Rel: May 28, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200486

Ex parte A.A.

PETITION FOR WRIT OF MANDAMUS

(In re: C.G.

v.

A.A. and J.A.)

(Shelby Circuit Court, DR-18-900660)

THOMPSON, Presiding Judge.

A.A. ("the mother") filed a petition for a writ of mandamus seeking review of a March 19, 2021, order of the Shelby Circuit Court ("the trial court") that ordered genetic paternity testing for the mother's son, G.A. ("the child").

The materials submitted to this court by the parties and the child's guardian ad litem reveal the following facts. The mother married D.M. on April 6, 2016, and she separated from him on June 2, 2016. D.M. filed a July 2017 petition in the Marshall Circuit Court seeking a divorce from the mother. In his divorce action, D.M. alleged, among other things, that he was not the father of the child with whom the mother was, at that time, pregnant. The Marshall Circuit Court entered a July 6, 2017, judgment divorcing the mother from D.M. That divorce judgment incorporated an agreement reached by the mother and D.M. that is not included in the materials submitted to this court.

Before the entry of the July 6, 2017, judgment that divorced her from D.M., the mother purported to marry C.G. on December 20, 2016. In May 2017, the mother gave birth to a daughter, B.G. The mother and C.G.

separated on approximately November 3, 2017, and, within one week, the mother began a relationship with another man, J.A.

C.G. filed in the trial court a January 11, 2018, complaint seeking a divorce from the mother; that action was assigned case number DR-18-900020 ("the divorce action"). In his complaint, C.G. sought, among other things, an award of custody of B.G., the child born during his purported marriage to the mother. C.G. also alleged that he had "reason to believe" that the mother was pregnant with another child at the time he filed his divorce complaint. The trial court entered a January 12, 2018, order granting C.G. sole pendente lite custody of B.G.

On January 23, 2018, the mother filed an answer in the divorce action and alleged that, because she had still been legally married to D.M. at the time she purported to marry C.G., the marriage to C.G. was void. The mother also alleged that, at that time, she was pregnant with the child but that C.G. was not the father of the child.

The mother married J.A. in Tennessee on May 15, 2018. At the time of that marriage, J.A. had not been divorced from his former wife for the 60 days required by the judgment that divorced that couple. See § 30-2-10,

Ala. Code 1975 ("When a judgment has been entered granting a divorce in this state, the court shall order that neither party shall again marry, except to each other, until 60 days after the judgment is entered ...."). It appears that the parties do not challenge the validity of the marriage of J.A. and the mother.

The child was born on June 23, 2018, one month after the mother married J.A., and the mother and J.A. remained married throughout the proceedings below. J.A. is listed as the father on the child's birth certificate.

On November 9, 2018, after the mother had filed her answer in the divorce action alleging that her marriage to C.G. was void, C.G. filed in the trial court a new action against the mother in which he sought, among other things, a determination of the paternity of the child. That new action was assigned to a different trial-court judge than the one presiding over the divorce action, was assigned case number DR-18-90060, and is hereinafter referred to as "the paternity action." In the paternity action, C.G. alleged that genetic testing, the results of which he had submitted in the divorce action, established his paternity of B.G. and the child, and he

sought an award of sole custody of both the children. The mother answered and counterclaimed, also seeking, among other things, a determination of C.G.'s paternity of both children. J.A. moved to intervene in the paternity action, and the trial court granted that motion.

On March 22, 2019, the trial court entered a judgment in the divorce action in which it annulled the marriage between C.G. and the mother on the basis that it was "void." The paternity action remained pending.

In the paternity action, the mother and J.A. maintained that, by virtue of J.A.'s marriage to the mother before the birth of the child, J.A. was the child's presumed father under § 26-17-204, Ala. Code 1975. On January 2, 2020, J.A. moved for a judgment on the pleadings, arguing that he was the child's presumed father, that he persisted in maintaining that presumption, and, therefore, that C.G. could not challenge his paternity of the child. C.G. opposed that motion. On the motion of J.A. and the mother, the trial court entered an order in the paternity action, stating that it would not consider as evidence in the paternity action the results of the genetic testing that C.G. had submitted in the divorce action.

