

**Affirmed and Memorandum Opinion filed January 5, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-08-00778-CV**

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**LARRY ALEXANDER, Appellant**

**V.**

**TIFFANY JOHNSON, Appellee**

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**On Appeal from the 311th District Court  
Harris County, Texas  
Trial Court Cause No. 2007-46912**

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**M E M O R A N D U M   O P I N I O N**

Appellant, Larry Alexander, appeals from an order denying his petition for bill of review to set aside a default order in a suit affecting the parent-child relationship (“default SAPCR order”). The default SAPCR order appointed appellant possessory conservator of J.A., a child, and ordered appellant to pay child support. In two issues, appellant contends that he was entitled to bill-of-review relief because he was fraudulently induced to sign an acknowledgment of paternity (“AOP”), preventing him from presenting a meritorious defense to the trial court’s default SAPCR order.

## I. BACKGROUND

Appellant and appellee, Tiffany Johnson, had a dating relationship in 2004. On March 25, 2005, appellee gave birth to J.A. The following day, on March 26, 2005, appellant executed an acknowledgment of paternity that he was J.A.'s father.<sup>1</sup> The couple's relationship ended thereafter, and in 2006, appellant initiated SAPCR proceedings seeking custody of J.A.

### A. 2006 SAPCR Proceedings

In February 2006, appellant filed a suit affecting parent-child relationship requesting that he be appointed J.A.'s managing conservator; appellee challenged appellant's petition by filing a countersuit. Although appellant initiated the SAPCR suit to establish and protect his conservatorship rights to J.A., appellant later changed his position, petitioning the court for voluntary relinquishment and termination of his parental rights. On October 30, 2006, the trial court held a final hearing on the parties' petitions. Appellee appeared with counsel, but appellant failed to appear in person or by counsel. The trial court found appellant in default and proceeded with the final hearing in his absence.

On December 1, 2006, the trial court signed the default SAPCR order appointing appellee sole managing conservator of J.A. and appellant possessory conservator. The default SAPCR order also compelled appellant to pay child support. Thereafter, appellant attempted to challenge the default SAPCR order by filing a petition for bill of review.<sup>2</sup>

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<sup>1</sup> See Tex. Fam. Code § 160.301 ("A mother of a child and a man claiming to be the biological father of the child may sign an acknowledgment of paternity with the intent to establish the man's paternity."). A valid AOP "is the equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent." *Id.* § 160.305.

<sup>2</sup> In his petition for bill of review, appellant claimed that he filed a motion for new trial after rendition of the default SAPCR order, but the motion for new trial was denied.

### ***B. 2007 Bill of Review Proceedings***

On August 6, 2007, appellant filed a petition for bill of review; he alleged that appellee fraudulently induced him to sign the AOP and misled him to believe that he was J.A.'s father when in fact he was not. Appellant claimed that he was entitled to bill-of-review relief and requested that the default SAPCR order be set aside and the AOP rescinded. The trial court held a hearing on appellant's petition. At the bill of review hearing, appellant testified that although he signed the AOP and although he initiated the SAPCR proceeding seeking custody of J.A., he later doubted his paternity, and his request for genetic testing was refused by the trial court. Appellant further testified that he was unable to attend the October 2006 SAPCR hearing because he was working offshore and was assured by his counsel at the time that he would appear on appellant's behalf and would secure a continuance. At the conclusion of the hearing, the trial court denied appellant's petition, dismissed the bill of review, and signed an order memorializing its ruling.

Appellant now appeals the trial court's bill-of-review order denying the petition. In two issues, appellant contends that the trial court erred by denying his petition for bill of review because: (1) appellant was "denied the opportunity to take a paternity test which would be a meritorious defense [to] the judgment"; (2) appellee "denied appellant the right to take a paternity test"; and (3) appellant was denied the opportunity to raise the meritorious defense at no fault or negligence of his own.

## **II. STANDARD OF REVIEW**

A bill of review is an equitable proceeding to set aside a judgment that is not void on the face of the record, but is no longer appealable or subject to a motion for new trial. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. *Chapman*, 118 S.W.3d at 751;

*Alexander v. Hagedorn*, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (1950). Accordingly, a party petitioning for a bill of review must plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) that the petitioner was prevented from making by the fraud, accident, or wrongful act of his opponent, and (3) the petitioner was not negligent. *Chapman*, 118 S.W.3d at 751–52. Furthermore, only “extrinsic fraud” will support a bill of review and entitle a petitioner to relief. *See Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989); *Nelson v. Chaney*, 193 S.W.3d 161, 165 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Extrinsic fraud is wrongful conduct practiced outside of the adversary trial that affects the manner in which the judgment was procured and prevents a litigant from having a fair opportunity to assert his rights at trial. *See Browning v. Prostock*, 165 S.W.3d 336, 347 (Tex. 2005); *Tice*, 767 S.W.2d at 702; *Nelson*, 193 S.W.3d at 165. Conversely, intrinsic fraud relates to matters that could have been litigated in the initial action, including fraudulent instruments and perjured testimony. *See Browning*, 165 S.W.3d at 347–48.

