Rel: June 5, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180796

Z.W.E.

v.

L.B.

Appeal from Jackson Juvenile Court
(CS-19-2.01)

On Application for Rehearing

THOMPSON, Presiding Judge.

This court's opinion of February 7, 2020, is withdrawn, and the following is substituted therefor.

Z.W.E., the alleged father ("the alleged father"), appeals from a judgment of the Jackson Juvenile Court ("the juvenile court") dismissing his petition to establish the paternity of the child ("the child") of L.B. ("the mother"), in which he also sought shared custody and/or visitation with the child.[1]

The record, which consists of only 34 pages, indicates the following. On November 19, 2018, the alleged father filed the petition, asserting that he was the father of the child who, at that time, had not yet been born. On February 15, 2019, the mother filed a verified motion to dismiss the alleged father's petition. In her motion, the mother asserted that, on November 14, 2018, she had married Z.A.F. ("the husband"). The child was born on December 26, 2018. The child's birth certificate, a copy of which was attached as an exhibit to the motion to dismiss, indicated that the husband was the child's father. The husband's affidavit was also

[1]The alleged father filed his petition in the DeKalb Juvenile Court. The mother filed a motion for a change of venue on the ground that she and the child resided in Jackson County. The DeKalb Juvenile Court granted the mother's motion and transferred the action to the juvenile court.

attached to the motion. In the affidavit, the husband testified that he had gone to several obstetrician appointments with the mother "when [the mother] was pregnant with our" child. The husband said that he was present at the birth and that he has "been there ever since." The husband testified in the affidavit that he has cared for the child physically, emotionally, and financially since the child's birth and that he had formed a "significant father-child bond" with the child. The husband asserted that he openly held out the child as his "natural child" and that he "adamantly persist[ed] in [his] status as the legal father" of the child.

After setting forth the applicable law in this matter, the mother argued in her motion that, because the husband persisted in his status as the legal father of the child, his presumption of paternity could not be challenged. Therefore, she said, the alleged father lacked what she referred to as "standing" and his petition was due to be dismissed.

On April 3, 2019, the alleged father responded to the mother's motion.[2] In his unsworn response, the alleged father

[2]In the mother's appellate brief, she states that the alleged father's response to her motion to dismiss was unverified. Although the alleged father signed the response,

stated that he and the mother had been in a "dating relationship" and had "cohabitated" from February 2018 until August 2018 and that the mother became pregnant during that time. He said that the mother and her family had acknowledged that he was the biological father of the child. He asserted that he and the mother had celebrated a "gender reveal" with family and friends in July 2018. The alleged father said that, in mid November 2018, the mother began refusing to have any contact with his family or with him, and, therefore, he filed the paternity petition.

In his response to the mother's motion to dismiss, the alleged father stated that, at the February 4, 2019, hearing

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the notary statement indicating that the alleged father had appeared before a notary and had been duly sworn was not signed and no notary seal appears on the document. In his reply brief, the alleged father states that "the copy without the notary signature was inadvertently entered on Alafile without the notary signature and seal." Without citing any authority, the alleged father argues that his signature "serves to aver the facts presented." Because the response was not a sworn document, however, the alleged father's statements do not have the evidentiary effect of testimony. See, e.g., Ex parte Williams, 268 Ala. 535, 539, 108 So. 2d 454, 459 (1958)(holding that an unsworn statement "bears none of the accepted guaranties of truth" and that, when a statement is not made under oath, the maker of the statement "does not make himself liable to the penalties of perjury if the statement be untrue").

on the motion to change venue (see note 1, supra), he learned that the mother had married the husband on November 14, 2018. The alleged father stated that the marriage took place after he "had made known his intention to seek DNA testing but four days prior to the filing" of his petition.[3] He claimed that the mother and the husband were in a "dating relationship" for approximately three weeks before they married. He asserted that the husband had been living with another woman until October 2018.

In his response, the alleged father said that, before the child's birth, he had held out the child as his own and had provided financial and emotional support to the mother during her pregnancy. In asking the juvenile court to deny the mother's motion to dismiss, the alleged father stated that he was the biological father of the child and that he "desire[d] to support the child, have a relationship with the child and exercise his parental rights." Additionally, the alleged father argued that the mother's efforts to keep the child from

[3]The record indicates that the mother and the husband married five days before the alleged father filed his petition.

him had violated "his constitutional right to direct and participate in the upbringing of his child."

The record indicates that the juvenile court held a hearing on the mother's motion to dismiss on May 22, 2019. A transcript of that hearing is not included in the record on appeal. We note that, in certifying the adequacy of the record for appeal to this court, the juvenile court stated that "[n]o formal testimony was taken in this matter." On May 23, 2019, the juvenile court entered its judgment dismissing the alleged father's petition. In doing so, the juvenile court found that the mother had been married to the husband for 42 days when the child was born and that, therefore, under Alabama law, the husband is the presumed father of the child. The juvenile court found that the husband had not renounced his presumption of fatherhood and had, in fact, "'adamantly persist[ed]'" in his status as the legal father. Accordingly, the juvenile court determined that the alleged father's petition was due to be dismissed.

On June 6, 2019, the alleged father timely filed a motion to alter, amend, or vacate the judgment. On June 10, 2019, the juvenile court denied that motion. On June 24, 2019, the

alleged father appealed from the May 23, 2019, judgment dismissing his petition.

On appeal, the alleged father first contends that the juvenile court erred or abused its discretion in denying his request for an evidentiary hearing. In his response to the mother's motion to dismiss, the alleged father stated that he was entitled to a hearing to present evidence establishing that he had "persisted in his claim to be the legal father." In his appellate brief, the alleged father argues that such evidence would have demonstrated that, in addition to the husband, who was the presumed father by virtue of being married to the mother at the time of the child's birth, the alleged father was also a presumed father of the child. Therefore, the alleged father contends that the juvenile court should have weighed those competing presumptions and addressed the petition on its merits.

The juvenile court held a hearing on the mother's motion to dismiss, but, as previously mentioned, there is no transcript of what transpired at that hearing. Therefore, there is nothing in the record to demonstrate that the juvenile court actually "denied" a request for an evidentiary

hearing. Regardless, the factual assertions made by the parties in their respective filings were undisputed, and the juvenile court decided this matter on legal grounds. We observe that, in her motion to dismiss, the mother argued that the alleged father lacked what she called "standing," but which, in these circumstances, is more properly referred to as capacity to bring the action. See Ex parte Presse, 554 So. 2d 406, 418 (Ala. 1989)("[S]o long as the presumed father persists in maintaining his paternal status," no other man has capacity "to challenge the presumed father's parental relationship."); see also C.L.W. v. Madison Cty. Dep't of Human Res., 170 So. 3d 669, 672 (Ala. Civ. App. 2014)(same).

The Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, provides:

> "(a) A man is presumed to be the father of a child if:
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> > "(1) he and the mother of the child are married to each other and the child is born during the marriage;
> >
> > "(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;

"(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce;

"(4) after the child's birth, he and the child's mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with the law although the attempted marriage is or could be declared invalid, and:

> "(A) he has acknowledged his paternity of the child in writing, such writing being filed with the appropriate court or the Alabama Office of Vital Statistics; or
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> "(B) with his consent, he is named as the child's father on the child's birth certificate; or
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> "(C) he is otherwise obligated to support the child either under a written voluntary promise or by court order;

"(5) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child or otherwise openly holds out the child as his natural child and establishes a significant parental relationship with the child by providing

> emotional and financial support for the child; or
>
> "(6) he legitimated the child in accordance with Chapter 11 of Title 26."

§ 26-17-204(a), Ala. Code 1975.

As the alleged father acknowledges, the right to maintain a paternity action when there is a presumed father is governed by § 26-17-607, Ala. Code 1975, which provides:

> "(a) Except as otherwise provided in subsection (b), a presumed father may bring an action to disprove paternity at any time. If the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity.
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> "(b) A presumption of paternity under this section may be rebutted in an appropriate action only by clear and convincing evidence. In the event two or more conflicting presumptions arise, that which is founded upon the weightier considerations of public policy and logic, as evidenced by the facts, shall control. The presumption of paternity is rebutted by a court decree establishing paternity of the child by another man."

(Emphasis added.)

The Alabama Comment to § 26-17-607 states:

> "Subsection (a) follows Ex parte Presse, 554 So. 2d 406 (Ala. 1989)[,] and its progeny that favor maintaining the integrity of the family unit and the father-child relationship that was developed therein. Once the presumed father ceases to persist in his parentage, then an action can be brought. If

> it is determined that the presumed father is not the biological father and non-parentage is found, a proceeding to adjudicate parentage may be brought under this article."

(Emphasis added.)

In his appellate brief, the alleged father does not challenge the husband's assertion that the husband is the presumed father under § 26-17-204(a)(1), i.e., that the husband was married to the mother at the time the child was born. The father also does not suggest that the husband has not persisted in his status as the child's legal father, and he does not challenge any of the factual assertions that the husband made in his affidavit. Instead, the alleged father argues that he, too, should be considered a presumed father of the child, and, he says, the juvenile court must permit him to present evidence to support that presumption. He contends that he held out the child as his own since the child's conception and that he provided both financially and emotionally for the mother and the child during the mother's pregnancy.

The alleged father supports his contention that he is a presumed legal father of the child by referring to "AL. HB

314: ACT 189, May 2019," i.e., Act No. 2019-189, Ala. Acts 2019 ("the Act"), which the Alabama Legislature passed in May 2019. In his brief, the alleged father states that the Act bans abortion and "sets out that as early as within weeks a fetus has a heartbeat and should be recognized as viable."[4] The alleged father then concludes, without further explanation, that, "[u]nder this premise the [alleged father] has already been active in the life of the child." That is the extent of the authority and the legal argument that the alleged father has put forth to show that, under Alabama law, there is a presumption that he is the child's legal father under the AUPA.

As § 26-17-204(a) is currently written, none of the provisions conferring the status of a presumed father applies to the facts of this case. Indeed, in his brief, the alleged father does not specify which provision of the AUPA confers upon him the status of a presumed father. It is well settled

[4]The Act is codified at § 26-23H-1 et seq., Ala. Code 1975. On October 29, 2019, the United States District Court for the Middle District of Alabama entered a preliminary injunction enjoining enforcement of the Act until the federal court resolves in full the issue of the constitutionality of the Act. Robinson v. Marshall, 415 F. Supp. 3d 1053 (M.D. Ala. 2019).

that courts may not interpret statutes to compensate for omissions.

> "'"[I]t is not the office of the court to insert in a statute that which has been omitted[;] ... what the legislature omits, the courts cannot supply."' Pace v. Armstrong World Indus., Inc., 578 So. 2d 281, 284 (Ala. 1991) (quoting 73 Am. Jur. 2d Statutes § 203 (1974)). See also Elmore Cnty. Comm'n v. Smith, 786 So. 2d 449, 455 (Ala. 2000) ('We will not read into a statute what the Legislature has not written.'); Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993) ('The judiciary will not add that which the Legislature chose to omit.'); Siegelman v. Chase Manhattan Bank (USA), Nat'l Ass'n, 575 So. 2d 1041, 1045 (Ala. 1991) ('[A] court may explain the language but it may not detract from or add to the statute.'); Dale v. Birmingham News Co., 452 So. 2d 1321, 1323 (Ala. 1984) ('[W]e deem it inappropriate to engraft by judicial fiat a change the legislature has apparently not chosen to make.'); and Ex parte Jones, 444 So. 2d 888, 890 (Ala. 1983) ('We cannot read into the statute a provision which the legislature did not include.').
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> "Indeed, we have held that 'to change the statute under guise of construction, [is] an infringement upon the legislative prerogative.' Holt v. Long, 234 Ala. 369, 372, 174 So. 759, 760 (1937). See also Alabama Indus. Bank v. State ex rel. Avinger, 286 Ala. 59, 62, 237 So. 2d 108, 110–11 (1970) ('The office of interpretation is not to improve the statute; it is to expound it....'); Echols v. State, 24 Ala. App. 352, 353, 135 So. 410, 411 (1931) ('[C]ourts are without authority to add to or take from the written statutory law as passed by the Legislature and approved.'). Federal courts follow the same principle. See Ali v. Federal Bureau of Prisons, 552 U.S. 214, 228, 128 S.Ct. 831, 169 L.Ed. 2d 680 (2008); Badaracco v. Commissioner

> of Internal Revenue, 464 U.S. 386, 398, 104 S.Ct. 756, 78 L.Ed. 2d 549 (1984) ('Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.'); and Nguyen v. United States, 556 F.3d 1244, 1256 (11th Cir. 2009) ('We are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it....')."

Ex parte Christopher, 145 So. 3d 60, 66-67 (Ala. 2013). "[A] court may explain the language [in a statute,] but it may not detract from or add to the statue." Siegelman v. Chase Manhattan Bank (USA), Nat'l Ass'n, 575 So. 2d 1041, 1045 (Ala. 1991). Moreover, "[t]his [c]ourt's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this [c]ourt's role to assume the legislative prerogative to correct defective legislation or amended statutes." Id. at 1051. "The Legislature is presumed to be aware of existing law and judicial interpretation when it adopts a statute." Carson v. City of Prichard, 709 So. 2d 1199, 1206 (Ala. 1998); see also Weaver v. Hollis, 247 Ala. 57, 60, 22 So. 2d 525, 528 (1945) ("'The presumption is that the legislature does not intend to make any alteration in the law beyond what it

explicitly declares ....' Duncan v. Rudulph, 245 Ala. 175[, 176], 16 So. 2d 313, 314 [(1944)].").

We further observe that permitting courts to add to or to detract from the plain language of statutes would violate the separation of powers provided for under the Alabama Constitution of 1901.

> "In Alabama, legislation cannot originate with the judiciary. '[T]he judicial shall never exercise the legislative ... powers....' Ala. Const. 1901, art. III, § 43. Instead, '[t]he legislative power shall be vested in a legislature, which shall consist of a senate and a house of representatives.' Id., art. IV, § 44. 'No law shall be passed except by bill....' Id., art. IV, § 61. And no bill shall become a law unless first referred to and acted upon by a standing committee of each house. Id., art. IV, § 62. Additionally, no bill shall become a law unless approved by a recorded majority vote in each house. Id., art. IV, § 63. Adoption of amendments also requires a recorded majority vote. Id., art. IV, § 64. Finally, '[e]very bill which shall have passed both houses of the legislature ... shall be presented to the governor' for signature. Id., art. V, § 125.
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> "Courts do not make law. No law can be enacted or amended apart from the constitutionally mandated procedure, known as bicameralism and presentment. See INS v. Chadha, 462 U.S. 919, 952, 103 S.Ct. 2764, 77 L.Ed. 2d 317 (1983) (noting the 'bicameralism and presentment requirements of Art. I' of the United States Constitution)."

Ex parte Christopher, 145 So. 3d at 69-70 (emphasis added).

In his dissenting opinion, Judge Moore asserts that the legislature has already spoken to what constitutes a "child." He argues that because, in other contexts, a "child" has been interpreted or defined to include an unborn child -- e.g., a majority of the supreme court's interpretation in Ex parte Ankrom, 152 So. 3d 397, 411 (Ala. 2013), of the word "child" in the context of the criminal child-endangerment statute, § 26-15-3.2, Ala. Code 1975,[5] and the definition of "child" in the Alabama Adoption Code, § 26-10A-1, Ala. Code 1975 -- those definitions should also be applicable to the AUPA. We first note that it is in Judge Moore's dissenting opinion, not in the alleged father's brief, that the definition of "child" from those sections of the Alabama Code is first argued to apply in this case.

More important, the AUPA as written currently does not provide for the recognition of prebirth emotional and financial support as a basis for conferring the status of presumed father, and this court cannot expand § 26-17-204(a)

[5]We observe that Ankrom actually sets forth a majority of our supreme court's interpretation of what the legislature meant by "child" in the criminal child-endangerment statute. The statute itself does not define "child."

to shoehorn the facts of this case into fitting the provisions that do allow for such a status. It would set an unwise precedent to allow a litigant to appropriate the definition of a word used in another title or chapter of the Alabama Code to the chapter under which that litigant is proceeding to enable a desired outcome. It is up to the legislature, not this court, to create such an expansion of the terms used in the AUPA. Accordingly, we reject the alleged father's assertion that his prebirth support of the child confers upon him the status of a presumed father.

