

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1864

NOLAN WINFIELD MILLER

VERSUS

DIANA GAYLE MILLER

Judgment Rendered: JUN 15 2007

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket No. 2005-0003937

Honorable M. Douglas Hughes, Judge

Carol E. Parker
Ponchatoula, LA

Counsel for
Plaintiff-Appellant
Nolan Winfield Miller

Vanessa R. Williams
Hammond, LA

Counsel for
Defendant/Appellee
Diana Gayle Miller

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J. concurs and assigns reasons. by [signature]
McClendon, J. concurs for the reasons assigned by Judge Parro
[signature]

GUIDRY, J.

A presumptive father appeals a judgment of the trial court dismissing his petition to disavow paternity as prescribed. Finding no error in the judgment appealed, we affirm.

FACTS AND PROCEDURAL HISTORY

Nolan Winfield Miller and Diana Gayle Miller were married in 1990, establishing their matrimonial domicile in Tangipahoa Parish. Mrs. Miller gave birth to a daughter in September 2004. In February 2005, Mrs. Miller admitted to engaging in an extramarital affair in February 2004, for which the couple sought counseling from their minister and Mr. Miller forgave her. In September 2005, the couple separated. Following the separation, Mr. Miller filed a "Petition for Custody and Injunction," wherein he sought a judgment of joint custody of the couple's minor child with established periods of visitation. Mr. Miller also requested that the judgment enjoin Mrs. Miller from having members of the opposite sex to whom she was neither married nor related by blood from staying overnight during the times she had physical custody of the minor child and to enjoin her from relocating outside of the state of Louisiana with the minor child.

In response to the petition, Mrs. Miller filed an "Answer and Reconventional Demand," wherein she admitted that the parties had separated in September 2005 and that she had engaged in one extramarital affair for which Mr. Miller had forgiven her after the couple had received counseling from their minister. She reconvened against Mr. Miller to request sole custody of their daughter based on Mr. Miller's itinerant employment as a cross country truck driver and allegations that Mr. Miller had molested both Mrs. Miller's daughter from a previous relationship and Mrs. Miller's niece. Mrs. Miller further requested a divorce pursuant to La. C.C. art. 102; child support; alimony; and an injunction to prohibit Mr. Miller from disposing of, alienating, or encumbering community property, from harassing, threatening, abusing or attempting to intimidate Mrs. Miller, and

from contacting Mrs. Miller except about matters directly related to their minor daughter.

By an order signed January 3, 2006, the trial court issued a preliminary injunction enjoining Mr. Miller from adversely disposing of any community property and further enjoining Mr. Miller from harassing, threatening, or intimidating Mrs. Miller or contacting her except about matters directly related to the minor child. The trial court further ordered that Mr. Miller appear and show cause why the additional requests made by Mrs. Miller in her reconventional demand should not be granted. Thereafter, on March 20, 2006, Mr. Miller filed a petition to disavow paternity of the couple's minor daughter, wherein he alleged that Mrs. Miller had falsely represented to him that their minor child was his biological daughter.

A hearing on the petition to disavow was held on May 8, 2006. Following the hearing, the trial court dismissed Mr. Miller's petition to disavow paternity as being prescribed, and Mr. Miller has appealed that ruling herein.¹

DISCUSSION

In this appeal, Mr. Miller requests that this court reverse the trial court's judgment dismissing his petition to disavow and remand the matter to the trial court with instructions to order and receive blood or DNA testing regarding proof of paternity. We deny Mr. Miller's requests.

At the time of the daughter's birth, the husband of the mother was presumed to be the father of a child born during the marriage. La. C.C. art. 184.² The husband may disavow paternity of the child by clear and convincing evidence that

¹ Mr. Miller filed a motion and order for appeal on June 7, 2006, following the trial court's ruling in open court dismissing his petition to disavow paternity. The trial court later signed a written judgment dismissing Mr. Miller's petition to disavow paternity on October 12, 2006.

² Articles 178 through 211 of the Louisiana Civil Code of 1870 were revised, amended, and reenacted by 2005 La. Acts, No. 192, §1, to consist of Articles 184 through 198, effective June 29, 2005; however, Section 3 of Act 192 sets forth that "[t]he provision of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date." Therefore, all further references will be to the applicable codal articles affected by Act 192.

he is not the father pursuant to La. C.C. art. 187; however, an action to disavow paternity is subject to a liberative prescriptive period of one year that commences to run from the day the husband learns or should have learned of the birth of the child. La. C.C. art. 189. As such, the prescriptive period for bringing a disavowal of paternity action is subject to both suspension and interruption. La. C.C. art. 189, Revision Comments – 2005, comment (a); see also La. C.C. arts. 3462-3472.

