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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 3, 2023

IN RE JAMES T.

**Appeal from the Circuit Court for Davidson County
No. 21A61 Robert E. Lee Davies, Judge**

No. M2022-01666-COA-R3-PT

A foster mother filed a petition to terminate parental rights and adopt a minor child. This appeal concerns the rights of a putative father who signed a Voluntary Acknowledgment of Paternity asserting that he was the biological father of the minor child. We have determined that the foster mother had standing to challenge the VAP, and we affirm the trial court's decision disestablishing the putative father's status as legal father.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Nicholas Perenich, Jr., Nashville, Tennessee, for the appellant, James T., Sr.

Jennifer L. E. Williams, Springfield, Tennessee, for the appellee, Jacqueline C.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Nancy B. ("Mother") is the biological mother of James T., Jr., ("the child"), who was born in April 2020. At that time, James T., Sr., ("Putative Father"), signed a Voluntary Acknowledgment of Paternity ("VAP") in which he stated, under oath, that he was the child's biological father; and he was listed as the child's father on the birth certificate.

When the child was approximately one week old, the Department of Children's Services ("DCS" or "the Department") removed the child from the home of Mother and Putative Father and placed him with Jacqueline C. ("Foster Mother"). In April 2021, the juvenile court adjudicated the child dependent and neglected and granted Foster Mother permanent guardianship.

On July 19, 2021, Foster Mother filed a petition for termination of parental rights and adoption against Mother and Putative Father in circuit court. The petition alleged multiple grounds for termination against each respondent. In May 2022, the court entered an order finding that Putative Father was incarcerated and appointing counsel for him. The court also appointed a guardian ad litem (“GAL”) to represent the child.

The parties engaged in discovery. In response to Foster Mother’s requests for admissions, Putative Father stated that Mother was pregnant before he met her, that he did not have sexual relations with Mother to conceive the child, and that he was not the biological father of the child. In August 2022, Foster Mother filed a motion to disestablish paternity based upon Putative Father’s admissions. Putative Father filed a response averring that Foster Mother did not have standing to disestablish paternity and arguing that his rights should not be disestablished. The court ordered paternity testing, which confirmed that Putative Father was not the child’s biological father. Foster Mother filed an amended motion to disestablish paternity in September 2022.

At a hearing in October 2022, the court did not hear any evidence. Based upon the amended motion, exhibits, answer, and admissions, the court entered an order on November 1, 2022, finding that “there was a material mistake of fact at the execution of the Voluntary Acknowledgment of Paternity (VAP) which allowed the Respondent to be named as the legal father of the Minor Child.” The court held that Putative Father was “disestablished as the legal father of the Minor Child; and therefore, is no longer a legal parent in this adoption.” Putative Father was removed as a party to the proceedings.

On November 3, 2022, the court held a final hearing on the termination of the parental rights of Mother, who had never appeared or filed a response in the matter. The court entered two orders on November 22, 2022. The first order terminated Mother’s parental rights on multiple grounds, and the second order approved the adoption of the child by Foster Mother.

Putative Father filed a notice of appeal on November 30, 2022. He raises one issue for our determination: whether a man who signs a VAP regarding a minor child and who is shown by paternity testing not to be the child’s biological father can properly be dismissed from termination and adoption proceedings upon motion of the foster mother.

STANDARD OF REVIEW

The standing issue presents a question of law, which we review de novo without a presumption of correctness. *In re Paetyn M.*, No. W2017-02444-COA-R3-PT, 2019 WL 630124, at *3 (Tenn. Ct. App. Feb. 14, 2019) (citing *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004); *Northland Ins. Co. v. State*, 335 S.W.3d 727, 729 (Tenn. 2000)). Interpretation of the applicable statutes also involves questions of law, so the same standard of review applies. *In re Shelby L.B.*, No. 2010-00879-COA-R9-PT, 2011 WL 1225567, at

*3 (Tenn. Ct. App. Mar. 31, 2011) (citing TENN. R. APP. P. 13(d); *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007)).

ANALYSIS

1. Standing of prospective adoptive mother to challenge VAP

We must begin by addressing whether Foster Mother had standing to seek rescission of Putative Father's VAP. Putative Father argues that Foster Mother did not have standing under the applicable statutes. We respectfully disagree.

