STATE OF MICHIGAN

COURT OF APPEALS

DANIEL J. COVERT, Plaintiff-Appellee,	UNPUBLISHED June 5, 2007
v	No. 267988 Wayne Circuit Court Family Division
KAREN COVERT, a/k/a KAREN RAVI, Defendant-Appellant.	LC No. 98-826418-DM

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court order granting plaintiff's motion to set aside the child support portion of the judgment of divorce and ordering defendant to pay back all child support that plaintiff had paid to date. Because plaintiff failed to raise a timely motion for relief within one year of the date of judgment and because that the trial court order was an improper retroactive modification of child support in violation of MCL 552.603, we reverse the portions of the trial court order setting aside the child support provision of the judgment of divorce and ordering defendant to pay back to plaintiff all child support paid to date. We affirm the trial court's order terminating child support, but set the date of termination as January 20, 2005, the date defendant filed a motion for an increase in child support and enforcement of the parenting time schedule.

The parties were married in July of 1991, and plaintiff filed for divorce in August, 1998. Plaintiff's complaint for divorce identified David Covert (d.o.b. 11-19-88) as the parties' minor child. A judgment of divorce, entered in June of 1999, granted defendant physical custody of David and required plaintiff to pay child support. Six years after the parties' judgment for divorce was entered, plaintiff filed a motion for relief from judgment after finding out that he was not David's biological father. Plaintiff argued that he only recently found out that defendant was still married to her former husband, William Rex Jones, Jr., at the time of David's birth, that Jones was listed as the father on David's birth certificate, and that the results of a DNA test proved he was not the biological father of David.

An evidentiary hearing was thereafter held, at which plaintiff testified that when he and defendant began dating, she told him she was divorced. According to plaintiff, less than a year after they had been dating, defendant told him she was pregnant with their child. Plaintiff never questioned the child's paternity until he saw David's birth certificate in 2002, listing Jones, not

plaintiff as the child's father. An at-home DNA test performed in 2005 showed that plaintiff was not David's biological father, as did a later court-ordered DNA test.

Defendant testified at the evidentiary hearing that she was still married to Jones, but living with plaintiff, when the child was born. According to defendant, plaintiff knew she was still married when they began dating, and that she only put Jones on the child's birth certificate as his father because she was told that because they were still legally married, Jones' name had to be on the birth certificate. Defendant admitted that she signed an affidavit in 2005 swearing that she had not had sexual relations with anyone other than plaintiff at the time of the child's conception.

After hearing the testimony, the trial court opined that defendant deceived plaintiff, falsely saying she was divorced when she was not, and telling plaintiff that the child was his son. The trial court noted that although defendant may have believed it was true to some extent, she obviously also knew she had sex with someone else, whoever David's real father is, so the affidavit was false in that regard. The court concluded that defendant had committed fraud and ultimately entered an order providing that plaintiff was not David's biological father, and ordering defendant to repay $54,892.81 in support paid over the years.

Defendant raises several arguments on appeal, one of which is that plaintiff's action was barred by failure to raise a timely motion for relief within one year of the date of judgment. The trial court's ruling on a motion to set aside a prior judgment is reviewed for an abuse of discretion. *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004) (citation omitted). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"A trial court may relieve a party from a final judgment, order, or proceeding on grounds of fraud, misrepresentation, or other misconduct of the adverse party pursuant to MCR 2.612(C)(1)(c)." *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). If the fraud is within the cause of action itself (intrinsic fraud), the only remedy is a motion for relief from judgment and not an independent action. *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995). The movant must bring the motion within one year following entry of the judgment. MCR 2.612(C)(2); *Kiefer, supra*, pp 180-181. The time limitation does not apply to independent actions alleging fraud on the court, but does apply to motions alleging fraud on the court. MCR 2.612(C)(3); *Kiefer, supra*, p 182. The purpose behind the time limitation is to enforce the finality of judgments. *Triplett v St Amour*, 444 Mich 170, 178; 507 NW2d 194 (1993).

Here, plaintiff responded to defendant's motion for an increase in child support by filing a motion to set aside the child support portion of the judgment of divorce pursuant to MCR 2.612(C)(1)(c) and MCR 2.612(C)(1)(d). Although plaintiff consistently argued both fraud and that the judgment was void, the court only addressed fraud in its findings and order.

