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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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2180012

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Ex parte David Cole Robbins

PETITION FOR WRIT OF MANDAMUS

(In re: David Cole Robbins

v.

Jessie Burnett Robbins)

(Blount Circuit Court, DR-18-900013)

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2180041

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Ex parte Jessie Burnett Robbins

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(In re: David Cole Robbins

v.

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(Blount Circuit Court, DR-18-900013)

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THOMPSON, Presiding Judge.

On January 27, 2018, David Cole Robbins ("Robbins") filed in the Blount Circuit Court ("the trial court") a complaint seeking a divorce from Jessie Burnett Robbins ("the mother"). In that complaint, Robbins alleged that he and the mother had married on October 11, 2015, and that one minor child ("the child") had been born "of the marriage" in 2010. Robbins alleged that the parties had separated on January 1, 2018, that he resided in Oneonta, and that the mother "currently resides" in Ashville. We take judicial notice that Oneonta is in Blount County and that Ashville is in St. Clair County. Robbins's divorce complaint contained no allegations concerning where the parties had resided during their marriage or where they had resided at the time of their separation.

In a related action filed in the Blount Juvenile Court ("the juvenile court") on January 10, 2018, the child's maternal grandparents alleged that the child was dependent, that the mother had consented to the dependency action and to an award of custody to them, and that the child's father was unknown. In their dependency action, the maternal grandparents alleged that the mother resided at the Oneonta address that Robbins cited as his own address in his complaint

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in the divorce action. On January 25, 2018, the juvenile court awarded the maternal grandparents pendente lite custody of the child. Thereafter, Robbins filed a motion in the juvenile court alleging that he was the child's legal father and seeking to set aside the pendente lite award of custody to the maternal grandparents. Robbins later filed a verified renewal of that motion and alleged, in pertinent part, that, although the maternal grandparents had claimed not to know the mother's whereabouts, "the mother had stayed with them on the very night [the dependency] petition was filed and every night before and after." It is not clear whether the juvenile court ruled on Robbins's motion.

On February 2, 2018, Robbins filed in the trial court a motion to consolidate the dependency action with the divorce action. On February 5, 2018, the parties executed a "temporary agreement" specifying that the pending dependency action would be dismissed and providing for pendente lite visitation for Robbins with the child; that "temporary agreement" was filed in the trial court on February 7, 2018. The juvenile court dismissed the maternal grandparents' dependency action on February 5, 2018. On February 15, 2018, the trial court entered an order purporting to grant Robbins's

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motion to consolidate the divorce action with the then-dismissed dependency action.

On March 1, 2018, the mother filed in the trial court a motion for a change of venue. In her motion, the mother alleged that Robbins resides in Blount County, that she resides in St. Clair County, and that the parties' marital residence was located in Etowah County. The mother further alleged that, at the time of their separation, the parties had resided in Etowah County, and, she said, Robbins was still living in the marital home.

On September 18, 2018, the trial court entered an order in which it denied the mother's request for a change of venue, directed the parties to abide by the terms of the February 5, 2018, temporary agreement, and ordered that Robbins and the child submit to DNA paternity testing on October 5, 2018.

On October 3, 2018, Robbins filed a petition for a writ of mandamus in this court in which he challenged that part of the September 18, 2018, order requiring DNA paternity testing; Robbins's petition was assigned case number 2180012. In case number 2180012, this court stayed the scheduled paternity

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testing pending further order of the court and called for an answer.<sup>1</sup>

On October 5, 2018, the mother filed a petition for a writ of mandamus challenging that part of the September 18, 2018, order that denied her motion to transfer on the basis of venue. The mother's petition for a writ of mandamus was assigned case number 2180041, and this court called for an answer in case number 2180041. Those petitions have now been consolidated.

The materials submitted to this court indicate that the trial court conducted a hearing on April 26, 2018. Although none of the materials submitted to this court indicate the nature of that hearing or the issues considered, the mother alleges in her petition for a writ of mandamus filed in case number 2180041 that, at that hearing, the trial court received arguments on the issue of venue.

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<sup>1</sup>The order at issue in these petitions was entered in the State Judicial Information System ("SJIS") on September 18, 2018. Rule 58(c), Ala. R. Civ. P. In our initial consideration of the petition for a writ of mandamus and motion to stay in case number 2180012, this court did not have the SJIS case-action summary before it, and it appeared that the order had been entered on September 17, 2018. For that reason, orders of this court dated October 4, 2018, and October 5, 2018, issued in case number 2180012 refer to the order as "the September 17, 2018 order."

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In her petition, the mother argues that venue was not proper in the trial court, and, therefore, that the trial court erred in denying her motion for a change of venue.

"Complaints for divorce may be filed in the circuit court of the county in which the defendant resides, or in the circuit court of the county in which the parties resided when the separation occurred, or if the defendant is a nonresident, then in the circuit court of the county in which the other party to the marriage resides."

§ 30-2-4, Ala. Code 1975.

This court has explained:

"'Venue, in a divorce action, lies in the county where the parties resided at the time of the separation, not in the county where the separation occurred. Norton v. Norton, 48 Ala. App. 663, 267 So. 2d 457 (Ala. Civ. App. 1972).' Ex parte Watkins, 555 So. 2d 1098, 1099 (Ala. Civ. App. 1989). 'This court also observed in Watkins that "[t]he question of whether to transfer a case because of venue addresses itself to the sound discretion of the trial court, and any abuse of that discretion may be controlled by the writ of mandamus." [555 So. 2d at 1099].' Carson v. Carson, 237 So. 3d 889, 892 (Ala. Civ. App. 2017). Furthermore, '[t]he determination of whether the parties resided in [a certain county] is a factual question resolved by the trial court after a hearing of the evidence by the court. Such a finding is given a presumption of correctness and will not be disturbed by this court unless we can say it was plainly and palpably wrong.' Ex parte Greene, 527 So. 2d 1320, 1321 (Ala. Civ. App. 1988)."

Ex parte Hudson, 241 So. 3d 728, 731 (Ala. Civ. App. 2017).

Furthermore, ""[t]he burden of proving improper venue is on

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the party raising the issue and on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the part of the trial judge."'" Ex parte Hudson, 241 So. 3d at 731 (quoting Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002), quoting in turn Ex parte Finance America Corp., 507 So. 2d 458, 460 (Ala. 1987)).

In this case, the mother has not included in support of her petition for a writ of mandamus any evidence concerning the parties' residences. Robbins made allegations in his divorce complaint relevant to the issue of venue, and the mother made other allegations in her motion for a change of venue. In addition, there are some allegations concerning the mother's residence contained in the dependency petition filed by the maternal grandparents. However, those allegations do not constitute evidence.<sup>2</sup>

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<sup>2</sup>We further note that the mother did not include in her petition for a writ of mandamus a copy of the September 18, 2018, order she challenges in her petition. This court has reached the mother's arguments only because that order is included among the materials submitted by Robbins in his petition for a writ of mandamus in case number 2180012, which has been consolidated with the petition filed by the mother in case number 2180041.

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"The unsworn statements, factual assertions, and arguments of counsel are not evidence.' Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005). Similarly, the statements made by counsel in an unsworn pleading or motion are also not evidence. Hicks v. Jackson Cty. Comm'n, 990 So. 2d 904, 905 n.1 (Ala. Civ. App. 2008)."

Ex parte Gentile Co., 221 So. 3d 1066, 1069 (Ala. Civ. App. 2016).

In Ex parte Gentile Co., supra, Gentile Company sued The Bright Star Restaurant, Inc., and the trial court ordered that the action be transferred based on improper venue in response to a motion filed by Bright Star. In its petition for a writ of mandamus filed in this court, in which it challenged that order, Gentile argued that, in seeking to transfer the action, Bright Star had not met its evidentiary burden. This court agreed, noting that, "[a]lthough it is a logical inference from the allegations of the parties that most of the performance of the contract [at issue] occurred in Bessemer, Bright Star made no attempt to present evidence to support that finding." Ex parte Gentile Co., 221 So. 3d at 1069. Therefore, this court granted the petition for a writ of mandamus, concluding that Bright Star had not met its burden in seeking to transfer the action. Id. See also Hospital Bldg. & Equip. Co. v. Ramco Roofing & Supply Co., 454 So. 2d



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1012, 1013-14 (Ala. Civ. App. 1982) (holding that the trial court had not erred in denying a motion to transfer based on improper venue when the movant had not submitted competent evidence in support of its allegation that venue was improper).

The mother failed to submit any evidence in support of her mandamus petition that would support her argument that the trial court erred in denying her motion for a change of venue. Accordingly, we deny the mother's petition for a writ of mandamus in case number 2180041.

