REL: May 22, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180650 and 2180651

R.D., Sr.

v.

S.S.

Appeals from Mobile Juvenile Court
(JU-12-733.01 and JU-12-733.02)

PER CURIAM.

In appeal number 2180650, R.D., Sr. ("the alleged father"), appeals from a final judgment entered by the Mobile Juvenile Court ("the juvenile court") in case number JU-12-733.01, a dependency action concerning R.D., Jr. ("the child"). In appeal number 2180651, the alleged father appeals

from a final judgment entered by the juvenile court in case number JU-12-733.02, a custody action concerning the child. This court consolidated the appeals. We reverse the judgments and remand the cases for further proceedings consistent with this opinion.

Procedural Background

The child was born on November 4, 2011. On May 7, 2012, Ru.D. ("the alleged paternal grandmother") filed a complaint in the juvenile court, alleging that the child was dependent and requesting an award of his custody ("the dependency action"). The juvenile-court clerk assigned the dependency action case number JU-12-733.01. In the dependency action, the juvenile court awarded the alleged paternal grandmother pendente lite custody of the child. The alleged paternal grandmother eventually served summons and the complaint on S.S. ("the mother"); the mother's husband, L.G. ("the mother's husband"); and the alleged father.

On July 6, 2012, the mother's husband filed a motion to dismiss the dependency action, asserting, in pertinent part, that he had been married to the mother since February 19, 2003, that the child was born during the marriage, that he was

the presumed father of the child, that he was "persist[ing] in the presumption of paternity," and that the child was not dependent because "there is a parent that ... can meet the needs of the child." On July 24, 2012, the juvenile court denied the motion to dismiss but entered an order providing that "[the mother's husband] is the presumed father by virtue of the marriage to the mother, and all parties are hereby so advised so that proper pleadings may be filed and appropriate burden of proof observed."

On August 21, 2012, the mother filed in the dependency action an affidavit of substantial hardship in which she moved the juvenile court to declare her indigent and to appoint counsel to represent her. The juvenile court granted the mother's motion. The mother did not file an answer or any other pleading in the dependency action.

On September 25, 2014, the mother filed a "petition for visitation" seeking not only visitation but also, as she later clarified, custody of the child ("the custody action"). The juvenile court treated that petition as a new complaint and assigned the petition case number JU-12-733.02. On February 5, 2015, the juvenile court granted the mother pendente lite

visitation with the child, subject to the condition that the mother's husband have no contact with the child.

On December 29, 2014, the alleged father appeared in both the dependency action and the custody action, asserting his indigent status and requesting appointment of counsel. The juvenile court appointed counsel for the alleged father on January 5, 2015. On February 3, 2015, the alleged father filed a motion in both the dependency action and the custody action asserting, among other things, that he was the biological father of the child, that he had acknowledged his paternity of the child, and that he was requesting genetic testing to prove his paternity.[1] The juvenile court granted the motion in both actions by ordering the child, the mother, and the alleged father to undergo testing within 30 days.

On May 28, 2015, the mother filed a motion in the dependency action asking the juvenile court to hold the

[1]No party has challenged the alleged father's appearance in simultaneous proceedings to assert a paternity claim, so we do not address that point. But see Ala. Code 1975, § 6-5-440 ("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."),

alleged paternal grandmother in contempt for allegedly denying her visitation as required by the February 5, 2015, order. On July 1, 2015, the juvenile court entered an order in the dependency action stating that the mother's contempt motion would "be addressed at the trial."

On August 18, 2015, the juvenile court conducted a trial of both the dependency action and the custody action. At the commencement of the trial, the alleged father's attorney pointed out that the genetic testing ordered by the juvenile court had not occurred. The attorney for the mother's husband responded that the mother's husband still persisted in his paternity of the child, and the mother's husband stated that he wanted the mother to have custody of the child. The juvenile-court judge then orally stated:

> "I'll dismiss [the alleged father] as a party. He'll have to wait outside as a witness, and that's -- that ends your lawyer, okay? He can always file a motion to reconsider, and we can do something else if somebody can find some law that changes what[,] to my understanding[,] is still the Alabama law is that[,] if you're married, then the father -- the husband is the presumed father, and he trumps all other rights. So I'll today dismiss as to [the alleged father]."

Following the trial, the juvenile-court judge orally indicated that he had determined that the child was dependent,

that custody of the child should be awarded to the alleged paternal grandmother, that the mother and the mother's husband, which he characterized as the presumed and legal father of the child, should be required to pay child support to the alleged paternal grandmother, and that the mother should be permitted visitation with the child according to an agreement between the mother and the alleged paternal grandmother. However, the juvenile court did not enter a judgment in either action until May 26, 2017, when it entered substantively identical judgments in both the dependency action and the custody action providing, in pertinent part:

> "The Court finds the child to be dependent and that the mother and [the mother's husband] are unable to discharge their responsibilities to and for the child. The Court finds that it is in the best interests of the child that custody of the child shall be awarded to [the alleged paternal grandmother].
>
> "It is ORDERED, ADJUDGED, and DECREED by the Court that legal custody of [the child] is awarded to [the alleged paternal grandmother]....
>
> "The Court awards no visitation at this time."

(Capitalization in original.) On May 30, 2017, the mother filed a postjudgment motion in both the dependency action and the custody action, arguing that the child was no longer

dependent; those postjudgment motions were denied by operation of law on June 13, 2017, the 14th day after their filing. See Rule 1(B), Ala. R. Juv. P. The mother timely filed notices of appeal in both actions. The mother's husband did not appeal.

In S.S. v. R.D., 258 So. 3d 340 (Ala. Civ. App. 2018), this court determined that the mother had appealed from a nonfinal judgment in the dependency action, and we dismissed her appeal from the judgment entered in that action. Specifically, this court concluded that the juvenile court had not ruled on the mother's contempt motion, had not dismissed the alleged father as a party to the action, and had not adjudicated the paternity of the child. This court also reversed the judgment entered in the custody action and remanded the cause for the juvenile court to consider whether the child was currently dependent because, we said, 21 months had lapsed between the date of the trial and the entry of the judgment.

