

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS DAVID BURNETT,
Plaintiff-Appellee,

UNPUBLISHED
May 26, 2016

v

TRACY LYNN AHOLA and DEREK AHOLA,
Defendants-Appellants.

No. 330311
Genesee Circuit Court
LC No. 14-312262-DP

Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants, Tracy Lynn Ahola and Derek Ahola, are married to each other and appeal by right the trial court’s order pursuant to the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq.*, establishing plaintiff, Nicholas David Burnett, as the biological and legal father of defendant Tracy Lynn Ahola’s son, JDA. JDA was conceived while Nicholas and Tracy were engaged in an extramarital sexual relationship; a significant factual dispute in the trial court was whether Nicholas was aware at the time that Tracy had not divorced Derek as Nicholas claimed Tracy had told him. Two genetic tests showed that Derek was not, and Nicholas was, JDA’s biological father. Defendants contend that the trial court erroneously found Nicholas to have standing to challenge Derek’s presumed paternity pursuant to MCL 722.1441(3)(a). We affirm.

Under ROPA, an “alleged father . . . who by his actions could have fathered the child,” MCL 722.1433(c), may, under limited circumstances, challenge the paternity of a “presumed father . . . 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); MCL 722.1441; *Glaubius v Glaubius*, 306 Mich App 157, 165-166; 855 NW2d 221 (2014). It is undisputed that Nicholas is an “alleged father” and Derek is the “presumed father” of JDA. Relevant to the instant appeal, the statutory procedures require an alleged father seeking to make such a challenge to establish, *inter alia*, that he “did not know or have reason to know that the mother was married at the time of conception,” and that all three of the parties “at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.” MCL 722.1441(3)(a)(i), MCL 722.1441(3)(a)(ii). We review the trial court’s determinations of law de novo. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). We review the trial court’s factual findings for clear error. *Glaubius*, 306 Mich App at 164. We defer to the trial court’s superior ability to evaluate the credibility of the witnesses, and likewise afford the trial court the benefit of any doubt. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881).

Some extended discussion of the evidence is unavoidable; we consider the totality of the record, and in light of the procedural posture of this matter we do so in the light most favorable to the alleged father, to determine whether a reasonable person could have concluded that the alleged father was unaware of the mother's marriage at the time of the child's conception. *Grimes v Van Hook-Williams*, 302 Mich App 521, 528; 839 NW2d 237 (2013). The mother's marital status must be more than merely doubtful to the alleged father; he must actually have been unaware that she was married and without good reason to believe she was in fact married. See *Sprenger v Bickle*, 307 Mich App 411, 418-419; 861 NW2d 52 (2014). We find that the trial court properly considered the evidence and concluded that Nicholas did not know, or have reason to know, that Tracy was married at the time of JDA's conception, and it made its credibility determinations after careful consideration of all of the evidence presented.

Nicholas testified that Tracy frequently discussed her divorce and the possibility of living with Nicholas. Nicholas's wife and two of her friends confirmed that Tracy "openly communicated to them that she and [Derek] were in the process of getting a divorce," before the date of conception. Tracy admitted that JDA was conceived at the end of September, 2013, immediately after Nicholas returned from a business trip to California. Nicholas testified that it was during this trip that Tracy told him her divorce had been finalized. Additionally, the evidence established that Tracy held herself out as divorced when she accompanied Nicholas on a house hunting trip in late September, either on the date of conception or just before the date of conception. In a video deposition reviewed during the bench trial, real estate agent Ryan Eashoo confirmed that Tracy had looked at two houses with Nicholas on September 27, 2013, explaining that she was recently divorced and looking to move out of her marital home as soon as possible. Although Tracy denied searching for houses with Nicholas or ever meeting Eashoo, the trial court found the testimony of Nicholas and Eashoo "significantly credible." We are not definitely and firmly convinced that the trial court made a mistake when it found "the testimony of a disinterested third party, [Eashoo], more credible than [Tracy's] as to this fact." Further, although Tracy's mother testified that Nicholas had known Tracy was not divorced during the time period surrounding JDA's conception, the trial court specifically found her testimony to be less credible than Nicholas's and Eashoo's.

That the trial court found Nicholas's version of event more credible than Tracy's was not unreasonable and, contrary to defendants' argument, did not demonstrate some inexplicable bias. The trial court considered the divorce questionnaire Nicholas filled out on September 30, 2013, in which Nicholas explicitly stated his belief that Tracy was recently divorced, finding "this piece of evidence highly credible and illustrative as to [Nicholas's] state of mind regarding [Tracy's] marital status very close in time to the date the minor child was conceived." It also found convincing Nicholas's cellular telephone records, which indicated a sharp decline in communications between Nicholas and Tracy after October 3, 2013, the date on which Nicholas claimed to have learned of Tracy's deception regarding her divorce.

The fact that Nicholas knew of Tracy's marriage before the date of conception did not foreclose the possibility that he did not know of the marriage on the actual date of conception. Tracy's act of telling Nicholas that her divorce had been finalized, which occurred before the date of JDA's conception, was an intervening circumstance that rendered Nicholas's subsequent belief that she was divorced reasonable. See *Grimes*, 302 Mich App at 529 (holding that without proof of an intervening divorce, it is presumptively unreasonable for an alleged father to believe

a previously married woman is not still married). The evidence showed that Tracy actively deceived Nicholas regarding her marital status to such an extent that Nicholas would have had no reason to question it. Nicholas testified that he believed Tracy when she told him that her divorce was finalized, and there was no objective reason for him to doubt her. She had spoken of her pending divorce with Nicholas's wife and several other acquaintances, and accompanied Nicholas on a house hunting venture. Finally, the fact that Nicholas might have seen Derek's belongings in Tracy's marital home during his final "romantic trysts" with Tracy does not render his belief objectively unreasonable. Nicholas testified that Tracy had told him that she was going to move out of the marital house, and this deception would not have been revealed by the presence of Derek's belongings in the house.

Viewing the totality of the evidence in a light most favorable to Nicholas, the alleged father, we agree with the trial court's conclusion that Nicholas did not know, nor did he have reason to know, that Tracy was married at the time of conception.

Further, the trial court did not err when it found that Derek, Tracy, and Nicholas "at some time mutually and openly acknowledged a biological relationship between the alleged father and the child." Although the Legislature did not provide definitions of "mutually" or "acknowledged" when it enacted MCL 722.1443, this Court has looked for guidance in dictionary definitions of these terms:

"Acknowledge" is defined as "1. to admit to be real or true; recognize the existence, truth, or fact of . . . 2. to show or express recognition or realization of . . . 3. to recognize the authority, validity, or claims of . . ." *The Random House Dictionary of the English Language, Second Edition Unabridged*.

* * *

"Mutual" is defined as "1. possessed, experienced, performed, etc., by each of two or more with respect to the other; reciprocal . . . 2. having the same relation each toward the other . . . 3. of or pertaining to each of two or more; held in common; shared . . ." *Id.* The RPA, therefore, requires that all three individuals—the alleged father, the presumed father, and the mother—mutually acknowledge that the alleged father is the child's biological father. [*Parks v Parks*, 304 Mich App 232, 242-243; 850 NW2d 595 (2014).]

Subsection (ii) is not satisfied merely because the presumed father questions his own paternity; he must specifically acknowledge the biological relationship between the alleged father and the child. *Id.* at 242.

It is undisputed that Nicholas openly acknowledged his biological relationship to JDA. The trial court also found "ample" evidence to support Tracy's open acknowledgment of the relationship. She called Nicholas to inform him that she was pregnant with his child, and asked him to accompany her to at least one appointment and ultrasound. Nicholas's sister also testified that Tracy had acknowledged Nicholas's relationship to JDA during a brief encounter before JDA's birth, at the daycare facility where she and Tracy took their children. The only real

dispute concerned whether Derek, the presumed father, had acknowledged Nicholas's relationship to JDA.

In finding that Derek openly acknowledged Nicholas's biological parentage, the trial court relied on the text message sent from Derek to Nicholas on the day of JDA's birth, explaining that when Nicholas proved allegations related to Tracy's affair he could "have the child." The trial court also relied on "testimony that [Nicholas], [Nicholas's wife], and both [d]efendants communicated openly about the results of the two genetic tests performed during the pregnancy." Specifically, it relied on Nicholas's testimony that "[h]e and Derek openly acknowledged" Nicholas's relationship with JDA, that he had discussed the results of both tests with Derek, and that Nicholas was aware that his wife "had a specific conversation with Derek when paying for the paternity testing that he was not the father." As previously noted, the trial court found Nicholas's testimony particularly credible.

Defendants argue that this Court's decision in *Parks* is controlling, and that because "Derek steadfastly held himself out to be JDA's father," the trial court could not have found that the mutual and open acknowledgment requirement was met. However, this case is easily distinguished from *Parks*, where the only evidence of paternity was a DNA test confirming the alleged father's biological relationship to the child. *Parks*, 304 Mich App at 240. In that case, this Court found that subsection (ii) had not been met because (1) alleged statements of the presumed father were unsupported and inadmissible, (2) the presumed father's statements to his parents "advising them of what was happening" with the court proceedings was not an acknowledgment of another man's paternity, and (3) there was evidence that the presumed father refused to consider the DNA test results, claiming that a "piece of paper" would not change the fact that the child was his son. *Id.* at 240-243. In sum, there was no evidence in that case that the presumed father had ever actually acknowledged a lack of paternity or that another man might possibly be his son's father.

It is true that paternity test results, without more, may not act as a substitute for the requirement of mutual and open acknowledgment of a biological relationship as described under MCL 722.1443(3)(a)(ii). See *id.* at 240-243 (declining to find that MCL 722.1443(3)(a)(ii)'s open and mutual acknowledgment requirement had been satisfied despite evidence that DNA test results confirmed the alleged father's biological relationship to the child); see also MCL 722.1443(5) (explaining that, under the Revocation of Paternity Act, DNA test results are not binding and serve only "to assist the court in making a determination."). However, it was not the test results themselves, but the parties' admitted discussions of the test results, that led to the trial court's conclusion that Nicholas, Tracy, and Derek had each mutually and openly acknowledged Nicholas's biological relationship to JDA. The trial court noted that "[a]lthough [d]efendants, through their testimony, stated that they did not openly discuss and acknowledge [Nicholas]'s biological relationship with the minor child, this [c]ourt is satisfied that any claim of that nature is against the great weight of the evidence and the testimony."

We are not convinced that the trial court made a mistake when it concluded that Nicholas, Tracy, and Derek had mutually and openly acknowledged Nicholas's biological relationship to JDA. Defendants argue that, because the three individuals did not sit down together and exchange explicit statements regarding Nicholas's paternity, the mutuality requirement could not have been met. However, contrary to defendants' argument, there is no temporal requirement in

the plain language of MCR 722.1441(3)(a)(ii). The testimony regarding the parties' discussions of the paternity test results was enough to show that they "shared" similar beliefs and information regarding the relationship. That is all that is required for mutuality under the statute, and the trial court did not clearly err when it so concluded.

The trial court properly found subsections (i) and (ii) met, and there was no dispute that subsection (iii) was met, it also properly made a paternity determination pursuant to subsection (iv) and therefore possessed the authority to enter the order of filiation establishing Nicholas as the biological and legal father of JDA.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause