

2014 IL App (2d) 131154-U
No. 2-13-1154
Order filed November 20, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
SCOTT FLYNN,)	of Stephenson County.
)	
Petitioner-Appellant,)	
)	
and)	No. 00-D-231
)	
HEIDI FLYNN,)	
)	
Respondent-Appellee)	Honorable
)	Theresa L. Ursin,
(Dan Bauldauf, Intervenor).)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied, as untimely, petitioner's petitions to declare the nonexistence of a parent-child relationship (under the Parentage Act of 1984 and section 2-1401 of the Code of Civil Procedure): evidence supported the court's finding that petitioner knew more than two years earlier that he might not be the child's father, and his knowledge defeated his contention that respondent fraudulently concealed any relevant facts.

¶ 2 Petitioner, Scott Flynn, appeals, *pro se*, from a judgment of the circuit court of Stephenson County denying as untimely his petition to contest paternity and his petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Because

both petitions were untimely, and there was no basis for tolling the limitations period for the section 2-1401 petition, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On April 9, 1999, petitioner married respondent, Heidi Flynn. Prior to the marriage, they had a daughter. On July 14, 1999, a second daughter, Kelsie,¹ was born. In September 2001 their marriage was dissolved. The judgment of dissolution provided that petitioner and respondent would have joint custody of, and petitioner would pay child support for, the two children.

¶ 5 On February 4, 2011, petitioner filed a petition to contest paternity, alleging that he is not the natural father of Kelsie. In August 2011, petitioner took a DNA test. Respondent and Kelsie did so in January 2012. The January 13, 2012, test results established that petitioner was not Kelsie's biological father.

¶ 6 In October 2012, petitioner filed an "amended petition to contest paternity *** [and for] relief from judgment" in which he additionally relied on section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2010)). He alleged that the two-year limitations period for his section 2-1401 petition should be tolled because respondent fraudulently concealed facts related to Kelsie's paternity, such that he did not know that he was not her father until less than two years before he filed the petition.

¶ 7 On January 13, 2013, Dan Bauldauf filed a motion to intervene. In that motion, Bauldauf alleged that he had been subpoenaed and had given a deposition "because Heidi Flynn and Scott Flynn are both of the impression that [he] is the [f]ather of [Kelsie]." The trial court granted

¹ Although the report of proceedings refers to this daughter as Kelsey, we will use the spelling of Kelsie as set forth in the judgment of dissolution.

Bauldauf leave to intervene.

¶ 8 On September 5, 2013, the trial court conducted an evidentiary hearing on petitioner's amended petition. According to petitioner, respondent was pregnant when they were married, and Kelsie was born during the marriage. Petitioner married respondent only so that Kelsie could be claimed on his health insurance.

¶ 9 According to petitioner, after the divorce, respondent made a series of false accusations against him and also told him several lies. She falsely reported to the Department of Children and Family Services that he was abusing and neglecting the children when they visited him, and she also sought several unfounded orders of protection against him. She lied about having terminal cancer and on several occasions called him at work and falsely told him that the children were seriously ill.

¶ 10 Petitioner admitted that he had a telephone conversation with Bauldauf's wife, Brooke, regarding Kelsie's paternity. He could not recall when that was. According to petitioner, he had heard rumors that he might not be Kelsie's biological father, but his attorney told him that the rumors were hearsay and that he would be considered her father "unless [he had] some kind of solid proof" that he was not. He interpreted solid proof to mean DNA testing. He could not remember the time frame in which he heard the rumors. He denied that respondent ever told him that he was not Kelsie's father. He denied knowing that Kelsie was not his child before the DNA testing.

¶ 11 Jeremy Flynn, petitioner's brother, testified that, approximately 10 years before the hearing, he had a telephone conversation with petitioner regarding Kelsie's paternity. According to Jeremy, petitioner told him that respondent had said that Kelsie "might not be his child."

¶ 12 Brooke Bauldauf testified that she had a telephone conversation with petitioner in July

2003, after she had heard rumors that her husband might be Kelsie's father. Petitioner told her that he had heard similar rumors. He also stated that he was "well aware that Kels[ie] was not his child because he and his wife *** had not had sexual relations during the time that she became pregnant with Kels[ie]." According to Brooke, petitioner was "very well aware that Kels[ie] was not his child." Petitioner told her that, regardless of any paternity tests, he was always going to be Kelsie's father. Brooke never again discussed Kelsie's paternity with petitioner.

