REL: June 26, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180810 and 2180811

D.N.

v.

State of Alabama ex rel. C.G.

Appeals from Calhoun Circuit Court
(CS-18-900302 and CS-18-900361)

PER CURIAM.

These appeals arise from two child-support actions brought by the State of Alabama on behalf of C.G. ("the mother") in the Calhoun Circuit Court pursuant to Ala. Code

1975, § 38-10-7,[1] with respect to three minor children. Case no. CS-18-900361, which was commenced in October 2018, concerned the two older children at issue: A.I.N., born in July 2014, and E.E., born in March 2017. Case no. CS-18-900302, which was commenced in August 2018 (but in which service of process did not take place until November 2018), concerned a third child, A.G.W., who was born on May 18, 2018. Named as the father of the children in the two actions was the mother's former husband, D.N. ("the former husband").

The former husband, appearing pro se in case no. CS-18-900361 and listing a Pennsylvania mailing address, filed a request in that case for genetic testing as to A.I.N., admitting that that child had been born during the former husband's marriage to the mother but nonetheless questioning that child's biological paternity. On November 15, 2018, the date upon which the former husband was served with process in

[1]Subsection (a) of that statute permits the State to bring child-support actions in Alabama circuit, district, or juvenile courts in response to applications to the State Department of Human Resources for monetary aid with respect to children as to whom one "ow[es] the obligation of support" but has failed to provide that support. See also Ala. Code 1975, § 26-17-104 (also noting circuit court's jurisdiction to adjudicate parentage and determine incidental issues of support).

case no. CS-18-900302, the trial court entered genetic-testing orders in both cases as to all three children. The reported results of those tests excluded the former husband as the biological father of all three children at issue.

The State subsequently filed motions seeking dismissal of both cases, averring that the mother and the former husband had been divorced by a Pennsylvania court on June 18, 2018, and contending that, in light of the genetic-testing results, the former husband should be adjudicated not to be the legal father of the children. The trial court, treating those filings as having injected the issue of the former husband's nonpaternity into the cases and citing Ala. Code 1975, § 26-17-608, which permits a court to apply equitable principles in a paternity proceeding involving a presumed or acknowledged father, appointed a guardian ad litem to represent the interests of the children, and that court indicated that it would not immediately rule on the issue of the children's paternity.

On May 2, 2019, the trial court set the cases for a single June 6, 2019, trial. The trial court denied the former husband's request for a continuance on May 31, 2019. On June

5, 2019, after counsel for the former husband had filed notices of appearance and continuance motions on the eve of trial, the trial court again declined to continue the cases. The former husband then filed a motion expressly seeking to "disprove" parentage of the children at issue and requested that that motion be heard at trial.

The trial court held a trial in the two actions on June 6, 2019, at which that court heard testimony from the mother, a representative of the Calhoun County Department of Human Resources ("Calhoun County DHR"), and a representative of a parenting-services provider. The former husband did not appear in person at trial, although his attorney did participate in the questioning of witnesses and presented arguments on his behalf. The trial court subsequently entered two judgments determining that the former husband was "obligated to pay support for the" children at issue and setting the former husband's aggregate prospective child-support obligation, pursuant to the child-support guidelines set forth in Rule 32, Ala. R. Jud. Admin., at $763 per month; the trial court further denied the former husband's motions to disprove paternity and, in case no. CS-18-900361, awarded

retroactive child support in the amount of $2,052 as to the two older children. The former husband's postjudgment motions, filed by new counsel, were denied by the trial court, and the former husband subsequently timely appealed from both of the trial court's judgments; this court, acting ex mero motu, consolidated the appeal assigned case no. 2180810, which was taken in the trial court's case no. CS-18-900302, with the appeal assigned case no. 2180811, which was taken in the trial court's case no. CS-18-900361.

The former husband raises two issues. First, he says, the trial court erroneously failed to give preclusive effect to the genetic-testing results in determining that he had a duty to support the three children at issue. Second, he contends that the trial court's judgments could not properly have determined him to be the father of the children at issue because, he says, the judgments lack express findings and are not supported by sufficient evidence. Although we have not been favored with a brief on the part of the State of Alabama, the mother, or the guardian ad litem, we nonetheless recognize the heavy burden that the former husband assumes in

challenging the correctness of the trial court's judgments as to paternity:

> "The trial court conducted a hearing and heard the testimony. It had the opportunity to observe the witnesses and weigh the evidence. Because of this, we are due to accord the court's ruling a presumption of correctness, and, in the absence of findings which are plainly and palpably erroneous and manifestly unjust, we must affirm the [judgment of the] trial court."

State ex rel. D.K. v. R.T., 599 So. 2d 627, 629 (Ala. Civ. App. 1992).

With that standard in mind, we turn to the pertinent evidence of record, which is comparatively meager, consisting of 37 pages of trial proceedings and no evidentiary exhibits apart from the genetic-testing results. The mother testified at trial that she and the former husband had formerly been married and had lived together in Philadelphia, Pennsylvania. The oldest child at issue, A.I.N., bears the former husband's last name, and the mother testified that she and the former husband had lived together both during her pregnancy with A.I.N. and during A.I.N.'s infancy, but she added that the couple had separated by the time she was pregnant with E.E., her second child. Although the mother could not specify the precise length of their separation, if one assumes normal

fetal development, the mother's testimony would permit an inference that the mother cohabited with the former husband, at a minimum, between the first half of 2014 and the first half of 2016. However, on cross-examination by the former husband's attorney, the mother testified that the former husband had not "been around" her for two years preceding the June 2019 trial, indicating that the parties had maintained some sort of relationship into 2017, and she added that she and the former husband were divorced, at the former husband's request, "last year," i.e., 2018 -- testimony that is consistent with the State's representation of the former husband's divorce from the mother as having occurred in Pennsylvania on June 18, 2018, one month after the birth of the third child, A.G.W. The mother testified to having unsuccessfully requested of the former husband's attorney in the divorce action that the children be "added to the divorce decree," and the subsequent divorce judgment, according to undisputed testimony, does not mention the existence of any children of the marriage.[2]

[2]Although counsel for the State questioned at trial the propriety of that omission, we note that Pennsylvania's law regarding domestic-relations judgments would not likely deem

Much of the other testimony elicited by counsel at trial concerned the involvement of the mother, the former husband, and the mother's two older children in dependency proceedings in Jefferson County[3] in which the mother, over the course of a two-year period, temporarily lost and ultimately regained physical custody of her two older children. A worker for a parenting-services provider that had been involved in those proceedings testified both that she had known the mother for two years preceding trial and that she had, during the court proceedings in Jefferson County, also met the former husband, whom she identified as having had counsel during those proceedings. That witness further testified that the former husband, acting on the advice of counsel, had been involved in those proceedings to the extent of requesting an award of custody, participating in individualized-service-plan meetings involving the mother's two older children "to get his children

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such an omission as an absolute bar to a subsequent award of child support. See Commonwealth ex rel. O'Brien v. O'Brien, 182 Pa. Super. 584, 588, 128 A.2d 164, 166 (1956) (holding that party to divorce action cannot, via implication or inaction, limit the right of parties' children to support), aff'd, 390 Pa. 551, 136 A.2d 451 (1957).

[3]The mother was not asked at trial when she relocated from Pennsylvania to Alabama or when she moved to Calhoun County.

back," and participating in visitation sessions with those children. A worker with Calhoun County DHR confirmed that the former husband had "filed for custody of the two olde[r] children ... because [they] were [taken] from [the mother] because they had nowhere to stay"; that worker also testified that the former husband had refused to allow a study of his home in Pennsylvania as a component of that process.

Consistent with the testimony of the other two witnesses called at trial, the mother stated, in response to questioning by the guardian ad litem, that the former husband had participated in "all of" the dependency proceedings in Jefferson County, including participating in court proceedings and certain individualized-service-plan meetings and visiting with the two older children. Further, the mother testified, the former husband showed affection to A.I.N. during those dependency proceedings. However, the mother also testified that the former husband had refused to "work services" provided in conjunction with these proceedings, such as participating in parenting classes. According to the mother, the former husband "treat[ed] the children as his own," acknowledged them on their birthdays and at Christmas, and did

not stop doing so until he found out that the mother was "taking him for child support."

During further questioning of the mother at trial, counsel for the former husband asked whether the trial court would be able to see the text of any orders issued in the Jefferson County dependency proceedings. After the trial court interjected that it was not sure, the court subsequently noted on the record that it was "looking at the order from Jefferson County"[4] and had perceived from that order that the mother had been awarded custody of the two older children in February 2019. According to the trial court, the Jefferson County order recited both that it had been entered over "the objection of attorney for father" and that "Father's visitation shall be addressed in a CS custody case" (emphasis added).

Citing authority for the proposition that genetic-testing results excluding a person as a biological parent are

[4]As we have noted, no exhibits were introduced or admitted into evidence apart from the genetic-testing results, and the record does not otherwise reveal the means by which the Calhoun Circuit Court became aware of the specific contents of any orders entered in Jefferson County, much less that any party objected to the Calhoun Circuit Court's consideration of any such orders.

sufficient to rebut a presumption of parenthood that arises under the 2008 version of the Alabama Uniform Parentage Act, Ala. Code 1975, § 26-17-101 et seq. ("the AUPA"), see, e.g., D.J.G. v. F.E.G., 91 So. 3d 69, 74-75 (Ala. Civ. App. 2012),[5] the former husband first posits that the trial court did not have the discretion to deny his request to declare him not to be the father of the three children at issue because, he says, the genetic-testing results clearly excluded him as the biological father of the children. However, we note that neither D.J.G. nor the other cases cited by the former husband in his argument as to this issue that predate the adoption of the 2008 version of the AUPA acknowledge our legislature's recognition that parentage is, in the law, not always, as the former husband would apparently have it, a mere matter of cells and tissue. As this court stated in G.R.B. v. L.J.B.,

[5]Although the record indicates that A.I.N. was born in Pennsylvania, and suggests that E.E. might also have been born in Pennsylvania, we note that no party invoked in writing the potential applicability of Pennsylvania law pursuant to Rule 44.1, Ala. R. Civ. P., in either case presented for review. Thus, like the trial court, we will apply Alabama law to the substantive issues presented. See Brotherhood's Relief & Comp. Fund v. Rafferty, 91 So. 3d 693, 696 n.4 (Ala. Civ. App. 2011) (citing Brad's Indus., Inc. v. Coast Bank, 429 So. 2d 1001, 1003 (Ala. 1983)).

260 So. 3d 833 (Ala. Civ. App. 2018), in which this court reversed a determination of nonpaternity entered by a circuit court on the basis that the child at issue was aware that her mother's husband was not her biological father,

> "[r]egardless of whether a child is aware of the lack of a biological connection with his or her acknowledged or presumed father, that child is still subject to potential harm from allowing an acknowledged or presumed father to disprove his paternity; indeed, a child stands to lose a parent-child relationship and the emotional and financial support and stability associated therewith. The actual parent-child relationship, not simply whether a child is aware of the lack of a biological connection with his or her acknowledged or presumed father, should be the focus of the consideration regarding the 'nature of the relationship between the child and the presumed or acknowledged father.'"

G.R.B., 260 So. 3d at 838 (quoting subsection (b)(4) of Ala. Code 1975, § 26-17-608).

Similarly, in these cases, the trial court, in its orders appointing the children's guardian ad litem, also relied upon § 26-17-608, a statute that, according to the "Uniform Comment" thereto, expressly incorporates into Alabama law the doctrine of "paternity by estoppel." In Ex parte Robbins, 276 So. 3d 232 (Ala. Civ. App. 2018), this court noted that, under the doctrine of paternity by estoppel, "if a presumed father

seeks to disprove his paternity, a trial court could deny the man's claim on what amount to equitable grounds" after consideration of, among other things, "possible harm to the child" and "the length of time a man has acted in the role of a child's father." 276 So. 3d at 238 (emphasis added). The factors suggested by our legislature in § 26-17-608(b) informing that inquiry include the following:

> "(1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
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> "(2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
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> "(3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
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> "(4) the nature of the relationship between the child and the presumed or acknowledged father;
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> "(5) the age of the child;
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> "(6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
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> "(7) the nature of the relationship between the child and any alleged father;
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> "(8) the extent to which the passage of time reduces the chances of establishing the paternity of

> another man and a child-support obligation in favor of the child; and
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> "(9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child."

