REL: August 13, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200744

Ex parte D.R.

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama ex rel. K.N.

v.

D.R.)

(Jackson Juvenile Court, CS-20-900013)

EDWARDS, Judge.

The State of Alabama filed, on behalf of K.N. ("the mother"), a petition in the Jackson Juvenile Court ("the juvenile court") on March 10,

2020, seeking to establish the paternity of her child ("the child") and a child-support obligation for D.R.[1] D.R. filed an initial answer to the State's petition, in which he asserted that he lived in Jackson County. However, it appears that the mother filed what D.R. referred to as a "counterclaim," to which D.R. filed a separate answer containing an averment that he resided in Grant, which is located in Marshall County.

On May 21, 2020, D.R. filed in the paternity action a verified motion to dismiss or, in the alternative, to change venue. In that motion, D.R. asserted that he lived in Marshall County and that, by agreement with the mother, the child resided with him during the week and with the mother on the weekends. Thus, he contended, the paternity action should be transferred to the Marshall Juvenile Court based on the requirement in Ala. Code 1975, § 26-17-605, that a paternity action be brought in the county where the child resides or in the county where the defendant

[1]The recited facts and procedural history have been taken from D.R.'s mandamus petition and from the materials submitted in support of the petition; because no answer controverting those facts was filed by the State, we take those facts as true. See Ex parte Lester, 297 So. 3d 477, 478 (Ala. Civ. App. 2019).

resides, which, he said, would be Marshall County in either instance, because the child resided with him a majority of the time. In addition, he also asserted that, in the alternative, venue should be changed based on the forum non conveniens statute, Ala. Code 1975, § 6-3-21.1(a), because, he said, "although the parties may live in such geographical proximity to Jackson County that they may reasonably attend court, the [father] lives and earns his living in Marshall County, and any execution of any judgment for child support any court may order will need to be executed in Marshall County."

The juvenile court set D.R.'s motion for a hearing in August 2020. That hearing either never transpired or was not completed because the parties reached an agreement resolving all the issues before the juvenile court. However, the parties never executed any agreement, and they could not later agree on its terms.

In April 2021, D.R. filed a renewed motion to dismiss or, in the alternative, to change venue. He recited the above facts and again relied on § 26-17-605 or, in the alternative, § 6-3-21.1(a) as the bases for his motion. The juvenile court set that motion for a hearing to be held on May

27, 2021, but later amended its order to change the date of the hearing to May 26, 2021.

When D.R. and his counsel appeared at the May 26, 2021, hearing, they were informed that the motion would be heard by a referee and that the hearing would not be recorded or transcribed. According to the affidavit of Kyle Clark, D.R.'s attorney who appeared with D.R. at the May 26, 2021, hearing, Clark asked that the proceeding be recorded "because it was [his] intent to object to such a proceeding on the record." According to Clark, his requests and objections were overruled by the referee.[2] On May 26, 2021, the referee entered an order denying D.R.'s motion.

On June 1, 2021, D.R. filed a motion pursuant to Ala. Code 1975, § 12-15-106(f), seeking a rehearing and objecting to the referee's "findings." On June 4, 2021, without holding a hearing, the juvenile court entered an

[2]We note that if Clark or D.R. actually objected to having the matter heard by the referee, the juvenile court was not permitted to direct that the matter be heard by a referee. See Ala. Code 1975, § 12-15-106(b)(4) (providing that "[t]he presiding judge of the juvenile court may direct that the referee handle various kinds of juvenile and child-support cases unless ... [a] party objects to a hearing being held by a referee").

order in which it denied D.R.'s motion for a rehearing. In that order, the juvenile court recounted the procedural history of the case but made no specific statement regarding its basis for denying D.R.'s request for a rehearing of the venue issue. D.R. then filed, on June 17, 2021, this petition for the writ of mandamus.

> " ' "A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is 'appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court.' Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001)." ' "

Ex parte Brown, 963 So. 2d 604, 606-07 (Ala. 2007) (quoting Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

As D.R. correctly notes, § 12-15-106(f) provides:

> "A rehearing before a judge with authority over juvenile court matters concerning the matter heard by the referee shall be scheduled if any party files a written request therefor within the time frames provided in subsection (e). Once a rehearing is scheduled, the parties shall be notified of the date, time, and

> the place of the rehearing. Notice to a party represented by counsel shall be given to counsel, and this notice shall be sufficient unless the juvenile court orders otherwise. When an adequate record has been made in the proceeding before the referee, the judge shall review the record before rehearing and may admit new evidence at the rehearing. If the record is not adequate, the rehearing shall be de novo."

The juvenile court failed to schedule a rehearing of the venue matter heard by the referee. Instead, the juvenile court considered D.R.'s motion and, in view of the procedural history of the action, "denied" D.R.'s motion for a rehearing. The juvenile court is not permitted to deny a motion for a rehearing of a matter resolved by a referee; the language of § 12-15-106(f) requires the juvenile court to schedule a rehearing of the matter and, if the record before the referee is adequate, to review that record or, if there is no adequate record of the hearing held before the referee, to proceed to a de novo hearing on the matter. See Ex parte Quarles, 197 So. 3d 499, 501-02 (Ala. Civ. App. 2015) ("Subsection 12-15-106(e)[, Ala. Code 1975,] repeatedly states in clear and unambiguous terms that a party has a right to a rehearing if requested within 14 days of the filing of the findings and recommendations of the referee.").

Although we might question, based on the limited materials before us, whether D.R. should prevail on his request to change venue, we need not inquire into that issue.[3] Our supreme court has determined that the failure to grant a rehearing under § 12-15-106(f) cannot be harmless error. We explained in State Department of Human Resources v. A.G., 36 So. 3d 563, 564 (Ala. Civ. App. 2009):

> "In Ex parte T.R., 4 So. 3d 487 (Ala. 2008), the Alabama Supreme Court considered the issue whether Ala. Code 1975, § 12-15-6(d) -- a predecessor statute of [Ala. Code 1975,] § 12-15-106(f)[,] that was substantially similar to § 12-15-106(f) -- and [Ala. R. Juv. P.,] Rule 2.1(F)[,[4]] mandate that the juvenile

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[3]For example, the materials before us do not contain D.R.'s answer to the State's petition or to the mother's "counterclaim," and we are therefore unable to discern whether he raised the issue of improper venue in either answer. See Ex parte Lugo de Vega, 65 So. 3d 886, 896-97 (Ala. 2010) (denying a petition for the writ of mandamus requesting a change of venue because the petitioners had "neither raised the defense of improper venue by motion under Rule 12[, Ala. R. Civ. P.,] nor included the defense of improper venue in their initial answer to the complaint"). Because, as explained in the body of this opinion, the error of the juvenile court in denying D.R.'s request for a rehearing is not harmless, we express no opinion on the legal bases presented for a change of venue in D.R.'s motion and renewed motion.

[4]Rule 2.1, Ala. R. Juv. P., was rescinded effective July 1, 2014. "Rule 2.1 was deleted because the substance of Rule 2.1 has been codified in Ala. Code 1975, § 12-15-106." Comment to Rescission of Rule 2.1 Effective July 1, 2014.

court grant a rehearing on a timely filed motion for a rehearing and whether the denial of a rehearing could be considered harmless error. In that case, our supreme court held:

> " 'Rule 2.1(F) provides, and [§] 12-15-6 provided, that upon a written request for a rehearing before a judge, the trial court shall schedule and conduct a hearing, if for no other purpose, to provide a party with an opportunity to argue why the referee erred, why the record is not adequate, and/or why the record should be supplemented with additional evidence (regardless of whether there is an adequate record of the referee's proceedings). In the present case, the mother was denied her right to a "rehearing" under the rule and the statute. This was error on the part of the trial court and, we conclude, error that "affected [a] substantial right[]" of the mother, i.e., the right to have her case reheard by a judge.'

"T.R., 4 So. 3d at 490."

D.R. has demonstrated that the juvenile court failed to comply with § 12-15-106(f). Thus, we grant his petition and issue a writ directing the juvenile court to set aside its June 4, 2021, order and to proceed with a rehearing on D.R.'s motion regarding venue as required by § 12-15-106(f).

PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.