As a motion for relief from judgment based on fraud, plaintiff's claim was subject to the one-year limitation, and therefore, the trial court abused its discretion in granting him relief under MCR 2.612(C)(1)(c). The exception to the time limitation for fraud on the court does not apply in this case because there was no independent action. *Kiefer, supra*, p 182. The judgment

of divorce indicated that plaintiff was the father, ordered him to pay child support, and also allowed him the benefit of visitation time with David, who he believed to be his biological son. Although the circumstances are unfortunate for plaintiff, David's actual biological father, and especially for David, there is no enumerated exception to the one-year time limitation for fraud that is not discovered within that year.

Defendant also argues that the trial court order was an improper retroactive modification of child support in violation of MCL 552.603. We agree, to the extent that the order modified child support from the date the divorce action was initiated. Modification of a child support order is reviewed for an abuse of discretion. *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002).

"A trial court may modify a child support order if modification is justified by changed circumstances." *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999); MCL 552.17. However, retroactive modification of support payments that have already come due is prohibited except during the period in which a petition for modification is pending. MCL 552.603(2). The custodial parent should be able to rely upon the receipt of a court ordered payment until the other parent files a petition to modify the payment. *Harvey v Harvey*, 237 Mich App 432, 438; 603 NW2d 302 (1999). This prohibition does not apply where there is an ex parte interim order or other temporary support order, or to a court approved agreement between the parties for retroactive modification. MCL 552.603(3); MCL 552.603(5).

At the first hearing on plaintiff's motion to set aside the child support, the court found that plaintiff was not the biological father, terminated the child support, and ordered an evidentiary hearing to determine the amount of money plaintiff should be reimbursed. At the evidentiary hearing, the court ordered defendant to repay all the child support that plaintiff had paid to her since the filing of the complaint for divorce. This ruling essentially modified the support payments from the beginning of the divorce case to the present time to zero, even though defendant presumably used the payments she received in David's upbringing. By the clear and unambiguous language of the statute, the court was only permitted to modify the payments from the date of defendant's motion for an increase in child support. *Waple v Waple*, 179 Mich App 673, 676; 446 NW2d 536 (1989). Therefore, while termination of child support as of the date defendant's motion was justified due to a change in circumstances, the trial court's order for repayment of the amount paid between the filing of the complaint for divorce and the filing of defendant's motion for an increase in child support was an abuse of discretion.

Defendant also argues that res judicata and laches preclude plaintiff from now contesting paternity, and that allowing relief from judgment in this case raises due process and equal protection concerns. However, defendant did not raise these arguments before the trial court and the trial court made no finding regarding the same. Because the trial court did not rule on the issue and appellate review is limited to issues actually decided by the trial court, we need not address these issues on appeal. *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994).

Defendant's allegations that the court denied David due process and equal protection similarly merit only passing comment. Not only was this argument not raised below and is thus unpreserved for review, constitutional protections are generally personal. *People v Smith,* 420 Mich 1, 17; 360 NW2d 841 (1984). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v*

Comm'r of Ins, 174 Mich App 467, 471; 437 NW2d 271 (1988) (citations omitted). Defendant thus cannot assert the rights of due process and equal protection on behalf of David.

Defendant additionally argues that the doctrine of equitable parenting precludes plaintiff from challenging paternity. We disagree.

The equitable parent doctrine provides that:

> [A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [*Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999).]

Importantly, this doctrine has not been extended beyond the context of marriage. *Killingbeck v Killingbeck*, 269 Mich App 132, 142; 711 NW2d 759 (2005). Because David was not conceived or born during the parties' marriage, the equitable parent doctrine is inapplicable to this case.

Finally, defendant's objection to the court ordering a DNA test fails because defendant and plaintiff discussed and agreed to this option at a hearing and spent ample time negotiating who would pay for the test and where it would be performed. In addition, defendant cites no authority for her position that the court could not order a DNA test, so this issue is deemed abandoned. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

The portions of the trial court's order setting aside the child support provision of the judgment of divorce and ordering defendant to pay back to plaintiff all child support paid to date are reversed. We affirm the trial court's order terminating child support, but set the date of termination as January 20, 2005, the date defendant filed a motion for an increase in child support and enforcement of the parenting time schedule.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto