruled as follows:

> MCL[] 722.1441(3) allows the alleged father, being Petitioner in this matter[,] to challenge the presumed father's parentage when all of the following apply. A) The alleged father did not know or have reason to know that the mother was married at the time of conception. The Court has listened to the testimony and finds that the father knew, or certainly should have known, that the mother was married at the time of conception and therefore, I am going to deny the Petition.

II. STANDARD OF REVIEW

"When reviewing a decision related to the [RPA], this Court reviews the trial court's factual findings, if any, for clear error, which occurs when this Court is firmly and definitely convinced that a mistake was made." *Sprenger v Bickle*, 307 Mich App 411, 417-418; 861 NW2d 52 (2014) (*Sprenger II*) (quotation marks and citation omitted). "[W]e review de novo the interpretation and application of statutory provisions." *Glaubius v Glaubius*, 306 Mich App 157, 164; 855 NW2d 221 (2014).

III. ANALYSIS

Plaintiff first argues that the trial court erred in denying his motion because the parties previously acknowledged that plaintiff is DA's biological father. He also contends that the court erred in denying his request to order that the parties submit to a DNA test. Notably, plaintiff does not contest the trial court's factual finding under MCL 722.1441(3)(a), which was the sole basis of its denial of plaintiff's motion.[2] As such, plaintiff arguably has abandoned any challenge to the trial court's order denying his motion. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406-407; 651 NW2d 756 (2002); *Palo Group Foster Care, Inc v Michigan Dep't of Soc Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Nevertheless, plaintiff's claims lack merit because he fails to recognize the statutory framework that governs this case and, as a result, fails to recognize that the trial court properly determined whether he had standing to initiate this action before considering whether further DNA testing was necessary.

With regard to these issues, plaintiff primarily relies on MCL 722.716(1), which authorizes a trial court to order DNA testing, and MCL 722.716(5), which provides, in relevant part, "If the probability of paternity determined [through] . . . DNA identification profiling is 99% or higher, . . . paternity is established."[3] MCL 722.716 is a section of the Paternity Act, MCL 722.711 *et seq*. Plaintiff's reliance on this statute is misplaced, as the Paternity Act is not implicated here. See *Barnes v Jeudevine*, 475 Mich 696, 702-703; 718 NW2d 311 (2006); *Sprenger v Bickle*, 302 Mich App 400, 404-405; 839 NW2d 59 (2013) (*Sprenger I*).

Rather, as the trial court properly recognized, the statutory framework applicable to this case is the Revocation of Paternity Act ("RPA"), MCL 722.1431 *et seq*.

> The RPA generally provides a court with authority to "[d]etermine that a child was born out of wedlock" and to "[m]ake a determination of paternity and enter an order of filiation[.]" MCL 722.1443(2)(c) and (d). MCL 722.1441 "governs

[2] Plaintiff merely claims that MCL 722.1441 does not provide a standard applicable to the facts of this case.

[3] MCL 722.716 was amended effective March 17, 2015, but the amendments did not affect the statutory language cited by plaintiff.

> an action to determine that a presumed[4] father is not a child's father," MCL 722.1435(3) . . . . [*Sprenger II*, 307 Mich App at 415; see also *Parks v Parks*, 304 Mich App 232, 238; 850 NW2d 595 (2014).]

MCL 722.1441, provides, in relevant part:

> (3) 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 an alleged father and any of the following [subsections] applies:
>
> (a) All of the following apply:
>
> (*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.
>
> (*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.

The trial court's factual finding under this section was not clearly erroneous. See *Sprenger II*, 307 Mich App at 417-418. It is overwhelmingly apparent from the evidence presented at the motion hearing that plaintiff knew or had reason to know that Barbara was married when DA was conceived.[5] Plaintiff specifically testified that he was aware that plaintiff was married in 2009. However, he claimed that he was no longer aware that she was married in 2010 because he *assumed* that defendants were divorced after Barbara told him that her husband was "no longer around."[6] However, Barbara's statement was not equivalent to a pronouncement

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[4] " 'Presumed father' means 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(e) (formerly MCL 722.1433(4)).

[5] Given the nature of the testimony presented at the hearing, as well as plaintiff's failure to specifically challenge the trial court's factual findings or any of the evidence presented at the hearing, we find it unnecessary for us to consider whether MCL 722.1441(3)(a)(*i*) must be established by a preponderance of the evidence or clear and convincing evidence. See *Sprenger*, 307 Mich App at 421 n 5.

[6] Notably, plaintiff later stated that he had merely "assumed that they had moved on."

that defendants had divorced. Additionally, it was undisputed that Barbara never confirmed with plaintiff that she and Kenneth were divorced. As we explained in *Grimes v Van Hook-Williams*, 302 Mich App 521, 529; 839 NW2d 237 (2013),

> In the absence of any proof of an intervening divorce, it was unreasonable for plaintiff to presume that defendant did not remain legally married to [defendant Kenneth]. See *Killackey v Killackey*, 156 Mich 127, 133; 120 NW 680 (1909) (noting that, in the absence of evidence to the contrary, the presumption is that married persons have sustained the usual relations of husband and wife from the date of their marriage up to the time that a suit for divorce is filed).

Further, despite plaintiff's claim that nothing occurred during their two-month relationship that would have provided notice that Barbara remained married, multiple witnesses testified regarding numerous circumstances that would have put plaintiff on notice that defendants' marriage continued through the time at which DA was conceived. Thus, on this record, we find no error in the trial court's conclusion that plaintiff lacked standing to commence this action under the RPA because he knew or should have known that Barbara was married at the time of conception. See MCL 722.1441(3)(a)(*i*); *Sprenger II*, 307 Mich App at 419; *Grimes*, 302 Mich App at 528-529.

Given this conclusion, we reject the remainder of plaintiff's claims. Because plaintiff did not have standing to initiate this case, the trial court did not err in dismissing his motion without first considering the best interests of DA under MCL 722.1443(4). Cf. *Frame v Nehls*, 452 Mich 171, 177; 550 NW2d 739 (1996) (stating that whether parties before a court have standing is a threshold matter that must be determined). Likewise, given plaintiff's lack of standing, the trial court did not err in failing to order DNA testing under MCL 722.1443(5). Cf. *Frame*, 452 Mich at 177. The dispositive issue in this case was whether plaintiff knew or had reason to know that Barbara was married when DA was conceived, as this fact directly affected whether plaintiff had standing to bring this suit. MCL 722.1441(3)(a)(*i*). DNA test results had no bearing on that issue.

IV. CONCLUSION

The trial court properly dismissed plaintiff's motion to establish paternity because he lacked standing to initiate this action under MCL 722.1441(3)(a)(*i*).

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey