STATE OF MICHIGAN

COURT OF APPEALS

In re BS, Minor.

UNPUBLISHED
August 26, 2021

No. 354103
Ottawa Circuit Court
Family Division
LC No. 20-092453-AU

ON REMAND

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

This adoption case is before us on remand for reconsideration in light of *In re MGR*, 504 Mich 852 (2019), and *In re LMB*, 504 Mich 869 (2019).[1] Petitioner continues to challenge the trial court's order denying her petition to identify the father of the minor child, BS, and determine and terminate his parental rights under MCL 710.39 of the Adoption Code, MCL 710.21 *et seq*. We once again dismiss this appeal as moot.

I. FACTS AND PROCEEDINGS

BS was born out of wedlock in February 2020. The day after the birth, BS's biological mother, petitioner, filed a petition under the Adoption Code identifying respondent as the putative father and seeking to determine and terminate his parental rights. That petition was brought in the Ottawa Circuit Court. In addition, respondent filed a petition under the Paternity Act, MCL 722.711 *et seq*., in the Kent Circuit Court seeking to be identified as the legal father of BS. Respondent did not request a stay of the adoption proceedings.

[1] See *In re BS*, ___Mich___ (2021) (Docket No. 162564).

In June 2020, the trial court in the adoption proceedings held a hearing under MCL 710.39.[2] It ultimately concluded that respondent had provided "substantial and regular support or care" to petitioner and that as a result, his parental rights may only be terminated under MCL 710.39(2). Petitioner thus filed the instant appeal, arguing that respondent was not entitled to the heightened protections of MCL 710.39(2).

While the appeal was pending, petitioner moved for a stay of the paternity proceedings until the adoption proceedings were fully litigated. The trial court in the paternity proceedings denied the motion and entered an order of filiation identifying respondent as the legal father. Petitioner sought leave to appeal that order in this Court, and leave was denied. *Sterk v Speyer*, unpublished order of the Court of Appeals, entered August 20, 2020 (Docket No. 354518). Petitioner did not seek leave to appeal this order in our Supreme Court.

On December 22, 2020, this Court dismissed the instant appeal as moot, reasoning that "[b]ecause respondent is BS's biological and legal father pursuant to an order of filiation entered by the Kent Circuit Court, [MCL 710.39] is no longer applicable and it is impossible for us to grant the relief petitioner-mother requests . . . ." *In re BS*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 354103), p 2.

Petitioner sought leave to appeal in our Supreme Court. Respondent moved to dismiss her application as untimely filed. On May 28, 2021, our Supreme Court entered the following order remanding the case to us for reconsideration:

> On order of the Court, the motion to dismiss is DENIED. The application for leave to appeal the December 22, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *In re MGR*, 504 Mich 852 (2019), and *In re LMB*, 504 Mich 869 (2019).
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> We do not retain jurisdiction. [*In re BS*, ___Mich at ___.]

On remand, we granted respondent's motion to file a supplemental brief. *In re BS*, unpublished order of the Court of Appeals, entered July 13, 2021 (Docket No. 354103). He has done so, and petitioner filed a responsive brief.[3]

II. STANDARD OF REVIEW

[2] Such a hearing may be referred to as a "Section 39 hearing." As explained *infra*, MCL 710.39(1)-(2) create a two-tier scheme for terminating the parental rights of a putative father, with subsection (2) providing certain heightened protections that are not provided by subsection (1).

[3] Respondent explains in his supplemental brief that on June 29, 2021, the trial court in the paternity proceedings awarded the parties joint legal custody and respondent primary physical custody of BS. A copy of that order is included with his brief.

"We review a lower court's decision to grant or deny a petition for adoption for an abuse of discretion." *In re TMK*, 242 Mich App 302, 304; 617 NW2d 925 (2000). "Whether an issue is moot is a question of law that this Court reviews de novo." *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019).

III. ANALYSIS

The Paternity Act "was created as a procedural vehicle for determining the paternity of children 'born out of wedlock,' and enforcing the resulting support obligation." *Sykowski v Appleyard*, 420 Mich 367, 375; 362 NW2d 211 (1985). "Paternity is established once an order of filiation is entered." *In re MKK*, 286 Mich App 546, 557; 781 NW2d 132 (2009). "Once a man perfects his legal paternity, he is considered a 'parent,' with all the attendant rights and responsibilities, and termination of his parental rights can generally only be accomplished in cases of neglect or abuse under MCL 712A.19b." *Id.* at 558.

