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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2012

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Ex parte Jennifer Ann Vest (Herron)

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: Ex parte Jennifer Ann Vest (Herron)

(In re: Jennifer Ann Vest (Herron)

v.

David Jeremy Vest))

**(Elmore Circuit Court, DR-01-492.02;
Court of Civil Appeals, 2100647)**

MALONE, Chief Justice.

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Jennifer Ann Vest (Herron) petitioned this Court for certiorari review of the decision of the Alabama Court of Civil Appeals denying her second petition for a writ of mandamus in a child-custody matter. We granted Jennifer's petition to examine the rationale applied by the Court of Civil Appeals, which appeared to be premised upon a perceived conflict between Ala. Code 1975, § 6-5-440, Alabama's abatement statute, and Ala. Code 1975, § 30-3-5, the statute providing for venue in proceedings seeking modification of child-custody and child-support orders. Jennifer argues to this Court that the Court of Civil Appeals' rationale conflicts with the mandate of § 6-5-440.

In Ex parte Vest, [Ms. 2100647, Sept. 2, 2011] ___ So. 3d ___ (Ala. Civ. App. 2011), the Court of Civil Appeals examined what it apparently perceived as tension between §§ 6-5-440 and 30-3-5. The court held, in pertinent part:

"[I]n arguing that § 6-5-440 bars the father's postdivorce proceeding because she had previously filed a postdivorce proceeding in the Mobile Circuit Court, the mother is asking this court to hold that one former spouse may race to the courthouse and file a postdivorce proceeding in an improper venue and thereby bar the other former spouse from filing a postdivorce proceeding in the proper venue. The mother has cited no binding precedent that dictates that result. Moreover, if we were to hold that §

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6-5-440 dictates such a result, we would be encouraging former spouses to race to the courthouse and forum shop. Consequently, we hold that, under the particular circumstances of this case, § 6-5-440 does not bar the father's postdivorce proceeding in the Elmore Circuit Court."

Vest, ___ So. 3d at ___. We reject the race-to-the-courthouse rationale announced by the Court of Civil Appeals in Vest. Venue in a child-custody-modification action can be waived. See, e.g., S.D.F. v. A.K., 875 So. 2d 326, 327-28 (Ala. Civ. App. 2003) (holding that the mother had waived venue of ongoing custody-modification proceedings by referring to future proceedings, but not to the proceedings then pending, in objecting to venue); Russey v. Dunlap, 532 So. 2d 630 (Ala. Civ. App. 1988) (reversing a trial court's sua sponte dismissal of a child-support-modification action and further determining that the father had waived objections to venue in that court).

It does not follow from the principle that venue in child-custody-modification proceedings can be waived that a forum-shopping parent can "file a postdivorce proceeding in an improper venue and thereby bar the other former spouse from filing a postdivorce proceeding in the proper venue," Vest, ___ So. 3d at ___, because the respondent parent can always

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object to venue in his or her first responsive pleading in the court in which venue is alleged to be improper. Nor does the requirement that a party object immediately to venue or waive the venue issue constitute a trap for the unwary, because Rule 12, Ala. R. Civ. P., has long provided that a defense of improper venue can be waived if omitted from the first responsive pleading.

We therefore reverse the judgment of the Court of Civil Appeals and remand this cause to that court for further consideration of § 6-5-440 and any other arguments that may have been pretermitted by the Court of Civil Appeals' analysis.

REVERSED AND REMANDED.

Woodall, Bolin, Parker, Shaw, and Main, JJ., concur.

Stuart, Murdock, and Wise, JJ., concur specially.

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STUART, Justice (concurring specially).

The main opinion and Justice Murdock's special concurrence address principles relating to venue in a child-custody-modification proceeding; I write to note an additional principle. Alabama's abatement statute, § 6-5-440, Ala. Code 1975, must be timely raised as a defense to a second-filed action or it is waived. Section 6-5-440 provides:

"No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times."

This Court noted in Washington Mutual Bank, F.A. v. Campbell, 24 So. 3d 435, 437 n.2 (Ala. 2009), that § 6-5-440 is not jurisdictional:

"'[Section 6-5-440] does not provide that the trial court "is deprived of" jurisdiction over the second-filed action, or that the second-filed action "is void." Instead, § 6-5-440 provides that when two actions are commenced at different times, the pendency of the first-filed action "is a good defense" to the second-filed action. Thus, a defendant must raise the first-filed action as a defense in a motion to dismiss.'"

(Quoting First Tennessee Bank, N.A. v. Snell, 718 So. 2d 20, 27 (Ala. 1998) (See, J., concurring in the result).) ""[I]f

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that defense is not raised by the defendant in a motion to dismiss, ... it is waived."'" Perdue v. Green, [Ms. 1101337, March 16, 2012] ___ So. 3d ___, ___ n.4 (Ala. 2012) (quoting Regions Bank v. Reed, 60 So. 3d 868, 884 (Ala. 2010), quoting in turn Veteto v. Yocum, 793 So. 2d 814, 815 n. 1 (Ala. Civ. App. 2001)).

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MURDOCK, Justice (concurring specially).

The main opinion notes two corollary principles in its analysis: "Venue in a child-custody-modification action can be waived" and "the respondent parent can always object to venue in his or her first responsive pleading in [a] court in which venue is alleged to be improper." ___ So. 3d at ___. I write separately to emphasize that the reason for these statements in the main opinion is solely to explain how and why it is that Ala. Code 1975, § 6-5-440, Alabama's abatement statute, and Alabama statutes and rules of procedure pertaining to venue and objections to venue do not necessitate a "race to the courthouse." Section 6-5-440 does not require some inquiry into whether an otherwise valid objection to the venue of an earlier filed action has or has not been waived in that earlier action. Why that earlier action may remain pending is between the parties and the court in that action; it is not a matter to be inquired into by the court in the later filed action. All the court in the later action is called upon or authorized to do under § 6-5-440 is to ascertain whether there is pending, for whatever reason, in another court of this state an earlier filed "action ... for

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the same cause." See also Ex parte Norfolk Southern Ry., 992 So. 2d 1286 (Ala. 2008) (holding that a party with a compulsory counterclaim in an earlier filed action constitutes a "plaintiff" in that action for purposes of § 6-5-440). If there is, then, under the terms of § 6-5-440, the later filed action must be dismissed.

Wise, J., concurs.