Tennessee Code Annotated section 24-7-113(e)(2)¹ specifically addresses the procedure for challenging a VAP and stated, in pertinent part:

The challenger must institute the proceeding upon notice to the other signatory and other necessary parties including the Title IV-D agency within five (5) years of the execution of the acknowledgment, and if the court finds based upon the evidence presented at the hearing that there is substantial likelihood that fraud, duress, or a material mistake of fact existed in the execution of the acknowledgment of paternity, then, and only then, the court shall order parentage tests. . . . Nothing herein shall preclude the challenger from presenting any other form of evidence as a substitute for the parentage tests if it is not possible to conduct such tests.

Tenn. Code Ann. § 24-7-113(e) (2022). Relying on this provision's reference to "the other signatory," Putative Father argues that the challenger must be a signatory to the VAP. Because Foster Mother was not a signatory to the VAP, Putative Father contends that she does not have standing.

Although we have not previously considered the standing of a foster parent to challenge a VAP, we have considered similar questions in other cases. In *In re C.A.F.*, 114 S.W.3d 524, 525 (Tenn. Ct. App. 2003), Ms. Smith, mother of C.A.F., met Mr. F. while she was in jail. Ms. Smith's parental rights to two of her other children had previously been terminated. *In re C.A.F.*, 114 S.W.3d at 525. In an attempt to prevent DCS's involvement in the child's life, Ms. Smith, who was in prison, asked Mr. F. and he agreed to execute a VAP; Mr. F. accepted physical custody of the infant child. *Id.* at 525-26. Mr. F. later moved out of state and then returned to Tennessee. *Id.* at 526. A woman with whom Mr. F. had a brief relationship claimed custody rights to the child. *Id.* Mr. F. subsequently married Ms. Smith. *Id.*

¹ We apply the version of Tenn. Code Ann. § 24-7-113 in effect when Putative Father executed the VAP and when Foster Mother's petition was filed.

The Department filed a petition for termination of parental rights naming as respondents Ms. Smith, Mr. F., and the child's alleged biological father, who did not make an appearance in the proceedings. *Id.* The results of DNA testing showed that Mr. F. was not the child's biological father. *Id.* at 527. The trial court relied upon the "conclusive presumption" of paternity created by the VAP and the limited circumstances under which the VAP could be rescinded. *Id.* The court concluded that the VAP statute did not give the State standing to challenge the VAP. *Id.*

On appeal, this Court reached a different conclusion on the standing question. The Court disagreed with the trial court's interpretation that only signatories to the VAP had standing to challenge the acknowledgement. *Id.* at 528. In rejecting this reasoning, the Court stated:

The normal operation of Tenn. Code Ann. § 24-7-113 makes it possible for an unwed mother to confer a constitutionally protected parental status upon any male willing to sign a voluntary acknowledgment of paternity. By limiting paternity challenges to the signatories to a voluntary acknowledgment, the trial court would make that status virtually unassailable, even to challenge by the actual biological father. This is an inappropriate construction of Tenn. Code Ann. § 24-7-113, for it would defeat the clear intent of the paternity statutes.

The appellee argues that if the State is given standing to challenge paternity in this case, then it could do so anywhere and at any time, thus casting government in the role of potential interloper in every family's private affairs. We do not agree. This case merely stands for the principle that if the state files a Petition for Termination of Parental Rights, it must necessarily have the power to inquire into the authenticity of the claims of parenthood it is seeking to terminate.

Id. at 529.

In a later case, *In re Francis P.*, 532 S.W.3d 356, 360 (Tenn. Ct. App. 2017), Tony P. signed a VAP at the time of the minor child's birth. He brought a petition to establish paternity as well as a termination and adoption petition against the child's mother. *In re Francis P.*, 532 S.W.3d at 360-61. For present purposes, the paternity action is most relevant. Jon F., who claimed to be the child's biological father, filed a competing paternity petition. *Id.* at 361. Jon F. submitted a DNA test establishing his parentage. *Id.* The trial court adjudicated the paternity action, found that Jon F. had standing to challenge the VAP, and ruled that Jon F. had rebutted the VAP. *Id.* at 363. On appeal, citing *In re C.A.F.*, this Court agreed with the trial court that Jon F. had standing to bring an action pursuant to Tenn. Code Ann. § 24-7-113(e)(2) to challenge the VAP executed by Tony P. *Id.* at 368 n.2.