Upon this court's dismissal of the appeal in the dependency action and this court's reversal and remand in the custody action, the alleged father filed in both actions a renewed motion for genetic testing and a motion requesting the

juvenile court to adjudicate the paternity of the child. The mother filed a response to the motions in which she asserted that the mother's husband had previously indicated that he was persisting in his status as the presumed father of the child and that the juvenile court should honor his previous statement by dismissing the alleged father as a party in both actions and denying his requests for genetic testing and an adjudication of paternity. On February 10, 2019, the alleged father filed a response in both actions, asserting that the mother's husband was not the biological father of the child, that the mother's husband had never supported or otherwise acted as a father to the child, that the mother's husband was not persisting in his status as the presumed father of the child, that the alleged father was also a presumed father of the child, and that the alleged father was maintaining his request for genetic testing and an adjudication of his paternity of the child. On February 10, 2019, the alleged father filed a motion requesting an evidentiary hearing to contest the assertion that the mother's husband was persisting in his status as the presumed father of the child and to prove his own status as a presumed father of the child who should be

adjudicated the legal father of the child. The mother's husband did not appear in the proceedings after the issuance of our opinion in S.S. v. R.D.

On March 21, 2019, the juvenile court conducted a second trial in both the dependency action and the custody action. At the commencement of the trial, the juvenile-court judge determined from questioning the attorneys and the mother that the child had been born during the marriage between the mother and the mother's husband and that no father had been identified on the birth certificate of the child. The juvenile-court judge then stated:

> "I've got a pending motion about DNA testing for [the alleged father]. The problem, is, in the past -- even though I -- I don't have anybody appointed for [the mother's husband] today for the remand hearing. I haven't heard from him, but in the past, he had maintained that the child was his. And being the [mother's] husband, he has a presumption that I can't upset."

The juvenile-court judge asked the mother if she wanted genetic testing. The mother responded that "everyone knows it's [the alleged father's] child anyway," but her attorney indicated that the mother did not want the testing done. The alleged father's attorney countered that the alleged father was entitled to an evidentiary hearing on the questions of his

own status as a presumed father and whether the mother's husband was persisting in his status as the presumed father of the child. The juvenile-court judge then stated:

> "My problem with that analysis is that I'm stuck with [the mother's husband's] persistence in pursuing this as his child from his last pronouncements. He hasn't filed anything since, and he hasn't been put in a position to file anything since or needed to since this remand.
>
> "And while, yes, your client can claim ... that he has a presumption of paternity, the court cases are very clear in that if there are competing presumptions, in which there is here, that the one that is more favored in the law is to be given precedence, if you will. Given more priority.
>
> "And that consistent with all of these blasted cases is that any paternity -- any paternity presumption which is grounded in marriage -- which those first four are, frankly.
>
> "....
>
> "It gets precedence .... And so -- so I'm -- so, you know, maybe, you can get it upset in this one. I -- that's all I know. So I'm denying the request to add [the alleged father] as a party. I'm denying the request for a DNA."

The juvenile court then proceeded to take testimony.

On April 24, 2019, the juvenile court entered identical judgments in the dependency action and in the custody action. The judgments acknowledge that the mother's husband is not the biological father of the child but conclude that the mother's

husband is the presumed father of the child who is persisting in that status. The judgments dismissed the alleged father as a party, providing, in pertinent part:

> "[The alleged father] had filed multiple motions seeking DNA parentage testing, however the mother is legally married to [the mother's husband], who is therefore the presumed father. [The alleged father] claims to be a presumed father under [Ala. Code 1975, §] 26-17-204(a)(5)[,] due to his relationship with the child, openly holding the child out as his natural child, supporting the child, and having established a significant parental relationship. However, the presumption [of paternity inuring to the mother's husband], being based on marriage, outweighs [the alleged father's] alleged presumption and therefore the [juvenile court] did rule and does order that the request for DNA testing by [the alleged father] is hereby denied. [The alleged father] is DISMISSED as a party to these actions."

(Capitalization in original.) The judgments further provided that the child was dependent because the mother and the mother's husband had abandoned the child by, among other things, not supporting the child, not inquiring about the child, and not adjusting their circumstances to meet the needs of the child. The juvenile court also determined that, by continuing her relationship with the mother's husband, the mother had exposed the child to "a violent person who is inappropriate to have any contact with the child," thereby rendering the mother's home "an unfit and unsafe place for the

child to reside." The juvenile court awarded custody of the child to the alleged paternal grandmother and awarded the mother limited, supervised visitation with the child. The juvenile court denied the mother's husband any contact with the child.

The mother and the alleged father timely appealed from the judgments in both the dependency action and the custody action.[2] This court originally consolidated the mother's and the alleged father's appeals; however, upon submission, we unconsolidated the appeals. This opinion addresses only the alleged father's appeals.

Issues

The alleged father argues that the juvenile erred in dismissing him as a party to both the dependency action and the custody action without conducting genetic testing to ascertain the paternity of the child and without holding an evidentiary hearing on the paternity issues. He also argues

[2]Upon initial review, this court determined that the juvenile court had again failed to address the mother's contempt claim in the dependency action. This court remanded the dependency action to the juvenile court, which adjudicated the contempt claim by denying it on February 26, 2020, thereby making its judgment in the dependency action final. See Decker v. Decker, 984 So. 2d 1216 (Ala. Civ. App. 2007).

that the juvenile court erred by failing to adjudicate him the father of the child.

Discussion

Under Ala. Code 1975, § 26-17-204(a)(1), a part of the Alabama Uniform Parentage Act (2008) ("the AUPA"), Ala. Code 1975, § 26-17-101 et seq., when a woman gives birth to a child during a marriage, her husband is the presumed father of that child. If the husband, as 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). In its July 24, 2012, order in the dependency action and in the final judgments entered in the dependency action and the custody action, the juvenile court determined that the mother's husband was a presumed father because the child was born during his marriage to the mother. In 2012, the mother's husband filed a motion to dismiss in the dependency action in which he asserted that he was persisting in his presumed paternity of the child. Likewise, at the commencement of the trial in 2015, the attorney for the mother's husband asserted that the mother's husband continued to maintain that position.

In 2019, the juvenile court noted that the mother's husband had not appeared for trial but determined that the juvenile court was "stuck" by the 2012 and 2015 "pronouncements" to conclude that the mother's husband was still persisting in his status as the presumed father of the child.[3]

We disagree. As the Alabama Comment to Ala. Code 1975, § 26-17-607, explains,

> "[s]ubsection (a) [of § 26-17-607] 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."

In Ex parte Presse, 554 So. 2d 406 (Ala. 1989), Norman Presse married Jean Presse Koenemann in 1973. While the

[3]In 2019, the mother filed a motion purporting to raise the mother's husband's continuing claim to paternity of the child despite his absence from the proceedings. The alleged father moved to strike that motion, but the juvenile court impliedly denied that motion when it dismissed the alleged father as a party on the basis that the mother's husband persisted in his status as the legal father of the child. We express no opinion on the propriety of the mother's motion because the alleged father has not raised that issue in these appeals. "An issue that is not raised on appeal is waived." Grant v. Grant, 820 So. 2d 824, 825 (Ala. Civ. App. 2001).

couple was living in Tuscaloosa between 1975 and 1977, Jean engaged in an adulterous affair with Lynn Koenemann that resulted in the birth of a child in 1977 while Jean remained married to Norman. Not aware of the affair and the true paternity of the child, Norman raised the child as his own. In January 1980, when Norman and Jean divorced, Norman received custody of the child and continued to raise her as his own daughter. Jean married Koenemann in March 1980 and successfully petitioned to obtain sole physical custody of the child in May 1980. Norman exercised his liberal visitation privileges with the child thereafter. In 1986, Jean and Koenemann filed a paternity action in which they sought to have Koenemann adjudicated the legal father of the child and to modify the divorce judgment to eliminate Norman's legal relationship to the child along with any rights to visitation with the child. Based on genetic testing, the trial court determined that Koenemann was the biological father of the child, ordered the birth certificate of the child amended to reflect his paternity, and awarded Norman visitation with the child. This court affirmed the trial court's judgment.

Presse v. Koenemann, 554 So. 2d 403, 404 (Ala. Civ. App. 1988).

On certiorari review, the Koenemanns conceded that Jean was barred by the doctrine of res judicata from relitigating the question of the paternity of the child that had been decided in favor of Norman in the divorce judgment, leaving the contest solely between Norman and Koenemann. The supreme court decided that, in that context,

> "[t]he dispositive issue, then, is: Does a man claiming to be the father of a child conceived and born during the marriage of its mother to another man have standing under the [predecessor to the AUPA] to initiate an action to establish that he is the father of the child, where the presumed father persists in the presumption that he is the father?"

554 So. 2d at 411. The court answered that question in the negative "[u]nder the facts of th[at] case." Id.

The supreme court emphasized the particular "facts" motivating its conclusion. The court recognized that Norman had forged a significant and long-standing father-child relationship with the child. 554 So. 2d at 418. The court stated: "The record before us shows that despite divorce, physical separation, and painful assertions that he is not the true father of [the child], Norman ... has provided her with

unconditional love, financial support, and companionship." 554 So. 2d at 418. Even after Norman lost custody of the child, he "religiously exercised his visitation privileges and never once hinted that he disavowed his paternity of the child." 554 So. 2d at 412. The opinion implied that Norman intended to continue treating the child as his own daughter in the same benevolent manner despite the evidence of her biological parentage.

Under Ex parte Presse, so long as the husband of a mother of a child born during the marriage has assumed the fatherly role and has been discharging his parental obligations of support, love, and companionship toward the child, and the husband displays a commitment to continuing in his parental role, with all that it entails, the presumed fatherhood of the husband may not be challenged by another person, even the actual biological father of the child. Accordingly, a husband of a mother of a child born during the marriage "persists in his status as the legal father of a child" within the meaning of § 26-17-607(a) by actively claiming his rights as a father, by consistently discharging his legal responsibilities to and for the child, and by committing to continuing to do so. See

A.S. v. M.W., 100 So. 3d 1112 (Ala. Civ. App. 2012). By that standard, a court adjudicating the issue whether a husband of a mother of a child born during the marriage is persisting in his status as the legal father of a child should focus on his conduct toward the child, see L.R.B. v. Talladega Cty. Dep't of Human Res., 223 So. 3d 923, 925 (Ala. Civ. App. 2016), and not rest its conclusion solely on a formal statement made by the husband in court.

In J.O.J. v. R.R., 895 So. 2d 336 (Ala. Civ. App. 2004), then Judge Crawley authored an opinion concerning the right of an alleged biological father to maintain an action to prove his paternity.[4] In that case, the mother married in 1984 but separated from her husband in June 1993. She began cohabiting with the alleged biological father and gave birth to their son on June 12, 1994. The mother later divorced the husband in 2001. Months later, the husband died. The alleged biological father attempted to maintain a paternity action in 2001, but the action was dismissed. On appeal from the judgment of dismissal, the mother argued that Ex parte Presse foreclosed

[4]We note that only a plurality of the court in J.O.J. agreed with the specific remand instructions to the trial court.

the paternity action. The main opinion concluded, however, that

> "[t]he holding in Ex parte Presse ... does not automatically resolve the issue of the biological father's standing to bring his paternity action in the present case. The biological father, under the holding in Ex parte Presse, lacks standing only if the husband persisted in the presumption of paternity .... We have no evidence concerning whether the husband wished to persist in or disavow his presumption of paternity."[5]

895 So. 2d at 340. The main opinion determined that the alleged biological father was entitled to an evidentiary hearing

> "at which the parties may attempt to prove that the husband either did or did not persist in his presumption of paternity. If, after that hearing, the circuit court determines that the husband did not persist in his presumption of paternity, the biological father's paternity action should proceed."

895 So. 2d at 340-41. In W.D.R. v. H.M., 897 So. 2d 327, 331 (Ala. Civ. App. 2004), a majority of this court held that an

[5]Although older caselaw speaks in terms of an alleged father's "standing" to bring a paternity action, our supreme court and this court have, in more recent cases, addressed what the courts had formerly characterized as "standing" in terms of a party's capacity to bring an action. See, e.g., Jakeman v. Lawrence Grp. Mgmt. Co., LLC, 151 So. 3d 1083 (Ala. 2014); Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 46 (Ala. 2013); and Ex parte Gentry, 228 So. 3d 1016, 1020-21 (Ala. Civ. App. 2107).

alleged biological father who seeks to maintain a paternity action relating to a child born during a mother's marriage to another man is entitled to an evidentiary hearing to determine whether the husband has persisted in his presumption of paternity. This court has consistently followed J.O.J. and W.D.R. by holding that, when a genuine controversy exists as to whether a husband is persisting in his status as the legal father of the child, it is reversible error for a trial court to dismiss a paternity action filed by an alleged biological father on the basis of § 26-17-607(a), or to its predecessor, and the holding in Ex parte Presse without first holding an evidentiary hearing to resolve that controversy. See, e.g., D.B. v. A.K., 93 So. 3d 946, 949 (Ala. Civ. App. 2012); R.D.B. v. A.C., 27 So. 3d 1283 (Ala. Civ. App. 2009); see also Ex parte N.M.D., 249 So. 3d 511, 514 (Ala. Civ. App. 2017) (issuing a writ of mandamus directing the juvenile court to hold an evidentiary hearing as to whether husband of mother persisted in his status as the legal father of child).

In these actions, the juvenile court determined that the alleged father could not maintain a paternity action because the mother's husband had indicated through statements in court

that he was persisting in his status as the legal father of the child. The juvenile court denied the alleged father an evidentiary hearing to prove that the mother's husband was not, by his conduct toward the child, persisting in his status as the legal father of the child despite those in-court assertions. However, the allegations made by the alleged father in his motions and by the alleged paternal grandmother in her dependency complaint, as well as a great deal of the evidence admitted during the trial of the dependency action and the custody action, strongly indicate that the mother's husband had never asserted his status as the legal father of the child as had the husband in Ex parte Presse and that the mother's husband was not committed to doing so in the future. The alleged father and the alleged paternal grandmother maintained that the mother's husband had never interacted with the child, had not forged a father-child relationship with the child, had not supported the child, had not visited with the child, and had even not inquired regarding the health or welfare of the child. Notably, the mother's husband has never claimed a right to custody or even to visitation with the child. Moreover, the mother's husband did not challenge the

original dependency judgment or the award of custody to the alleged paternal grandmother, and he did not appear at the 2019 trial to pursue any rights to the child, perhaps suggesting that, if he had ever persisted in his status as the presumed father within the meaning of Ex parte Presse, he had since ceased to persist in his parentage so that a paternity action could be maintained. See Alabama Comment to § 26-17-607.

At the very least, the alleged father presented a genuine controversy as to whether the mother's husband was persisting in his status as the legal father of the child. We, therefore, conclude that the juvenile court erred in dismissing the father as party to the dependency action and the custody action without first affording him an evidentiary hearing to prove that the mother's husband was not persisting in his status as the legal father of the child. We reverse the judgments entered in the dependency action and in the custody action insofar as they dismissed the alleged father as a party and adjudicated the mother's husband as the legal father of the child, and we remand the actions for the juvenile court to make the threshold determination of whether

the mother's husband persists in his status as the legal father of the child in accordance with the principles outlined in this opinion.

On remand, if the juvenile court determines that the mother's husband is not persisting in his status as the legal father of the child, the juvenile court shall reinstate the alleged father as a party to the actions, order the genetic testing requested by the alleged father, see Ala. Code 1975, § 26-17-502(a) ("Except as otherwise provided in this article and Article 6 [of the AUPA], the court shall order the child and other designated individuals to submit to genetic testing if the request for testing is made by a party to the proceeding, the Alabama Department of Human Resources, or the representative of the child."), and resolve the competing paternity-presumption claims of the alleged father and the mother's husband in accordance with § 26-17-204(b) and § 26-17-607(b) of the AUPA, which provide that, "[i]n 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."[6]

[6]Section 26-17-603, Ala. Code 1975, provides that "a man whose paternity of the child is to be adjudicated" must be

The AUPA expresses the public policy to "favor maintaining the integrity of the family unit and the father-child relationship that was developed therein," Alabama Comment to § 26-17-607, as explained in Ex parte Presse and its progeny. See D.I. v. I.G., 262 So. 3d 651, 657 (Ala. Civ. App. 2018). In Ex parte Presse, the supreme court explained that the presumptions of paternity contained in the predecessor to the AUPA "espouse[] principles that seek to protect the sanctity of family relationships." 554 So. 2d at 412. The supreme court further noted that those presumptions further the state's interest in protecting "the psychological stability and general welfare of the child." 554 So. 2d at 418. When deciding which of two or more competing presumptions of paternity prevails, a court should give

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joined as a party to a paternity action. The juvenile court should take measures to assure that the mother's husband is joined, or remains joined, as a party before any proceeding to adjudicate the paternity of the child so that the judgment will not be void. See, e.g., A.S. v. M.W., supra. However, nothing in our opinion should be construed as requiring the mother's husband to reappear in the underlying proceedings and to litigate the paternity of the child if he concedes that the alleged father should be adjudicated the legal father of the child.

weightier consideration to the one founded on those policies as demonstrated by the facts in evidence.

In Ex parte Presse, the supreme court stated that the presumption of fatherhood inuring to the husband of the mother of a child born during their marriage is "an ancient one, supported by logic, common sense, and justice," 554 So. 2d at 412, but the supreme court did not determine that Norman's presumption of paternity should prevail simply because he was Jean's husband at the time of the birth of the child. The supreme court rested its decision on the facts as established by the undisputed evidence in the record showing that Norman had acted as a father toward the child since she was born, had forged a long-standing benevolent paternal relationship with the child, and had never disavowed his status as the presumed father of the child. The supreme court specifically noted that Norman had a superior claim to the paternity of the child because severing or curtailing his de facto paternal relationship to the child would frustrate the public policies behind the predecessor to the AUPA. 554 So. 2d at 418.

However, Ex parte Presse does not hold that, as a matter of law, the presumption in favor of the husband always "trumps

all other rights," as the juvenile court phrased it in these actions. In Ex parte Kimbrell, 180 So. 3d 30, 38 (Ala. Civ. App. 2015), this court held that, under the unusual circumstances in which the child born during the marriage of the mother has not formed a familial relationship with the mother's husband, but has instead forged an exclusive father-child relationship with his or her biological father who is also a presumed father, the public policy underlying the AUPA of preserving familial relationships beneficial to the child militates against adjudicating the husband as the father of the child.

In Ex parte Kimbrell, the mother married John Herbert in 1996. In 1997, the mother left Herbert without divorcing him. Based on a conversation with Herbert, the mother assumed that Herbert would obtain the divorce in her absence, but he did not. The mother did not divorce Herbert for the next 17 years. In approximately 2004, the mother began cohabiting with Denny Kimbrell. They conceived a child who was born in 2006. Kimbrell was listed as the father on the child's birth certificate, received the child into his home and openly held out the child as his natural child, and provided the child

emotional and financial support. Seven months after the child was born, the mother and Kimbrell were ceremoniously married, but that marriage was annulled because the mother remained married to Herbert. In the judgment annulling the marriage, the trial court determined that Kimbrell was the legal father of the child although the child was born during the marriage between the mother and Herbert.

On those unusual facts, this court agreed with the implied determination of the trial court that Kimbrell's presumption of paternity was founded on weightier considerations of public policy and logic. This court rejected the mother's argument that Ex parte Presse established that the husband should always prevail in a case of competing claims of paternity, stating: "Ex parte Presse ... did not hold that in all circumstances, and regardless of the facts of individual cases, a presumption in favor of the mother's husband was to prevail over that in favor of another presumed father." 180 So. 3d at 38. The court explained:

> "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. 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."

180 So. 3d at 38. We denied the mother's petition for a writ of mandamus requesting that the order of the trial court adjudicating Kimbrell to be the legal father of the child be vacated.

In these actions, the alleged father asserts that he is a presumed father under § 26-17-204(a)(5), which provides that a man shall be considered a presumed father of a child 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."

The alleged father asserts that the mother separated from the mother's husband because of domestic abuse with the intention

of divorcing him but that she failed to obtain a divorce. While the mother's husband was incarcerated for domestic violence, she invited the alleged father to live with her. During their cohabitation, the mother and the alleged father conceived the child. The alleged father is not listed on the birth certificate as the father of the child, but the child is named after him in recognition of his paternity. The alleged father has consistently held out the child as his own. According to the evidence presented to the juvenile court, the mother, the mother's husband, and the community at large recognize the alleged father as the father of the child. The alleged father has been raising the child in the same home with the alleged paternal grandmother since the child was three years old. The alleged father stated that he provides the child love, companionship, and emotional and financial support. He also claims that he educates, feeds, bathes, and otherwise cares for the child on a daily basis. The alleged father asserts that he has served as the exclusive paternal figure for the child for nearly six years and that the child understands that the alleged father is his father.

Unlike in Ex parte Presse, in these actions, the alleged father claims that he is not seeking to supplant the mother's husband as the de facto father of the child. The alleged father maintains that the child has never been in a familial relationship with the mother's husband. Significantly, the alleged father seeks an adjudication of his paternity in a case in which the child has been determined to be dependent due to abandonment by the mother and the mother's husband. The juvenile court determined as early as 2012, when the child was in his infancy, that the best interests of the child would be served by awarding custody of the child to the alleged paternal grandmother. The child has been residing in her home since 2012 and with the alleged father since 2015. Although the juvenile court eventually awarded the mother visitation with the child, it has never allowed the mother's husband any contact with the child. Ultimately, the juvenile court determined that the mother's husband is a violent person who should have no contact with the child. The alleged father argues that the mother's husband has no relationship with the child other than a purely legal one based on the technicality of the continuation of his marriage to the mother despite her

efforts to divorce him. The alleged father maintains that the public policy behind the AUPA of preserving the sanctity of family relationships would not be violated, but would be fostered, by adjudicating him, rather than the mother's husband, as the legal father of the child.

Should the juvenile court determine that the mother's husband is not persisting in his status as the legal father of the child, the court should afford the alleged father an opportunity to prove that his claim to the paternity of the child should be given weightier consideration than that of the mother's husband through facts in evidence as required by § 26-17-204(b) and § 26-17-607(b). Under those statutes, the court should conduct an evidentiary hearing to ascertain the facts relevant to the question of which presumption of paternity is founded on the weightier considerations of public policy and logic. In making its determination, the court should consider the child's best interest and general welfare, the existing father-child relationship and psychological bond between the child and each presumed father, the existence of family relationships, the length of time each presumed father has assumed the role of father to the child, any disruption to

the child's life, the stability for the child, the willingness and ability of each presumed father to provide the child with financial and emotional support, any public-policy and logic arguments presented, and any other relevant factors.

Conclusion

We reverse the judgments of the juvenile court entered in the dependency action and in the custody action, and we remand the actions to the juvenile court to conduct further proceedings consistent with this opinion.

2180650 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2180651 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore and Edwards, JJ., concur.

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

Hanson, J., concurs in the result but dissents from the rationale, with writing.

HANSON, Judge, concurring in the result but dissenting from the rationale.

The main opinion in these cases reverses judgments of the Mobile Juvenile Court that, in effect, declined to allow R.D., Sr. ("the alleged father"), to assert a claim of paternity as to a child otherwise before that court (i.e., R.D., Jr., hereinafter "the child") on pending dependency and custody claims asserted as to the child by the alleged father's mother, Ru.D. ("the alleged paternal grandmother"), and S.S. ("the mother"), respectively.[7] I agree with the main opinion that the judgments are due to be reversed with instructions to conduct a further hearing on the matter of whether the mother's husband, L.G. ("the presumed father"), continues to persist in the statutory and common-law presumption that favors his paternity of the child arising from his marriage to the mother at the time of the child's conception and birth. Beyond that narrow point, however, I cannot, in good conscience, join the main opinion.

[7]The mother's appeals from those judgments, which awarded the alleged paternal grandmother custody of the child, have been deconsolidated and have been separately decided by this court. See S.S. v. R.D. (Nos. 2180637 and 2180638, May 22, 2020), ___ So. 3d ___ (Ala. Civ. App. 2020) (table).

The main opinion correctly notes that the presumed father appeared in the alleged paternal grandmother's dependency action as early as July 2012, filing a motion to dismiss that action on the basis that he was "a parent that [could] meet the needs of the child," that the child had been born during the presumed father's marriage to the mother, and that he was "persist[ing] in the presumption of paternity." The juvenile court denied the presumed father's motion soon after it was filed but advised all parties that he was, in fact, "the presumed father by virtue of the marriage to the mother." Some two and a half years later, in early 2015, the alleged father appeared in the dependency action and in the mother's subsequent custody action and, notwithstanding the juvenile court's order advising of the presumed father's status, sought genetic testing in aid of establishing his own claim of paternity as to the child, averring that he had acknowledged the child as his own. At the outset of the initial August 2015 trial of the dependency and custody actions, the presumed father's attorney appeared and stated that the presumed father maintained his persistence in the presumption of paternity, contending that the mother and not the alleged paternal

grandmother should be awarded custody; on the basis of that statement of persistence, the juvenile court dismissed the alleged father as a party and proceeded with the initial trial as to the dependency and custody claims. However, that court delayed in disposing of the dependency and custody claims for approximately 21 months, which delay prompted this court to reverse the judgment in the custody action because of the staleness of the evidence received as to the child's circumstances and to remand "for a full evidentiary hearing regarding the mother's request for custody of the child." S.S. v. R.D., 258 So. 3d 340, 348 (Ala. Civ. App. 2018).

Although it is the law that a reversal of a judgment "annuls it in its entirety and vacates all rulings that are contained within it," Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985), which would necessarily include the juvenile court's previous ruling as to the alleged father's lack of capacity to assert a competing paternity claim, the presumed father did not himself again appear to state his persistence in the presumption of paternity at the hearing conducted by the juvenile court on remand from this court's decision in S.S.; rather, the mother's counsel asserted that the presumed

father's position had not changed. Based upon the principle summarized in Ex parte Riley, both I and the judges concurring in the main opinion are certainly clear to a conclusion that the juvenile court should have held, and should now hold, a new hearing to receive and consider all pertinent evidence as to the issue whether the presumed father is persisting -- in the present tense -- in his presumption of paternity as to the child. Beyond that narrow point, however, I cannot join in the analysis employed in the main opinion to the extent that that opinion speaks to the substantive issue of a putative father's alleged rights to impugn a presumed father's status stemming from his marriage to the mother of a child.

A portion of the Alabama Uniform Parentage Act (2008) ("the 2008 AUPA"), Ala. Code 1975, § 26-17-101 et seq., provides that a man, such as the presumed father in these cases, is presumed to be the father of a child if "he and the mother of the child are married to each other and the child is born during the marriage."[8] Ala. Code 1975, § 26-17-

[8]The alleged father's contention in his appellate brief that the presumed father was merely "alleged" to be married to the mother at the time of the child's birth, and his assertion in his appellate brief that his counsel "has not been able to find a marriage certificate," overlook the mother's testimony

204(a)(1). However, the alleged father also claims to be the presumed father of the child under Ala. Code 1975, § 26-17-204(a)(5), another provision of the 2008 AUPA, which affords a presumption of paternity if, "while the child is under the age of majority, [a man] 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." Under the 2008 AUPA, as under earlier law, "[i]n 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." Ala. Code 1975, § 26-17-204(b). Those provisions of the 2008 AUPA carry forward, respectively, former § 26-17-5(a)(1), former § 26-17-5(a)(4), and former § 26-17-5(b), which appear in the former Alabama Uniform Parentage Act, Ala. Code 1975, former § 26-17-1 et seq. (repealed), and, by implication, judicial interpretations thereof:

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after remand that she and the presumed father had, at the time of the second trial, been married for 16 years, a longer time than the child at issue has been in being.

> "'It is an ingrained principle of statutory construction that "[t]he Legislature is presumed to be aware of existing law and judicial interpretation when it adopts a statute. Ex parte Louisville & N.R.R., 398 So. 2d 291, 296 (Ala. 1981)."' Ex parte Fontaine Trailer Co., 854 So. 2d 71, 83 (Ala. 2003) (quoting Carson v. City of Prichard, 709 So. 2d 1199, 1206 (Ala. 1998)). In adopting statutes and amendments thereto '"'the Legislature is presumed to have known the fixed judicial construction preexisting statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction.'"' Ex parte Fontaine Trailer Co., 854 So. 2d at 83 (quoting Wood-Dickerson Supply Co. v. Cocciola, 153 Ala. 555, 557, 45 So. 192, 192 (1907), quoting in turn Morrison v. Stevenson, 69 Ala. 448, 450 (1881)). '[W]here a statute is reenacted without material change, "it must be assumed that the Legislature was familiar with its interpretation by this court and was satisfied therewith."' Jones v. Conradi, 673 So. 2d 389, 392 (Ala. 1995) (quoting Nolen v. Clark, 238 Ala. 320, 321, 191 So. 342, 343 (1939))."

Wright v. Childree, 972 So. 2d 771, 778-79 (Ala. 2006).

In Ex parte Presse, 554 So. 2d 406 (Ala. 1989), a child sired by a mother's paramour was born during the mother's marriage to her first husband, which marriage was dissolved by a divorce judgment awarding custody of the child to the mother with the first husband having liberal visitation; the mother then married the paramour, and the mother and her new husband brought a civil action seeking to have the first husband excluded as the father of the child. Reversing this court's

affirmance of a judgment in favor of the new husband, our supreme court rejected the proposition that the new husband, although arguably entitled to a presumption of paternity stemming from his holding out of the child as his own following the mother's marriage to him, could bring a paternity action in contravention of the first husband's presumption of paternity emanating from his marriage to the mother. Opining that "it is not logical that two men could be presumed to be the child's father," the court reasoned in Presse that "[t]he presumption in favor of [the first husband] is an ancient one, supported by logic, common sense, and justice" (554 So. 2d at 412); in further support, our supreme court quoted with approval the following secondary sources:

> "'Pater est quem nuptiae demonstrat -- the presumption that the husband of the mother of a child born during marriage is the father of that child -- is often said to be one of the strongest presumptions known to the law. Although the presumption is rebuttable in appropriate circumstances, the Uniform Parentage Act (UPA) provides that it may be challenged only by a child's mother, her husband, or the child itself. Thus, under the UPA, as under the majority of other state statutory schemes, a man claiming to be the biological father of a child born during the marriage of its mother to another is unable to initiate an action to establish paternity.'"