We turn now to the mother's assertion that the alleged father did not have the capacity to challenge the husband's status as the legal father. Research reveals that existing caselaw supports the mother's position. In Ex parte Presse, 554 So. 2d 406 (Ala. 1989), our supreme court held that a man claiming to be the biological father of a child conceived and born during the marriage of the child's mother to another man did not have capacity under the former AUPA to initiate an action to establish that he was the father of the child, so long as the presumed father persisted in the presumption that he was the father.

In Ex parte Presse, the mother in that case had had an affair with Lynn Koenemann while she was married to Norman Presse. A child was born during the marriage, and the mother and Presse lived together for several years until their divorce. Later, the mother married Koenemann, and she and Koenemann sought to have Koenemann's paternity of that child established. The trial court determined that Koenemann was the child's father, and Presse appealed. This court affirmed the trial court's judgment. See Presse v. Koenemann, 554 So. 2d 403 (Ala. Civ. App. 1988). Our supreme court reversed this court's judgment, concluding that Koenemann lacked "standing," i.e., capacity, to assert his paternity of a child born of the mother's marriage to another man. Ex parte Presse, 554 So. 2d at 418.

In Ex parte C.A.P., 683 So. 2d 1010, 1012 (Ala. 1996), our supreme court further explained the holding in Ex parte Presse, stating:

> "The Court in Presse did not base its decision on whether the child was conceived during the marriage, and § 26-17-5(a)(1)[, Ala. Code 1975, the predecessor to § 26-17-204(a)(1),] does not require that the child be conceived during the marriage to make the husband the presumed father. Rather, all that is required, under either caselaw or statute,

> is that the child be born during the marriage. The Code uses the word 'birth' as the benchmark for establishing presumptions of paternity, not the time of conception. See also Foster v. Whitley, 564 So. 2d 990 (Ala. Civ. App. 1990), in which Whitley sought to intervene in a divorce proceeding, claiming to be the father of a minor child of the marriage, and in which the husband, as in this case, never contended that he was not the father of the child. Relying on Ex parte Presse, supra, and discounting the argument that Whitley was the presumed father under § 26-17-5(a)(4)[, Ala. Code 1975, the predecessor to § 26-17-204(a)(5),] because he openly held the child out as his own, the Court of Civil Appeals in Foster, 564 So. 2d at 991, held that Whitley had no standing to challenge paternity:
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> > "'[S]ince the husband was married to the mother at the time of the birth, we find that § 26-17-5(a)(1) controls and that the husband is the presumed father under that section.'
>
> "See also Leonard v. Leonard, 360 So. 2d 710 (Ala. 1978)."

(Emphasis added.)

In D.B. v. A.K., 93 So. 3d 946, 948-49 (Ala. Civ. App. 2012), this court explained:

> "'If the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity.' Ala. Code 1975, § 26-17-607(a). This court has held, however, that 'a man seeking to establish paternity of a child born during the mother's marriage to another man must be given the opportunity to establish standing in an evidentiary hearing where he and others may present

> evidence bearing on whether the presumed father ... had persisted in his presumption of paternity.' W.D.R. v. H.M., 897 So. 2d 327, 331 (Ala. Civ. App. 2004) (stating that, because it could not be determined as a matter of law that the presumed father had persisted in his presumption of paternity, the juvenile court must hold a hearing on that issue); see also R.D.B. v. A.C., 27 So. 3d 1283, 1287–88 (Ala. Civ. App. 2009) (holding that, because the biological father's 'allegations ... call[ed] into question whether the legal father persist[ed] in his presumption of paternity,' the juvenile court 'should permit the biological father and others to present evidence regarding whether the legal father persists in his presumption of paternity'); and J.O.J. v. R.R., 895 So. 2d 336 (Ala. Civ. App. 2004) (holding that evidentiary hearing must be held to determine whether the biological father had standing when there was no evidence regarding whether the child's legal father had persisted in his presumption of paternity)."

Ex parte Kimbrell, 180 So. 3d 30 (Ala. Civ. App. 2015), involved a rare situation in which this court determined that the presumption set forth in Ex parte Presse was inapplicable. In Kimbrell, the mother in that case and Denny Kimbrell began living together in 2004, and they had a child in February 2006. Kimbrell was present for the child's birth, received the child into his home immediately after the birth, and, approximately seven months after the child was born, Kimbrell and the mother in that case married. Throughout those events,

Kimbrell believed and held the child out to be his natural born child. Kimbrell, 180 So. 3d at 32-33.

However, it came to light that the mother had never divorced her previous husband, John Herbert. The mother had left Herbert in 1997 and had not seen him from that time until after filing a complaint for a divorce from Kimbrell. The mother in that case attempted to argue that, as her husband, Herbert, from whom she had been estranged since 1997, was the child's presumed father. Id. at 33. Kimbrell, who persisted in his status as the child's legal father, sought a paternity determination. Herbert testified that he could not be the biological father of the child and said that he had not been involved in the child's life. The undisputed evidence indicated that Kimbrell was the only father the child had known since birth. Id. The trial court found that, under the circumstances, Kimbrell was the presumed legal father of the child. Id.

The mother in Kimbrell filed a petition for a writ of mandamus in this court, asserting that, because Herbert was her legal husband at the time the child was born, Herbert was also the child's presumed father. This court, noting the

"unique facts of this case," 180 So. 3d at 34, denied the mother's petition, explaining:

> "The facts of this case are unusual. The mother has sought to terminate the child's relationship with Kimbrell based on the legal technicality of her own failure to divorce her first husband[, Herbert]. The materials submitted to this court by the mother indicate that Kimbrell, the only father the child has ever known, has fought to maintain his relationship with the child. The mother has failed to present any evidence indicating that there is any relationship between Herbert and the child or that there exists a logical or public-policy argument in favor of preserving Herbert's status as the father of her child, who was undisputedly born of her relationship with and purported marriage to Kimbrell, albeit while she remained married to Herbert. It is clear that, regardless of the invalidity of the mother's marriage to Kimbrell because of the mother's failure to secure a divorce from Herbert, the familial relationship between the child and Kimbrell is the weightier consideration in terms of public policy, logic, and the best interests of the child."

Ex parte Kimbrell, 180 So. 3d at 38.

This case is readily distinguishable from Kimbrell. It bears repeating that, in this case, it is undisputed that the husband has persisted in the presumption of his paternity, and the alleged father has never challenged or denied the husband's status as a presumed father, the husband's conduct in supporting the child financially, physically, and

emotionally, or the husband's testimony that he had formed a strong father-child bond with the child. Instead, the alleged father claims that he, too, is a presumed father and that the juvenile court must hold an evidentiary hearing to weigh those competing presumptions.

This case is analogous to D.I. v. I.G., 262 So. 3d 651 (Ala. Civ. App. 2018). In that case, D.I., the biological father, sought to establish paternity of a child born to I.G., the mother in that case, and R.D., the man with whom I.G. was living when that child was born. R.D. was named as the father on the child's birth certificate. I.G., R.D., and the child lived together, and R.D. held out the child as his own and performed the duties of a father. Id. at 53. In affirming the trial court's determination that R.D. was the child's legal father, this court explained, among other things, that,

> "[a]lthough the language of § 26-17-602(3)[, Ala. Code 1975,] provides a man seeking to have his paternity adjudicated standing to bring an action to establish paternity, that statute clearly provides that such standing is subject to, i.e., limited by, the provisions of § 26-17-607. Section 26-17-607(a) specifically provides that the paternity of a presumed father may not be challenged by any person, provided that the presumed father wishes to persist in his status as the legal father. The Alabama Comment to § 26-17-607 makes very clear the intent

of the legislature to continue to 'favor maintaining the integrity of the family unit and the father-child relationship that was developed therein' first espoused by our supreme court in its interpretation of the former AUPA in Ex parte Presse, 554 So. 2d 406 (Ala. 1989). That is, the AUPA does not allow even proof that the child is not the biological child of the presumed father to overcome his status unless he permits it by choosing not to persist in his status as the presumed father. See, e.g., D.F.H.[v. J.D.G.], 125 So. 3d [146] at 154 [(Ala. Civ. App. 2013)]. To allow the alleged biological father to prove his paternity in one action so that he can disprove the presumed father's paternity in another would run afoul of the prohibition in § 26-17-607(a) against allowing another individual to challenge the presumed father's paternity despite his persistence. See Ex parte C.A.P., 683 So. 2d 1010, 1012 (Ala. 1996) (deciding under the former AUPA that '[a] man not presumed to be the father, but alleging himself to be the father, may institute an action to have himself declared the father only when the child has no presumed father'). Thus, we conclude that the circuit court properly interpreted and applied the relevant statutes to determine that the alleged biological father's action should be dismissed, regardless of whether his action is considered to be one to establish his own paternity or one intended to disprove the presumed father's paternity.

"We turn now to the alleged biological father's specific argument that the interpretation given to the relevant statutes must be incorrect because it does not allow § 26-17-204(b) and § 26-17-607(b) to have a field of operation. See Sullivan[v. State ex rel. Atty. Gen. of Alabama], 472 So. 2d [970] at 973 [(Ala. 1985)] (indicating that multiple statutes governing the same subject should be construed so as to be certain that each is 'afforded a field of operation'). The alleged biological father is

> correct that § 26-17-607(b) allows for a presumption of paternity arising under § 26-17-204(a) to be rebutted by clear and convincing evidence. However, the alleged biological father is incorrect insofar as he contends that the construction of § 26-17-607(a) given to the statute by the courts of this state somehow precludes § 26-17-607(b) from having a field of operation. Section 26-17-607(a) permits a presumed father to bring an action to disprove the presumption of his paternity. To do so, § 26-17-607(b) provides, he must present clear and convincing evidence to rebut the presumption that he is the father of the child. See Ex parte T.J., 89 So. 3d [744] at 747 n.2 [(Ala. 2012)] (indicating that § 26-17-607(b) applies when a presumed father seeks to rebut the presumption of paternity). Thus, despite the alleged biological father's contentions, § 26-17-607(b) has a clear field of operation, regardless of the fact that § 26-17-607(a) has been construed to preclude any individual from challenging a presumed father's status when he desires to persist in that status."

Id. at 657-58.

This court then concluded that,

> "even had the alleged biological father presented evidence indicating that he is the child's biological father, he would not be a 'presumed father' under § 26-17-204(a). Thus, at no point in the present case was the circuit court faced with conflicting presumptions such that it was required to weigh them under § 26-17-204(b)."

