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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte William N. Dunn,
as guardian ad litem for J.M.H., a minor

PETITION FOR WRIT OF MANDAMUS

(In re: C.R.R.

v.

D.L.B.)

(Shelby Circuit Court, DR-19-900314)

MOORE, Judge.

William N. Dunn ("the guardian ad litem"), as guardian ad litem for J.M.H. ("the child"), a minor, has petitioned this

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court for a writ of mandamus ordering the Shelby Circuit Court to dismiss the petition for custody filed by the child's mother, C.R.R. ("the mother"). We deny the petition.

Procedural History

On August 16, 2018, the mother filed a complaint in the Chilton Circuit Court seeking a divorce from J.R. and alleging that the child had been born of her marriage to J.R.; that action is hereinafter referred to as "the divorce action." On January 28, 2019, the Chilton Circuit Court awarded J.R. custody of the child pendente lite. On May 2, 2019, the mother filed an amended complaint for a divorce, and a motion to vacate the pendente lite custody award, asserting that the child had not been born of the marriage.¹

On May 20, 2019, the mother filed in the Shelby Circuit Court a petition against D.L.B. alleging that D.L.B. is the biological father of the child and seeking custody of the child; that action will hereinafter be referred to as "the custody action." On August 6, 2019, J.R. moved to intervene in the custody action. J.R. asserted that the divorce action

¹The materials before this court indicate that the child was born on July 17, 2005, and that the mother and J.R. were married on January 2, 2009.

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was pending in the Chilton Circuit Court and that he had custody of the child pursuant to an order of the Chilton Circuit Court; he also asserted that the custody action should be transferred to the Chilton Circuit Court and consolidated with the divorce action. Upon motion of the mother and the guardian ad litem, the Shelby Circuit Court ordered genetic testing. On October 21, 2019, the mother filed an objection to J.R.'s motion to intervene in the custody action.

On October 22, 2019, J.R. filed a motion to stay the custody action pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975. On December 3, 2019, J.R. filed a motion to dismiss the custody action based on the UCCJEA.

On January 23, 2020, the guardian ad litem filed a motion to dismiss the custody action, asserting that J.R. is the presumed father of the child pursuant to § 26-17-204(a)(4)(A), Ala. Code 1975, a part of the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-1 et seq., Ala. Code 1975, because "[J.R.] and the mother were married to each other on January 2, 2009 (and remain married to each other,) AND [because J.R.] (and the [mother]) executed an Affidavit of Paternity as to

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the paternity of [the child] on August 26, 2015[,], which has been filed with the Alabama Office of Vital Statistics." The guardian ad litem also asserted that the "Affidavit of Paternity has not been rescinded or successfully challenged and the time for doing so has expired." He further asserted that J.R. is the presumed father of the child "pursuant to § 26-17-204(a)(4)(B) of the AUPA [because] ... [J.R.] is named as the father on [the child's] birth certificate with his consent." The guardian ad litem also asserted that J.R. is "a presumed father of [the child] pursuant to § 26-17-204(a)(5) of the AUPA [because] he has received the child into his home and openly held out the child as his natural child and has established a significant parental relationship with the child by providing emotional and financial support for the child since at least January 2, 2009[,], and continues to do so." The guardian ad litem attached a copy of the Affidavit of Paternity and the birth certificate to his motion.

The guardian ad litem additionally asserted that D.L.B. is not a presumed father of the child because "he has never been married to the [mother] and has never held out [the child] as his natural child in his home or otherwise and has

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not developed a significant relationship with said child by providing emotional and financial support." According to the guardian ad litem, "[i]t is undisputed that [J.R.] persists in his status as the legal father of [the child]." Therefore, he says, "[p]ursuant to § 26-17-607(a) of the AUPA, '... neither the mother nor any other individual may maintain an action to disprove paternity.'"

The Shelby Circuit Court held a hearing on the guardian ad litem's motion to dismiss on January 27, 2020. At that hearing, J.R. was present but was not permitted to speak because his motion to intervene had not yet been ruled upon. The guardian ad litem argued that J.R. is the presumed father of the child and that there is no dispute that J.R. has persisted in his paternity. The mother's attorney, however, asserted that J.R. had told the child that J.R. is not his father. No testimony was presented at the hearing.

On January 28, 2020, the Shelby Circuit Court entered an order granting J.R.'s motion to intervene, denying J.R.'s motion to stay, and denying the guardian ad litem's motion to dismiss. The case was "set for a Hearing on Adjudication of

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Paternity on February 6, 2020." That hearing was subsequently stayed by the Shelby Circuit Court.

Standard of Review

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)."

