STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS DAVID BURNETT,

Plaintiff-Appellee,

v

TRACY LYNN AHOLA,

Defendant-Appellant,

and

DEREK AHOLA,

Defendant.

UNPUBLISHED
October 7, 2021

No. 356502
Genesee Circuit Court
LC No. 14-312262-DP

NICHOLAS DAVID BURNETT,

Plaintiff-Appellee,

v

TRACY LYNN AHOLA,

Defendant,

and

DEREK AHOLA,

Defendant-Appellant.

No. 356505
Genesee Circuit Court
LC No. 14-312262-DP

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals[1] regarding disputed parentage, in Docket No. 356502, defendant, Tracy Lynn Ahola, appeals as of right the opinion and order of the trial court finding that plaintiff, Nicholas David Burnett, committed intrinsic fraud and fraud on the court during a previous bench trial, holding him in contempt of court, fining him $7,500, and ordering him to pay 25% of Tracy Ahola's attorney fees accrued since she first moved for relief from the judgment previously issued under the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*. In Docket No. 356505, defendant, Derek Ahola, appeals as of right the same opinion and order of the trial court, which did not award Derek Ahola any attorney fees. We affirm in part, vacate in part, and remand for further proceedings consistent with the limited instructions in this opinion.

I. BACKGROUND

This case has a lengthy and acrimonious procedural and appellate history. This case arose, in 2014, out of a dispute regarding the parentage of JDA. "JDA was conceived while [plaintiff] and Tracy [Ahola] were engaged in an extramarital sexual relationship . . . ." *Burnett v Ahola*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2016 (Docket No. 330311) (*Burnett I*), p 1. Plaintiff sued under the ROPA, which allows an "alleged father" to challenge the paternity of a "presumed father" when the "alleged father" "did not know or have reason to know that the mother was married at the time of conception." MCL 722.1441(3)(a). "[A] significant factual dispute in the trial court was whether [plaintiff] was aware at the time [of conception] that Tracy [Ahola] had not divorced Derek [Ahola] as [plaintiff] claimed Tracy [Ahola] had told him." *Burnett I*, unpub op at 1. During the ROPA trial, evidence was presented from various witnesses that essentially established plaintiff actually believed Tracy Ahola was divorced at the time of conception of JDA. The trial court believed that evidence, issued a ROPA judgment, and entered an order of filiation establishing plaintiff as JDA's father. The parties do not dispute that plaintiff is JDA's biological father. On appeal, a panel of this Court affirmed the trial court's rulings. *Id*. at 5.

In a subsequent appeal, *Burnett v Ahola*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2017 (Docket No. 338618) (*Burnett II*), pp 1-3, vacated in part and remanded 501 Mich 1055 (2018), this Court summarized the proceedings that occurred back before the trial court:

> Subsequently, the trial court entered another parenting time order on July 6, 2016, increasing plaintiff's parenting time with JDA. Then, on September 30, 2016, the parties entered into a stipulated custody and parenting time agreement. That stipulated order provided that plaintiff and Tracy [Ahola] would share legal and physical custody of JDA.

[1] *Burnett v Ahola*, unpublished order of the Court of Appeals, entered March 16, 2021 (Docket Nos. 356502 and 356505).

> Less than one month later, on October 24, 2016, defendants moved the trial court for relief from the trial court's ROPA judgment. Defendants argued that during the ROPA bench trial, plaintiff committed fraud or misconduct against an adverse party pursuant to MCR 2.612(C)(1)(c), and fraud on the court itself pursuant to MCR 2.612[(C)](3). Defendants relied on recorded conversations between Tracy [Ahola] and plaintiff, which allegedly contained statements from plaintiff that he lied and got witnesses to lie on his behalf at trial. Defendants provided transcribed excerpts from the conversations, which defendants alleged occurred on June 1, 2016, June 8, 2016, and June 27, 2016. In light of the recordings, defendants requested that the trial court vacate its ROPA judgment and order, dismiss the case with prejudice, and enter an order for plaintiff to show cause why he should not be held in contempt of court and have his case referred to the Michigan State Police.

After considering the parties' arguments, the trial court ultimately denied the relief requested by defendants, noting that the delay in presenting evidence of plaintiff's fraud and the stipulated order for joint custody and equal parenting time amounted to an implied waiver by defendants. On appeal, a panel of this Court agreed with that reasoning and affirmed, holding that "in settling the issue of custody and expanding plaintiff's role in JDA's life, defendants' actions showed that they were prepared to move on from the issue of paternity and begin working toward a coparenting relationship." *Burnett II*, unpub op at 6-7. Our Supreme Court then entered an order vacating the portions of this Court's opinion regarding waiver of the fraud issues and remanded to this Court with instructions to remand to the trial court for an evidentiary hearing while maintaining jurisdiction. *Burnett v Ahola*, 501 Mich 1055 (2018). This Court entered that order on May 1, 2018.[2]

During the remand proceedings, the trial court declined to accept additional evidence of plaintiff's alleged fraud, and instead, determined that because defendants could have discovered the perjury and suborned perjury at the time of the ROPA trial, it was not newly discovered evidence, and thus, defendants were not entitled to relief from the ROPA judgment. In defendants' third appeal to this Court, this Court affirmed. *Burnet v Ahola (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued August 30, 2018 (Docket No. 338618) (*Burnett III*), pp 7-12, reversed and remanded 503 Mich 941 (2019). Once again, our Supreme Court disagreed and entered an order reversing this Court's opinion in *Burnett III*, vacating the trial court's order, and remanding to the trial court. *Burnett v Ahola*, 503 Mich 941 (2019). Our Supreme Court held that plaintiff's arguments regarding waiver and collateral estoppel did not apply to the case. *Id*. Thus, our Supreme Court once again remanded to the trial court, this time instructing the trial court to "(1) conduct an in-person evidentiary hearing to determine whether the plaintiff committed intrinsic fraud or fraud on the court during the ROPA proceedings, which

