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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

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A. Ho.

v.

R.J.

Appeal from Montgomery Juvenile Court
(CS-16-900885)

HANSON, Judge.

This appeal arises from a paternity action commenced in November 2016 by R.J. ("the alleged father"),¹ acting through counsel; in his complaint initiating the action, the alleged father averred that he had "just cause to believe" that he was the father of a minor child, who was designated in the complaint as J.L.Ho. ("the child"),² and sought a determination of the child's paternity and any resulting support obligations, joint legal custody of the child, "standard" visitation with the child, and any other appropriate relief. The complaint was filed in the domestic-relations division of the Montgomery Circuit Court, which, pursuant to local law, sits as the juvenile court in Montgomery County (see M.R.J. v. D.R.B., 17 So. 3d 683, 684 n.1 (Ala. Civ. App. 2009)), and was assigned to a judge thereof; for that reason, and because the juvenile courts of this state are vested with original jurisdiction to adjudicate

¹We have elected in this appeal to follow the provisions of Rule 52, Ala. R. App. P., governing anonymity in appeals involving minor children who are the subjects of juvenile-court proceedings.

²As will be pointed out later in this opinion, other portions of the record indicate that the child's name is actually J.L.He.

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parentage under Ala. Code 1975, § 12-15-115(a)(6), we will refer to the trial court as "the juvenile court."

The child's mother, A.Ho. ("the mother"), was not served with a copy of the alleged father's complaint until March 2017, and the mother did not initially retain counsel to represent her. Further, it appears from the record that, notwithstanding an order compelling genetic testing of the child entered in November 2017 by another circuit-court judge during the temporary incapacity of the judge originally assigned to the case (see Ala. Const. 1901 (Off. Recomp.), art. VI, § 159), the mother failed to present the child for testing as required, and she was found in contempt in January 2019 for having violated that order. Thereafter, an attorney representing the mother filed a notice of appearance.

At a hearing on February 5, 2019, after all the parties had been sworn in, counsel for the mother orally moved for the dismissal of the alleged father's action and asserted that the alleged father should be directed to recite the sections of the Alabama Code upon which his action was based; the juvenile court denied the mother's oral motion. Counsel for the alleged father then indicated that a report containing the results of a

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paternity test had revealed that the child's actual name was J.L.He. rather than J.L.Ho. and suggested that there was a need to "clarify what is the child's last name." When the juvenile-court judge asked "[w]here is the name [He.] coming from," the mother replied "[h]er father," apparently referring to another man, W.He.; after the alleged father had given initial testimony about having undergone genetic testing as to paternity and a copy of the report containing genetic-testing results had been transmitted to the juvenile court, the following colloquy ensued:

"THE COURT: [Counsel for the mother], what do you have to show that [the alleged father] is not the father of this child and, rather, that this person, [W.He.], is?

"[Counsel for the mother]: [W.He.]'s on the birth certificate. He provided financial support for the child. He's held the child out as his own in the community. He has abundant proof. He's been with the child --

"THE COURT: Is he here?

"[Counsel for the mother]: No.

"THE COURT: No. If he's --

"[Counsel for the mother]: But it's their burden, Your Honor. They have to overcome the presumption of the father, and they have to do it by clear and convincing evidence. And I don't see what prior portion of the statute -- because there's

three components of the statute that they're alleging that [the alleged father is the legal] father. They might be the biological father. That's all well and good, if they prove that. But that doesn't give them legal rights to the child to go ahead and say we want some visitation. They're going to have to overcome that burden. The burden of proof is on them. They are the ones who are alleging that this child is his.

"[Counsel for the alleged father]: However, Your Honor, the mother did not inform -- and we're not going to argue the case before you right now, but the mother did not inform [the alleged father] of the existence of the child. Furthermore, she was not married to [W.He.] so the presumption of the child is not his.

"THE COURT: Well, and what this Court would also say, [counsel for the mother], is that anybody can sign a birth certificate and anybody can make payments. And so I think that --

"[Counsel for the mother]: I have a case here. It is exactly like our case.