In reviewing the denial of a bill of review, every presumption is indulged in favor of the court’s ruling, which will not be disturbed unless it is affirmatively shown that there was an abuse of judicial discretion. *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The trial court abuses its discretion when it rules in an unreasonable or arbitrary manner, or without reference to any guiding rules or principles. *Id.*

### III. ANALYSIS

To succeed on a bill of review, the petitioner must first allege, with particularity, sworn facts sufficient to constitute a meritorious defense. *In re Office of Attorney Gen.*, 276 S.W.3d 611, 618 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding). Once a petitioner has pleaded with specificity his meritorious defense, he then, as a pretrial matter, must present prima facie proof of the meritorious defense. *Id.* A petitioner meets the requirement of presenting prima facie proof of a meritorious defense when he proves

that (1) his defense is not barred as a matter of law, and (2) he will be entitled to judgment on retrial if no evidence to the contrary is offered. *Baker v. Goldsmith*, 582 S.W.2d 404, 408–09 (Tex. 1979); *In re Office of Attorney Gen.*, 276 S.W.3d at 618. Determination of whether a bill-of-review petitioner has made a prima facie showing of a meritorious claim or defense is a question of law we review *de novo*. *Baker*, 582 S.W.2d at 409; *In re Office of Attorney Gen.*, 276 S.W.3d at 618; *Ramsey v. State*, 249 S.W.3d 568, 574 (Tex. App.—Waco 2008, no pet).

Appellant averred in his verified petition that he was not J.A.’s father, and such fact constituted a meritorious defense. At the bill of review hearing, appellant testified that he believed he was not J.A.’s father because shortly after the child’s birth, appellee ejected him from their home. Appellant also testified that he believed he was not J.A.’s father because appellee was regularly taking birth control at the time of her pregnancy. Appellant further testified that the trial court denied him the opportunity to prove his meritorious defense by denying his request for genetic testing.

In determining whether appellant has made a prima facie showing of a meritorious defense to the default SAPCR order, we start with the AOP because it adjudicated appellant’s paternity and serves basis for the default SAPCR order. *See* Tex. Fam. Code § 160.305(a). Subchapter D of the Texas version of the Uniform Parentage Act governs voluntary acknowledgment of paternity. *See id.* §§ 160.301–.316. Under subchapter D, the mother and a man claiming to be the biological father of a child may sign an AOP with intent to establish the man’s paternity. *Id.* § 160.301. An AOP must:

- (1) be in a record;
- (2) be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity;
- (3) state that the child whose paternity is being acknowledged:
  - (A) does not have a presumed father or has a presumed father whose full name is stated; and

- (b) does not have another acknowledged or adjudicated father;
- (4) state whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing; and
- (5) state that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of the paternity of the child and that a challenge to the acknowledgment is permitted only under limited circumstances and is barred after four years.

*Id.* § 160.302. An AOP becomes effective on the child's date of birth or the filing of the document with the bureau of vital statistics, whichever is later. *Id.* § 160.304(c). Furthermore, a properly executed AOP is equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent. *Id.* § 160.305(a).

Here, appellant concedes that he signed a valid AOP on March 26, 2005. He does not dispute its validity on its face under section 160.302 execution requirements. *See id.* § 160.302 (prescribing requirements for execution of AOP). Because the AOP adjudicated appellant's paternity of J.A., the AOP supports and validates the trial court's default SAPCR order regarding conservatorship and child support. Accordingly, to make a prima facie case of a meritorious defense to the default SAPCR order, appellant must present a meritorious defense against the AOP adjudicating paternity. The statute provides two methods of defending against an AOP: (1) a rescission proceeding and (2) a proceeding to challenge the AOP. *See id.* §§ 160.307–.309. A signatory to an AOP may rescind an acknowledgment of paternity by commencing a proceeding to rescind before the earlier of: (1) the 60th day after the effective date of the acknowledgment, as provided by section 160.304; or (2) the date of the first hearing in a proceeding to which the signatory is a party before a court to adjudicate an issue relating to the child, including child support. *Id.* § 160.307. There is no evidence in the record before us showing appellant has commenced a rescission proceeding under section 160.307. Furthermore, the time period for rescission under section 160.307 has now expired. *See*

*id.* Accordingly, appellant is barred, as a matter of law, from bringing a rescission proceeding to attack the AOP.

Nevertheless, if a signatory fails to bring a proceeding to rescind within the 60-day rescission period, he “may commence a proceeding to challenge the [AOP] . . . .” *Id.* § 160.308(a). The record before us reflects that no signatory has commenced a proceeding to “challenge” the AOP pursuant to section 160.308. Because the record reflects that no signatory commenced a proceeding to *challenge* the AOP in accordance with section 160.308, appellant could not assert such claim as a meritorious defense at the time the trial court signed the bill-of-review order.

As a matter of law, appellant could not present a meritorious defense against the AOP based solely on his testimony or a request for genetic testing absent rescission of or successful challenge to the AOP. *See In re S.R.B.*, 262 S.W.3d 428, 431 (Tex. App.—Houston [14th Dist.] 2008, no pet) (“The Uniform Parentage Act does not authorize a trial court to invalidate an AOP based solely on testimony questioning the male signatory’s paternity absent rescission of, or successful challenge, to the AOP.”). We conclude that appellant is barred as a matter of law from bringing a rescission proceeding and has not shown commencement of a proceeding or successful challenge pursuant to section 160.308. Accordingly, appellant has failed to make a prima facie showing of a meritorious defense to the AOP, and thus to the default SAPCR order.

We find that the trial court did not err in denying and dismissing appellant’s bill of review. We overrule appellant’s first and second issues and affirm the trial court’s judgment.

/s/ Adele Hedges  
Chief Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

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