[2] *Burnett v Ahola*, unpublished order of the Court of Appeals, entered May 1, 2018 (Docket No. 338618).

shall include consideration of relevant evidence discovered after entry of the ROPA judgment; and (2) if so, determine to what, if any, remedy the defendants are entitled." *Id.*

After additional motion practice, discovery, and interlocutory appeals,[3] the trial court held a two-day evidentiary hearing commencing on January 21, 2021. The trial court accepted testimony from plaintiff, Tracy Ahola, Derek Ahola, and other witnesses who did or could have testified during the ROPA trial. The trial court also admitted the recorded conversations, and the transcripts of those conversations, as evidence. Tracy Ahola testified that she believed plaintiff was being serious in the recordings when he said he perjured himself, suborned perjury, and attempted to bribe various members of the judicial system. For his part, plaintiff testified that he was "trolling" Tracy Ahola, which he explained as a way to try to upset someone on purpose by using exaggeration and lies. Plaintiff testified that no reasonable person would believe his outrageous claims in the recordings were actually true. Tracy Ahola, Derek Ahola, and plaintiff also testified regarding what they believed would be in JDA's best interests, should the trial court determine plaintiff committed intrinsic fraud or fraud on the court.

The trial court considered the evidence and invited the parties to file written explanations of their proposed findings of fact and conclusions of law. After considering those written documents as well, the trial court issued its opinion and order, in which if found plaintiff had committed both intrinsic fraud and fraud on the court. The trial court held plaintiff in contempt and ordered him to pay a fine of $7,500. As to the fraud, the trial court ordered plaintiff to pay

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[3] The case has been before this Court two additional times since the entry of that order by our Supreme Court. First, defendants applied for leave to appeal decisions of the trial court related to a refusal to reopen discovery and denying a request for recusal of the trial court judge. This Court denied leave to appeal, *Burnett v Ahola*, unpublished order of the Court of Appeals, entered August 14, 2019 (Docket No. 349484); *Burnett v Ahola*, unpublished order of the Court of Appeals, entered August 14, 2019 (Docket No. 349497), but our Supreme Court entered an order vacating the trial court's orders staying discovery and denying defendants' motion to lift the discovery stay. *Burnett v Ahola*, 504 Mich 1002 (2019). Our Supreme Court also directed "the Genesee Circuit Court to assign a different judge to preside over further proceedings in this case." *Id.* Second, defendants again applied for leave to appeal after the trial court granted plaintiff's motion in limine to limit evidence admitted at the evidentiary hearing to newly discovered evidence. This Court peremptorily reversed in an order, cited our Supreme Court's previous orders regarding the necessity of an evidentiary hearing, and reiterated those instructions:

> On remand the circuit court shall conduct the ordered evidentiary hearing in open court, consider the recorded statements by plaintiff and witness testimony regarding those statements, and determine whether plaintiff obtained the ROPA judgment by intrinsic fraud or fraud upon the court. The parties may call, examine, and cross-examine witnesses who previously testified or could have testified at the ROPA trial insofar as their testimony is relevant to showing the truth or falsity of the recorded conversations between plaintiff and defendant Tracy Lynn Ahola. [*Burnett v Ahola*, unpublished order of the Court of Appeals, entered November 30, 2020 (Docket No. 354991); *Burnett v Ahola*, unpublished order of the Court of Appeals, entered November 30, 2020 (Docket No. 354996).]

25% of Tracy Ahola's attorney fees as a sanction for the misconduct. The trial court declined to vacate the ROPA judgment and revoke plaintiff's paternity of JDA after finding it would not be in JDA's best interests to do so. Defendants moved the trial court to reconsider its decision regarding the appropriate remedies for plaintiff's fraud, which the trial court denied. This appeal followed.

II. ANALYSIS

A. THE ROPA JUDGMENT AND PLAINTIFF'S PATERNITY

In originally challenging the trial court's ROPA judgment, defendants moved for relief from judgment under MCR 2.612(C)(1)(c) and (C)(3). According to MCR 2.612(C)(1)(c), "On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds: . . . [f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Under MCR 2.612(C)(3), the trial court has the power to "set aside a judgment for fraud on the court."

Now on appeal defendants argue that the trial court abused its discretion by refusing to vacate the ROPA judgment and revoke plaintiff's paternity of JDA after determining plaintiff committed intrinsic fraud and fraud on the court. "This Court reviews a trial court's decision whether to set aside a judgment under MCR 2.612 for an abuse of discretion." *Adler v Dormio*, 309 Mich App 702, 707; 872 NW2d 721 (2015). "A trial court has not abused its discretion if its decision results in an outcome within the range of principled outcomes." *Id.* "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). "When reviewing a decision related to the [ROPA], this Court reviews the trial court's factual findings, if any, for clear error. The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake." *Rogers v Wcisel*, 312 Mich App 79, 86; 877 NW2d 169 (2015) (quotation marks and citation omitted). "In addition, this Court also reviews de novo issues of law involving statutory construction, as well as the proper interpretation and application of a court rule." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 532; 866 NW2d 817 (2014) (citations omitted).

In the present case, unlike almost all cases that have considered these court rules, the question of whether plaintiff committed intrinsic fraud or fraud on the court is not in dispute. Indeed, the trial court found plaintiff committed fraudulent acts in the form of perjury and suborning perjury, and plaintiff does not challenge that conclusion in this appeal. Instead, the issue presented is whether the trial court properly determined that, in light of its findings of fraud, it did not have to vacate the ROPA judgment and revoke plaintiff's paternity of JDA.

Defendants' primary contention is that the trial court was essentially without authority to exercise discretion regarding the appropriate remedy after concluding plaintiff committed fraud. This argument, however, ignores the plain and unambiguous language used in the court rule relied on by defendants. "We employ statutory construction principles when interpreting court rules, applying the rule's plain and unambiguous language as written." *Legion-London v Surgical Institute of Mich Ambulatory Surgery Ctr, LLC*, 331 Mich App 364, 367 n 1; 951 NW2d 687 (2020) (quotation marks and citation omitted). Thus, the first step in such analysis requires "considering the plain language of the . . . court rule in order to ascertain its meaning." *Patel v Patel*, 324 Mich App 631, 640; 922 NW2d 647 (2018). "If the rule's language is plain and

unambiguous, then judicial construction is not permitted and the rule must be applied as written." *Sanders v McLaren-Macomb*, 323 Mich App 254, 266-267; 916 NW2d 305 (2018) (quotation marks and citation omitted). "[T]he intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id.* at 266 (quotation marks and citation omitted).

The court rule in question, MCR 2.612(C), contains two relevant parts. The first, under MCR 2.612(C)(1), provides for the ability of the court to provide a party relief from judgment under certain sets of circumstances. Importantly, the rule provides the authority to relieve a party from a judgment, but it does not mandate providing such relief, even where the circumstances have been proven. "On motion and on just terms, the court *may* relieve a party . . . from a final judgment, order, or proceeding on the following grounds . . . ." MCR 2.612(C)(1) (emphasis added). "Use of the word 'may' indicates that an action is permissive, not mandatory." *Hardenbergh v Dep't of Treasury*, 323 Mich App 515, 524; 917 NW2d 765 (2018). Further, MCR 2.612(C)(3) does not contain any provision that would suggest, in cases of fraud on the court, that a trial court *is required* to set aside the relevant judgment: "This subrule does not limit the power of a court . . . to set aside a judgment for fraud on the court." Stated differently, while MCR 2.612(C)(3) provides that it does not limit the power of a trial court to set aside a judgment, it fails to establish that setting aside a judgment is mandatory after fraud on the court is proven.

In short, the plain and unambiguous language used in MCR 2.612(C) shows that a trial court "may" provide relief from judgment when, as here, a party proves the opposing party committed intrinsic fraud or fraud on the court. Considering our Supreme Court's decision to use the permissive word "may" in the court rule, we must enforce that language as it is written. *Hardenbergh*, 323 Mich App at 524; *Sanders*, 323 Mich App at 266-267. If the Court wished to force trial courts to set aside judgments for proof of intrinsic fraud or fraud on the court, it would have used the word "shall" in place of the word "may," thereby changing the permissive nature of the court rule to mandatory. See *Comm to Ban Fracking in Mich v Bd of State Canvassers*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 354270); slip op at 6. That the Court did not do so with respect to MCR 2.612(C) is determinative with respect to defendants' arguments the trial court did not have the authority to exercise discretion when determining whether to set aside the ROPA judgment and revoke plaintiff's paternity. *Sanders*, 323 Mich App at 266-267.

Rather than address the language in the court rule, which clearly belies defendants' position regarding the trial court's discretion, defendants rely on caselaw. Defendants primarily rely on this Court's decision in *Baum v Baum*, 20 Mich App 68; 173 NW2d 744 (1969),[4] superseded by statute on other grounds as stated in *Glaubius v Glaubius*, 306 Mich App 157, 174; 855 NW2d 221 (2014), and our Supreme Court's opinion in *Allen v Allen*, 341 Mich 543; 67 NW2d 805 (1954). Derek Ahola contends these two opinions established law requiring a court to set aside a judgment for fraud when the judgment would not have been entered but for the fraud. Defendants argue that the ROPA judgment in this case, which required plaintiff to prove he did not know or

[4] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

have reason to know that Tracy Ahola was married at the time of conception, would not have been entered but for plaintiff's perjured testimony that he believed Tracy Ahola to be divorced at the time of conception. Indeed, that position cannot be disputed considering the trial court found plaintiff perjured himself in that regard, and plaintiff does not challenge that finding in this appeal.

Even so, the caselaw cited by defendants does not stand for the position asserted. For example, in *Baum*, 20 Mich App at 71, this Court considered a case in which the trial court vacated a judgment of divorce after finding that one party had committed fraud by misstating the date of marriage in the complaint for divorce. On appeal, this Court noted that a trial court certainly has the power to set aside judgments of divorce in the event of fraud. *Id*. at 72. The panel also noted that not all misstatements or concealments warrant setting aside a judgment; therefore, analysis should focus on whether the alleged fraud was "material to the determination reflected by the judgment." *Id*. This Court summarized by stating, "Thus, if the determination of the court would not have been different had the facts in question been truthfully represented, the judgment should not be set aside." *Id*. Later in the opinion, the panel noted that the plaintiff falsified the date of marriage in an attempt "to preserve and protect the reputation of what would otherwise be considered an illegitimate child." *Id*. at 75. Although the *Baum* Court was clear it did not "condone any fraud whatsoever in pleadings," it also noted that "each incident must be determined on its own merits." *Id*. After finding "the trial court would have entered a judgment regardless of the [fraudulent] dates," this Court reversed the trial court's decision to set aside the judgment because "the misrepresentation as to dates in the original complaint would not have materially affected the outcome of the divorce proceedings." *Id*. at 76.