"THE COURT: Okay. It may very well be just like this case, but I'm saying to you anyone can sign a birth certificate. Anyone can make payments in terms of taking care of a child. Anyone can hold the child out as their own, but that does not make him or her the father. And if there are two presumed fathers, as you are asserting to the Court, [W.He.] and [the alleged father], [the alleged father] has the results from the paternity test.

"The Court is going to listen to all of the testimony that is presented and take into evidence any documentary evidence, but I tell you this. Person or persons holding himself out as

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the father and the person that actually has the results, in my mind, it's not a contest. Okay."

(Emphasis added.)

After counsel for the mother had lodged an objection to the admission into evidence of the genetic-testing report tendered by the alleged father, counsel for the mother further pressed his argument about the existence of a presumption in favor of W.He.:

"[Counsel for the mother]: ... I just want to recite this in regards to our motion to dismiss. In [Ala. Code 1975, §] 26-17-204, the statute reads in pertinent part as follows: A man is presumed to be the father of a child if, (5), 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. (B), A presumption of paternity is established under this section may be rebutted only by adjudication under Article 6. In 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. The presumption of paternity is rebutted by a court decree establishing paternity of the child by another man.

"So in this situation, we're arguing in regards to [§ 26-17-]204 that in order for [the alleged father] to do that -- and just because he's the biological [father] does not mean that he ... is able to prevent the presumption under [§ 26-17-]204(a)(5).

"THE COURT: I don't know that's he's trying to prevent -- necessarily prevent the presumption. I think he's here today to offer some proof that he also is a presumed father because he has the results from this [genetic] testing. So then in that code section, the Court is directed to look at both of the presumptions and to make a determination as to which has more weight than the other. I think I addressed that to you before you-all left the courtroom when I said to you, without making a decision on the case, is that anybody can pay child support, anybody can sign the birth certificate and things of that nature. But we're going to go forward. We're going to have a hearing, and the Court is going to make some determination with regard to the issue of paternity.

"[Counsel for the alleged father]: Yes, Your Honor. And if I may add one thing, Your Honor, in response to opposing counsel's statement, that claims that opposing counsel referenced has to be made by the alleged presumed father, in which he has not interpled himself. He's not gone down to pay the fee, has not been [in]serted into this case. Even if he's presented as a witness, he still cannot make that claim until he's in the case as a party.

"THE COURT: All right. Thank you. You want to respond?

"[Counsel for the mother]: Yeah, I disagree with that wholeheartedly because the presumption follows the father [i.e., W.He.]. That's why it's a presumption. If the father meets the threshold presumption, then he [i.e., the alleged father] can't break the family unit, although he might be the biological father. And that's what that case is stating. He can't come in and disrupt what's --

"THE COURT: He's [i.e., the alleged father's] also a presumed father, [counsel for the mother]. And I think that's what you're failing to acknowledge, that in this instance, if the facts are -- or if the allegations are true and as you allege and assert, this Court also has to take into consideration the fact that we have a result from a paternity test that shows that the probability of paternity is 99.995 percent in this matter. So as I said before, [the alleged father] too is a presumed father, and it is the decision of this Court that will make -- that will ultimately decide the issues in this case. Okay? So I agree with [counsel for the alleged father] that the presumption and any right that goes with it has to be borne by the father [i.e., W.He.] and not by the mother in this matter. Okay? So let's go forward."

Counsel for the mother then called W.He. as a witness. W.He. testified that he and the mother had "been together" for 13 years and that they had had 2 children together, one of whom he identified as being the child at issue. W.He. added that he had been present at the child's delivery, that his name had been placed on the child's birth certificate, that the child had resided with him since her birth, that she was insured through his public-education health insurance, that he had attended the child's extracurricular activities, and that he had held himself out in the community as the child's father. However, when counsel for the mother sought to elicit information regarding W.He.'s income-tax filings, counsel

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for the alleged father objected, asserting that "if [W.He.] wants to establish his own paternity, he can file his own action." The juvenile-court judge, after indicating a modicum of agreement with that objection, ultimately ordered a recess in the trial rather than proceeding further.