Ex parte S.T., 149 So. 3d 1089, 1090-91 (Ala. Civ. App. 2014).

Discussion

In his mandamus petition, the guardian ad litem argues that the Shelby Circuit Court erred in denying his motion to dismiss. Specifically, he argues, as he did in his motion to dismiss, that J.R. is the presumed father of the child and is persisting in his presumption of paternity and, thus, that the mother cannot maintain an action to disprove J.R.'s paternity.

This court has explained:

"If 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). This court has held, however, that 'a man seeking to establish paternity of a child born during the mother's marriage to another man must be given the opportunity to establish standing in an evidentiary hearing where he and others may present evidence

bearing on whether the presumed father ... had persisted in his presumption of paternity.' W.D.R. v. H.M., 897 So. 2d 327, 331 (Ala. Civ. App. 2004) (stating that, because it could not be determined as a matter of law that the presumed father had persisted in his presumption of paternity, the juvenile court must hold a hearing on that issue); see also R.D.B. v. A.C., 27 So. 3d 1283, 1287-88 (Ala. Civ. App. 2009) (holding that, because the biological father's 'allegations ... call[ed] into question whether the legal father persist[ed] in his presumption of paternity,' the juvenile court 'should permit the biological father and others to present evidence regarding whether the legal father persists in his presumption of paternity'); and J.O.J. v. R.R., 895 So. 2d 336 (Ala. Civ. App. 2004) (holding that evidentiary hearing must be held to determine whether the biological father had standing when there was no evidence regarding whether the child's legal father had persisted in his presumption of paternity)."

D.B. v. A.K., 93 So. 3d 946, 948-49 (Ala. Civ. App. 2012).

In this case, a hearing was held on the guardian ad litem's motion to dismiss, but no evidence was taken at that hearing. Indeed, J.R. was not allowed to speak at that hearing because his motion to intervene had not yet been granted. After the hearing, the Shelby Circuit Court granted J.R.'s motion to intervene and scheduled the case for a hearing on the issue of paternity.

In D.B., 93 So. 3d at 948-49, and the cases cited therein, this court made it clear that a trial court must hold

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an evidentiary hearing on the issue whether there is a presumed father who has persisted in his presumption of paternity. In this case, an evidentiary hearing has not yet taken place. Indeed, the custody action was set for a hearing on the issue of the paternity of the child, but the Shelby Circuit Court stayed the matter after this mandamus petition was filed. Therefore, we conclude that the guardian ad litem's petition for the writ of mandamus is premature and, thus, that there has been no showing of a clear legal right to the issuance of a writ of mandamus directing the Shelby Circuit Court to dismiss the custody action at this time. See, e.g., Ex parte R.S.C., 853 So. 2d 228, 234 (Ala. Civ. App. 2002) (holding that a "petition for a writ of mandamus seeking to set aside a purported denial of a Rule 60(b) motion by operation of law was premature because the trial court had not yet ruled on the motion[]"). Accordingly, we deny the petition.

PETITION DENIED.

Donaldson, Edwards, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, with writing.

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THOMPSON, Presiding Judge, concurring in the result.

I agree that the petition for a writ of mandamus seeking to direct the Shelby Circuit Court ("the trial court") to dismiss the custody action filed by C.R.R. ("the mother") is premature and, therefore, is due to be denied. I write to clarify that, in my opinion, the trial court should hold an evidentiary hearing on the issue of whether J.R. has persisted in his presumption of paternity.

A review of the materials before us indicates that, although J.R.'s name appears on the child's birth certificate and he has acknowledged his paternity of the child in writing, see § 26-17-204(a)(4)(A) and (B), Ala. Code 1975, at this point there is no evidence before the trial court indicating that J.R. has persisted in his presumption of paternity. Cf. Z.W.E. v. L.B., [Ms. 2180796, Feb. 7, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020) (The presumed father submitted a sworn affidavit testifying that he openly held out the child as his "'natural child'" and "'adamantly persist[ed] in [his] status as the legal father'" of the child, and the biological father acknowledged that the presumed father had persisted in his presumption of paternity.).

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If evidence taken at the hearing indicates that J.R. persists in his presumption of paternity, then the guardian ad litem can renew the motion to dismiss the mother's custody action, in which she asserts that D.L.B. is the child's biological father. I note that the right to maintain a paternity action when there is a presumed father is governed by § 26-17-607, Ala. Code 1975, which provides, in relevant part:

"(a) Except as otherwise provided in subsection (b), a presumed father may bring an action to disprove paternity at any time. If 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."

If, however, J.R. ceases to persist in his presumption of paternity, then such an action can be brought. Z.W.E., supra; § 26-17-607(a).