On August 4, 2020, the trial court entered in the paternity action an order finding that C.G. had sufficiently asserted a claim that he is a presumed father of the child under § 26-17-204(a)(3), Ala. Code 1975. In that August 4, 2020, order, the trial court scheduled an evidentiary hearing on the issue "whether the facts of the instant case distinguish it from Ex parte Presse, 554 So. 2d 406 (Ala. 1989), such as to allow this case to proceed on two conflicting presumptions," i.e., to determine whether both C.G. and J.A. could each be a presumed father of the child.

The court held an evidentiary hearing on August 29, 2020. On that same date, the trial court entered an order finding that C.G. had "successfully established his presumption." The trial court scheduled the paternity action for a September 16, 2020, hearing to receive oral arguments and evidence to determine "which of the two conflicting presumptions 'is founded upon the weightier considerations of public policy and logic,' as provided in § 26-17-204(b), Ala. Code 1975." In its August 29, 2020, order, the trial court also asked the child's guardian ad litem to brief the issue whether genetic testing should be ordered, and it specified that the parties were to respond to the guardian ad litem's brief

within five days if they deemed a response appropriate. The guardian ad litem submitted the requested brief on September 1, 2020, and recommended that genetic testing be ordered and that the results be admitted in the paternity action. It does not appear that the parties favored the trial court with a brief on the issue of the appropriateness of genetic testing.

For reasons that are not clear from the materials submitted to this court, no further action was taken in the matter for approximately six months. On March 19, 2021, the trial court entered an order in which it, among other things, ordered that genetic testing for C.G. and the child be conducted on April 7, 2021. The trial court specified that, after receipt of the genetic-testing results, the trial court would issue an oral ruling resolving the issue of the paternity of the child and immediately proceed to take evidence on the remaining pending issues.

On April 6, 2021, the day before the genetic testing was scheduled to be conducted, the mother filed in this court her petition for a writ of mandamus asking this court to vacate the trial court's March 19, 2021, order directing her to present the child for genetic testing on April 7, 2021.

On that same day, i.e., April 6, 2021, this court entered an order denying the mother's petition to the extent that it sought relief from that part of the March 19, 2021, order that mandated genetic testing scheduled on the day following the filing of the mother's petition for a writ of mandamus in this court.

In her petition for a writ of mandamus, as alternative relief, the mother also sought a writ prohibiting any further proceedings in the paternity action or limiting the issue in the paternity action solely to the inquiry whether J.A. persists in the presumption in favor of his paternity of the child. This court now addresses those arguments.

Initially, however, we note that the March 19, 2021, order from which the mother timely filed her petition for a writ of mandamus addresses only the issue of genetic testing. The August 29, 2020, order, and not the March 19, 2021, order, contains the determinations that C.G. is a presumed father of the child and that the facts of this case are distinguishable from those of Ex parte Presse, 554 So. 2d 406 (Ala. 1984). Thus, to the extent that the mother's arguments pertain to the findings contained in the August 29, 2020, order, her petition for a writ of

mandamus is untimely because it was not filed within the presumptively reasonable time for filing a mandamus petition challenging the August 29, 2020, order. See Rule 21(a)(3), Ala. R. App. P. ("The presumptively reasonable time for filing a petition seeking review of an order of a trial court ... shall be the same as the time for taking an appeal.")' Rule 4(a), Ala. R. App. P. (providing that, generally, an appeal must be filed within 42 days "of the entry of the judgment or order appealed from"). However, the mother's arguments pertaining to whether the paternity action should continue concern C.G.'s standing to assert a paternity claim under the facts of this case, and standing is a jurisdictional issue. Ex parte Presse, supra; B.B. v. M.N., 90 So. 3d 194, 196 (Ala. Civ. App. 2012). Our supreme court has held that an appellate court may consider an untimely petition for a writ of mandamus to the extent that it challenges the subject-matter jurisdiction of the court that entered the order being challenged. Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016). Accordingly, we address the mother's arguments asserted in her mandamus petition that are related to the rulings contained in the August 29, 2020, order to the extent that

her arguments implicate the issues of standing and the jurisdiction of the trial court.