Tennessee Code Ann. § 36-1-113(b)(1) provides that a prospective adoptive parent may bring a petition to terminate parental rights. The term “prospective adoptive parents” is defined as follows:

a nonagency person or persons who are seeking to adopt a child and who have made application with a licensed child-placing agency or licensed clinical social worker or the department for approval, or who have been previously approved, to receive a child for adoption, or who have received or who expect to receive a surrender of a child, or who have filed a petition for termination or for adoption[.]

Tenn. Code Ann. § 36-1-102(43). Foster Mother meets this definition and, therefore, has standing to bring a petition to terminate parental rights regarding the minor child. *Cf. In re Shelby L.B.*, 2011 WL 1225567, at *9-10 (holding that the petitioner lacked standing because he did not have the legal capacity to adopt). Based upon the reasoning applied in the caselaw, we conclude that, as a prospective adoptive parent, Foster Mother must necessarily have standing to challenge Putative Father’s status.

2. Disestablishment of paternity

We must next determine whether the trial court properly set aside the VAP based upon a material mistake of fact pursuant to Tenn. Code Ann. § 24-7-113(e).

A VAP “shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment, subject to rescission as provided in subsection (c).” Tenn. Code Ann. § 24-7-113(a). Unless rescinded, the VAP “shall be conclusive of that father’s paternity *without further order of the court.*” *Id.* (emphasis added). A VAP “establishes a ‘legal relationship’ between the father and the child.” *Baxter v. Rowan*, 620 S.W.3d 889, 895 (Tenn. Ct. App. 2020) (quoting *State ex rel. Dancy v. King*, No. W2010-00934-COA-R3-JV, 2011 WL 1235597, at *3 (Tenn. Ct. App. Apr. 5, 2011)). Discussing the public policy underlying Tenn. Code Ann. § 24-7-113, this Court has stated that the statute’s “main purpose is to make it possible to decree child support orders without first having to go through a paternity proceeding.” *In re C.A.F.*, 114 S.W.3d at 530. If a VAP has not been rescinded, it “may only be challenged on the basis of fraud, whether extrinsic or intrinsic, duress, or material mistake of fact.” Tenn. Code Ann. § 24-7-113(e)(1).

In analyzing this issue, we are guided by *In re T.K.Y.*, 205 S.W.3d 343 (Tenn. 2006), a case where our Supreme Court examined the relationship between the parentage statutes and the termination statutes. The mother of T.K.Y. was married and had an affair with Mr. P. before and after the birth of T.K.Y. *In re T.K.Y.*, 205 S.W.3d at 346. Later, the mother informed her husband of the affair and of the fact that Mr. P. was the child’s biological father. *Id.* The couple remained married, and the husband “continued to hold T.K.Y. out to the world as his child.” *Id.* Mr. P. filed a petition to establish parentage; the mother and

the husband filed a counterpetition asserting that the husband was the legal father and seeking to terminate Mr. P's parental rights. *Id.*

The Supreme Court began by evaluating the issue of parentage and stated:

The determination of the child's legal father is a two-step process. First, we look to the parentage statutes, Tennessee Code Annotated sections 36-2-301 to -322, to determine the child's father. Then, we look to the adoption and termination statutes to determine whether the parentage father is also the legal father. *See id.* §§ 36-1-101 to -142.

Id. at 349. In this context, the Court considered Tenn. Code Ann. § 36-2-304(a), which establishes rebuttable presumptions of paternity.² *Id.* The Court determined that the husband met two of the presumptions and Mr. P. qualified for one presumption. *Id.* Because the Court viewed the main purpose of the parentage statutes to be determining a child's biological father, it reasoned that the claims of the husband and Mr. P. could not be accorded equal weight. *Id.* at 350. Without "strong, specific evidence to the contrary, a [biological father] is the father of the child" under the parentage statutes. *Id.* at 351. The parties did not dispute the fact that Mr. P. was the child's biological father, and the Court concluded that Mr. P. was the child's father for purposes of the parentage statute. *Id.*

² Tennessee Code Annotated section 36-2-304(a) states:

A man is rebuttably presumed to be the father of a child if:

- (1) The man and the child's mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (2) Before the child's birth, the man and the mother have attempted to marry each other in compliance with the law, although the attempted marriage is or could be declared illegal, void and voidable;
- (3) After the child's birth, the man and the mother have married or attempted to marry each other in compliance with the law although such marriage is or could be declared illegal, void, or voidable; and:
 - (A) The man has acknowledged his paternity of the child in a writing filed under the putative father registry established by the department of children services, pursuant to § 36-2-318;
 - (B) The man has consented in writing to be named the child's father on the birth certificate; or
 - (C) The man is obligated to support the child under a written voluntary promise or by court order;
- (4) While the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as the man's natural child; or
- (5) Genetic tests have been administered as provided in § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of ninety-five percent (95%) or greater.