Under the Adoption Code, "[w]hen the parents of a child are unmarried and the mother places the child for adoption, the putative father's parental rights are determined under [MCL 710.39] . . . ." *In re BKD*, 246 Mich App 212, 215; 631 NW2d 353 (2002). MCL 710.39 provides, in relevant part, as follows:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
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> (2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

"The two-tiered standard of § 39 for terminating putative fathers' parental rights is based on the principles set forth" by the United States Supreme Court. *In re BKD*, 246 Mich App at 222. "[T]he Due Process and Equal Protection Clauses bar the state from terminating the parental rights of the father of an illegitimate child without the same showing of unfitness that would be necessary to terminate the rights of a mother or a married father." *Id.* "However, where the father of an illegitimate child has not taken steps to establish a custodial or supportive relationship, the state may constitutionally terminate his parental rights through procedures and standards that are less stringent than those required to terminate the parental rights of a mother or a married father." *Id.*

In *In re MKK*, the parties filed competing actions under the Paternity Act and the Adoption Code with respect to the minor child at issue. *In re MKK*, 286 Mich App at 548. Specifically, the

putative father filed an action under the Paternity Act to be declared the legal father, and the minor child's maternal aunt and uncle filed an action under the Adoption Code to adopt the minor child. *Id*. The trial court denied the putative father's motion to stay the adoption proceedings so he could obtain an order of filiation in the paternity proceedings. *Id*. This Court reversed that ruling, explaining that there was "good cause [under MCL 710.25(2)] for the court to stay the adoption proceedings and determine whether the putative father is the legal father, with all the attendant rights and responsibilities of that status." *Id*. at 562. In a footnote, this Court added that "[i]f respondent perfects his legal paternity, the adoption case may not proceed, and the other issues raised on appeal will be rendered moot." *Id*. at 567 n 7, citing MCL 710.31(1).

In *In re MGR*, 323 Mich App 279; 916 NW2d 662 (2018), the petitioners filed an action under the Adoption Code seeking to adopt the minor child at issue, and the appellee, the then-putative father, filed a separate action under the Paternity Act to be declared the legal father. *Id*. at 282-283. The trial court *sua sponte* stayed the adoption proceedings until the paternity proceedings were resolved. *Id*. at 283. The petitioners appealed that order, and this Court directed the trial court to continue the adoption proceedings under MCL 710.39. *Id*. The trial court ultimately declined to terminate the appellee's parental rights under MCL 710.39(2). *Id*. Shortly thereafter, the trial court in the paternity proceedings declared the appellee to be the legal father through an order of filiation. *Id*. at 285. The petitioners appealed the trial court's order declining to terminate the appellee's parental rights under MCL 710.39(2), but this Court ruled that the appeal was moot, explaining as follows:

> After the trial court entered its opinion and order declining to terminate appellee's parental rights under MCL 710.39(2), the same court entered an order of filiation in the separate paternity action, declaring appellee to be MGR's biological and, therefore, legal father. Accordingly, appellee is no longer a putative father, and neither we nor the trial court can grant relief under MCL 710.39(1) and (2), which both exclusively address termination of a putative father's rights during the course of an adoption. Because appellee is now considered a legal parent, his rights can only be terminated pursuant to MCL 712A.19b. . . . A remand to address statutory provisions that pertain to putative fathers, when there is no longer a putative father in this case, would provide no proper legal remedy at all. [*Id*. at 285-286.]

In addition to the petitioners' appeal, the birth mother also sought to appeal the trial court's order declining her motions to stay the paternity proceedings. This Court denied her application for leave to appeal. *Brown v Ross*, unpublished order of the Court of Appeals, entered May 11, 2018 (Docket No. 341325).

The petitioners and the birth mother, respectively, sought leave to appeal in our Supreme Court. In *In re MGR*, our Supreme Court reversed this Court and remanded to the trial court for further adoption proceedings under MCL 710.39, *In re MGR*, 504 Mich 852, and in *Brown*, our Supreme Court remanded to the trial court for entry of an order staying the paternity proceedings pending the outcome of the adoption proceedings, *Brown v Ross*, 504 Mich 871 (2019).

Our Supreme Court explained that this Court erred in ruling that the petitioners' appeal was moot because of the subsequently entered order of filiation:

> Respondent-father did not request that the trial court stay the adoption proceedings in favor of the paternity proceedings pursuant to MCL 710.25(2), and the facts did not justify a stay in any event.
>
> Instead, over petitioners' objection that there was no good cause, the trial court, *sua sponte*, entered an order on April 17, 2017 staying the adoption proceedings until the paternity action was resolved. . . . Respondent-father never requested the court to stay the adoption proceedings under MCL 710.25(2) for good cause relating to his separate paternity proceeding, and the facts did not justify a stay in any event. The trial court entered an order of filiation on October 4, 2017—*after* it had issued its Section 39 determination and *after* petitioners had appealed that decision to the Court of Appeals.
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> The birth mother, on the other hand, twice asked the trial court to stay the paternity action. . . .
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> The trial court's denial of the birth mother's motions was an abuse of discretion given the unique circumstances of this case. The trial court had the authority to stay the paternity action in favor of the adoption proceedings: absent good cause, adoption proceedings should be given priority. MCL 710.21a and MCL 710.25(2). And a trial court has the inherent authority to control the progress of a case. . . .
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> Because petitioners had a right to appeal the Section 39 determination and because good cause to delay those proceedings had not been alleged, the trial court should have stayed the paternity proceedings pursuant to MCR 7.209(E)(2)(b) so that the appellate court could review that decision. The order of filiation was therefore erroneously entered on October 4, 2017 and is vacated in our June 6, 2019 order in *Brown v Ross* (Docket No. 157997). Accordingly, the order of filiation did not moot appellate review of the trial court's September 14, 2017 Section 39 decision. [*In re MGR*, 504 Mich at 853-854 (emphasis in original; footnote omitted).]

In addition, the Court ruled that the trial court abused its discretion by ruling that the appellee was entitled to the heightened protections of MCL 710.39(2) and that he was instead only entitled to the protections set forth in MCL 710.39(1). *Id*. at 854-855.

Justice VIVIANO, in dissent, asserted that "[t]he majority . . . appears to create a per se rule that, unless a putative father files a motion to stay the adoption proceeding, a trial court must always stay the paternity action in favor of a competing adoption proceeding." *Id*. at 864 n 4 (VIVIANO, J., *dissenting*). The majority "respectfully disagree[d] that this order creates any *per se* rule; our decision today is based in the very specific facts of this case alone." *Id*. at 854 (order of the Court).

In re LMB was similarly, but not identically, postured. In *In re LMB*, the respondent filed an action under the Paternity Act to be declared the minor child's legal father, and the petitioners filed a separate action under the Adoption Code to adopt the minor child. *In re LMB*, 504 Mich at

869. The petitioners moved to stay the paternity proceedings, but the trial court denied that motion and eventually entered an order of filiation. *Id.* At about the same time, the trial court in the adoption proceedings ruled that the respondent was only entitled to the lesser protections of MCL 710.39(1), but it nonetheless declined to terminate his parental rights under that provision. *Id.* at 869-870. The petitioners appealed the trial court's ruling in the adoption proceedings, arguing that it should have terminated the respondent's parental rights under MCL 710.39(1). *Id.* at 869. In addition, in a separate appeal, the petitioners appealed the trial court's refusal to stay the paternity proceedings. *Id.* This Court ruled that the trial court abused its discretion when it refused to stay the paternity proceedings, *Sarna v Healy*, unpublished order of the Court of Appeals, entered December 18, 2017 (Docket No. 341211), but that the petitioners' appeal in the adoption proceedings was moot because the order of filiation itself was still in effect, *In re LMB* (*On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2018 (Docket No. 338169).

Our Supreme Court agreed with this Court that the trial court abused its discretion when it refused to stay the paternity proceedings, disagreed with this Court that the petitioners' appeal was moot, and ruled that the respondent's parental rights should have been terminated under MCL 710.39(1):

> The trial court presiding in the paternity action abused its discretion by denying petitioners' motion and allowing the case to proceed to entry of an order of filiation while this adoption case was proceeding. . . . Here, respondent-father never sought a stay of the adoption proceedings to pursue the paternity action, and no facts justified a stay in any event.
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> As a result, the trial court abused its discretion when it refused to stay the paternity action prior to entry of an order of filiation while this adoption proceeding was ongoing. Identifying this error, the Court of Appeals reversed the trial court's order denying petitioners' motion for a stay of the paternity proceedings. . . .
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> The Court of Appeals erred in dismissing this appeal as moot. Because petitioners prevailed on their appeal of the trial court's decision in *Sarna v Healy* to deny their motion to stay the paternity proceedings, that July 7, 2017 order of filiation, which post-dated its denial of the motion to stay, was entered erroneously. The question in this appeal is whether the trial court abused its discretion in its best-interest determination. It did, and we REVERSE and REMAND this case for entry of an order terminating respondent-father's rights to the child under MCL 710.39(1) of the Michigan Adoption Code, MCL 710.21 *et seq.* [*Id.* at 869-870 (footnotes omitted).]