In November 2019, the alleged father filed a motion seeking a hearing leading to the entry of a final judgment in the case, and another hearing was held on February 10, 2020. At that hearing, in response to the juvenile-court judge's remark that W.He. was "not a presumed father" because he was not married to the mother at the time of the birth of the child, counsel for the mother cited D.I. v. I.G., 262 So. 3d 651 (Ala. Civ. App. 2018), as contrary authority. In that case, this court noted that, as to the child at issue in that case, a man who "ha[d] held out the child as his own and ha[d] performed the duties of a father since the child's birth ... qualifie[d] as a presumed father under Ala. Code 1975, § 26-17-204(a)(5)," 262 So. 3d at 653, and held, among other things, that even conduct of a presumed father tending to recognize the existence of another person as a biological parent of a child would not warrant a conclusion that the presumed father did not "persist" in his presumption:

"[A] biological link between a man and a child is not required to establish legal parentage under § 26-17-204(a), and a presumed father may well know that he is not the biological father of a child. His acceptance of that fact is not an abandonment of his presumption; nor should be his willingness to recognize the child's biological father or other biological relatives, provided, of course, that he retains his role as the child's legal father by continuing to hold out the child as his natural child and by continuing to provide emotional and financial support to and for the child. In fact, we have held that, absent proof that a presumed father has 'ended his relationship with the child or ... ceded his paternal responsibilities to [another man],' a presumed father's knowledge of another man's claimed paternity coupled with that man's involvement in the child's life is not alone sufficient evidence to compel a finding that the presumed father has not persisted in his status under § 26-17-204(a). M.J.M. v. R.M.B., 204 So. 3d 366, 370 (Ala. Civ. App. 2016). We therefore reject the alleged biological father's argument that the presumed father's recognition of the alleged biological father's potential paternity and the presumed father's allowance of brief visitation with the alleged biological father and the alleged paternal grandparents negated the presumption of legal paternity in the presumed father or resulted in an abandonment of that presumption."

262 So. 3d at 656 (emphasis added; footnote omitted).

In response to counsel for the mother's citation of D.I., counsel for the alleged father noted that W.He. was not a party to the alleged father's paternity action and contended that "the correct way to persist is by being

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a part of the case." The juvenile-court judge, after a brief recess to review

D.I., indicated agreement with that position, stating:

"If [W.He.] wants to persist in that presumption that he is -- or persist in that representation that he is the presumed father, then it seems to me he needs to take some action either to defend against this, to prevent [the alleged father] from claiming that he is the biological father. I think it's more on your client, [counsel for the mother], to either defend or prove that he is the presumed father.

"....

"... So if [W.He.] wants to take the position that he's persisting in his representation that he is the presumed father of this child, he should have been ready."

After the juvenile-court judge had made those remarks, counsel for the mother stated:

"Well, my argument would be [W.He.] would be an indispensable party, and it would be the [alleged father], who knows about [W.He.] -- it would be upon [the alleged father and his counsel] to bring [W.He.] in as [a]n indispensable party because [W.He.'s] rights can adversely impact [the alleged father]'s rights, whatever he gets. When [the alleged father and his counsel] filed the petition, they knew about [W.He.]. They have had knowledge of him. They failed to -- it's their petition. He's an indispensable party in regards to the relationship that he has with the alleged father [sic]. So, you know, we'll just put that on the record in regards to that."

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Counsel for the mother then called the mother as a witness. She testified that she and W.He. had "been together" since 2006, that she and W.He. had been "living together" for 13-14 years (i.e., since before the child's birth), that the child had been named after W.He. and that he was listed as the father of the child on her birth certificate, and that W.He. had "provided support" for the child. After that testimony was given, counsel for the alleged father lodged an objection to the line of questioning of the mother's counsel, asserting that "we are not here for [the] argument" that W.He. is a presumed father. That objection was not ruled upon, however, because the juvenile-court judge engaged in a telephone conversation, on the record, with a representative of the laboratory that had conducted the genetic testing of the alleged father and the child concerning when they had presented themselves for testing. When counsel for the mother again resumed his examination of the mother, she testified that W.He. had visited with the child at her school, went on trips with the child, provided her clothing and similar supplies, and had held the child out in the community as his own child.