It is true, as the former husband asserts, that the trial court did not make express findings or state predicate legal conclusions in its judgments in the cases giving rise to these appeals regarding paternity by estoppel. That point, however, is ultimately immaterial to this court's review. Rule 52(a), Ala. R. Civ. P., provides that, in actions tried without a jury, "the court may upon written request and shall when required by statute[] find the facts specially and state separately its conclusions of law" (emphasis added); neither § 26-17-608 nor § 26-17-636 (governing parentage determinations generally) requires statements of findings and conclusions regarding parentage by estoppel, nor did any party request a statement of findings and conclusions in either case under review. It is well settled that when, as here, a trial court does not make specific factual findings in a judgment entered after an ore tenus proceeding, a reviewing court will assume that the findings necessary to support the judgment

were made, that the judgment and the necessary implicit findings are correct, that the judgment is due to be affirmed if supported by credible evidence, and that reversal is warranted only upon determination of plain and palpable error. See Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992); cf. Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001) (indicating that our legislature has the ability to require trial courts to provide statements of reasons in judgments when it so desires).

Turning first to the judgment in the case involving the older two children of the mother, i.e., case no. CS-18-900361, we note that the trial court heard evidence that A.I.N., although only four years old at the time of trial, was of a sufficient age to have lived with the former husband in Pennsylvania before the parties' separation and to have visited with the former husband during the Jefferson County dependency proceedings between 2017 and February 2019. Further, for all that appears in the record, the former husband fully participated in that action in the role of a father, to the point of seeking custody and exercising visitation rights, participating in service-planning meetings

involving A.I.N., acknowledging A.I.N. such as on his birthdays and at Christmas, and objecting to the Jefferson County court's order returning A.I.N. to the mother's custody.

In contrast, the former husband, less than 30 days after having been made a party to case no. CV-18-900361, initiated a request for genetic testing as to A.I.N., asserting that, "[d]espite [his] being deemed ... the legal father of [A.I.N.]" because of that child's having been born during the mother's marriage to the former husband, he "believe[d he] might not be the biological father of" A.I.N. The mother's testimony confirmed that the former husband changed his previous position regarding paternity of A.I.N. only upon having been "tak[en to court] for child support," and the inference arises from that testimony that the former husband had previously been placed on notice that A.I.N. was not his biological child. Finally, there is no evidence indicating that the mother or A.I.N. have ever alleged or recognized any other person as A.I.N.'s father or that there is any likelihood whatsoever that some other man who lived in or visited Philadelphia, Pennsylvania, during the middle of the preceding decade will be located and directed to pay child

support as to A.I.N.; indeed, the mother stated that A.I.N. had been the product of a rape and that she could not even recall at trial the names of any potential biological father of the two younger children.

Based upon that evidence touching and concerning the relative length of time during the lifetime of A.I.N. that the former husband had held himself out as A.I.N.'s father, coupled with the former husband's apparent prior notice of the prospect of his biological nonparentage and his having declined to act on that notice until being made a party to an action seeking financial support, the trial court could properly have determined that, notwithstanding the genetic-testing results excluding the former husband from biological parentage of A.I.N., the former husband, by virtue of his actions toward the mother, A.I.N., and the judicial system of Alabama, was estopped to deny that he was the father of A.I.N. and that it would be inequitable to permit him to sever his relationship with A.I.N. As a result, we conclude that, to the extent that the trial court determined in case no. CS-18-900361 that a duty to support A.I.N. existed, that judgment is due to be affirmed.

We reach an entirely different conclusion as to the mother's two younger children, however, and conclude that the judgments entered in case nos. CS-18-900361 and CS-18-900302 determining that the former husband has a duty of support as to E.E. and A.G.W. were plainly and palpably erroneous. See Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985) (ore tenus presumption of correctness is overcome when insufficient evidence is presented to the trial court to sustain its judgment).