Justice VIVIANO disagreed with the majority's analysis to the extent that, in his view, it "sets forth a rule that trial courts must always stay a paternity action in favor of adoption proceedings when the putative father has not filed a motion to stay the adoption proceedings." *Id.* at 870 (VIVIANO, J., *concurring in part and dissenting in part*). The majority "respectfully disagree[d] with the dissent that this order creates any *per se* rule." *Id.* at 869 n 1 (order of the Court).

We now address *In re MGR* and *In re LMB* to determine their applicability to this case. Because our Supreme Court expressly disavowed in *In re MGR* and *In re LMB* that it was creating a *per se* rule that a trial court must always stay paternity proceedings for competing adoption proceedings unless a putative father files a motion to stay the adoption proceedings, it follows that there is another, more limited principle to be gleaned from those orders. After reviewing those orders, both of which concerned proceedings under MCL 710.39(1), the clearest principle that we can discern that falls short of the *per se* rule identified by Justice VIVIANO is as follows: In cases where the putative father is, or should be, only entitled to the lesser protections of MCL 710.39(1), a trial court generally must stay paternity proceedings for competing adoption proceedings unless a putative father files a motion to stay the adoption proceedings.[4]

Here, once again, a putative father can avoid termination of his parental rights under the Adoption Code if he establishes either (1) "a custodial relationship with the child," or (2) that he "provided substantial and regular support or care in accordance with [his] ability to provide support or care for the mother during pregnancy." MCL 710.39(2). There is no contention that the first circumstance existed during the adoption proceedings. Moreover, with regard to the second circumstance, we conclude that the trial court abused its discretion by ruling that respondent provided substantial and regular support *in accordance with his ability to provide such support* for the purposes of MCL 710.39(2). As with the respondent in *In re MGR*, respondent in this case provided substantial and regular support for a limited time, i.e., during the roughly first three months of petitioner's pregnancy. Respondent ensured that petitioner did not pay any rent or utilities, and he ensured that petitioner had money for gas and food for the household. He also provided petitioner with a phone and paid for her phone bill. All of this support occurred during the time petitioner lived with respondent. However, after petitioner moved out because their relationship ended, respondent stopped providing any support or care. Respondent did not provide any money, items for BS, or anything to help petitioner during her pregnancy. Although there were approximately three months that respondent provided substantial and regular support, there likewise was approximately six months that he provided nothing. It was not until BS's birth that respondent then sent a $100 check to the adoption agency as a sign of "good faith."

Arguably, the trial court would not have abused its discretion if respondent had attempted to provide regular and substantial support or care even after the relationship ended but was unable to do so because petitioner refused that support or care. Unfortunately, in this case, respondent simply stopped providing any support or care once petitioner moved out and never made any attempt to continue.[5] Accordingly, the trial court in the adoption proceedings abused its discretion by ruling that respondent was entitled to the heightened protections of MCL 710.39(2). It therefore follows that respondent was only entitled to the protections of MCL 710.39(1), and under *In re MGR* and *In re LMB*, the trial court in the paternity proceedings should have stayed those

[4] The applicability of MCL 710.39(1) is the only relevant fact in *In re LMB* that we can identify that would create a narrower principle than the *per se* rule discussed by Justice VIVIANO.

[5] The language "during pregnancy" would suggest a mother's *entire* pregnancy, and not just a trimester, is the measure of "support or care." See MCL 710.39(2).

proceedings absent specific facts indicating otherwise. Thus, the trial court in the paternity proceedings abused its discretion as well.

Having concluded that the respective trial courts abused their discretion, we nonetheless again dismiss this appeal as moot.[6] In doing so, we adopt our original analysis dismissing this appeal as moot:

> Petitioner seeks an order terminating respondent's parental rights pursuant to MCL 710.39(1). By its terms, this statute only concerns the termination of the parental rights of putative fathers. See MCL 710.39(1); [*In re MKK*, 286 Mich App at 559] ("If the father is putative, the court must determine his rights pursuant to MCL 710.39."). Because respondent is BS's biological and legal father pursuant to an order of filiation entered by the Kent Circuit Court, MCL 710.39(1) is no longer applicable and it is impossible for us to grant the relief petitioner-mother requests and this appeal is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (generally, appellate courts do not decide moot issues); *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000) (an issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief). Accordingly, this appeal is dismissed. [*In re BS*, unpub op at 2.]

In other words, MCL 710.39 only applies to putative fathers, and respondent is no longer a putative father because the trial court in the paternity proceedings entered an order of filiation declaring him to be the legal father. The only possible avenue for petitioner to obtain her requested relief in this case, i.e., an order in the adoption proceedings identifying respondent as the father and determining and terminating his parental rights under MCL 710.39, would be to vacate or reverse the order of filiation or the earlier denial of petitioner's motion to stay in the paternity proceedings. But only the adoption proceedings are before this Court. Because the paternity proceedings are *not* before this Court, there is no procedural mechanism for this Court to grant petitioner relief from any of the orders issued in those proceedings. See *In re BS*, ___Mich at___ (VIVIANO, J., *dissenting*) ("[T]here is currently no pending appeal in the paternity action through

[6] Ordinarily, we would dismiss this appeal as moot in summary fashion as we did previously. However, we believe that our superfluous discussion of *In re MGR* and *In re LMB* and our conclusion that the trial court abused its discretion by ruling that respondent "provided substantial and regular support or care in accordance with [his] ability to provide support or care for the mother during pregnancy" for the purposes of MCL 710.39(2) is compelled by the remand order of our Supreme Court, which specifically directed us to reconsider this case in light of *In re MGR* and *In re LMB*. See *In re BS*, ___Mich at___ (VIVIANO, J., *dissenting*) ("On remand, in addition to determining what applicability those cases might have here, the Court of Appeals will need to make a threshold determination of whether it can grant any relief at all to petitioner given the procedural posture of the paternity action.").

which either this Court or the Court of Appeals could vacate or reverse any of the decisions by the trial court in that case.").[7] Therefore, this appeal is moot.

IV. CONCLUSION

Because we cannot vacate or reverse any orders within the paternity proceedings, we cannot grant petitioner her requested relief under MCL 710.39. Accordingly, this appeal is dismissed as moot.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

[7] In her responsive brief, petitioner argues that an order of filiation may be subsequently vacated a different court, i.e., the trial court in the adoption proceedings, and as a result, this case is not moot. We believe that such an argument is inconsistent with *In re MGR*, in which our Supreme Court expressly connected the lack of mootness in that case with the underlying order of filiation being vacated in the paternity proceedings:

> The order of filiation was . . . erroneously entered on October 4, 2017 and is vacated in our June 6, 2019 order in *Brown v Ross* (Docket No. 157997). Accordingly, the order of filiation did not moot appellate review of the trial court's September 14, 2017 Section 39 decision. [*In re MGR*, 504 Mich at 853-854.]

In other words, for our Supreme Court to conclude that the case was not moot, it also had to enter an order in the paternity proceedings vacating the order of filiation. We cannot do so here.

Petitioner also argues that once Adoption Code proceedings have been initiated, a subsequently entered order of filiation under the Paternity Act cannot moot those proceedings because only the father's status at the time the Adoption Code proceedings are initiated is relevant. That is, if a father is merely "putative" when Adoption Code proceedings are initiated, that "putative" status is controlling for the remainder of the proceedings regardless of any competing proceedings under the Paternity Act. We acknowledge that her argument has some persuasiveness but nonetheless believe that it is better directed at our Supreme Court. In both *In re MGR* and *In re LMB*, the respective fathers were merely "putative" fathers when the Adoption Code proceedings were initiated, yet our Supreme Court only reached its ultimate conclusions in those cases after determining that the orders of filiation were erroneously entered. In other words, the Adoption Code proceedings in those cases were only able to continue on remand *because* the orders of filiation were vacated. Our conclusion that this case is moot because the order of filiation was not vacated is thus consistent with the rationale of *In re MGR* and *In re LMB*. Simply put, to the extent that petitioner argues that an order of filiation is an irrelevant event if Adoption Code proceedings have already been initiated, it is the prerogative of only our Supreme Court to accept this argument and decide this case in a manner inconsistent with *In re MGR* and *In re LMB*.