¶ 13 On October 22, 2013, the trial court entered a written order. The court ruled that petitioner had not timely filed his petition to contest paternity. In doing so, the court found that, because petitioner, more than two years before he filed the petition, had obtained knowledge of facts relevant to his claim that he was not Kelsie's father, the petition was untimely. The court also found that there was no proof of fraudulent concealment sufficient to toll the limitations period applicable to the section 2-1401 petition. Therefore, the court denied both claims without ruling on the merits. Petitioner filed a timely notice of appeal. Neither respondent nor Bauldauf has filed a brief.

¶ 14

II. ANALYSIS

¶ 15 On appeal, petitioner contends, *pro se*, that the trial court erred in deeming his petition untimely and denied him due process by not allowing him to submit evidence that he was not Kelsie's father. He further maintains that, had the court ordered DNA testing earlier in the proceedings, his petitions would have been timely.

¶ 16 Section 8(a)(3) of the Illinois Parentage Act of 1984 (Act) provides, in relevant part, that an action to declare the nonexistence of a parent-child relationship under section 7 of the Act (750 ILCS 45/7 (West 2010)), shall be barred if brought more than two years after the petitioner

“obtains knowledge of relevant facts.” 750 ILCS 45/8(a)(3) (West 2010). Section 7(b) of the Act provides that a man presumed to be the father of a child may bring an action to declare the nonexistence of the parent-child relationship. 750 ILCS 45/7(b) (West 2010). A man is presumed to be the natural father of a child if the child was born or conceived during a marriage to the child’s natural mother. 750 ILCS 45/5(a)(1) (West 2010).

¶ 17 Here, petitioner was the presumed father of Kelsie within the meaning of section 5(a)(1) of the Act, as she was born during his marriage to respondent, her natural mother. Consequently, his petition to contest paternity was necessarily brought pursuant to section 7(b) of the Act. As such, the applicable limitations period expired two years after he knew that he might not be Kelsie’s natural father.

¶ 18 Knowledge of relevant facts that triggers the two-year limitations period is not limited to the receipt of DNA test results. *In re the Parentage of H.L.B.*, 2012 IL App (4th) 120437, ¶ 32. Rather, the two-year limitations period can be triggered by obtaining such knowledge from any reasonably reliable source. *In re Parentage of H.L.B.*, 2012 IL App (4th) 120437, ¶ 32.

¶ 19 In this case, the evidence clearly supported the trial court’s finding that petitioner, more than two years before he filed his petition to contest paternity, knew that he might not be Kelsie’s father. See *In re Marriage of Charles*, 284 Ill. App. 3d 339, 342 (1996) (findings of fact may be reversed only if against the manifest weight of the evidence). Brooke testified unequivocally that she had spoken to petitioner on the telephone in 2003 and that he had acknowledged that he was aware of the rumors that he was not Kelsie’s father. More importantly, during that conversation, petitioner told Brooke that he was well aware that he was not Kelsie’s father, as he and respondent had not had sex during the time frame of conception.² That evidence alone was

² We note that respondent, although not sworn as a witness at the hearing, stated to the

sufficient for the trial court to find that in 2003 petitioner had knowledge of relevant facts that triggered the running of the two-year limitations period. See *In re Marriage of Johnson*, 206 Ill. App. 3d 992, 995 (1990) (husband's absence from the country during the conception period constituted knowledge of relevant facts as to whether he was the child's father).

¶ 20 Additionally, petitioner's brother testified that, when he spoke to petitioner on the phone approximately 10 years before the hearing (sometime in 2003), petitioner stated that respondent had told him that Kelsie might not be his child. That evidence further supported the trial court's finding that in 2003 petitioner knew of facts relevant to the question of Kelsie's paternity.

¶ 21 Petitioner contended that any knowledge he acquired from respondent, that he might not be Kelsie's father, was suspect because of the purported lies she told him and false accusations she made after the dissolution of their marriage. Assuming that respondent engaged in such behavior, petitioner did not explain why he nonetheless believed that Kelsie might not be his daughter. Any dishonesty by respondent did not affect the import of the statements he made to Brooke and his brother regarding his belief that he might not be Kelsie's father. When he made those statements in 2003 he was fully aware of respondent's alleged propensity for lying and making false accusations. Notwithstanding that knowledge, he expressed his belief to both Brooke and his brother that he might not be Kelsie's father. More importantly, according to

court that she and petitioner had sex during the time period of conception. The trial court essentially responded that her unsworn and spontaneous statement was not evidence properly before the court. We agree. Even if it were, it did not refute the reason behind petitioner's statement to Brooke that he and respondent did not have sex during that time. Petitioner did not make the statement to show that he and respondent in fact did not have sex, but rather he made it to substantiate what he believed as to whether Kelsie was his child.

