rel: January 4, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170925

Brenda Holloway

v.

Justin Watson

Appeal from Baldwin Circuit Court
(DR-17-901526)

THOMPSON, Presiding Judge.

Brenda Holloway ("the maternal grandmother") appeals from a judgment of the Baldwin Circuit Court ("the trial court") disposing of her petition to establish grandparent visitation with the child ("the child") born of the marriage between the

maternal grandmother's daughter, Carla Danielle Watson ("the mother"), and Justin Watson ("the father"). The mother died of ovarian cancer in February 2012.

The record indicates the following. The maternal grandmother filed her verified petition seeking visitation with the child on December 12, 2017. At that time, the father and the child lived in Baldwin County; it is unclear where the maternal grandmother resided. In the petition, the maternal grandmother stated that the child was born on February 9, 2010. In an affidavit submitted as an exhibit to his motion to dismiss the maternal grandmother's petition, the father testified that, about one year after the child's birth, the mother was diagnosed with ovarian cancer. Upon the mother's diagnosis, the father said, the child lived with the maternal grandmother for about two months while the mother began receiving cancer treatment in Birmingham. By the late spring or early summer of 2011, the father said, the mother, the child, and he had moved into a rental house the maternal grandmother owned in Hartselle. The father also said that the child had not lived with the maternal grandmother, or had a

relationship with her, since February 2012, when the mother died.

In the visitation petition, the maternal grandmother stated that she had "established 'a significant and viable relationship with the child'" and, further, that she had "the 'capacity to give the child love, affection and guidance.'" The maternal grandmother averred that the loss of an opportunity for the maternal grandmother and the child to maintain a significant and viable relationship was "reasonably likely to cause harm to the child." In opposing the father's motion to dismiss, the maternal grandmother submitted an affidavit in which she testified that the child had lived primarily with her from the time the child was eight months old until she was nearly two years old. In her response to the motion to dismiss, the maternal grandmother averred that the father had "blocked" and "hidden" the child from her by changing his telephone number and disconnecting or deleting other means of communication between them, adding that the father "should not be granted protection when he is primarily at fault" for hiding the child and refusing the numerous gifts and cards the maternal grandmother had sent to the child. She

also said in her affidavit that, because the mother was no longer living, it was "crucial" for the child to have a continued relationship with the mother's family.

On June 19, 2018, the trial court held a hearing on the motion to dismiss. At that hearing, the maternal grandmother submitted several photographs of the child taken when the child had been with her. She also submitted scores of photographs of the gifts and cards she had sent to the child after the mother died. On June 20, 2018, the trial court entered a one-sentence judgment granting the father's motion to dismiss. We note that, in the judgment, the trial court stated that, in entering the judgment, it took "the testimony under submission." We clarify that the transcript of the hearing indicates that no oral testimony was given and that the only testimony appearing in the record is the parties' affidavits submitted in support of and in opposition to the father's motion to dismiss. The maternal grandmother timely filed a notice of appeal to this court.

On appeal, the maternal grandmother first contends that the trial court erred in disposing of the visitation petition based on a lack of subject-matter jurisdiction or the

untimeliness of the filing of the visitation petition, the two grounds the father presented to the trial court for dismissal.

In their appellate briefs, neither party explains why the trial court would not have subject-matter jurisdiction over this matter. "Matters of subject-matter jurisdiction are subject to de novo review." DuBose v. Weaver, 68 So. 3d 814, 821 (Ala. 2011).

Section 30-3-4.2(b), Ala. Code 1975, provides, in pertinent part, that

> "[a] grandparent may file an original action in a circuit court where his or her grandchild resides ... for reasonable visitation rights with respect to the grandchild if any of the following circumstances exist:
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> > "(1) ... the marital relationship between the parents of the child has been severed by death or divorce."

See also Ex parte K.J., [Ms. 2170716, June 22, 2018] ___ So. 3d ___, ___ n. 2 ("[A] circuit court generally has subject-matter jurisdiction over petitions seeking only grandparent visitation."). There is no dispute regarding the maternal grandmother's contentions that the child lives in Baldwin County and that the marital relationship between the mother

and the father was severed by the mother's death. Therefore, the trial court clearly had subject-matter jurisdiction over the grandmother's grandparent-visitation petition.

The father also contends that, at the time the maternal grandmother filed the petition, she had not seen or spoken with the child in more than three years. Therefore, he argues, pursuant to § 30-3-4.2(d), Ala. Code 1975, the trial court could not entertain the petition. Section 30-3-4.2(d) provides that,

> "[t]o establish a significant and viable relationship with the child, the petitioner shall prove by clear and convincing evidence any of the following:
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> > "(1)a. The child resided with the petitioner for at least six consecutive months with or without a parent present within the three years preceding the filing of the petition.
> >
> > "b. The petitioner was the caregiver to the child on a regular basis for at least six consecutive months within the three years preceding the filing of the petition.
> >
> > "c. The petitioner had frequent or regular contact with the child for at least 12 consecutive months that resulted in a strong and meaningful relationship with the child within the three years preceding the filing of the petition.

> "(2) Any other facts that establish the loss of the relationship between the petitioner and the child is likely to harm the child."

The father's basis for seeking a dismissal because of the maternal grandmother's alleged failure to meet the time requirements set forth in § 30-3-4.2(d) may be properly considered under Rule 12(b)(6), Ala. R. Civ. P., i.e., as asserting the maternal grandmother's petition failed to state a claim for which relief can be granted. See Mobile Infirmary v. Delchamps, 642 So. 2d 954, 956 (Ala. 1994)(motion to dismiss on the basis that the applicable limitations period had expired was considered a Rule 12(b)(6) motion).

> "'It is a well-established principle of law in this state that a complaint, like all other pleadings, should be liberally construed, Rule 8(f), Ala. R. Civ. P., and that a dismissal for failure to state a claim is properly granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. Winn-Dixie Montgomery, Inc. v. Henderson, 371 So. 2d 899 (Ala. 1979). Stated another way, if under a provable set of facts, upon any cognizable theory of law, a complaint states a claim upon which relief could be granted, the complaint should not be dismissed. Childs v. Mississippi Valley Title Insurance Co., 359 So. 2d 1146 (Ala. 1978).

> "'Where a [Rule] 12(b)(6) motion has been granted and this Court is called upon to review the dismissal of the complaint, we must examine the allegations contained therein and construe them so as to resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff. First National Bank v. Gilbert Imported Hardwoods, Inc., 398 So. 2d 258 (Ala. 1981). In so doing, this Court does not consider whether the plaintiff will ultimately prevail, only whether he has stated a claim under which he may possibly prevail. Karagan v. City of Mobile, 420 So. 2d 57 (Ala. 1982).'
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> "Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985) (emphasis in original). (Quoted in Greene County Bd. of Educ. v. Bailey, 586 So. 2d 893, 897-98 (Ala. 1991), Grant v. Butler, 590 So. 2d 254, 255 (Ala. 1991), and Applin v. Consumers Life Ins. Co., 623 So. 2d 1094, 1097 (Ala. 1993).)"

Mobile Infirmary, 642 So. 2d at 956.

Both parties submit that the trial court's judgment dismissing the visitation petition may be considered a summary judgment. Their assertions are apparently based on the submission of their affidavits in support of and in opposition to the father's motion to dismiss and the submitted photographs and documentary evidence of gifts and cards that the maternal grandmother mailed to the child. Our supreme court stated in Ex parte Price, 244 So. 3d 949, 954 (Ala. 2017), that a trial court has discretion whether to consider

materials outside the pleadings when considering a motion to dismiss. If it does consider materials attached to a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss and the materials are not excluded by the trial court, then the motion shall be treated as one for a summary judgment. Id. at 954-55. See also Adams v. Tractor & Equip. Co., 180 So. 3d 860, 864 (Ala. 2015)(citing Rule 12(b) (and noting that, "in a motion to dismiss asserting defense numbered (6) where 'matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment'"). As mentioned, in "dismissing" the petition, the trial court stated that it had "taken the testimony under submission." The record indicates that the only "testimony" before the trial court at the time the petition was disposed of was the parties' affidavits. Because the trial court appears to have considered those affidavits, we will review the trial court's judgment as a summary judgment.

> "'A motion for summary judgment tests the sufficiency of the evidence. Such a motion is to be granted when the trial court determines that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

> of law. The moving party bears the burden of negating the existence of a genuine issue of material fact. Furthermore, when a motion for summary judgment is made and supported as provided in Rule 56, [Ala. R. Civ. P.,] the nonmovant may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Proof by substantial evidence is required.'"
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> "Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc., 671 So. 2d 674, 675 (Ala. Civ. App. 1995) (citations omitted).

Thornbury v. Madison Cty. Comm'n, [Ms. 2170278, Sept. 28, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018).

In applying the standard of review for a summary judgment, we conclude that the trial court erred in disposing of the maternal grandmother's petition at this stage of the litigation. In response to the father's affidavit that she had not maintained a relationship with the child since February 2012, the maternal grandmother presented her own affidavit testifying that she had attempted to have a substantial and viable relationship with the child but that the father had taken steps to prevent such a relationship by disconnecting the telephone and severing "other various means" of communication. The father has not denied the maternal

grandmother's accusations. Such conduct could reasonably be construed as an attempt to prove "other facts that establish the loss of the relationship between the petitioner and the child." See § 30-3-4.2(d)(2). We note that there is no time period mentioned in § 30-3-4.2(d)(2). Moreover, the maternal grandmother has presented evidence indicating that she has attempted to give the child presents and to communicate with the child by mail within the three years preceding the filing of the petition. At this stage in the litigation, neither party has presented evidence regarding whether visitation between the child and the maternal grandmother is in the best interests of the child, as required by § 30-3-4.2(e). However, the maternal grandmother has argued before the trial court and on appeal that preventing the child from having any contact with the mother's side of the family will harm the child.

Based on our review of the record, we conclude that the father has failed to demonstrate that there are no genuine issues of material fact or that he is entitled to a judgment as a matter of law. Therefore, the summary judgment is improper. Additionally, the grandmother has asserted that the

father has interfered in her efforts to maintain a substantial and viable relationship with the child. In other words, the maternal grandmother has demonstrated a set of circumstances under which she could possibly prevail in her request to have visitation with the child. Therefore, even if the judgment were to be considered a dismissal of the action pursuant to Rule 12(b)(6), it would be improper as well.

Our holding is not to be construed as a determination by this court that the maternal grandmother will or should ultimately prevail in this matter. At this point, a factual determination establishing whether the maternal grandmother is entitled to visitation is premature. Instead, we conclude only that the maternal grandmother is able to pursue the litigation and to present evidence in addition to the parties' short affidavits, the photographs previously presented to the court, and proof of her attempts to mail items to the child, which are insufficient to allow the trial court to reach a determination as to whether visitation between the child and the maternal grandmother should be permitted. Accordingly, the judgment of the trial court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

Pittman, Moore, and Donaldson, JJ., concur.

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