

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER LYNN KIESLING,
Plaintiff-Appellee,

UNPUBLISHED
October 22, 2015

v

KYLE JOSEPH JOHNSTON,
Defendant-Appellant.

No. 326294
St. Clair Circuit Court
Family Division
LC No. 11-001828-DS

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Kyle Johnston, appeals as of right an order dismissing his motion brought under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq.*, to revoke his acknowledgement of parentage of the minor child.¹ We reverse and remand.

This case arises from an acknowledgement of parentage signed by plaintiff and defendant on April 7, 2011, regarding a child born on April 6, 2011. In August 2011, the Department of Human Services and plaintiff, Jennifer Kiesling, filed a complaint against defendant seeking child support for the child. On November 14, 2011, a Uniform Child Support Order and Order for Custody and Parenting Time was entered.

On July 24, 2014, defendant filed a “motion to amend birth certificate and to revoke affidavit of paternity” *in propria persona*. Defendant averred that plaintiff had misrepresented to him that he was the child’s father; thus, he acknowledged paternity and his name appeared on the birth certificate. However, defendant explained, after plaintiff confessed to him that he may not be the biological father of the child, a DNA test was performed. The DNA test results, dated January 9, 2014, confirmed that he was not the biological father of the child and the results were attached to defendant’s motion. Noting that, pursuant to MCL 722.1443(12) and (13), the court could allow an extension of time for filing an action or motion under certain circumstances if supported by an affidavit, defendant indicated that such affidavit was attached. Accordingly,

¹ Although defendant also challenges the trial court’s denial of *plaintiff’s* motion for revocation of paternity, plaintiff has not filed an appeal challenging the decision.

defendant requested that, pursuant to MCL 722.1437, the acknowledgement of parentage be revoked and the birth certificate amended in that regard. Defendant's "affidavit" indicated that, in reliance on statements made by plaintiff that he was the child's biological father, he signed an acknowledgement of parentage. However, he averred, plaintiff later indicated that he was not the biological father and DNA testing confirmed that information. This "affidavit" was signed by defendant but not notarized. Defendant also attached the DNA test results which indicated that defendant was excluded as the biological father of the child.

On August 11, 2014, a hearing was held on defendant's motion. Defendant, who appeared *in propria persona*, was advised by the court that, under the RPA, he had three years from the date of the child's birth to file a revocation motion, which expired April 6, 2014. Defendant was asked why he filed it late, and he responded that he was not aware of that. He further testified that the DNA testing was done January 3, 2014, but he did not get the results until February 1, 2014. When asked why he did not file this motion until July 2014, although he had consulted a lawyer in June, defendant testified: "[Plaintiff] told me that she was taking me off the birth certificate. She actually was the one that made me get DNA testing done" The trial court advised defendant that plaintiff could not take his name off the birth certificate and he responded that he "was unaware of this." The court explained to defendant that to revoke his acknowledgement of parentage, he had to file a motion under the RPA. Further, to extend the period of time to file such motion, the court advised, it had to find that plaintiff made a misrepresentation to him or engaged in fraud or misconduct that caused him to file the motion late and plaintiff did not do that. The court also had to find, by clear and convincing evidence, that granting the requested relief was not against the best interests of the child—which was not addressed in defendant's motion. The trial court noted that the parties shared joint legal and physical custody, and defendant indicated that he had not seen the child in over eight months. When asked why, defendant responded that plaintiff would not let him see the child unless he got the DNA test done, and indicated: "I did not want this." He was not aware that plaintiff had no right to do that "and it ruined my life." However, defendant indicated that he no longer wanted a relationship with the child because it had been eight months and the child was with his biological family. The trial court advised defendant that he was the child's legal father and his motion to change that was denied because there was no legal basis for doing so. The motion was late, there was no justification for extending the time to seek revocation, and defendant did not demonstrate that it was not against the child's best interest. On August 12, 2014, an order denying the motion, which was construed as a "motion to revoke acknowledgement of parentage" under MCL 722.1437, was entered.