Id. at 659.

As we have previously held, the alleged father is not a "presumed father" under the AUPA. Accordingly, the alleged

father had no capacity to bring this action. The trial court was never required or even authorized to weigh the competing presumptions the alleged father attempts to establish.

The alleged father also argues that the AUPA violates his constitutional right "to direct and participate in the upbringing" of the child. He maintains that the AUPA violates "due process" rights of biological fathers to assert their parental rights. The specific facts of this case are regrettable, and they demonstrate a possible equal-protection issue inherent in the current state of this area of the law. However, the alleged father failed to develop a cogent legal argument to support his assertion that his constitutional rights were violated, and he failed to cite any legal authority to support his contention.

It is well settled that an appellate court

> "will not 'create legal arguments for a party based on undelineated general propositions unsupported by authority or argument.' Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992). Further, it is well settled that '"[w]here an appellant fails to cite any authority for an argument, this Court may affirm the judgment as to those issues, for it is neither this Court's duty nor its function to perform all the legal research for an appellant."' Spradlin v. Birmingham Airport Auth., 613 So. 2d 347, 348 (Ala.

> 1993)(quoting Sea Calm Shipping Co., S.A. v. Cooks, 565 So. 2d 212, 216 (Ala. 1990))."

Allsopp v. Bolding, 86 So. 3d 952, 960 (Ala. 2011); see also Rule 28(a)(10), Ala. R. App. P., and Bedard v. Bedard, 266 So. 3d 1113, 1122 (Ala. Civ. App. 2018)(declining to consider an argument failing to comply with Rule 28(a)(10), Ala. R. App. P.).

This court empathizes with the situation in which the alleged father finds himself. He has highlighted an issue that is of concern to this court. However, this court is not empowered to modify the provisions of the AUPA to grant the alleged father the relief he seeks. It is up to the legislature to address situations such as those in this case.

The alleged father has not demonstrated that the juvenile court erred or abused its discretion in dismissing his petition for paternity and custody. Accordingly, the judgment is affirmed.

APPLICATION GRANTED; OPINION OF FEBRUARY 7, 2020, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Hanson, J., concurs.

Donaldson, J., concurs in the result, without writing.

Moore and Edwards, JJ., dissent, with writings.

MOORE, Judge, dissenting.

I respectfully dissent.

Background

On November 19, 2018, Z.W.E. ("the alleged biological father") commenced a prebirth paternity action against L.B. ("the mother") in the DeKalb Juvenile Court. On motion of the mother, the action was transferred to the Jackson Juvenile Court ("the juvenile court"). Upon transfer, the mother moved the juvenile court to dismiss the paternity action. The alleged biological father filed a response objecting to the motion to dismiss. After a hearing, the juvenile court dismissed the paternity action. The alleged biological father filed a postjudgment motion, which the juvenile court denied. The alleged biological father timely appealed to the Jackson Circuit Court, which transferred the appeal to this court. See Rule 28(D), Ala. R. Juv. P.

In her motion to dismiss, the mother asserted that she had married Z.A.F. ("the husband") on November 14, 2018, that she gave birth to A.C.F. ("the child") on December 26, 2018, that the husband was the presumed father of the child, and that the husband was persisting in his claim of paternity to

the child. The mother attached to her motion to dismiss her and the husband's marriage certificate, the birth certificate of the child, which named the husband as the father of the child, and the affidavit of the husband attesting, among other things, that he was "adamantly persist[ing] in [his] status as the legal father of [the child]."

In his response to the motion to dismiss, the alleged biological father asserted as follows. He and the mother had been in a dating relationship and had cohabited between February 2018 and August 2018, during which time the mother conceived the child. The mother informed him that she was expecting his child, and he and the mother began planning for the birth of the child. From the time of conception, the mother held out the child to be the child of the alleged biological father. The alleged biological father also held out the child as his own, privately and publicly expressed his desire to act as a father to the child, and provided financial and emotional support to the mother during her pregnancy. In July 2018, the mother and the alleged biological father celebrated a gender reveal with friends and family, as evidenced by posts on Facebook, a social-media outlet. In

approximately late October 2018, the mother commenced a romantic relationship with the husband. At some point in November 2018, the alleged biological father informed the mother of his intention to obtain genetic testing to prove his paternity. In early to mid November 2018, the mother ceased all communication with the alleged biological father and his family, and she married the husband on November 14, 2018. The alleged biological father filed his paternity petition five days later. After the child was born, the mother prevented the alleged biological father from bonding with the child.

The judgment dismissing the paternity action provides, in pertinent part:

> "This matter was before the Court on May 22, 2019 on the Motion to Dismiss filed by the [mother] and the [alleged biological father]'s response thereto.
>
> "Both parties were present and represented by Counsel. ... The Court heard oral argument from both counsel and took the matter under advisement based on the pleadings herein.
>
> "After consideration of the pleadings, affidavits, exhibits to the pleadings, the arguments of counsel and the law of the State of Alabama, as defined by Ex Parte Presse, 554 So. 2d 406 (1989) and the Code of Alabama [1975], as it relates to paternity and presumed fatherhood, the Court makes

> the following findings and it is hereby ORDERED as follows:
>
> "1. The [mother] was married to [the husband] at the time of the birth of the child that is the subject of this action for 42 days. Therefore, under the law of the State of Alabama, [the husband] is the presumed father of this child.
>
> "2. [The husband] has not renounced his presumption of fatherhood and has in fact executed an affidavit that he 'adamantly persist[s] in [his] status as the legal father.'
>
> "3. The Motion to Dismiss[] filed by [the mother] is ... GRANTED."