A.G.W., the youngest child, was born in May 2018, a mere 31 days before the date on which, the record indicates, the mother and the former husband were divorced. The record further permits only the inferences that that child was conceived after the former husband had not "been around" the mother for several months and that that child was born sufficiently late so as not to have ever lived with the former husband or, for all that appears in the record, to even have been a subject of the dependency proceedings in Jefferson County involving the two older children. Thus, none of the former husband's conduct warranting a finding of estoppel with regard to A.I.N. could properly be deemed directed toward

A.G.W. such that a court could properly determine that A.G.W. and the former husband ever had a genuine father-child relationship apart from the mere presumption of parentage arising from the subsequent termination of the marriage of the mother and the former husband. As a result, we conclude that the trial court, in case no. CS-18-900302, erred in determining that the former husband has a duty of support with regard to A.G.W. that is enforceable under Ala. Code 1975, § 38-10-7.

Although E.E.'s situation presents a closer question, we likewise conclude that the trial court erred in determining that the former husband has a duty of support as to E.E. under a parenthood-by-estoppel theory. There is some evidence in the record that E.E. had been present during visitation sessions involving A.I.N. and the former husband in connection with the dependency proceedings in Alabama, that the former husband had initially sought custody of E.E. in those proceedings, and that the former husband had acknowledged E.E. on two occasions, i.e., on that child's birthday and at Christmas. However, the record contains no evidence indicating that the former husband ever resided with E.E. in

Pennsylvania, and the Calhoun County DHR employee who testified at trial stated that, although the former husband had thought that A.I.N. was his child until genetic-testing results had disproved that notion in November 2018, the former husband had never indicated that he believed himself to be the father of E.E. That witness also noted that, during visitation sessions, the former husband had shown affection to A.I.N. but not to E.E.

Turning to the specific factors set forth in § 26-17-608(b), we note that the record contains no evidence indicating that the former husband and E.E. have any established parent-child bond (subsection (7)), that any relationship between the two had endured for any significant length of time (subsection (2)), or that disproving the former husband's paternity would have any harmful effect on E.E. (subsections (6) and (9)). Although the record reveals that the former husband could be said to have "visited" with E.E. in connection with visiting A.I.N. during the dependency proceedings, the evidence presented to the trial court does not indicate the precise number of visits or whether E.E. was of a sufficient age at the time to have had any memory of

them. The record is also unclear concerning the precise date on which the former husband was placed on notice that E.E. was not his biological child, see § 26-17-608(b)(1), although the Calhoun County DHR employee's testimony indicated that the former husband did not believe that E.E. was his child even before the November 2018 genetic-testing results; it is clear, however, that the former husband had communicated to Calhoun County DHR no later than December 4, 2018, that he did not desire to be adjudicated the legal father of E.E., i.e., the date that Calhoun County DHR filed its motion to dismiss the paternity action that recited that desire. Thus, the former husband's conduct that can properly be deemed specifically directed toward E.E. was, at most, limited to the former husband's having "acknowledged" one of E.E.'s birthdays and one Christmas, and, on that basis, we cannot conclude that the trial court's judgment as to E.E. is supported by sufficient evidence to sustain it. See Dennis, 474 So. 2d at 79.

Based upon the foregoing facts and authorities, in case no. 2180810, we reverse the judgment of the trial court in its case no. CS-18-900302 and remand that cause for the entry of a judgment of dismissal. In the companion appeal, case no.

2180811, we affirm the judgment of the trial court in its case no. CS-18-900361 to the extent that that court determined that the former husband has a duty of support as to A.I.N.; reverse that judgment to the extent that that court determined that the former husband has a duty of support as to E.E. and specified child-support obligations based upon a child-support-guidelines calculation with respect to more than one child; and remand that cause for the trial court to enter a new judgment in conformity with this opinion after recalculating the former husband's support duties based solely upon his parentage of A.I.N.

2180810 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

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

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

2180811 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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

Donaldson, J., concurs in part and dissents in part, with writing.

DONALDSON, Judge, concurring in part and dissenting in part in case number 2180811.

I concur in that part of the main opinion affirming the judgment of the Calhoun Circuit Court insofar as it determines that D.N. has a duty of support as to A.I.N. and remands the cause for a recalculation of D.N.'s child-support obligation. I dissent from that part of the main opinion reversing the circuit court's judgment requiring D.N. to support E.E.