In analyzing the applicability of *Baum*, Derek Ahola suggests that this Court held that a trial court *must* set aside a judgment that would not have been entered but for fraud. On closer look at the case, as discussed above, it is clear that the panel in *Baum* did not make such a holding. Indeed, the opinion in *Baum* reflects caselaw suggesting that if a fraudulent statement *did not* affect the judgment, then vacating the judgment is not warranted. *Id*. This statement of law, contrary to Derek Ahola's preferred analysis, does not reflect that the converse is true—when fraud caused entry of a judgment it *must* be vacated. Indeed, the panel in *Baum* even quoted a former version of MCR 2.612(C)(1)(c) and (C)(3), which still contained the word "may" when discussing a trial court's authority to set aside judgments after proof of fraud. *Id*. at 75-76. The *Baum* Court did not provide any analysis to suggest that the use of the word "may" could be overlooked when a situation arose in which a judgment would not have been entered but for a party's fraud. *Id*. at 76. Instead, *Baum* leaves this analysis exactly where it started—the trial court has discretion whether to grant relief from a judgment after proof of fraud is presented, which comports directly with the language our Supreme Court decided to use in MCR 2.612(C).

As noted, defendants also cite our Supreme Court's opinion in *Allen*, 341 Mich at 546-547, which also involved fraud leading to a judgment of divorce. In that case, the trial court specifically found the plaintiff's failure to inform the court that she was pregnant by another man at the time of trial amounted to "a fraud committed upon [the trial court]." *Id*. at 547. Had the trial court known of that situation, it reasoned, it "undoubtedly . . . would not have granted a divorce." *Id*. The trial court, however, held it would not vacate the judgment of divorce because "the inaction

or delay of the defendant himself, during his remaining lifetime,[5] to take any steps toward setting aside the decree, was a waiver and a bar which prevented the petitioners from setting aside the decree on the ground of fraud against the court." *Id*. Our Supreme Court, considering that issue on appeal, held that the trial court erred in determining the defendant could waive a fraud on the court. *Id*. at 549-550. Thus, the Court reversed, relying on statements from the trial court that, but for the waiver, it "would not hesitate 20 seconds in making a determination that the [divorce judgment] be set aside in its entirety, and resubmitted to this court." *Id*. at 549 (quotation marks omitted). Our Supreme Court's holding, then, can be easily explained establishing that a party cannot waive a fraud on the court, and a trial court can set aside a judgment of divorce when that judgment would not have been entered but for the fraudulent behavior. *Id*. at 550-552.

Derek Ahola suggests that the *Allen* Court established law requiring a trial court to set aside a judgment if it determined that, but for fraud, the judgment would not have been entered. But it is clear that the factual scenario in *Allen* is not presented in the case before this Court. Here, the trial court held it would not exercise its discretion to set aside the ROPA judgment, while acknowledging it had the power to do so, after finding plaintiff committed intrinsic fraud and fraud on the court without which the ROPA judgment never would have been entered. There is nothing in our Supreme Court's analysis in *Allen* to suggest that, once a trial court finds fraud was committed on the court, it *must* set aside the judgment obtained via that fraud. Instead, because the trial court had already established its belief that setting aside the judgment for fraud was warranted, but for a faulty legal ground, the Court in *Allen* was merely enforcing the trial court's expressed intent, if it believed it had the discretion to do so. In other words, like in *Baum*, the *Allen* Court verified that it *is not* an abuse of discretion to set aside a judgment on the basis of fraud without which the judgment would not have been entered in the first place. For the same reasons discussed above, that does not amount to a holding that refusing to set aside such a judgment *must* be an abuse of discretion. Thus, defendants' reliance on that caselaw to suggest the trial court lacked discretion to refuse to vacate the ROPA judgment and revoke plaintiff's paternity of JDA is misplaced. See *Allen*, 341 Mich at 550-552; *Baum*, 20 Mich App at 76.

Having determined the trial court had discretion when deciding whether to grant defendants' motion to vacate the ROPA judgment and revoke plaintiff's paternity, we next consider whether the trial court abused that discretion when it declined to grant the requested relief.[6] Defendants argue that the trial court abused its discretion by considering JDA's best

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[5] The defendant in *Allen* died before the action was initiated to set aside the judgment of divorce, which was brought by the petitioners, who were the defendant's heirs and the administrator of his estate. *Allen*, 341 Mich at 545.

[6] Defendants initially contend that the trial court abused its discretion by failing to recognize that plaintiff lost his standing to assert a claim under the ROPA, and this retroactively nullified his complaint, the ROPA judgment, and his paternity of JDA. A close review of all the filings and oral arguments presented before the issuance of the trial court's opinion and order after the evidentiary hearing reveals no reference to standing. The record shows defendants raised the issue for the first time in their motions for reconsideration. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Pioneer State Mut Ins Co v Michalek*, 330 Mich

interests when determining whether to vacate the ROPA judgment and revoke plaintiff's paternity. Because the trial court had discretion under the circumstances of the case, the ultimate question is whether the trial court's decision to consider best interests "results in an outcome within the range of principled outcomes." *Adler,* 309 Mich App at 707.

In exercising its discretion, the trial court deemed it was appropriate to consider JDA's best interests. The trial court reached that decision after concluding that defendants' request, as one to set aside the ROPA judgment establishing plaintiff's paternity of JDA, implicated MCL 722.1443(4). That statute provides:

> (4) A court may refuse to enter an order setting aside a paternity determination, revoking an acknowledgment of parentage, determining that a genetic father is not a child's father, or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:
>
> > (a) Whether the presumed father is estopped from denying parentage because of his conduct.
> >
> > (b) The length of time the presumed father was on notice that he might not be the child's father.
> >
> > (c) The facts surrounding the presumed father's discovery that he might not be the child's father.
> >
> > (d) The nature of the relationship between the child and the presumed or alleged father.
> >
> > (e) The age of the child.
> >
> > (f) The harm that may result to the child.