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During cross-examination by counsel for the alleged father, the mother admitted that she and the alleged father had engaged in sexual intercourse, although she testified that no such encounters had occurred at the time of the child's conception and that, in any event, she had insisted upon the use of barrier methods of birth control during such encounters. After the mother's testimony had concluded, the alleged father was recalled to give further testimony, after which counsel for the mother sought a recess because of the lack of an original certification of the genetic-testing results, and the juvenile court ordered the parties to return to court on February 28, 2020. At that subsequent proceeding, the juvenile court admitted the genetic-testing report into evidence over the mother's hearsay and authenticity objections and heard additional testimony from the parties. On September 30, 2020, the juvenile court entered an order in which it determined, based upon the genetic-testing report, that the alleged father "is the biological father of the ... [c]hild" and that the order would "become final after 14 days if [the mother] fail[ed] to otherwise act to establish paternity."

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On October 13, 2020, the mother, through counsel, filed a notice of appeal directed to the September 30, 2020, order. This court determined that the September 30, 2020, order was not a final judgment that would support an appeal because, among other things, it did not adjudicate the issue of the alleged father's visitation rights, and the cause was remanded for the entry of a final judgment. The juvenile court complied with this court's order and entered a final judgment on March 9, 2021, determining the alleged father to be "the [f]ather" of the child, directing a conforming amendment of the child's birth certificate, awarding the alleged father and the mother joint legal custody of the child and awarding the alleged father visitation rights, directing the parties to engage in counseling aimed at integrating the alleged father into the child's life, and requiring the alleged father to pay the mother \$386 per month as child support. In its judgment, the juvenile court opined that the mother and W.He. had "failed to present any evidence or testimony ... to establish a common-law marriage or a legal marriage," observed that W.He. "was not a party to this action and never filed a motion to intervene or motion to dismiss this action," and stated that the mother and W.He. "were given the

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opportunity to present their own genetic testing to establish paternity but failed to do so."

The mother filed a postjudgment motion in which she argued, among other things, that

"[W.He.], who was at the birth of the child, and the listed father on the child's birth certificate, who has held [the child] out as his own and has performed the duties of a father since the child's birth by providing emotional and financial support such that he qualifies as a presumed father ... was a necessary party to this action and that without his presence the parties['] rights cannot be fully adjudicated."

The alleged father, appearing through new counsel, filed a response in opposition to the postjudgment motion, averring that, in the absence of W.He's appearance in the case, the juvenile court had no basis to determine him to be the legal father of the child. The juvenile court thereafter entered an order denying the postjudgment motion, and the mother's appeal proceeded to submission on the parties' briefs.

Although the mother argues in her brief that the juvenile court's judgment is due to be reversed on the bases that the alleged father lacked standing to bring an action regarding the child's paternity and that the juvenile court erred in allowing the admission into evidence of the genetic-

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testing report, we are not in a position to reach those substantive questions. Rather, our cases support the position taken by counsel for the mother both during the February 10, 2020, hearing and in her postjudgment motion: the absence of an indispensable party, W.He., from the proceedings below divested the juvenile court of power to enter a judgment determining the paternity of the child.

Until the legislature's enactment of the 2008 version of the Alabama Uniform Parentage Act ("the 2008 AUPA"), Ala. Code 1975, § 26-17-101 et seq., paternity proceedings in Alabama were governed by the 1984 version of that act, Ala. Code 1975, former § 26-17-1 et seq. ("the 1984 AUPA"). A portion of the 1984 AUPA provided that, with respect to actions seeking an adjudication regarding a child's paternity, "[t]he natural mother, each man presumed to be the father ..., and each man alleged to be the natural father, shall be made parties." Ala. Code 1975, former § 26-17-11 (emphasis added). In J.W. v. C.H., 988 So. 2d 560 (Ala. Civ. App. 2007), this court held that a man who had held himself out to be the father of a child and with whom that child and that child's mother had lived following the military deployment of another presumed father

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qualified as a "presumed father" under the 1984 AUPA and that that man was "a necessary party to any paternity action" as to that child "regardless of whether [he] was entitled to pursue his own challenge to a paternity determination regarding the child." 988 So. 2d at 564 (emphasis added).

