

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID DURKEE,	§	
	§	
Petitioner Below-	§	No. 276, 2004
Appellant,	§	
	§	
v.	§	Court Below---Family Court
	§	of the State of Delaware,
	§	in and for New Castle County
RHODA KIRK,	§	File No. CS02-04208
	§	Petition No. 03-14576
Respondent Below-	§	
Appellee.	§	

Submitted: October 29, 2004

Decided: January 7, 2005

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER¹

This 7th day of January 2005, upon consideration of the appellant's amended opening brief and the record below, it appears to the Court that:²

(1) The petitioner-appellant, David Durkee, filed an appeal from the Family Court's June 1, 2004 order accepting the Family Court Commissioner's December 3, 2003 decision denying Durkee's petition to set aside a judgment of paternity. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) On November 19, 2003, following the filing of Durkee's petition, a hearing was held before a Family Court Commissioner. The respondent-appellee,

¹ The Court has sua sponte assigned pseudonyms to the parties. Supr. Ct. R. 7(d).

² By Order dated September 21, 2004, the Court ordered this case to be decided on the basis of the amended opening brief and the record below.

Rhoda Kirk, and Durkee both appeared. Durkee was represented by counsel. The testimony at the hearing established the following. Durkee and Kirk met in November 2000. Kirk, who was pregnant at the time, gave birth to a daughter, Katie, in March 2001. Durkee was present at Katie's birth. After several months, Durkee moved in with Kirk and Katie.

(3) While Durkee lived with Kirk and Katie, he paid all of their living expenses, including the rent. Kirk used Durkee's credit cards to pay down certain personal debts with Durkee's permission. Durkee testified, however, that he discovered a substantial unauthorized withdrawal from his bank account and several unauthorized charges on the credit cards. When he questioned Kirk about this, she denied responsibility. Several months later, Durkee learned that, without his authorization, Kirk had opened a secondary credit card under his name. Despite knowing this, Durkee co-signed a car loan for Kirk.

(4) Durkee assisted Kirk in caring for Katie. He changed her diapers, held her and fed her. According to Durkee, Kirk was the disciplinarian and he was the one Katie went to for comfort. Even though Durkee developed affection for Katie, he knew he was not her biological father and never held himself out as such.

(5) In December 2001, the Division of Child Support Enforcement ("DCSE") sought a finding of paternity and an award of child support on behalf of

Katie against a man named “Mike,” whose name had been given to DCSE by Kirk. According to Durkee, after a child support mediation attended by Kirk and “Mike,” “Mike” threatened to seek custody of and visitation with Katie. Kirk, who had told Durkee that “Mike” was a “shady guy,” sought to have DCSE drop its lawsuit against “Mike.” On March 19, 2002, Durkee and Kirk signed an acknowledgement of paternity of Katie. Durkee did not consult an attorney or contact DCSE before doing so.

(6) The acknowledgement of paternity contained a “Notice of Rights and Responsibilities” which stated the following: “When this Acknowledgement . . . is properly signed, it conclusively establishes the man’s paternity of this child, unless either parent . . . rescinds the acknowledgement within 60 days of when it was signed.” It also stated: “This Acknowledgement establishes the duty of both parents to support the child. Based on this Acknowledgement the Court may order either parent to pay child support” Finally, it stated the following in bolded capital letters: **“IF EITHER OF YOU IS NOT ABSOLUTELY SURE THAT THIS MAN IS THE BIOLOGICAL FATHER OF THIS CHILD, YOU SHOULD NOT SIGN THIS ACKNOWLEDGEMENT OF PATERNITY.”** In addition, above the signature line where Durkee signed his name, there was an

acknowledgement that the signer is the biological father of the child, that he accepts responsibility for child support and that he waives genetic testing.

(7) After completing the acknowledgement of paternity, Durkee and Kirk hand delivered it to the Family Court in Georgetown, Delaware. The document then was filed with the Delaware Office of Vital Statistics. Subsequently, DCSE dropped its lawsuit against “Mike.” Durkee testified that he signed the acknowledgement of paternity because Kirk told him that was the only way DCSE would drop its lawsuit against “Mike.” He also testified that Kirk stated she would never seek child support from him on behalf of Katie.

(8) In the fall of 2002, Durkee and Kirk ended their relationship and Durkee moved out of their residence. According to Durkee, Kirk told him not to contact Katie any more. In January 2003, Durkee was served with a petition for child support that Kirk filed on behalf of Katie. In September 2003, Durkee, who was represented by counsel, requested discovery from Kirk regarding the identification of Katie’s biological father. In October 2003, the Family Court ordered Kirk to comply with the discovery request. However, Kirk represented that she was unable to recall “Mike’s” last name. No further action was taken with respect to this issue by either the Family Court or the parties.

(9) On December 3, 2003, the Commissioner issued an order dismissing Durkee's petition to set aside a judgment of paternity on the basis that the acknowledgement of paternity had not been rescinded in a timely manner, there was no evidence that a fraud had been perpetrated on Durkee, and there was no evidence that Durkee had signed the acknowledgement of paternity under duress. On June 1, 2004, the Family Court issued an order accepting the order of the Commissioner.

(10) In this appeal, Durkee claims that the Commissioner erred by: a) failing to provide "Mike" with notice of the petition to set aside the judgment of paternity and make him a party to the proceedings; b) failing to nullify the fraudulently-obtained judgment of paternity; and c) finding that Durkee's decision to acknowledge paternity was not the result of undue influence by Kirk. Durkee further claims that the Family Court erred and abused its discretion by accepting the Commissioner's order.

(11) The Family Court reviews *de novo* those portions of a Commissioner's order to which objection is made and may accept, reject or modify the order in whole or in part, and may receive further evidence or remand the matter to the Commissioner with instructions.³ This Court's review of appeals

³ Del. Code Ann. tit. 10, § 915(d) (1); Fam. Ct. Civ. Proc. R. 53.1 (e).

from the Family Court extends to review of the facts and the law.⁴ If the Family Court has applied the law correctly, the standard of review is abuse of discretion.⁵

(12) The governing statute makes clear that an acknowledgement of paternity, such as the one signed by the parties in this case,⁶ “shall be final, binding, conclusive and determinative of the child’s paternity for all purposes, unless timely rescinded . . . [within] 60 days from the date on which an acknowledgement of paternity was signed by the parents. . . .”⁷ The statute further states that in the absence of a timely rescission, an acknowledgement of paternity may be set aside only upon a finding of fraud, duress or material mistake of fact.⁸

(13) The language of the governing statute does not support Durkee’s first claim that the individual named “Mike” had to be made a party to the proceedings on Durkee’s petition to set aside the acknowledgement of paternity. To the contrary, the only issues to be determined in the proceedings were whether there was a timely rescission, and, if not, whether the acknowledgement of paternity should be set aside due to fraud, duress or material mistake of fact.

(14) Durkee’s other two claims are also without merit. We have reviewed carefully the record in this case, including the transcript of the hearing before the

⁴ *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

⁵ *Jones v. Lang*, 591 A.2d 185, 186 (Del. 1991).

⁶ Del. Code Ann. tit. 13, § 804(a) (5) (1999).

⁷ Del. Code Ann. tit. 13, § 804(c) (1999).

⁸ *Id.*

Commissioner, the Commissioner's order and the Family Court's order accepting the order of the Commissioner. The Commissioner's determination that there was no basis upon which to set aside the acknowledgement of paternity was clearly supported by the evidence presented at the hearing.⁹ Moreover, there was no error or abuse of discretion by the Family Court in accepting that determination.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁹ *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d at 1204.