Brooke, petitioner questioned whether he was Kelsie's father based on community rumors and the fact that he had not had sex with respondent during the time of conception. Those sources of knowledge were independent of anything respondent said or did. Therefore, his reliance on respondent's purported dishonesty was misplaced, and the trial court justifiably rejected it.

¶ 22 Petitioner also pointed to advice from his former attorney to explain why he did not pursue the question of Kelsie's parentage earlier. In that regard, he testified that his attorney told him that rumors and hearsay would not help him in court if he challenged the paternity of Kelsie and that he needed solid proof. Assuming the truth of petitioner's testimony in that regard, such advice should have prompted him to seek more concrete evidence such as blood or DNA testing. See *In re Marriage of Johnson*, 206 Ill. App. 3d at 996 (advice of counsel that husband was not entitled to contest paternity did not override his knowledge that he was not the father). In fact, according to petitioner, he considered solid proof to mean DNA testing, but he offered no reason why he did not pursue such testing at that time. There is no evidence in the record that he did so until 2011. Rather than seeking more evidence regarding Kelsie's paternity, petitioner continued to act as though he was Kelsie's father for several years thereafter.

¶ 23 Although petitioner denied that he had any knowledge of relevant facts before the DNA test results in 2012, the evidence showed otherwise. Petitioner has identified no reason on appeal to disturb the trial court's findings in that regard. Because the evidence supported the court's finding that petitioner knew of facts relevant to his claim that he was not Kelsie's father more than two years before he filed his petition to contest paternity, the petition was barred by the two-year statute of limitations in section 8(a)(3) of the Act.

¶ 24 Petitioner alternatively relied on section 2-1401(c) in seeking to set aside that portion of the dissolution judgment pertaining to his parental obligations to Kelsie. A section 2-1401

petition allows a party to challenge a final judgment more than 30 days after its entry by alerting the court to issues of fact outside the record that, if known when the judgment was entered, would have affected the judgment. *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004). Such a petition generally may not be brought more than two years after entry of the judgment. *In re Marriage of Morreale*, 351 Ill. App. 3d at 241. The two-year limitations period is tolled, however, for the “[t]ime during which *** the ground for relief is fraudulently concealed.” 735 ILCS 5/2-1401(c) (West 2010).

¶ 25 Petitioner contended that respondent fraudulently concealed that he was not Kelsie’s father by acting as though he was during the dissolution proceedings and thereafter. That alone was insufficient to constitute fraudulent concealment. Even if respondent did not reveal during the dissolution proceedings or thereafter that petitioner was not Kelsie’s father, there was no evidence to show that petitioner was actually deceived by the purported fraud. Moreover, the evidence showed that petitioner was anything but deceived. Indeed, petitioner’s acknowledgement to Brooke that he knew he was not Kelsie’s father, because he and respondent had not had sex during the conception time frame, and his statement to his brother that respondent had said that he might not be the father, were entirely inconsistent with his current claim that he was hoodwinked by respondent. Because petitioner failed to show that there was any fraudulent concealment that prevented him from filing his section 2-1401 petition within the two-year limitations period, the trial court correctly denied him relief on that basis.

¶ 26 We also reject petitioner’s contention that he was denied due process because the trial court refused to allow him to submit evidence that he was not in fact Kelsie’s father. That argument lacks merit, because his petitions were not denied on the basis of paternity. Instead, they were denied because they were untimely. Because the court never had occasion to reach the

merits, such evidence was not material to its disposition. Thus, petitioner was not denied due process. See *People v. White*, 257 Ill. App. 3d 405, 414 (1993) (exclusion of immaterial evidence does not constitute denial of due process).

¶ 27 Petitioner further contends that, had the trial court ordered DNA testing earlier in the proceedings, his petitions would have been timely. This contention is irrelevant. The trial court was not required to help petitioner pursue his doubts about Kelsie's paternity. Petitioner could have taken a DNA test at any time, as he ultimately did. Further, and in any event, he could have filed his petitions without one.

¶ 28 Although the result in this case might seem harsh, had petitioner timely acted on his knowledge that he might not be Kelsie's father, he would have had the opportunity to obtain the relief he now seeks. Instead, he opted to continue to treat Kelsie as his daughter. Perhaps he did so because, as he told Brooke, regardless of any paternity testing "he was always going to be Kels[ie]'s father." It is simply too late for him to challenge his own statement.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Stephenson County denying petitioner's petitions to contest paternity and for relief under section 2-1401.

¶ 31 Affirmed.