The 2008 AUPA did not reenact former § 26-17-11; rather, the 2008 AUPA provides that certain individuals, notably including "a man whose paternity of the child is to be adjudicated," "must be joined as parties in a proceeding to adjudicate parentage." Ala. Code 1975, § 26-17-603(2) (emphasis added). Nonetheless, this court has confirmed that J.W.'s holding is still good law. In A.S. v. M.W., 100 So. 3d 1112 (Ala. Civ. App. 2012), a mother of three children appealed from juvenile-court judgments determining that all three children were dependent and placing two of them in the care of a man who had previously been adjudicated to have been the legal father of those children, despite the fact that those two children had been born during the mother's marriage to another man ("the husband") and that the husband had, according to the mother, persisted in his concomitant presumption that he was the father of those children. 100 So. 3d at 1113. Although this court indicated that there had been

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evidence before the juvenile court regarding the husband's conduct tending to indicate that the husband was not truly persisting in that presumption, we were nonetheless "constrained" by the 2008 AUPA and J.W., supra, to hold "that the judgment adjudicating the paternity of the children [was] void for failure to join [the husband] as an indispensable party." 100 So. 3d at 1114 (emphasis added). We remanded the cases with directions for the juvenile court to join the husband as a party if it was feasible to do so. Id. To like effect is our recent decision in R.D. v. S.S., 309 So. 3d 146 (Ala. Civ. App. 2020), in which this court, in reversing a judgment dismissing an alleged father's paternity claim and remanding the case, directed the juvenile court in that case to, consistent with § 26-17-603 and A.S., "take measures to assure that the mother's husband [wa]s joined, or remain[ed] joined, as a party before any proceeding to adjudicate the paternity of the child so that the judgment [entered on remand would] not be void." 309 So. 3d at 156 n.6.

Similarly, in this case, counsel for the mother adduced evidence, in the form of the testimony of both the mother and W.He., indicating that W.He. is indeed a presumed father of the child who is persisting in his

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presumption of paternity as to the child. See D.I., 262 So. 3d at 655. Thus, the juvenile court, under J.W., A.S., and R.D., supra, should not have proceeded to render and enter a judgment determining the alleged father to be the legal father of the child, awarding the alleged father joint legal custody of the child, directing that visitation should commence, and ordering the alleged father to pay child support without joining W.He. as a party, and that court's failure to do so rendered that judgment void. "A void judgment will not support an appeal." L.C. v. Shelby Cnty. Dep't of Hum. Res., 293 So. 3d 912, 916 (Ala. Civ. App. 2019). We therefore dismiss the appeal with the following instructions to the juvenile court: (1) to take steps, pursuant to Rule 19(a), Ala. R. Civ. P., to join W.He. as a party to the action as a presumed father of the child; (2) to determine, after W.He.'s joinder, whether W.He. "persists in his status as the legal father of the child" so as to prevent any paternity action from being maintained under the AUPA (see Ala. Code 1975, § 26-17-607(a)); and (3) if W.He. does not persist in that status and a paternity action can lawfully be maintained by the alleged father notwithstanding § 26-17-607(a), to proceed to adjudicate the legal father of the child in a manner consistent

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with the principles set forth in the caselaw of this court, see D.I., 262 So. 3d at 656 ("a biological link between a man and a child is not required to establish legal parentage under § 26-17-204(a)"), and our supreme court, see Ex parte T.J., 89 So. 3d 744, 749 (Ala. 2012) ("the presumption established by § 26-17-204(a)(5) is based on the man's relationship with the child, not on a biological connection").

APPEAL DISMISSED WITH INSTRUCTIONS.

Moore, Edwards, and Fridy, JJ., concur.

Thompson, P.J., concurs in the result, without writing.