The Court then proceeded to analyze the issue of the child’s legal father under the adoption and termination statutes. *Id.* In contrast to the parentage statutes, the Court noted, the adoption and termination statutes “provide a framework for determining the legal father of a child.” *Id.* After examining the statutory definitions set forth in Tenn. Code Ann. § 36-1-102, the Court concluded that “the biological father is not automatically the legal father of a child.” *Id.* at 351-52. The Court noted that the adoption and termination statutes appeared to give a preference to the husband, “absent an adjudicative process.” *Id.* at 352. In the instance where there is an adjudication, the Court resolved the issue as follows:

Once the biological father has established his paternity, his constitutionally-protected fundamental right to parent his child vests and he is the legal father. That right may only be stripped pursuant to the statutory parental termination procedures—it may not be forfeited in a balancing test or to another man who may appear to be a more ideal father.

Id. The Court determined that Mr. P. was the child’s legal father and that his rights could only be terminated in accordance with the termination statutes. *Id.* at 353.

Applying the two-step analysis from *In re T.K.Y.*, we begin with Putative Father’s parentage status and note that, although he signed a VAP, he never married or attempted to marry the child’s mother. Thus, this case does not involve a paternity action, and the presumptions set forth in the parentage statutes do not apply to the facts of this case. *See* Tenn. Code Ann. § 36-2-304(a)(3)(B) (stating that the presumptions apply when a man consents in writing to be named as father on the birth certificate, but only if the man and the child’s mother married or attempted to marry after the child’s birth). Instead, this case involves a VAP, which establishes a legal relationship distinct from the presumption of parentage created under Tenn. Code Ann. § 36-2-304. *See* Tenn. Code Ann. § 36-2-301 (stating that the purpose of the parentage statutes is to provide “a single cause of action to establish parentage of children *other than* establishment by adoption pursuant to chapter 1 of this title, *or by acknowledgement of parentage pursuant to § 68-3-203(g), § 68-3-302 or § 68-3-305(b)*”) (emphasis added). Unlike the parentage statutes that set forth a cause of action to establish paternity, a VAP, unless rescinded, “shall be conclusive of that father’s paternity *without further order of the court.*” Tenn. Code Ann. § 24-7-113(a) (emphasis added). Thus, a VAP “establishes a ‘legal relationship’ between the father and the child.” *Baxter*, 620 S.W.3d at 895 (quoting *King*, 2011 WL 1235597, at *3).

Moving on to the second step in the *In re T.K.Y.* analysis, we must address Putative Father’s status under the termination statutes. Under Tenn. Code Ann. § 36-1-102(29)(A)(iv), a legal parent includes “[a] man who has been adjudicated to be the legal father of the child . . . or who has signed, pursuant to § 24-7-113, § 68-3-203(g), § 68-3-302, or § 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under Tennessee law.” *See also In re Francis P.*, 532 S.W.3d at 367. Thus, Putative Father qualified as the minor child’s legal parent at the time when Foster Mother initiated the

termination action, and we must determine whether the trial court properly disestablished Putative Father's status as legal father. Pursuant to Tenn. Code Ann. § 24-7-113(e)(2), this status may be challenged based upon "a substantial likelihood that fraud, duress, or a material mistake of fact existed in the execution of the acknowledgment of paternity."

In his discovery responses, Putative Father admitted that he knew he was not the child's biological father, that the biological mother was pregnant when he met her, and that he did not have sexual relations with her to conceive the minor child. Based upon Foster Mother's motion to disestablish paternity and on Putative Father's admissions, the trial court ordered paternity testing,³ which confirmed that Putative Father is not the child's biological father. The trial court found that the VAP was disestablished based upon a material mistake of fact at the time of the execution of the VAP.