Discussion

In his brief to this court, the alleged biological father argues that the juvenile court erred as a matter of law in denying him an evidentiary hearing in order to contest the husband's claim of paternity and to prove his own paternity of the child.[6] "In order to preserve an alleged error of law for appellate review, the appellant must bring that alleged error

[6]The alleged biological father also argues that his constitutional rights to due process and equal protection of the law have been violated. Although the alleged biological father did broadly assert in his response to the motion to dismiss and in his postjudgment motion that his constitutional rights were being violated, the alleged biological father did not make the specific argument he now raises on appeal. As a result, the argument was not preserved for review. See Ex parte J.W.B., 230 So. 3d 783 (Ala. 2016).

to the attention of the trial court and receive an adverse ruling." Grove Hill Homeowners' Ass'n, Inc. v. Rice, 43 So. 3d 609, 613 (Ala. Civ. App. 2010) (citing Cottrell v. National Collegiate Athletic Ass'n, 975 So. 2d 306, 349 (Ala. 2007)). The alleged biological father specifically requested an evidentiary hearing regarding the competing claims of paternity in paragraph 10 of his response to the mother's motion to dismiss. The record shows that the juvenile court conducted a hearing on the mother's motion to dismiss. Although there is no transcript of that hearing, the order of the juvenile court plainly states that the juvenile court rendered its judgment "[a]fter consideration of the pleadings, affidavits, exhibits to the pleadings, the arguments of counsel and the law of the State of Alabama," indicating that the juvenile court dismissed the action without conducting the evidentiary hearing requested by the alleged biological father. The record affirmatively shows that the alleged biological father asserted his right to an evidentiary hearing and that he received an adverse ruling denying his request, thus preserving the issue for appellate review. See Barnes v. Dale, 530 So. 2d 770, 777 (Ala. 1988).

The juvenile court foreclosed any inquiry into the paternity of the child based solely on the husband's statement in his affidavit that he was persisting in his status as a presumed father of the child. However, that statement alone did not present a legally sufficient ground for dismissing the action. Regardless of whether he is a presumed father, an alleged biological father has a right to an evidentiary hearing to determine whether the husband of the mother is, in fact, persisting in his status as the presumed father of the child by acting as a father to the child and demonstrating a commitment to continuing in that role. See J.O.J. v. R.M., 205 So. 2d 726, 732-35 (Ala. Civ. App. 2015) (Moore, J., dissenting). The alleged biological father requested an evidentiary hearing for exactly that purpose, and our caselaw is clear that he is entitled to that hearing. See D.B. v. A.K., 93 So. 3d 946, 948–49 (Ala. Civ. App. 2012). Thus, I disagree with the main opinion that the determination of whether the alleged biological father is a presumed father of the child controls his right to an evidentiary hearing.

I further disagree with the main opinion that the alleged biological father cannot, under the facts asserted, be

considered a presumed father of the child. Although the juvenile court actually never reached the issue whether the alleged biological father could be considered a presumed father of the child, the main opinion affirms the judgment on the ground that, as a matter of law, a man cannot become a presumed father based on his prebirth conduct toward a child. The main opinion maintains that the terms of the Alabama Uniform Parentage Act ("the AUPA"), Ala. Code 1975, § 26-17-101 et seq., cannot be judicially construed as including as a presumed father a man who acts as a father toward an unborn child. However, I believe the legislature has indicated its intent otherwise.

Section 26-17-204(a)(5), Ala. Code 1975, confers the status of "presumed father" on a man if,

> "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child or otherwise openly holds out the child as his natural child and establishes a significant parental relationship with the child by providing emotional and financial support for the child."

(Emphasis added.) The AUPA defines a "child" as "an individual of any age whose parentage may be determined under this chapter." See Ala. Code 1975, § 26-17-102(5) (emphasis

added). In Ex parte Ankrom, 152 So. 3d 397, 411 (Ala. 2013), our supreme court, when discussing the plain meaning of the word "child" in the context of the criminal chemical-endangerment statute, held that the undefined term "child" in that statute includes an unborn child. The alleged biological father cites "AL. HB 314: ACT 189, May 2019," i.e., Act No. 2019-189, Ala. Acts 2019, which is codified as Ala. Code 1975, § 26-23H-1 et seq., and which defines a "child" as "[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability." § 26-23H-3(7), Ala. Code 1975. In Ex parte C.A.P., 683 So. 3d 1010, 1012 (Ala. 1996), the supreme court stated that the "presumptions of paternity" use "birth" as a benchmark, but it is clear that, in context, the supreme court was referring to the presumption of paternity relating to a child born during a marriage and that the legislature has since clearly expressed its intention that a "child" includes an unborn child. This court does not violate the separation of powers by simply construing the meaning of a word chosen by the legislature to convey its intention. "'It is emphatically the province and duty of the judicial department to say what the

law is.' Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)." Ex parte Christopher, 145 So. 3d 60, 70 (Ala. 2013).

Because the word "child" includes an unborn child, under § 26-17-204(a)(5) a man may become a presumed father of a child by acting as a father toward an unborn child in the manner prescribed by the statute.[7] In this case, the alleged biological father asserted in his response to the motion to dismiss that, while the mother was pregnant, he had cohabited with the mother, had openly acknowledged his paternity of the child, and had provided the mother emotional and financial support. Accepting those assertions as true for the purposes of ruling on the motion to dismiss, see Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 21 (Ala. 2007), the alleged

[7]I note that Ala. Code 1975, § 26-10A-9(a)(1), a part of the Alabama Adoption Code, Ala. Code 1975, § 26-10A-1 et seq., provides that abandonment of a child includes "the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to the birth." To be congruent with this statute, the AUPA should be construed as recognizing that a biological father who does provide emotional and financial support to the mother during her pregnancy, in addition to meeting the other factors set forth in § 26-7-204(a)(5), thereby becomes a presumed father of the child.

biological father acted as a father to his unborn child and demonstrated a commitment to continuing in that role following the birth of the child, so as to acquire the status of a presumed father under § 26-17-204(a)(5).

Because, according to the facts as set forth by the alleged biological father, this case involves two presumed fathers, §§ 26-17-204(b) and 26-17-607(b), Ala. Code 1974, apply. See Ex parte Kimbrell, 180 So. 3d 30 (Ala. Civ. App. 2015) (holding that, when two presumed fathers persist in their claims of paternity, § 26-17-607(b), not § 26-17-607(a), applies). Those Code sections provide, in pertinent part: "In the event two or more conflicting presumptions arise, that which is founded upon the weightier considerations of public policy and logic, as evidenced by the facts, shall control." (Emphasis added.) The AUPA clearly envisions that, when competing claims of paternity are made by two or more presumed fathers, the trial court shall base its paternity determination on facts as established through an evidentiary hearing. In this case, the alleged biological father asserts that the mother, after first conceiving the child with him and acknowledging his paternity of the child, began a romantic

relationship with and married the husband less than two months before the child was born. The alleged biological father asserts that his paternity claim should receive priority because it was the first established and can be substantiated with genetic testing. The alleged biological father asserts that he has a right to a relationship with his natural child that should outweigh any claim to paternity by the husband, whose only tie to the child is through his relatively short marriage to the mother, which took place well into her pregnancy. The law requires that the alleged biological father be afforded an evidentiary hearing to judicially establish these facts upon which his cogent arguments for the superiority of his paternity claim rests.

By affirming the judgment of the juvenile court, a majority of this court deprives the alleged biological father of even an opportunity at a relationship with his alleged biological child. If the facts are as alleged -- and, at this point, they have not been disputed -- logic and public policy would seem to weigh heavily in favor of the claim of the alleged biological father who, thus far, has been precluded from acting as a father to the child only because of the

unilateral actions of the mother and the husband. I conclude that the legislature did not intend that a child should be deprived of a relationship with his or her biological father simply to honor the claim of the husband of a mother who marries the mother during her pregnancy with full knowledge of the true paternity of the child.

For the foregoing reasons, I believe the judgment of the juvenile court should be reversed and the case remanded for further proceedings to determine the status of the alleged biological father. If the alleged biological father is a presumed father, the juvenile court should hold an evidentiary hearing to determine which paternity presumption should prevail, as required by §§ 26-17-204(b) and 26-17-607(b). If the alleged biological father is not a presumed father, the juvenile court should hold an evidentiary hearing to determine whether the husband is persisting in his status as the legal father of the child under § 26-17-607(a), if that fact remains in dispute.

EDWARDS, Judge, dissenting.

I respectfully dissent. In my opinion, reversal of the Jackson Juvenile Court's judgment dismissing the paternity action commenced by Z.W.E. ("the alleged biological father") is required because the juvenile court was not presented facts upon which it could have based its apparent conclusion that A.C.F. ("the child") has only one presumed father.[8] I agree with Judge Moore that the alleged biological father has preserved for review in this court his argument that he was entitled to a hearing. I also agree with Judge Moore's conclusion that a child may have more than one presumed father under Ala. Code 1975, § 26-17-204. The Alabama Uniform Parentage Act, Ala. Code 1975, § 26-17-101 et seq., expressly provides that two or more presumptions of paternity may arise in the text of § 26-17-204(b), which reads: "In the event two or more conflicting presumptions arise, that which is founded

[8]In my opinion, the juvenile court did not consider evidence relating to the alleged biological father's conduct toward the mother before the child's birth. The alleged biological father's response to the motion to dismiss was not verified, and, thus, was not evidence.

upon the weightier considerations of public policy and logic, as evidenced by the facts, shall control."

The alleged biological father has asserted facts that, if proven at an evidentiary hearing, could possibly entitle him to the status of a presumed father, provided that the juvenile court accepts his argument that his conduct toward L.B. ("the mother") before the birth of the child should be considered under Ala. Code 1975, § 26-17-204(a)(5), as part of the determination of whether the alleged biological father openly held out the child as his own or developed a significant parental relationship with the child. Although no court has yet determined whether the conduct of a man before the birth of a child of which he claims parentage is sufficient to establish a presumption of paternity under § 26-17-204(a)(5), the determination of the alleged biological father's status should be made in the first instance in the juvenile court, after consideration of evidence presented by the parties.[9] Thus, I would reverse the judgment of the juvenile court and

[9]I express no opinion regarding whether the facts asserted by the alleged biological father are sufficient to result in a presumption of fatherhood under § 26-17-204(a)(5).

remand the cause with instructions that the juvenile court hold an evidentiary hearing on the alleged biological father's argument that he is a presumed father under § 26-17-204(a)(5).