REL: October 16, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190809

Ex parte H.E.O.

PETITION FOR WRIT OF MANDAMUS

(In re: M.B.F.

v.

H.E.O.)

(Jefferson Juvenile Court, Bessemer Division, CS-20-900153)

EDWARDS, Judge.

On July 31, 2020, H.E.O. ("the mother") filed in this court a petition for the writ of mandamus seeking an order

directing the Bessemer Division of the Jefferson Juvenile Court ("the juvenile court") to hold a hearing on the mother's motion challenging service of process and venue in the paternity action filed in the juvenile court by M.B.F. ("the alleged father"). We called for answers to the petition and for briefs. After consideration of the materials and the arguments presented, we grant the petition and issue a writ.

The materials attached to the petition indicate that the alleged father filed the paternity action in April 2020 and that the mother was served by a private process server on May 4, 2020. Oddly, the return of service was not filed with the juvenile-court clerk until July 16, 2020, which was a week after the juvenile-court referee entered an order on July 9, 2020, finding that the mother had not yet been served and resetting the hearing on the alleged father's complaint seeking to establish paternity for August 20, 2020. The referee's order was ratified by the juvenile-court judge on July 9, 2020.

On July 20, 2020, the alleged father filed a motion requesting that the mother produce the child for paternity testing before the August 2020 hearing. The juvenile court

granted that motion on the same day it was filed, ordering the mother to present the child for DNA testing on July 30, 2020. In that order, the juvenile court also stated that the mother would be arrested if she failed to appear for the DNA testing.

On July 29, 2020, the mother filed a motion entitled "motion to quash service, ... motion to dismiss, and ... motion to transfer for improper venue." In that motion, the mother argued that the juvenile court lacked personal jurisdiction over her because, she said, she had not been served with the alleged father's complaint, and she also argued that, although she resided in Jefferson County, she did not reside within the territorial boundaries of the Bessemer Division and, therefore, she asserted, venue was not proper in the juvenile court. See Ala. Code 1975, § 26-17-605 (explaining that venue of a paternity action is proper in the county in which the child resides, the county in which the defendant resides, or the county in which a father or an alleged father's estate is being administered or probated); see, e.g., Ex parte Johnson, 692 So. 2d 843, 845 (Ala. Civ. App. 1997) (explaining, in the context of a child-custody case, that the Bessemer Division is a separate and distinct

venue from Jefferson Division of the Jefferson Circuit Court). She also contended that all previous orders entered by the juvenile court were void and should be set aside. The mother attached an affidavit to her motion in which she averred that she lives in Hoover, that she had not been personally served with the alleged father's complaint, that no legal papers had been delivered to her through the United States mail, that no one living at her residence had signed for any legal papers, and that no legal papers had been left at her residence. The mother requested that her motion be set for a hearing at which the juvenile court could take evidence regarding service of process; the mother also suggested that the juvenile court hear the motion at the upcoming August 20, 2020, hearing.

On the same day the mother filed her motion, and just over an hour after its filing, the juvenile court denied the mother's motion. The juvenile court stated in its order that "service of process has been perfected" and again stated that law-enforcement officers would be sent to the mother's home if she failed to appear for DNA testing on July 30, 2020, as previously ordered. Regarding the mother's venue challenge, the juvenile court stated in its order that, "after the [DNA]

testing has been completed, the court will consider the transfer. Birmingham division is back long [sic] and it will take months to order and do the [DNA] test." Subsequently, both the juvenile-court judge and the alleged father acknowledged that venue was improper in the juvenile court.[1]

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[1]We note that the juvenile court's decision to delay a transfer of the father's paternity action to the proper venue was inappropriate. Our supreme court has indicated that the question of venue should be decided without delay, explaining:

> "In any event, the law is clear that venue is to be determined at the commencement of the action. Ex parte Pratt, 815 So. 2d [532,] 534 [(Ala. 2001)]. Moreover, if venue is shown to be improper, the case must be transferred. Ex parte Overstreet, 748 So. 2d [194,] 196 [(Ala. 1999)]. We believe that the trial court's denial of Pike's motion for a change of venue while reserving for an unlimited time the right to revisit the issue effectively traps Pike in an improper venue."

Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1093 (Ala. 2002). The juvenile court's decision to delay the venue determination in order to ensure that genetic testing was completed likewise trapped the mother in an improper venue and was improper. Moreover, the juvenile-court judge has conceded that venue is improper but states in her brief to this court that "it is simply not in the interest of justice to transfer the case." No "interest of justice" basis for denying or delaying the transfer of an action to the proper venue exists. The language of Rule 82(d)(1), Ala. R. Civ. P., is mandatory: "When an action is commenced laying venue in the wrong county, the court, on timely motion of the defendant, shall transfer the action to the court in which the action might have been properly filed and the case shall proceed as though originally filed therein." (Emphasis added.)

The mother did not appear for DNA testing on July 30, 2020. The juvenile court issued an order on that same day directing the juvenile-court clerk to issue a failure-to-appear warrant for the mother's arrest.[2] The order specifically stated that the mother was to have no bond.

In the mother's mandamus petition, she argues that the juvenile court abused its discretion by failing to hold a hearing on her motion to quash service of process. She further challenges the order entered by the juvenile court on July 30, 2020, ordering the mother's incarceration without bond. The mother further develops both arguments in her brief in support of her mandamus petition, which we have considered, along with the briefs of both the alleged father and the juvenile-court judge.

The mother's petition does not challenge the juvenile court's ruling denying her motion insofar as it sought a change of venue; instead, she argues that issue for the first time in her brief in support of the mandamus petition, which was filed more than 14 days after the entry of the juvenile court's July 29, 2020, order. See Ex parte J.B., 223 So. 3d

[2]The mother requested a stay of the juvenile court's arrest order. We granted the requested stay.

251, 253 (Ala. Civ. App. 2016) (explaining that a petition for the writ of mandamus directed to an order of a juvenile court must be filed within 14 days after the entry of the order). Nevertheless, both the alleged father and the juvenile-court judge have conceded that venue in the juvenile court is improper and that the action is due to be transferred, see Rule 82(d)(1), Ala. R. Civ. P. (requiring the transfer of an action commenced in the wrong venue); Ex parte Guarantee Ins. Co., 133 So. 3d 862, 867 (Ala. 2013) ("If venue is improper at the outset, then, upon motion of the defendant, the court must transfer the case to a court where venue is proper."), and a court of improper venue should not order substantive relief when the action is due to be transferred. See Walden v. ES Capital, LLC, 89 So. 3d 90, 115 (Ala. 2011) (requiring a circuit court to set aside its order requiring an accounting because the petitioner was entitled to a change of venue). Thus, the juvenile court clearly erred in ordering paternity testing after it concluded that venue was improper in the juvenile court. See note 1, supra. Notwithstanding that error, however, we will not address the issue of venue because

of the mother's failure to timely raise that issue by including it in her mandamus petition.

> "'A writ of mandamus is an extraordinary remedy ... that should be granted only if the trial court clearly abused its discretion by acting in an arbitrary or capricious manner.' Ex parte Edwards, 727 So. 2d 792, 794 (Ala. 1998). The petitioner must demonstrate:
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> > "'"(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."'
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> "Ex parte Edwards, 727 So. 2d at 794 (quoting Ex parte Adams, 514 So. 2d 845, 850 (Ala. 1987))."

Ex parte D.J.B., 859 So. 2d 445, 448 (Ala. Civ. App. 2003).

We first note that, as the juvenile-court judge points out in her brief to this court, generally, a petition for the writ of mandamus is not an appropriate vehicle by which to review the denial of a motion to quash service of process. Ex parte Maxwell, 812 So. 2d 333 (Ala. 2001). However, our supreme court observed in Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 882 (Ala. 1983), that it has "allowed review by extraordinary writ, even in the face of a clear prohibition of its usage, where the issue or issues

presented also raised matters of substantial importance." Because the mother argues that the juvenile court has failed to hold a hearing on the motion to quash and that the juvenile court has issued a writ of arrest and ordered the mother to be held without bond, we conclude that, in this particular instance, the other issues involved in this petition are "of substantial importance."

That being determined, however, we note that the mother is not asking this court to issue a writ ordering the juvenile court to quash service; instead, she seeks a writ ordering the juvenile court to afford the mother the opportunity to be heard on her motion to quash, which, the mother contends, is required by Rule 12(d), Ala. R. Civ. P. That rule reads, in its entirety, as follows:

> "The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Rule 12(d).

> "We apply the principles applicable to statutory construction in construing our rules of civil procedure. Greener v. Killough, 1 So. 3d 93, 102

> (Ala. Civ. App. 2008). Thus, when we are examining a rule, '"'[w]ords in [that rule] must be given their natural, plain, ordinary, and commonly understood meaning.'"' Greener, 1 So. 3d at 102 (quoting Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998), quoting in turn IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992))."

Ex parte Tidra Corp., 223 So. 3d 931, 934-35 (Ala. Civ. App. 2016). Our courts have not had many opportunities to discuss the requirement of a hearing under Rule 12(d). However, we have observed that Rule 12(d) requires that a defense asserted under Rule 12(b) "be heard and determined before trial." See Barbee v. Barbee, 624 So. 2d 645 (Ala. Civ. App. 1993) (indicating that a challenge to venue should have been heard and determined before the trial court entered a divorce judgment by default); see also Package Express Ctr., Inc. v. Maund, 957 So. 2d 1137, 1141 (Ala. Civ. App. 2006) (commenting, in a case applying Tennessee law, that "the Alabama ... rules[] envision that a personal-jurisdiction defense will generally be determined before trial on application of any party to an action").

When the language used in the Federal Rules of Civil Procedure is similar to that used in the Alabama Rules of Civil Procedure, "a presumption arises that cases construing

the Federal Rules are authority for construction of the Alabama Rules." Ex parte Scott, 414 So. 2d 939, 941 (Ala. 1982). Many federal courts have indicated that the federal counterpart to Rule 12(d), Ala. R. Civ. P., which was former Rule 12(d), Fed. R. Civ. P., and is now current Rule 12(i), Fed. R. Civ. P., does not require an oral hearing. See, e.g., Greene v. WCI Holdings Corp., 136 F.3d 313, 316 (2d Cir. 1998) ("Every circuit to consider the issue has determined that the 'hearing' requirements of Rule 12 ... do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court."); Kloss v. RBS Citizens, N.A., 996 F. Supp. 2d 574, 590 (E.D. Mich. 2014) (same). The federal rules provide that a federal district court may dispense with motions without holding an oral hearing. Rule 78(b), Fed. R. Civ. P. ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); Kloss, 996 F. Supp. 2d at 590 (relying, in part, on Rule 78 to conclude that an oral hearing was not required on a motion to dismiss).

Rule 78, Ala. R. Civ. P., likewise allows for the disposition of some motions without an oral hearing. That rule reads, in part, that, "[t]o expedite its business, the

court may make provision by rule or order for the submission and determination of motions not seeking final judgment without oral hearing upon brief written statement of reasons in support and opposition." Rule 78. However, our Rule 78 specifically provides that, "unless there is a request for oral hearing, the court may enter an order denying a motion to dismiss without oral hearing." Id.

The mother's motion was a combined motion to quash and motion to dismiss for lack of service of process. The juvenile court denied that motion on the same day it was filed despite the request contained therein for an oral hearing. Based on Rule 12(d) and Rule 78, the mother was entitled to an oral hearing before the juvenile court ruled on the mother's motion to dismiss. Thus, the mother has established a clear, legal right to the hearing she seeks.[3]

In light of our resolution of the mother's petition insofar as it requested a hearing on the mother's motion to

[3]We express no opinion on the merits of the mother's challenge to service of process. However, as the juvenile court points out, Cain v. Cain, 892 So. 2d 952 (Ala. Civ. App. 2004), is inapposite in light of the presence of an executed service return in the record. See Rule 4(i)(1)(C), Ala. R. Civ. P.; Nolan v. Nolan, 429 So. 2d 596 (Ala. Civ. App. 1982). Thus, although the delay in filing the return of service was unusual, the mother will have the burden of presenting evidence to overcome the presumption that she has been properly served with process.

quash and to dismiss, we conclude that we must direct the juvenile court to set aside the arrest warrant issued when the mother failed to appear to present the child for a DNA test on July 30, 2020.

PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Donaldson and Hanson, JJ., concur.

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