What constitutes a material mistake of fact for purposes of Tenn. Code Ann. § 24-7-113? We have previously stated that "one who signs a VAP in the sincere belief that he is the father of the child, and then later shows that he may have been mistaken about that belief, can establish a 'material mistake of fact' sufficient to challenge the VAP under Section 24-7-113(e)." *State ex rel. Parks v. Parks*, No. W2005-00957-COA-R3-JV, 2006 WL 2032560, at *8 (Tenn. Ct. App. July 19, 2006) (citing *In re C.A.F.*, 114 S.W.3d at 529-30). In *In re Francis P.*, 532 S.W.3d at 369-70, the court affirmed the trial court's rescission of the VAP based upon a mutual mistake of fact. At the time of the signing of the VAP, both the mother and the alleged father mistakenly believed that the alleged father was the child's biological father. *In re Francis P.*, 532 S.W.3d at 360. In the present case, there is no dispute that Putative Father knew he was not the child's father when he signed the VAP. Therefore, the trial court's determination that the VAP was disestablished based upon a material mistake was erroneous.

Foster Mother asserts on appeal that the VAP was properly rescinded based upon fraud, even though the trial court did not base its decision upon that ground. Putative Father argues that fraud "cannot be proven in this case."

To establish a claim for fraud there must be proof of the following elements:

- (1) an intentional misrepresentation with regard to a material fact;
- (2) knowledge of the representation[']s] falsity—that the representation was made knowingly or without belief in its truth, or recklessly without regard to its truth or falsity;
- (3) that the plaintiff reasonably relied on the misrepresentation and suffered damage; and

³ The trial court was authorized to order DNA testing under Tenn. Code Ann. § 24-7-113(e) based upon the admissions, which indicated that there was a "substantial likelihood" of fraud, duress, or a material mistake of fact.

(4) that the misrepresentation relates to an existing or past fact, or, if the claim is based on promissory fraud, then the misrepresentation must embody a promise of future action without the present intention to carry out the promise.

King, 2011 WL 1235597, at *4-5 (quoting *Jones v. State ex rel. Coleman*, No. W2006-00540-COA-R3-JV, 2006 WL 3613612, at *3 (Tenn. Ct. App. Dec. 12, 2006)). Putative Father does not dispute the first, second, and fourth elements of fraud, and the undisputed evidence supports the establishment of those elements: Both Mother and Putative Father knew that he was not the child's biological father and, by signing the VAP, made the false representation that he was the child's biological father, a material fact. It is the third element that is in dispute here. Putative Father asserts that "the petitioner in this case [Foster Mother] did not suffer any damages in reliance on the VAP."

The definition of fraud referenced by the parties typically applies in contract disputes. See *Jones*, 2006 WL 3613612, at *3 (quoting *Shahrdar v. Global Hous., Inc.*, 983 S.W.2d 230, 237 (Tenn. Ct. App. 1998)). We must address how the third element, which requires reliance and damages, applies in the context of determining whether a VAP should be set aside. By signing a VAP, both parties are affirming under oath that the alleged father is the child's biological father. This information is then provided to the office of vital records and, if the mother is receiving certain types of state assistance, to the Title IV-D child support agency in the area where the mother resides. See Tenn. Code Ann. § 68-3-302(d). The VAP is used to prepare the child's birth certificate and as a basis for seeking child support from the man who signed the VAP.

In *In re C.A.F.*, 114 S.W.3d at 529, this Court considered a challenge to the status of a man who became the child's legal father pursuant to a VAP. The legal father contended that, when he signed the VAP, he was uncertain whether he was the child's biological father, and that the mother was also unsure. *In re C.A.F.*, 114 S.W.3d at 529. The trial court found the mother lacked credibility, and the legal father had "flatly denied" that he was the child's biological father when questioned by state authorities. *Id.* This Court concluded that the mother "attempted to perpetrate a fraud upon the state and that she enlisted [the legal father] in this effort."⁴ *Id.* Thus, this Court has recognized that, in the context of a challenge to a VAP, fraud may be established based upon a misrepresentation to the state and to the public.

In the present case, as in *In re C.A.F.*, Putative Father's false representation of paternity constituted a fraud upon the state. Moreover, Foster Mother reasonably relied

⁴ The Court further noted that, even if the mother believed that the legal father might be the child's biological father, the challenge to the VAP would still be effective based upon a material mistake of fact, as shown by the paternity test. *In re C.A.F.*, 114 S.W.3d at 529-30.