> "Mandamus is an extraordinary remedy. An appellate court will grant a petition for a writ of mandamus only when '(1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked.' Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000) (citing Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997)). Review by mandamus is not appropriate where the petitioner has another adequate remedy, such as an appeal. Ex parte Jackson, 780 So. 2d 681 (Ala. 2000); Ex parte Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000); Ex parte Walters, 646 So. 2d 154 (Ala. Civ. App. 1994)."

Ex parte Amerigas, 855 So. 2d 544, 546-47 (Ala. Civ. App. 2003).

A paternity action may be asserted, in certain situations, under Article 6 of the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975. Subject to certain limitations, a man seeking to have his paternity of a child established may initiate a paternity action. § 26-17-602(3), Ala. Code 1975. In her petition for a writ of mandamus, the mother relies on that part of § 26-17-607(a), Ala. Code 1975, that provides that, "[i]f 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." She contends that J.A. is the child's presumed father and that J.A. persists in the presumption in favor of his paternity, and, for that reason, she argues that C.G. may not challenge J.A.'s paternity of the child.

Section 26-17-204, Ala. Code 1975, a part of the AUPA, governs when a man is presumed to be the father of a child; that statute provides:

> "(a) A man is presumed to be the father of a child if:
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> "(1) he and the mother of the child are married to each other and the child is born during the marriage;
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> "(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
>
> "(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce;
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> "(4) after the child's birth, he and the child's mother have married, or attempted to marry, each other by a marriage solemnized in apparent

compliance with the law although the attempted marriage is or could be declared invalid, and:

> "(A) he has acknowledged his paternity of the child in writing, such writing being filed with the appropriate court or the Alabama Office of Vital Statistics; or
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> "(B) with his consent, he is named as the child's father on the child's birth certificate; or
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> "(C) he is otherwise obligated to support the child either under a written voluntary promise or by court order;

"(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; or

"(6) he legitimated the child in accordance with Chapter 11 of Title 26.

"(b) A presumption of paternity established under this section may be rebutted only by an 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."

In Ex parte Presse, supra, Jean Ann, a woman who was married to Norman Presse, had an affair with a man named Lynn Koenemann. Jean Ann later gave birth to a child while married to Norman. Jean Ann subsequently divorced Norman, who was awarded custody of the child. Jean Ann then married Koenemann, and the two filed an action against Norman seeking to establish Koenemann's paternity of the child born during Jean Ann and Norman's marriage. Testing confirmed that Koenemann was the biological father of the child, but Norman opposed the action and persisted in the presumption afforded to him by former § 26-17-5(b), Ala. Code 1975, the predecessor to § 26-17-204, that he was the child's legal father. The trial court determined that Koenemann was the father of the child, and this court affirmed. Our supreme court reversed, however, concluding that a biological father of a child who was conceived and born during the mother's marriage to another man lacked standing under the predecessor to the AUPA to maintain an action seeking to establish his own paternity of the child if the mother's husband, i.e., the child's presumed father, persisted in the presumption that he was the father of the child. Ex parte Presse, supra. In reaching its holding in that

case, our supreme court rejected the argument that Koenemann was a presumed father of the child under the facts of that case.

In her petition for a writ of mandamus, the mother argues that, because J.A. is a presumed father, the holding of Ex parte Presse, supra, and similar cases preclude C.G. from having standing to challenge the presumption of paternity in favor of J.A. See, e.g., Ex parte C.A.P., 683 So. 2d 1010 (Ala. 1996) (holding that a trial court properly dismissed an action filed by a man who was not a presumed father of the child against the mother's husband and concluding that the alleged father lacked standing because the mother's husband persisted in the presumption in favor of his paternity of the child); D.I. v. I.G., 262 So. 3d 651, 655 (Ala. Civ. App. 2018) (affirming a judgment dismissing a child's biological father's paternity action when the child's presumed father persisted in the presumption in favor of his paternity); Baker v. Kennedy, 51 So. 3d 339 (Ala. 2010) (holding that, because Kennedy was a child's presumed father, Baker, a man alleging that he was the child's father, lacked standing to bring an action challenging Kennedy's status as the presumed father).

In all the cases upon which the mother relies, an alleged father or a biological father sought to have his paternity of a child established when the child's only presumed father persisted in his presumption of paternity. See Ex parte Presse, supra; Ex parte C.A.P., supra; D.I. v. I.G., supra; Baker v. Kennedy, supra. In this case, however, the trial court determined in its August 29, 2020, order that C.G. is also a presumed father of the child, apparently pursuant to § 26-17-204(a)(3). In its August 29, 2020, order, the trial court also found that the facts of this case are distinguishable from those of Ex parte Presse, supra. We agree. As already explained, Ex parte Presse, supra, involved an alleged father seeking to establish his paternity of a child when the child's only presumed father persisted in his presumption of paternity. This case involved one presumed father, i.e., C.G., seeking to establish his paternity in an action against the child's mother and the child's other presumed father, i.e., J.A. Accordingly, Ex parte Presse and the other cases upon which the mother relies do not govern this case, and those cases do not support the mother's argument that C.G. lacks standing under the facts

of this case to continue to assert his claim seeking an adjudication of the child's paternity.

When a child has more than one presumed father, a determination of the child's paternity must be based on "the weightier considerations of public policy and logic, as evidenced by the facts." § 26-1-204(b). This court addressed such a situation in Ex parte Kimbrell, 180 So. 3d 30 (Ala. Civ. App. 2015). In that case, this court addressed an unusual fact situation in which the mother, in a action seeking a divorce from Denny Kimbrell, asserted that she had never legally divorced John Herbert, her former husband, and, therefore, that her marriage to Kimbrell was void. Kimbrell sought an annulment and filed a complaint to establish the paternity of a child born during his relationship with the mother. The mother argued that Herbert was the child's presumed father by virtue of his marriage to the mother even though she had not seen him for years before the child was conceived. The juvenile court in that case, among other things, determined that Kimbrell was also a presumed father of the child, determined that Kimbrell had the weightier claim to paternity, established Kimbrell's status as the child's legal father, and scheduled the

matter for a trial on the issue of the child's custody. This court denied the mother's petition for a writ of mandamus, holding that the mother had failed to demonstrate that the juvenile court had exceeded its discretion in determining that Kimbrell's claim of paternity should prevail over that of Herbert. Ex parte Kimbrell, supra.

In her petition for a writ of mandamus, the mother argues that Ex parte Kimbrell, supra, is not applicable to the facts of this case and that the presumption in favor of J.A.'s paternity of the child should prevail over that of C.G. However, unlike in Ex parte Kimbrell, there has been no evidentiary hearing in this case regarding which of the two competing presumptions carries more weight and should prevail, and the trial court has made no ruling on that issue. The trial court has indicated that it intends to receive the results of the genetic testing and to enter a ruling on the issue of the child's paternity. Until the trial court does so, the mother's argument with regard to whether a presumption in favor of J.A. should prevail over the presumption in favor of C.G. is premature.

The mother has failed to demonstrate a clear, legal right to the relief she seeks, and, therefore, we deny the petition for a writ of mandamus.

PETITION DENIED.

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