App 138, 150; 946 NW2d 812 (2019) (quotation marks and citation omitted). Thus, defendants' arguments related to plaintiff's standing are not preserved for our review. *Id*. " 'Michigan generally follows the "raise or waive" rule of appellate review,' " and therefore, "[t]he failure to timely raise an issue typically waives appellate review of that issue." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192; 920 NW2d 148 (2018), quoting *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). See also *In re Murray*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349068); slip op at 3-4. Moreover, we observe that defendants present claim-for-relief standing arguments that are not jurisdictional in nature. See *Miller v Allstate Ins Co*, 481 Mich 601, 608-609; 751 NW2d 463 (2008). Consequently, defendants' standing arguments can be waived. See *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 527-528; 695 NW2d 508 (2004). We consider defendants' unpreserved standing arguments waived and decline to consider them.

> (g) Other factors that may affect the equities arising from the disruption of the father-child relationship.
>
> (h) Any other factor that the court determines appropriate to consider. [*Id*.]

This statute has been analyzed by this Court as requiring a trial court to state its findings regarding best interests only when it refuses to alter the paternity of the minor child. *Jones v Jones*, 320 Mich App 248, 256-257; 905 NW2d 475 (2017). By its own language, the statute applies when a trial court is considering a request for "setting aside a paternity determination." MCL 722.1443(4).

Defendants insist that consideration of MCL 722.1443(4) was improper because that statute was only meant to apply when analyzing an original action under the ROPA. For example, when the trial court entered its initial order establishing plaintiff's paternity of JDA and revoking the presumed paternity of Derek Ahola, the statute would apply, according to defendants. In other words, after determining JDA was born out of wedlock, the trial court could have declined to establish paternity for plaintiff by finding it would not be in JDA's best interests. Defendants contend that the statute does not apply in any other situations.

The plain and unambiguous language of the statute, which we must enforce, *Jones*, 320 Mich App at 253, is not so limited. MCL 722.1443(4) unambiguously states that a trial court should consider the best interests of a minor child under a distinct set of circumstances in a ROPA case. One such situation is a decision regarding whether to set "aside a paternity determination." MCL 722.1443(4). Undoubtedly, defendants were moving the trial court to set aside its prior determination of paternity in favor of plaintiff. Whether the Legislature imagined MCL 722.1443(4) would be raised more than five years after the original ROPA judgment and paternity decision was made is not necessarily relevant. The simple fact is that MCL 722.1443(4) provides an opportunity for a trial court to consider the best interests of a minor child before entering an order "setting aside a paternity determination." Thus, the trial court's decision to do so, in light of its inherent discretion when considering whether to grant a motion for relief from judgment on the basis of fraud, MCR 2.612(C), was not an error.

In an effort to avoid the plain language of a portion of MCL 722.1443(4), defendants focus on the best-interest factors included in the statute. Specifically, defendants contend that because the factors found at MCL 722.1443(4)(a) through (c) focus on the "presumed father," they are not relevant to the present dispute regarding JDA's relationship with plaintiff and, therefore, the entire statute must not have been meant to apply. Defendants ignore, however, that the remaining four specific factors are undoubtedly relevant to whether it would be in JDA's best interests to set aside plaintiff's established paternity. MCL 722.1443(4)(d) through (g). Indeed, those factors require the trial court to consider JDA's relationship with plaintiff, JDA's age, the potential harm to JDA if his relationship with plaintiff were to be interrupted, and the equities involved in the case. *Id*. Defendants' argument is unavailing considering that MCL 722.1443(4) states that its own applicability is to an array of different situations including, whether "to enter an order setting aside a paternity determination, revoking an acknowledgment of parentage, determining that a genetic father is not a child's father, or determining that a child is born out of wedlock." Naturally, then, there will be circumstances relevant to certain situations that are not relevant to others. Although the considerations of JDA's relationship with the "presumed father" might not be relevant in the

instant case, they could be when analyzing whether to hold that a child has been born out of wedlock. *Id.*

Contrary to defendants' assertion that the inapplicability of a few factors in MCL 722.1443(4) renders the entire statute inapplicable, our Supreme Court has previously discussed that, when considering a proposed change in legal custody that would not affect the established custodial environment of a minor child, there may be situations when one or more of the best-interest factors under MCL 722.23 simply are not relevant.[7] *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010). "[U]nder those circumstances, although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further." *Id.* at 93. "In other words, if a particular best-interest factor is irrelevant to the question at hand, i.e., whether the proposed change is in the best interests of the child, the trial court need not say anything other than that the factor is irrelevant." *Id.* As pertinent to the present case, our Supreme Court did not state that because some of the factors were not relevant, the entire statute did not apply. *Id.* Thus, it stands to reason that simply because some factors in MCL 722.1443(4) are not applicable to the present case, the entire statute need not be avoided. Instead, the trial court did not abuse its discretion in considering the relevant best-interest factors under MCL 722.1443(4).

To summarize, defendants moved to set aside the ROPA judgment and revoke the trial court's determination that plaintiff was JDA's father because of fraud committed by plaintiff. After determining plaintiff committed fraud, the trial court had discretion regarding whether to actually set aside the ROPA judgment and change JDA's paternity. According to MCL 722.1443(4), when considering whether to enter an order "setting aside a paternity determination," the trial court is permitted to address the minor child's best interests. Thus, contrary to the claims by defendants, the trial court did not err in doing so.

The final question to address for this issue, then, is whether the trial court clearly erred in finding JDA's best interests favored maintaining his parental relationship with plaintiff. Recall that the trial court's factual findings cannot be determined to be clearly erroneous unless "this Court is definitely and firmly convinced that [the trial court] made a mistake." *Rogers*, 312 Mich App at 86 (quotation marks and citation omitted). Further, "to the extent the court's findings were based on its assessment of the witnesses' credibility, we must defer to the court's determinations given its superior position to make these judgments." *Martin v Martin*, 331 Mich App 224, 239; 952 NW2d 530 (2020) (quotation marks and citation omitted). The trial court made the following factual findings in its written opinion and order after the evidentiary hearing:

> During the evidentiary hearing before this court, it was undisputed that the parties entered into a consent custody and parenting time order over four years ago, which gave both parties joint physical and joint legal custody of the minor child. This consent order also provided for an eventual 50/50 parenting time schedule,

[7] MCL 722.23 is part of the Child Custody Act of 1970, MCL 722.21 *et seq.*, and addresses whether a parent's custody of his or her child should change. MCL 722.23 and MCL 722.1443(4) address similar circumstances and, therefore, under the doctrine of *in pari materia* we should read them together when possible. See, e.g., *In re AGD*, 327 Mich App 332, 344; 933 NW2d 751 (2019).

> and the schedule has been followed for over three years. Throughout the duration that this schedule has been being exercised, the minor child established relationships with his biological half-siblings at both homes, as well as both biological parents.
>
> In reviewing and applying the factors articulated in MCL 722.1443(4), this court considered the relationship between the child and the biological father, noting that Plaintiff Nicholas Burnett stated during the evidentiary hearing, "I think he is extremely happy to have two families. Honestly, I think he is happy in both families." And the Co-Defendant Derek Ahola testified with "We're all adults. They're adults. We'll all get through that. It's just [JDA's] emotional well-being that is what we're concerned about." Also, at the age of six and a half the minor child has spent substantial time at both homes. Taking all of these factors into great consideration, the court finds that there is a bond and relationship between the minor child and both of his families, and it would not be in his best interest to sever those relationships.
>
> It is also the opinion of the court that significant harm to the minor child may occur if he is swiftly removed from the ties of his siblings and family.

As the trial court summarized, "[I]t would not be in the minor child's best interests to set aside the [ROPA] judgment or alter the custody or parenting time order that was previously entered by [the trial] court."

Defendants' sole argument regarding these factual findings is that the trial court should not have believed plaintiff's testimony that JDA was happy and would be harmed if his parental relationship with JDA suddenly ended. Defendants assert the trial court clearly erred by believing plaintiff after the trial court found plaintiff perjured himself during the ROPA trial. While the trial court was certainly permitted to consider that plaintiff had committed perjury during the ROPA trial, those events occurred more than five years before the instant evidentiary hearing. Moreover, plaintiff explained that he was in a state of emotional distress during the ROPA trial and the recordings that occurred afterward. Plaintiff then testified about his relationship with JDA. The trial court was present for all of that testimony, able to view plaintiff's demeanor during that testimony, and found his testimony regarding JDA's best interests credible. In a review performed by this Court, the trial court's ability to engage in that level of observation of plaintiff's testimony requires us to defer to the trial court's finding that plaintiff was the more credible witness. *Martin*, 331 Mich App at 239.

Further, during the evidentiary hearing, which defendants knew would relate to the remedy that might be granted should they prove plaintiff committed intrinsic fraud and fraud on the court, defendants did not present any evidence, other than their own testimony, regarding JDA's relationship with plaintiff and JDA's well-being in the current arrangement. For example, it is not as if the trial court believed plaintiff instead of JDA's child psychologist or therapist as related to JDA's best interests. Instead, the trial court was presented with testimony of plaintiff and defendants only. The trial court was required to consider that testimony and decide whom to believe on the basis of the trial court's assessment of their credibility. The trial court decided to believe plaintiff, and found that JDA had a bond with plaintiff and would be harmed by the sudden

cessation of the parental relationship. On appeal, defendants have not presented any reason or evidence, other than their own conjecture, to disturb that decision by the trial court. Consequently, because we must defer to the trial court's credibility determinations, *id*., and because defendants have not provided anything to cause us to be "definitely and firmly convinced that [the trial court] made a mistake," *Rogers*, 312 Mich App at 86 (quotation marks and citation omitted), we must affirm the trial court's factual findings that JDA's best interests were served by denying defendants' motion to set aside the ROPA judgment and revoke plaintiff's paternity. Furthermore, considering JDA has spent more than half of his life in a situation in which plaintiff is his father and he spends half of his time at plaintiff's home, the trial court's finding regarding best interests is understandable and has evidentiary support.

In light of the fact that the trial court did not clearly err in its finding related to JDA's best interests, the trial court's decision to deny the request to vacate the ROPA judgment and revoke plaintiff's paternity as a remedy for plaintiff's fraud was "an outcome within the range of principled outcomes," and thus, not an abuse of discretion. See *Adler*, 309 Mich App at 707.

B. ATTORNEY FEES AS A SANCTION

Defendants next argue that the trial court abused its discretion by limiting the attorney fees award to 25% of Tracy Ahola's attorney fees accrued since she moved for relief from judgment and denying Derek Ahola's request for attorney fees. This Court reviews the award of attorney fees for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "We review a trial court's findings of fact underlying the award of attorney fees for clear error, and we review any underlying issues of law de novo." *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015).

Defendants argue that the trial court should have granted them all of their attorney fees as a sanction for plaintiff's litigation misconduct. "Michigan follows the American rule regarding the imposition of attorney fees and costs, which provides that attorney fees ordinarily are not recoverable unless a statute, court rule, or common-law exception provides to the contrary." *Ayotte v Dep't of Health & Human Servs*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350666); slip op at 10. "An exception to the American rule is the trial court's inherent authority to sanction a litigant or attorney for misconduct by assessing attorney fees." *Id*. at ___; slip op at 10-11. The purpose of that authority is "to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." *Colen v Colen*, 331 Mich App 295, 304; 952 NW2d 558 (2020) (quotation marks and citation omitted).

In addition to referencing the trial court's inherent authority to sanction litigants, defendants also reference MCR 1.109(E),[8] MCL 722.1443(11), MCL 600.1721, and *In re*

[8] Tracy Ahola cites the prior version of MCR 1.109(E), which was found at MCR 2.114. "MCR 2.114 was repealed, effective September 1, 2018, and substantially relocated to current MCR 1.109(E). 501 Mich cclxxviii." *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 707 n 18; 950 NW2d 502 (2019).

Contempt of Henry, 282 Mich App 656; 765 NW2d 44 (2009). Under MCR 1.109(E)(2), each document filed with the trial court must be signed by a party or a party's attorney.

> (5) *Effect of Signature*. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> > (a) he or she has read the document;
> >
> > (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
> >
> > (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [MCR 1.109(E)(5).]

According to MCR 1.109(E)(6), when subrule (E)(5) is violated, the trial court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." "In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCR 1.109(E)(7). This Court has summarized the effect of those court rules, stating that "[s]anctions are warranted under [the court rules] where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose." *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 707; 950 NW2d 502 (2019) (quotation marks and citation omitted). Because MCR 1.109(E)(6) only requires "an appropriate sanction, which *may* include an order to pay reasonable attorney fees, the trial court has the discretion to tailor its sanction to the circumstances." *Kaeb v Kaeb*, 309 Mich App 556, 565; 873 NW2d 319 (2015).

According to MCL 722.1443(11), which is part of the ROPA statutory scheme, a trial court, "in its discretion, may order a nonprevailing party . . . to pay the reasonable attorney fees and costs of a prevailing party." Notably, the statute uses the word "may" when discussing the trial court's ability to award attorney fees to a prevailing party. *Id*. As discussed earlier, "[u]se of the word 'may' indicates that an action is permissive, not mandatory." *Hardenbergh*, 323 Mich App at 524.

Under MCL 600.1721, which relates to findings of contempt, "[i]f the alleged misconduct has caused an actual loss or injury to any person the court shall order the [contemnor] to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the [contemnor]." "The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *Ferranti v Electrical Resources Co*, 330 Mich App 439, 447; 948 NW2d 596 (2019) (quotation marks and citation omitted). Our Supreme Court has held that "the plain language of MCL 600.1721 requires a showing of contemptuous misconduct that caused the person seeking indemnification to suffer a loss or injury and, if these elements are established,

requires the court to order the contemnor to pay 'a sufficient sum to indemnify' the person for the loss." *In re Bradley Estate*, 494 Mich 367, 391; 835 NW2d 545 (2013). The indemnification contemplated under MCL 600.1721 includes the ability to "properly assess attorney fees" when circumstances warrant such. *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 595; 884 NW2d 587 (2015). As relied on by defendants, this Court in *In re Contempt of Henry*, 282 Mich App at 685 (quotation marks and citation omitted), reached a similar conclusion, stating that "[t]he sum required by MCL 600.1721 may include attorney fees that occurred as a result of the other party's contemptuous conduct."

Defendants' citation to the various court rules, statutes, and caselaw was done apparently to convince us the trial court *was required* to award defendants *all* of their attorney fees in this case. The problem with that argument is, regardless of what law defendants choose to operate under, the trial court maintains the discretion to both determine whether to award attorney fees and to fashion an appropriate remedy. Under the trial court's inherent authority to sanction a litigant for misconduct, the trial court is permitted "to *impose sanctions appropriate* to contain and prevent abuses so as to ensure the orderly operation of justice." *Colen*, 331 Mich App at 304 (quotation marks and citation omitted; emphasis added). With respect to MCR 1.109(E), because MCR 1.109(E)(6) only requires "an appropriate sanction, which *may* include an order to pay reasonable attorney fees, the trial court has the discretion to tailor its sanction to the circumstance." *Kaeb*, 309 Mich App at 565. Further, the ROPA provision related to awarding attorney fees to the prevailing party, MCL 722.1443(11), uses the word "may," and, therefore, "is permissive, not mandatory." *Hardenbergh*, 323 Mich App at 524. Finally, the contempt statute, MCL 600.1721, requires a trial court to award damages when a party is found in contempt, which can include attorney fees, but only the damages actually caused by the contemnor. *In re Bradley Estate*, 494 Mich at 391. Thus, considering that law, the appropriate question for us to consider is whether the trial court abused its discretion by determining that 25% of Tracy Ahola's attorney fees accrued since she first moved for relief from judgment was an adequate remedy under the circumstances presented.

When analyzing that question, the trial court made the following findings of fact and conclusions of law:

> In fashioning a remedy, the court considered the misconduct of Plaintiff Nicholas Burnett, but also the conduct of Defendant Tracy Ahola. Defendant Tracy Ahola testified at the evidentiary hearing that she deliberately failed to notify this court of the contents of her recordings, and failed to offer that information to the mediator, with the intent to use this information to her advantage at a later date. She stated "I thought that as soon as I brought my recordings, which was a month later, I thought as soon as that came out, that the ROPA judgment would be reversed anyway." Rather than raise the issue and place her objection, Defendant Tracy Ahola entered into a consent judgement for joint custody and parenting time. This court was left to wonder how differently this case could have been if all issues were presented to the court prior to the consent custody and parenting time order being entered.
>
> However, intrinsic fraud and fraud on the court were still committed, and as a result, this court finds that the Plaintiff, Nicholas Burnett, is held in contempt and

> sanctioned in the dollar amount of $7,500, and must reimburse 25% of Defendant Tracy Ahola's attorneys fees as damages for the costs incurred since filing the initial motion to set aside the ROPA judgment. MCR 2.501. As stated briefly above, this instance of fraud affected these proceedings in such an immense way that any lesser sanction would not be sufficient, but any more would be excessive taking into consideration the actions of both parties.

From that reasoning by the trial court, it is clear there was some concern regarding Tracy Ahola's involvement in causing the significant amount of litigation in this case. A simple review of the appellate history in this case shows Tracy Ahola's decision to delay notifying the trial court of the recorded conversations and instead to stipulate to joint legal and physical custody was a primary cause of the *amount* of litigation required in this case. While the trial court appropriately recognized that plaintiff's fraud was inexcusable and the ultimate source of the issues, the trial court also recognized that, had Tracy Ahola come to the court sooner and refused to stipulate to joint legal and physical custody and equal parenting time, the case would have played out much differently. Indeed, as can be seen from the panel's opinion in *Burnett II*, unpub op at 6-7, it was Tracy Ahola's decision in that regard which ultimately led the panel to determine that defendants were not entitled to relief from the ROPA judgment. In light of that factual and appellate record, the trial court's factual finding that much of the subsequent litigation was caused by Tracy Ahola's decision to delay alerting the trial court of plaintiff's fraud was not clearly erroneous.[9] *Teran*, 313 Mich App at 208.

Having made that finding with respect to Tracy Ahola, the trial court was then left to determine an appropriate remedy for plaintiff's undeniable misconduct. *Colen*, 331 Mich App at 304; *Kaeb*, 309 Mich App at 565; MCL 722.1443(11); MCL 600.1721. The trial court acknowledged plaintiff's wrongdoing, cited Tracy Ahola's inaction that resulted in significantly more litigation than would have been necessary otherwise, and determined an appropriate sanction for plaintiff was to pay 25% of Tracy Ahola's attorney fees accrued since she originally moved for relief from the ROPA judgment. Our review of the record confirms that, although plaintiff's fraud was entirely improper, the trial court did not abuse its discretion by refusing to award Tracy Ahola all of her attorney fees for *years* of litigation that might have been solved in *months* had she immediately alerted the trial court to her discovery of plaintiff's fraud. Consequently, with respect to Tracy Ahola's arguments related to attorney fees,[10] the trial court did not abuse its discretion.

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[9] Tracy Ahola argues that the record shows that her prompt presentation of her allegations of fraud to the trial court would not have made a difference in this case because the original trial court judge was biased against her. But, as analyzed in *Burnett II*, unpub op at 1-3, the record actually shows that the original trial court judge did not believe Tracy Ahola was entitled to relief from the ROPA judgment *because* of her delay in presenting plaintiff's alleged fraud.

[10] Tracy Ahola also argues the trial court abused its discretion by failing to enter a liquidated damage amount that calculated the amount of attorney fees actually owed. The problem with Tracy Ahola's argument in that regard is she did not present any evidence of her attorney fees during the evidentiary hearing, so the trial court did not have any evidence to rely on to make such a calculation. Moreover, the record does not establish that the trial court does not ultimately intend

Id.; *Colen*, 331 Mich App at 304; *Kaeb*, 309 Mich App at 565; MCL 722.1443(11); MCL 600.1721.

For his part, Derek Ahola asserts that the trial court abused its discretion by entirely failing to address his claim for attorney fees as a sanction under any of the various legal frameworks discussed above. As can be seen from the trial court's factual findings and conclusions of law quoted earlier, the trial court was seemingly discussing only Tracy Ahola's request for attorney fees and her behavior in the case. Indeed, when making its final conclusion with respect to attorney fees, the trial court stated it had considered "the actions of both parties." In mentioning "both parties," it is plain the trial court was considering only the actions of Tracy Ahola and plaintiff. The trial court did not mention Derek Ahola by name or reference his involvement or lack of involvement in the circumstances ultimately relied on by the trial court to reach its conclusion. Despite the failure to address Derek Ahola in its analysis, the trial court's decision awarding attorney fees only to Tracy Ahola impliedly denied Derek Ahola's requests for attorney fees. This Court has previously held that a failure to address a request for attorney fees after "multiple requests was an abuse of discretion." *Loutts v Loutts*, 298 Mich App 21, 24-25; 826 NW2d 152 (2012).

In light of the trial court's apparent failure to address Derek Ahola's requests for attorney fees as a sanction, we must remand this matter to the trial court to make a determination in the first instance. On remand, the trial court will be able to consider Derek Ahola's claims that he was not involved in Tracy Ahola's dilatory tactics, did not sign the stipulated custody and parenting-time agreement, and suffered the most damages as a result of plaintiff's fraud.

III. CONCLUSION

Affirmed in part, vacated in part, and remanded for the limited purpose of considering Derek Ahola's claim for attorney fees as a sanction. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

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to accept evidence regarding the attorney fees and make an actual conclusion regarding their calculation. Consequently, considering that the trial court has yet to rule on the issue of the actual dollar amount owed, Tracy Ahola's argument in that regard is not yet ripe for our review. See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553-554; 904 NW2d 192 (2017).