On the face of Mr. Miller's petition to disavow paternity, filed on March 20, 2006, the matter was prescribed, having been filed more than one year after the birth of the child sought to be disavowed.³ Moreover, there is no evidence in the record before us that would support maintaining the action to disavow paternity. Mr. Miller relies on former La. R.S. 9:305⁴ to support his contention that his action to disavow paternity has not prescribed. Paragraph A of that statute provided:

Notwithstanding the provisions of Civil Code Art. 189 and for the sole purpose of determining the proper payor in child support cases, if the husband, or legal father who is presumed to be the father of the child, erroneously believed, because of misrepresentation, fraud, or deception by the mother, that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief or for ten years, whichever ends first.

Based on the evidence in the record before us, there was no proof presented by Mr. Miller proving misrepresentation, fraud, or deception by Mrs. Miller. Rather, Mr. Miller acknowledged at trial that he had unprotected sex with his wife during the time of the minor child's conception, which was around January 2004. He further admitted that his wife had confessed in 2005 to having an affair in February 2004, which would have presumably been after she was already pregnant with the couple's child. According to the pleadings filed by the parties, Mrs.

³ Normally, it is the exceptor who must prove the action is barred by prescription; however, when the petition reveals prima facie that the claim has prescribed, the burden shifts to the plaintiff to demonstrate suspension or interruption of the prescriptive period. Allen v. State, 05-1076, p. 3 (La. App. 1st Cir. 5/5/06), 934 So. 2d 172, 174, writ denied, 06-1218 (La. 9/15/06), 936 So. 2d 1272.

⁴ Repealed by 2006 La. Acts, No. 344, § 7, effective June 13, 2006.

Miller's responses to interrogatories propounded to her by Mr. Miller, and Mr. Miller's trial testimony, Mr. Miller was made aware of Mrs. Miller's extramarital affair in February 2005. Further, Mr. Miller testified that Mrs. Miller never told him that the minor child was not his child and that he believed the child to be his biological child.

Thus, based on the evidence presented, Mr. Miller's petition to disavow paternity was prescribed because it was not brought within one year of the child's birth as required by La. C.C. art. 189. Additionally, Mr. Miller failed to prove that he "erroneously believed" he was the father of the minor child; hence, he failed to show that the prescriptive period of Article 189 was suspended pursuant to the provisions of former La. R.S. 9:305. See Gallo v. Gallo, 03-0794, p. 10 (La. 12/3/03), 861 So. 2d 168, 175.⁵ Accordingly, we find no error in the trial court's dismissal of Mr. Miller's petition to disavow paternity.

CONCLUSION

We affirm the judgment of the trial court dismissing Mr. Miller's petition to disavow paternity. All costs of this appeal are cast to the appellant, Nolan Winfield Miller.

AFFIRMED.

⁵ It should be observed that at the time the Gallo decision was rendered, the time period for bringing a disavowal action pursuant to Article 189 was interpreted as being preemptive; however, Article 189 was expressly amended by 2005 La. Acts, No. 192, § 1 (effective June 29, 2005), to make the time period prescriptive.

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WHP
by
[Signature]
PARRO, J., concurring.

When Mr. Miller filed his petition to disavow paternity, LSA-R.S. 9:305(A) provided:

Notwithstanding the provisions of Civil Code Art. 189 and for the sole purpose of determining the proper payor in child support cases, if the husband, or legal father who is presumed to be the father of the child, erroneously believed, because of misrepresentation, fraud, or deception by the mother, that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief or for ten years, whichever ends first.

For LSA-R.S. 9:305(A) to apply, there must first be some evidence that the child in question is **not** the child of the presumptive father. Once this threshold issue is satisfied, the presumptive father must prove that he "erroneously believed" that the child was his as a result of "misrepresentation, fraud, or deception by the mother." If these elements of the presumptive father's burden of proof are met, the court must determine whether the time for filing a suit for disavowal of paternity has prescribed pursuant to the provisions of former LSA-R.S. 9:305(A).

Based on the record before us, Mr. Miller failed to present any evidence that he believed he was not the father of the child, but on the contrary, he testified that he believed the child to be his biological child. Under these circumstances, it is my belief that Mr. Miller cannot resort to the provisions of LSA-R.S. 9:305(A) at this time. Since he did not file a disavowal action timely pursuant to the provisions of LSA-C.C. art. 189, I respectfully concur with the majority opinion.