

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1074

FREDERICK A. MILLER

VERSUS

MAGDA J. MILLER

Consolidated With

2011 CA 1075

FREDERICK A. MILLER

VERSUS

MAGDA J. MILLER

Judgment Rendered: DEC 21 2011

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2000-15008 c/w 2001-12624

Honorable Mary Devereaux, Judge Presiding

Cynthia Mauroner Petry
Covington, Louisiana
and
Leslie A. Bonin
New Orleans, Louisiana

Counsel for Plaintiff/Appellant
Frederick A. Miller

Suellen Richardson
Covington, Louisiana
and
Gerald Wasserman
Leonard M. Berins
Metairie, Louisiana

Counsel for Defendant/Appellee
Magda J. Miller

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Handwritten signatures in black ink, including what appears to be 'F.A. Miller', 'M.J. Miller', and several other names, likely representing the parties and their legal counsel.

McCLENDON, J.

Plaintiff-appellant appeals a judgment dismissing his rule to modify spousal support on the sustaining of defendant-appellee's peremptory exception raising the objection of no cause of action. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Frederick Miller and Magda Miller were divorced in 2001. They subsequently entered into a consent judgment, which was signed by the trial court in September 2002, that resolved various custody, visitation, and support matters. Among the terms of the judgment were Ms. Miller's agreement to waive spousal support and Mr. Miller's agreement to maintain Ms. Miller and the couple's children on a term life insurance policy in force at the time of the judgment. With regard to the life insurance, the agreement provided:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff, Frederick A. Miller, shall maintain Defendant, Magda J. Miller, and the children...as the beneficiary of life insurance proceeds on his life in the amounts presently designated.... If and when Defendant, Magda J. Miller, remarries, Plaintiff, Frederick [A.] Miller, shall have no further legal obligation to maintain her as beneficiary and if he chooses not to, then the amount of life insurance proceeds to which Defendant, Magda J. Miller, was entitled shall be split between the children....

On March 4, 2010, Mr. Miller filed a "Rule to Modify Judgment," alleging that a change in circumstances had occurred since the consent judgment had been entered. In light of the alleged change in circumstances, Mr. Miller requested "that he no longer be required to maintain [Ms. Miller] as a beneficiary on the term life policy."

In response, Ms. Miller filed a peremptory exception raising the objection of no cause of action, asserting that the insurance policy was "to remain in effect until and unless Ms. Miller decided to re-marry" and because Ms. Miller had not remarried, Mr. Miller had no cause of action based on a "change in circumstances." Ms. Miller also asserted that the insurance policy was not intended as a form of spousal support so any reference to a change in circumstances is irrelevant. Mr. Miller disputes this assertion.

After a hearing, the trial court sustained the exception and dismissed Mr. Miller's rule. Mr. Miller has appealed, alleging that the trial court erred in sustaining Ms. Miller's peremptory exception raising the objection of no cause of action in connection with his "Rule to Modify Judgment."

DISCUSSION

The peremptory exception raising the objection of no cause of action is a procedural device used to test the legal sufficiency of the petition. Unlike a motion for summary judgment, in making the determination on an exception of no cause of action, all well-pleaded allegations of fact in the petition must be accepted as true, and no reference can be made to extraneous supportive or controverting evidence. The court must then determine whether the law affords any relief to the claimant if those factual allegations are proven at trial. If the allegations of the petition state a cause of action as to any part of the demand, the exception must be overruled. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that plaintiff can prove no set of facts in support of any claim which would entitle him to relief. **Pelts and Skins, L.L.C. v. Louisiana Dept. of Wildlife and Fisheries**, 05-0952, p. 8 (La.App. 1 Cir. 6/21/06), 938 So.2d 1047, 1052-53, writ denied 06-1821 (La. 10/27/06), 939 So.2d 1281. The question therefore is whether, in the light most favorable to plaintiff, with every doubt resolved in his favor, the petition states any valid cause of action for relief under any evidence admissible under the pleadings. **Pelts and Skins, L.L.C.**, 05-0952 at p. 8, 938 So.2d at 1053.

However, even in the most favorable light, we cannot ignore the clear language of the consent judgment, which Mr. Miller seeks to modify and which the parties do not dispute. With respect to spousal support, the Louisiana Civil Code provides, in Article 114, that "[a]n award of periodic support may be modified if the circumstances of either party materially change and shall be terminated if it has become unnecessary."¹ An exception exists where the

¹ Mr. Miller avers that his ongoing payments for insurance benefitting Ms. Miller by its very nature is a form of spousal support, and his agreement to maintain her as beneficiary on the

consent judgment contains a non-modification provision. **Bland v. Bland**, 97-0329, p. 5 (La.App. 1 Cir. 12/29/97), 705 So.2d 1158, 1161. Despite Mr. Miller's assertion that judgment omitted the end date for this particular aspect of the court's order, the clear language of the consent judgment provided for termination of the provision at issue only upon Ms. Miller's remarriage. Accordingly, because the consent judgment contained a non-modification provision addressing the provision's duration, Mr. Miller cannot alter the provision's duration based on an alleged material change in circumstances. Accordingly, Mr. Miller's assignment of error is without merit.

CONCLUSION

In light of the foregoing, the trial court's judgment signed August 4, 2010, sustaining Ms. Miller's peremptory exception raising the objection of no cause of action is affirmed. Costs of this appeal are assessed to appellant, Frederick Miller.

AFFIRMED.

policy was intended as security for spousal support. Although Ms. Miller avers that these payments do not constitute a form of spousal support, on the exception of no cause of action, we must resolve such doubt in petitioner's favor.