On December 19, 2014, through counsel, defendant filed a second motion for revocation of his acknowledgement of parentage. Defendant again averred that he did not learn that he was not the child's father until February 2014, when he received the results of a DNA test. Defendant further averred that on March 26, 2014, plaintiff told him that she was taking steps to remove defendant's name from the child's birth certificate. He did not learn until June 2014 that plaintiff had not taken any steps to establish the child's correct paternity. Defendant argued that he failed to file his motion to revoke the acknowledgement of parentage within the applicable time because plaintiff fraudulently represented that she had taken the proper steps to remove defendant as the child's father and he did not discover plaintiff's deceit until after the 3-year statutory time had passed. Thus, defendant requested the court to extend the time for filing his motion to revoke the acknowledgement of parentage. Defendant also argued that plaintiff's

fraudulent representations induced him to sign the acknowledgement of parentage and it was not until he received the DNA tests that he learned of the deception. And, he argued, revoking the acknowledgement of parentage was not against the 3½-year old child's best interest because he had not seen the child in over a year and the child's biological family was very involved in the child's life. Thus, defendant requested the court to grant his motion and revoke the acknowledgement of parentage. Defendant attached his signed and notarized affidavit to his motion. Shortly thereafter, plaintiff also filed a "motion for revocation of paternity," requesting the court to revoke the acknowledgement of parentage.

At a hearing on the motions, the court reviewed the fact that defendant's previous motion for revocation was denied because it was untimely and he failed to qualify for an extension of time to file the same. Defendant argued, through his attorney, that although the DNA tests were obtained before the three-year statutory time limit expired, plaintiff led him to believe that she was taking the necessary steps to have defendant removed from the child's birth certificate. He did not discover that plaintiff took no such steps until June, and then he promptly filed his first motion for revocation. The court asked defense counsel how that constituted fraud or misrepresentation and counsel responded that plaintiff falsely represented to defendant that she was going to take care of this matter and defendant relied on that misrepresentation to his detriment because he did not pursue the matter himself. The trial court concluded that neither parties' motion was filed within the applicable statutory three-year limitations period and neither party established that circumstances existed which allowed the court to extend that period; thus, the motions for revocation of the acknowledgement of parentage were denied. This appeal followed.

Defendant argues that the trial court erred in denying his motions to revoke the acknowledgement of parentage after concluding that no statutory basis existed to extend the three-year time limit to file such a motion. We agree.

This Court reviews for clear error a trial court's factual findings in support of decisions made under the RPA, MCL 722.1431 *et seq.* *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014). Clear error is committed when this Court is definitely and firmly convinced that a mistake was made. *Id.* (citation omitted). We review *de novo* the proper interpretation and application of a statute as a question of law. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

MCL 722.1437 of the RPA governs an action for revocation of an acknowledgment of parentage and provides:

(1) The mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage. An action under this section shall be filed within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later. . . .

* * *

(2)² An action for revocation under this section shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:

(a) Mistake of fact.

(b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.

(c) Fraud.

(d) Misrepresentation or misconduct.

(e) Duress in signing the acknowledgment.

(3) If the court in an action for revocation under this section finds that an affidavit under subsection (2) is sufficient, the court shall order blood or tissue typing or DNA identification profiling as required under section 13(5). The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child.

MCL 722.1443 of the RPA also provides for the extension of the three-year time limitation and provides:

(12) A court may extend the time for filing an action or motion under this act. A request for extension shall be supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under this act but did not file the action or motion within the time allowed under this act because of 1 of the following:

(a) Mistake of fact.

(b) Newly discovered evidence that by due diligence could not have been found earlier.

(c) Fraud.

(d) Misrepresentation or misconduct.

(e) Duress.

(13) If the court finds that an affidavit under subsection (12) is sufficient, the court may allow the action or motion to be filed and take other action the court considers

² Relevant sections of MCL 722.1437 were renumbered as of March 17, 2015. 2014 PA 368.

appropriate. The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under this act will not be against the best interests of the child considering the equities of the case.

Here, the trial court held that by the time defendant filed his first motion to revoke his acknowledgement of parentage, the three-year time limitation set forth in MCL 722.1437(1) had expired. Further, the court held, defendant failed to establish that any of the reasons set forth in MCL 722.1443(12) existed for extending the three-year time limitation to file a motion for revocation. Defendant argues that he did provide a sufficient reason for the trial court to extend the filing time for his motion. The reason he did not pursue this matter when he first learned the DNA test results was because plaintiff told him that she was taking action to remove his name from the birth certificate; she was going to correct the paternity and name the biological father of the child. The trial court responded that plaintiff could not remove his name from the birth certificate and neither fraud nor misrepresentation by plaintiff caused defendant to file his untimely motion to revoke his acknowledgement of parentage. We disagree with the trial court.

Pursuant to MCL 722.1437(1), plaintiff, who is the mother of the child, could have immediately filed an action to revoke the acknowledgement of parentage which, if successful, would have resulted in the correction of paternity and the removal of defendant's name from the child's birth certificate. See MCL 722.1437(4). According to the record evidence, plaintiff is the one who first challenged paternity and insisted that defendant get a DNA test. Once the DNA test proved that defendant was not the child's biological father, plaintiff told defendant that she would take action to correct paternity. Because the DNA test results were known before the three-year statutory period expired, plaintiff's petition to revoke the acknowledgement of parentage would have been timely. And the petition may have been successful because, although DNA testing results are not binding on the court under the RPA, MCL 722.1443(5), other factors may have weighed in favor of revocation.

But plaintiff did not file an action to correct the child's paternity immediately after she received the DNA test results. And by the time defendant found out that plaintiff did not take such action, the 3-year statutory period had expired. The trial court held that plaintiff's assurance to defendant that she would take action to correct paternity, i.e., have his name removed from the child's birth certificate, did not constitute a reason excusing delay under MCL 722.1443(12). We disagree. One justification excusing delay is "misrepresentation." MCL 722.1443(12)(d). As this Court explained in *In re Moiles*, 303 Mich App 59, 69; 840 NW2d 790 (2013), reversed in part, vacated in part on other grounds 495 Mich 944 (2014), the RPA does not define "misrepresentation," but it appears that "the Legislature meant to use the common-law legal meaning of the word 'misrepresentation,' as it is understood in the context of other legally binding writings." The *Moiles* Court concluded that the word was a legal term and, for guidance, turned to Black's Law Dictionary (9th ed) which defined "misrepresentation" as "[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive." *In re Moiles*, 303 Mich App at 70. The *Moiles* Court considered the distinctions between fraudulent and innocent misrepresentations and concluded that, because they "both encompass the act of making a false representation that deceives another," the Black's Law Dictionary definition was the most helpful in the context of interpreting the RPA. *Id.* at 71. We agree with these conclusions.

Here, as defendant testified at the hearing on his first motion to revoke and as he explained in his affidavit in support of his second motion to revoke, despite plaintiff's assurances that she was going to correct paternity, she took no such action. And a significant period of time went by before she told defendant that she had not attempted to correct paternity. Thus, plaintiff made a false or misleading statement to defendant about her intention to correct paternity, which deceived defendant and caused him not pursue an action to correct paternity before the statutory time period had expired. We conclude that plaintiff's false or misleading assertion to defendant constituted a "misrepresentation" under MCL 722.1443(12)(d). Therefore, the trial court erred in holding that a statutory basis did not exist to extend the three-year time limit to file defendant's motion for revocation of his acknowledgement of parentage.

Next, defendant argues that the trial court erred when it considered defendant's second motion as a motion for reconsideration because his first motion was not supported by a properly notarized affidavit and, thus, was defective. We need not address this issue because, the fact is, the trial court considered defendant's first motion for revocation regardless of the un-notarized affidavit, and denied it primarily on the ground that it was untimely without sufficient justification. The justification defendant provided through testimony at the hearing on the motion was plaintiff's false or misleading assertion that she was going to correct paternity which, as discussed above, constituted a "misrepresentation" under MCL 722.1443(12)(d). Accordingly, the trial court's denial of defendant's motion on the ground that a statutory basis did not exist to extend the three-year time limit was erroneous.

Next, defendant argues that clear and convincing evidence established that revocation of the acknowledgement of parentage was not against the best interests of the child. However, as defendant admits, because the trial court concluded that a statutory basis did not exist to extend the time for filing a motion for revocation, the court did not further consider this matter. But pursuant to MCL 722.1443(12), even if a statutory basis for an extension existed, the trial court must also find that the affidavit filed in support of the request for extension stated facts that "satisfied all the requirements for filing an action or motion under this act" ³ And MCL 722.1443(13) further provides that, even if the court finds that the affidavit under subsection (12) is sufficient, the court must still determine whether the moving party established by clear and convincing evidence that granting the requested relief "will not be against the best interests of the child considering the equities of the case." The trial court did not render findings on these necessary issues; accordingly, we remand this matter for further proceedings under the RPA.

³ We note that defendant asserts on appeal that a "mistake of fact" existed which supported his motion for revocation under MCL 722.1437(2)(a) because when he signed the acknowledgement of parentage he mistakenly believed he was the biological father of the child, but the DNA test results proved he was not. See *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 190; 740 NW2d 678 (2007).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly