

STATE OF MICHIGAN
COURT OF APPEALS

LEONARDO ORELLANA,
Plaintiff-Appellee,

UNPUBLISHED
July 24, 2018

v

No. 338929
Wayne Circuit Court
LC No. 16-107571-DP

JESSICA MAYNE,
Defendant-Appellant,
and
RICKI MAYNE,
Defendant.

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this case brought under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq.*, defendant, Jessica Mayne, appeals as of right the trial court's order awarding her sole legal and physical custody of the minor child, and awarding plaintiff, Leonardo Orellana, parenting time. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

In 2008, Mayne married Ricki Mayne. Although she never divorced him, the record reflects that they separated before 2012. Ricki moved from Michigan to England, and had no further physical contact with Mayne. In 2014, Mayne met Orellana in Florida. The two began a sexual relationship and during that relationship the minor child was conceived. Before the child was born, Mayne and Orellana moved from Florida to Michigan and began living in Mayne's home in Michigan. When the child was born, Orellana was present at the hospital, and within 24 hours of the child's birth Mayne and Orellana signed an affidavit of paternity indicating that Orellana was the child's father.

For a short period, Mayne, Orellana, and the child lived together. Then Mayne kicked Orellana out and prevented him from having contact with the child. Mayne also obtained a personal protection order (PPO) against Orellana.

In February 2016, a claim for “family support” was filed against Mayne, but it was dismissed after the court learned that Mayne was still married. Orellana then filed the instant suit under the Revocation of Paternity Act, seeking an order naming him as the child’s legal father. Mayne moved to revoke the affidavit of parentage, asserting that she had signed it under duress and that Orellana knew that she was married when the child was conceived. The trial court held an evidentiary hearing on both motions, and, after hearing testimony from Orellana and Mayne, concluded that Orellana had standing to continue his suit.¹

DNA testing confirmed that Orellana was the child’s biological father, and in June 2017, the court entered an opinion and order determining that it was in the child’s best interest to exclude the child from the marriage. The court also determined that Orellana was the child’s legal father and, following an evidentiary hearing, found that Mayne should have sole legal and physical custody of the child, but that Orellana should have parenting time. In July 2017, an order of filiation was entered naming Orellana as the child’s biological father.

II. BURDEN OF PROOF

The trial court found that Orellana had standing to commence this action because the requirements of MCL 722.1441(3) had been established by a preponderance of the evidence. On appeal, Mayne contends that we should determine that the requirements set forth in MCL 722.1441(3) must be established by clear and convincing evidence, not by a preponderance of the evidence.² Whether the clear-and-convincing standard or the preponderance-of-the-evidence standard should be applied under these circumstances is an issue of first impression. However, we decline to address it.

In order to preserve an issue for appellate review, the issue must have been “raised before and addressed and decided by the trial court” *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). In this case, the record plainly reflects that this issue was never raised before the trial court, so it is unpreserved. In *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008), our Supreme Court explained:

¹ Mayne filed a delayed application for leave to appeal in this Court. In an unpublished order, this Court noted that Ricki Mayne, the presumed father, was a necessary party and remanded to the trial court to determine whether under MCR 2.205(B) it could proceed with the appeal despite Orellana’s failure to join Ricki Mayne as a party. *Orellana v Mayne*, unpublished order of the Court of Appeals, entered March 10, 2017 (Docket No. 336833). In all other respects, this Court denied Mayne’s application for leave to appeal. *Id.* Ricki Mayne was eventually added as a party.

² MCL 722.1441(3) provides that if a child has a presumed father, an alleged father may file a paternity action under specific circumstances. If the requirements in MCL 722.1441(3) are not satisfied, then an alleged father lacks standing to commence an action under the Revocation of Paternity Act. *Grimes v Van Hook-Williams*, 302 Mich App 521, 529; 839 NW2d 237 (2013).

Michigan generally follows the “raise or waive” rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a “failure to timely raise an issue waives review of that issue on appeal.”

The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court’s attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [citations omitted.]

This Court has the discretion to “overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.” *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). That said, this Court will exercise its discretion sparingly and only where exceptional circumstances warrant review. *Booth v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993); *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987). In this case, Mayne has identified no exceptional circumstances warranting review despite her failure to satisfy the preservation requirements. Further, our review of the case reveals no reason to disregard our preservation requirements. Consequently, we hold that Mayne has waived this issue, and we decline to review it. *Walters*, 481 Mich at 387-388.

III. FACTUAL FINDINGS

A. STANDARD OF REVIEW

Mayne next challenges the trial court’s factual findings under MCL 722.1441(3). We review for clear error a trial court’s factual findings. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014). “The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake.” *Id.* (quotation marks and citation omitted).

B. ANALYSIS

MCL 722.1441 governs an action seeking to establish that a presumed father is not a child’s biological father. MCL 722.1435(4); *In re Daniels Estate*, 301 Mich App 450, 458-459; 837 NW2d 1 (2013). Specifically, MCL 722.1441(3) governs such an action initiated by an alleged father, and it provides in pertinent part:

(3) If a child has a presumed father,^[3] 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^[4] and any of the following applies:

* * *

(b) 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) Either of the following applies:

* * *

(B) The child is less than 3 years of age and the presumed father lives separately and apart from the child. . . .

(iii) 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.

On appeal, Mayne argues that the trial court erred by finding that Orellana "did not know or have reason to know that the mother was married at the time of conception." In support, she directs our attention to the undisputed fact that throughout her relationship with Orellana she wore her wedding ring. She testified that she told Orellana that she wore her wedding ring because she was married; however, Orellana testified that she told him she wore the ring to prevent unwanted attention from men. Orellana also stated that during the time he lived with Mayne she never indicated that she was married, and when he asked her about her marital status, she told him that she was "single." Orellana testified that he understood her answer to mean "[t]hat she was not married, she was with nobody at the moment." He added that he did not discover that Mayne was married until the legal proceedings began.

Mayne also argues that the court's finding was clearly erroneous because she produced documentary evidence showing that Orellana knew or should have known she was married. That evidence includes a copy of the baptismal certificate for the child, a birth announcement, and private messages between Orellana and other individuals which suggest that there were questions about Mayne's marital status. The trial court, however, found the documentary evidence, which was generated *after* the child's conception, was not relevant to determining whether, at the time of conception, Orellana knew or should have known that Mayne was married. Further, although

³ " '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).

⁴ " 'Alleged father' means a man who by his actions could have fathered the child." MCL 722.1433(c).

Mayne testified that she did, in fact, tell Orellana that she was married, the trial court credited Orellana's testimony that he did not know Mayne was married at the time of conception. This Court defers to a trial court's resolution of a credibility contest. *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Accordingly, we conclude that on this record the trial court's factual findings are not clearly erroneous.⁵

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

⁵ As explained above, we decline to address whether the trial court should have applied the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard to its factual determinations under MCL 722.1441(3). However, we note that, even if we were to conclude that the clear-and-convincing-evidence standard should have been used by the trial court, the outcome of the trial court's credibility determinations at the evidentiary hearing would not likely differ. In its opinion and order awarding Mayne sole legal and physical custody of the minor child, the court expressed serious reservations about the credibility of Mayne's testimony. The court expressly stated that Mayne's "truthfulness and veracity are called into question by the Court," because "[m]uch of her testimony was unsupported by documentation or in actual contradiction with the documents." The court also remarked that although it had "previously ruled that there were grounds to keep the Personal Protection Order in place the court now questions the veracity of those claims." Finally, the court added that it believed Mayne "exaggerated her claims to bolster her case."