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> "'The case of the married mother who brings into the world a child of someone not her husband lies differently. But it is not a difficult case either. The application of the presumption of legitimacy of a child born to a married woman would be in the child's interest in practically all cases. If the mother's husband does not disavow paternity, there is no reason to go after the child's true father. Whatever the current weight of the family protection argument may be, it certainly should prevent the illegitimate father from seeking to assert his claim to a child resulting from his union with a married mother. If, on the other hand, the mother's husband has disavowed paternity, no obstacle lies in the way of pursuing the child's father.'"

Ex parte Presse, 554 So. 2d at 413–14 (emphasis added; quoting Jean E. McEwen, Note, R. McG. & C.W. v. J.W. & W.W.: The Putative Father's Right to Standing to Rebut the Marital Presumption of Paternity, 76 N.W.U.L. Rev. 669, 669 (1981), and Harry D. Krause, Illegitimacy: Law and Social Policy 77 (1971)). Our supreme court summarized its holding thus:

> "[T]he legal question is whether a man has standing to bring an action seeking to declare a child illegitimate and to have himself declared the father of that child. This is not permitted under the [former AUPA], as long as there is a presumed father, pursuant to § 26-17-5(a)(1), who has not disclaimed his status as the child's father; consequently, another man ... has no standing to challenge the presumed paternity of that child. Put another way, so long as the presumed father persists in maintaining his parental status, not even the subsequent marriage of the child's mother to another

> man can create standing in the other man to challenge the presumed father's parental relationship."

Ex parte Presse, 554 So. 2d at 418 (emphasis added).

The holding in Ex parte Presse was extended by our supreme court in Ex parte C.A.P., 683 So. 2d 1010 (Ala. 1996), again reversing a judgment of this court that had allowed a putative father to bring an action to disprove a presumed father's paternity of a child born during the marriage of the presumed father to the mother even though the child had been conceived before the marriage. Our supreme court observed that "[n]either ... Ex parte Presse[] nor ... § 26-17-5[] intended ... that because the child was not conceived during the mother's marriage ..., an outsider as to the marriage[] had standing to attempt to establish his paternity notwithstanding the fact that the husband had not disclaimed, but rather maintained, his parental status." Ex parte C.A.P., 683 So. 2d at 1012. In reaching that decision, our supreme court cited and quoted with approval Foster v. Whitley, 564 So. 2d 990 (Ala. Civ. App. 1990), in which this court had held that a putative father who had sought to intervene in a divorce action to seek a determination of paternity lacked

"standing" to do so, "discounting the argument that [the putative father in that case] was the presumed father under § 26-17-5(a)(4) [of the former AUPA] because he openly held the child out as his own." Ex parte C.A.P., 683 So. 2d at 1012.

The foregoing authorities indicate that, at the time that the former AUPA was in effect, the legal presumption of a husband's paternity of a child born during a valid marriage under subsection (1) of Ala. Code 1975, former § 26-17-5(a), was deemed "founded upon the weightier considerations of public policy and logic" so as to take precedence over a presumption arising from "holding out" a child as one's own under subsection (4) of that statute. That concept was most notably applied by this court in C.Y.M. v. P.E.K., 776 So. 2d 817 (Ala. Civ. App. 2000), in which the record revealed that a child had been born while the mother had been living with another man. This court, citing Ala. Code 1975, former § 26-17-5(a)(1), Ex parte Presse, and Ex parte C.A.P., concluded that the man with whom the mother had been living at the time the child was born did not have "standing" to initiate a paternity action:

> "It is undisputed that the child was born during the marriage of the mother and her husband, even

> though the record indicates that the child was conceived and born while the mother and the husband were separated. Therefore, the husband is the presumed father of the child. Our supreme court has held that no one has standing to challenge a presumed father's paternity as long as the presumed father persists in claiming paternity of the child. The husband is not a party to this action, and, also, there is no evidence as to whether he persists in or relinquishes his status as the presumed father."

776 So. 2d at 818 (citations omitted; emphasis added). Thus, Ex parte Presse and its progeny can properly be read as endorsing the proposition that "the marital presumption [of paternity] has a higher priority than the holding out presumption or a biological-connection claim." C.E.G. v. A.L.A., 194 So. 3d 950, 957 (Ala. Civ. App. 2015).

Although the former AUPA, including Ala. Code 1975, former §§ 26-17-5(a)(1), 26-17-5(a)(4), and 26-17-5(b), was repealed by Act No. 2008-376, Ala. Acts 2008, the 2008 AUPA, as I have noted, contains substantially similar language regarding presumptions and the resolution of conflicts therein. See Ala. Code 1975, §§ 26-17-204(a)(1), 26-17-204(a)(5), 26-17-204(b), and 26-17-607(b). Not only does that reenactment of the pertinent provisions of the former AUPA amount to implicit legislative adoption of the judicial

construction under Wright, supra, I would also note that the 2008 AUPA now expressly provides that "[i]f a 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). The Alabama Comment to that statute expressly notes that "[s]ubsection (a) follows Ex parte Presse ... and its progeny that favor maintaining the integrity of the family unit and the father-child relationship that was developed therein."

In his appellate brief, the alleged father seeks to question the quantum of evidence necessary to permit a determination that a presumed father, such as the presumed father in these cases, is rightly deemed to have maintained his entitlement to the statutory presumption afforded by Ala. Code 1975, § 26-17-204(a)(1). Framed another way, the alleged father's appeals seek to pose and then to answer in his favor the question whether the juvenile court could properly have concluded in these cases, as it did, that the presumed father had not, in the words of Ex parte Presse, '"disavowed paternity"' (554 So. 2d at 417) or "disclaimed his status as the child's father" (554 So. 2d at 418) in a manner

inconsistent with an intent to persist in maintaining his parental status. I note that, under Alabama caselaw, the burden of proof is upon the party challenging the presumption of paternity to demonstrate that such a disavowal or disclaimer exists so as to permit an inference that the presumed father does not persist in maintaining that status. See, e.g., B.B. v. M.N., 90 So. 3d 194, 196 (Ala. Civ. App. 2012) (juvenile court did not err in finding that putative father of child lacked "standing" to bring paternity action because putative father "presented no evidence indicating that [the presumed father] failed to persist in the presumption of paternity"), and C.L.W. v. Madison Cty. Dep't of Human Res., 170 So. 3d 669, 673 (Ala. Civ. App. 2014) ("Because [the putative father of a child] failed to present any evidence [indicating that the presumed father had not persisted in his presumption of paternity], ... the juvenile court could not have properly determined that [the putative father] had met his burden ... ,and, thus, [he] lacked standing ....").

Notwithstanding those authorities, the brief of the alleged father would have this court hold that the record must contain evidence of a substantive familial relationship

between the presumed father and the pertinent child, through actions and deeds involving nurturing and support, in order for "persistence" in a paternity claim to be demonstrated -- evidence that, the alleged father says, was absent in these cases as to the presumed father, in contrast to the presence of evidence indicating that the alleged father had acknowledged and cared for the child. However, this court held in B.B., supra, that such comparative evidence "regarding [a putative father's] and [a presumed father's] interactions with [a] child" is ultimately not probative as to "the proper question for the juvenile court to resolve," i.e., "whether [the presumed father] persisted in the presumption of paternity" at the outset of the putative father's paternity action. 90 So. 3d at 196. Rather, under the progeny of Ex parte Presse, only slight evidence of a presumed father's intent to persist in claiming the status so presumed will suffice, such as: making a request for an award of custody of the pertinent child in a separate divorce proceeding (Ex parte S.E., 125 So. 3d 720, 721-22 (Ala. Civ. App. 2013)); claiming a parental presumption in opposing a maternal grandmother's "standing" to assert a claim of nonpaternity following the

death of the pertinent child's mother (Ex parte S.P., 72 So. 3d 1250, 1254 (Ala. Civ. App. 2011)); filing a response opposing a third party's motion to intervene in a divorce action in which the presumed father "'vigorously persist[ed] in his status'" (D.F.H. v. J.D.G., 125 So. 3d 146, 148 (Ala. Civ. App. 2013)); arguing that another party has no "standing" to reopen a judgment adjudicating paternity (Hooten v. Hooten, 754 So. 2d 634, 635 (Ala. Civ. App. 1999)); testifying that he wishes to remain the legal father of a child and intends to raise the child, even without hiring an attorney or contesting a putative father's biological paternity claim (M.J.M. v. R.M.B., 204 So. 3d 366, 370 (Ala. Civ. App. 2016)); and asserting one's legal paternity at a hearing despite genetic-testing results indicating no biological relationship between a presumed father and the pertinent child (Cravens v. Cravens, 936 So. 2d 538, 540 (Ala. Civ. App. 2005)).

In these cases, the juvenile court noted at the outset of the trial conducted on remand that, "in the past, [the presumed father] had maintained that the child was his" and that, "being the husband, he has a presumption that [the juvenile court] can't upset." Although the latter statement

is, in my view, a statement of law that is wholly consistent with Presse and with the cases decided thereafter indicating the minimal nature of conduct necessary on the part of husbands of mothers of children who are born during the husbands' marriages to the pertinent mothers to amount to "persisting" in the priority presumption of paternity afforded under the 2008 AUPA, the juvenile court was bound by our mandate in S.S. to consider all the material evidence pertinent to whether the presumed father, as a matter of fact, is still persisting in the presumption in his favor (which would necessarily include evidence tending to show any of the matters indicated in the caselaw cited in the previous paragraph of this writing). However, absent a proper factual determination that the presumed father is not still persisting in that presumption, the alleged father's claim is not, under the Presse line of cases and the 2008 AUPA, due to proceed.

I am aware that the presumed father in these cases, who is by no means a saintly individual, has not actively parented the child at issue and may even have persisted in the presumption of paternity as a result of motives that are not salutary. Nevertheless, both the highest court of this state

(by whose decisions, such as Ex parte Presse and Ex parte C.A.P., we are bound, see Ala. Code 1975, § 12-3-16) and the legislature of this state (by enacting § 26-17-607 as a part of the 2008 AUPA despite the presence of quite contrary language in the uniform act upon which the 2008 AUPA is otherwise based)[9] have espoused the view that the presumed father, irrespective of any underlying motives, must "cease[] to persist in his parentage" before a stranger to the marital relationship may prosecute a paternity claim. Ala. Code 1975, § 26-17-607, Alabama Comment; compare id., Uniform Comment (indicating that, under the uniform act, "a presumption of paternity may be challenged at any time if the mother and the presumed father were not cohabiting and did not engage in

[9]In contrast to the Alabama Comment to § 26-17-607, the Uniform Comment to § 607 of the 2002 Uniform Parentage Act, which is reprinted after the text of § 26-17-607, boldly asserts that the "days" of "impos[ing] an absolute bar on a man commencing a proceeding to establish his paternity if state law provides a statutory presumption of the paternity of another man" are "coming to an end." I submit that, in light of our legislature's decision to depart from the Uniform Parentage Act and to instead affirmatively codify Presse and its progeny, it is for that body and not the judiciary to decide when Alabama will, if ever, join the "[t]hirty-three states [that, as of 2000,] allow[ed] a man alleging himself to be the father of a child with a presumed father to rebut the marital presumption" when it is duly claimed. See Uniform Comment, supra.

sexual intercourse at the probable time of conception and the presumed father never openly held out the child as his own"). The current wisdom of the view espoused by our supreme court over the past 30-plus years and by our legislature is not a matter for this court to question, not even when hard facts are presented, and I cannot join the main opinion's apparent journey into matters of what the law ought to be, much less its telegraphing a suggested judgment to the juvenile court through suggestions of what evidence previously adduced may or may not "strongly indicate" regarding the various parties' conduct.[10] Accordingly, I concur only in the judgment of reversal in these cases.

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[10]To the extent that the main opinion draws support from the presumed father's election in 2017 not to appeal from the custody judgment favoring the alleged paternal grandmother -- the only judgment that this court concluded in S.S. to have been a final, appealable judgment -- I would note that the alleged father likewise did not appeal from that judgment. "'Under the law of the case doctrine, "[a] party cannot on a second appeal relitigate issues which were resolved by the [c]ourt in the first appeal or which would have been resolved had they been properly presented in the first appeal."'" Scrushy v. Tucker, 70 So. 3d 289, 303 (Ala. 2011) (quoting Kortum v. Johnson, 786 N.W.2d 702, 705 (N.D. 2010), quoting in turn State ex rel. North Dakota Dep't of Labor v. Riemers, 779 N.W.2d 649 (N.D. 2010)) (emphasis added in Scrushy).