In his petition for a writ of mandamus in case number 2180012, Robbins asks this court to direct the trial court to set aside that part of its September 18, 2018, order that required DNA paternity testing. Robbins has alleged that his paternity of the child has not been questioned by the mother or another man, and the mother, in her response to Robbins's petition, has not argued that she disputed Robbins's paternity before the trial court or that she challenged Robbins's claim that he is the legal father of the child before the trial court.<sup>3</sup> There is no transcript of the hearing before the

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<sup>3</sup>We note, however, that the mother has alleged in her petition filed in this court that the child is not Robbins's

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trial court after which the trial court ordered the DNA paternity testing. However, the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, which governs actions or claims involving the determination of the parentage of a child, provides for genetic testing if such testing is requested by a party:

"(a) Except as otherwise provided in this article [i.e., Article 5] and Article 6 [of the AUPA], the court shall order the child and other designated individuals to submit to genetic testing if the request for testing is made by a party to the proceeding, the Alabama Department of Human Resources, or the representative of the child."

§ 26-17-502, Ala. Code 1975 (emphasis added). Thus, it appears that the request for paternity testing was made during the hearing before the trial court. See Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (an appellate court will not presume error on the part of the trial court).

Robbins argues, however, that, given the claims and facts of this case, the trial court erred in ordering DNA paternity testing. In a verified motion filed in the dependency action,

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biological child and that Robbins has moved to strike that statement as not being supported by any evidence or documentation before this court.

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which the trial court later purported to consolidate with the divorce action, Robbins stated that he had supported the mother during her pregnancy with the child; that the two had lived together from the time of the pregnancy until their January 1, 2018, separation; that he had been present at the child's birth; that he has financially supported the child and has held the child out as his own since the child's birth; and that no man has come forward alleging that Robbins is not the child's father. The materials before this court indicate that the parties married several years after the child's birth.

Thus, it is clear that Robbins is claiming to be the child's presumed father, as that term is defined under the AUPA, which provides, in pertinent part:

"(a) A man is presumed to be the father of a child if:

"(1) he and the mother of the child are married to each other and the child is born during the marriage;

"(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

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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;

"(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

"(B) with his consent, he is named as the child's father on the child's birth certificate; or

"(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.

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"(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."

§ 26-17-204, Ala. Code 1975.

The divorce action between Robbins and the mother is in its initial stages; no answer has been filed in response to the divorce complaint. Although it appears from allegations made before this court that the mother might be disputing whether Robbins is the biological father of the child, there is nothing in the materials before this court indicating that she is disputing Robbins's status as the presumed father of the child under § 26-17-204. Nothing in § 26-17-204(a) requires that, in order to resolve whether Robbins is the child's presumed father, a determination of whether he is the child's biological father must be made. See B.C. v. J.S.U., 158 So. 3d 464, 467 (Ala. Civ. App. 2014) (a man may be a presumed father of a child even if he admits he is not the child's biological child); and Black v. Black, 625 So. 2d 450, 453 (Ala. Civ. App. 1993) (affirming an award of custody to a

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man who was not the biological father of one of the children but who was that child's presumed father).

The parties have not had an opportunity to present evidence regarding Robbins's status under § 26-17-204(a) as the child's presumed father. Assuming that evidence to be presented in the divorce action establishes Robbins as the presumed father of the child under § 26-17-204(a), his status as the child's presumed father could be rebutted only pursuant to the provisions of Article 6 of the AUPA. § 26-17-204(b). Robbins points out in his appellate brief that, assuming he is the child's presumed father, he could maintain an action to prove or disprove his paternity but that no action to disprove his paternity could be maintained by the mother or another man claiming to be the child's father. § 26-17-607(a), Ala. Code 1975 ("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."). Thus, Robbins could concede that he is not the child's biological father and, assuming that the evidence supports his

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allegations, still prevail on his claim that he is the child's presumed father.

We note that the AUPA provides that if a presumed father seeks to disprove his paternity, a trial court could deny the man's claim on what amount to equitable grounds. § 26-17-608, Ala. Code 1975. Among the considerations in determining whether to deny a presumed father's claim seeking to disprove paternity is the possible harm to the child. For example, the trial court should consider the length of time a man has acted in the role of a child's father and any harm to the child that might result from the determination of whether a presumed father is the child's biological father. § 26-17-608(a)(2)(b).

This case does not involve Robbins, as the alleged presumed father, seeking to disprove his paternity of the child but, instead, involves Robbins's efforts to establish his status as the child's presumed father. Regardless, considerations such as those listed in § 26-17-608(a) should be considered in a case such as this one, in which only one man is claiming to be the child's presumed father. See Headrick v. Headrick, 916 So. 2d 610, 613 (Ala. Civ. App. 2005) ("The paramount consideration, or polestar, for a court

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in a child-custody case is the welfare and best interests of the child.").

In this case, the issue of Robbins's biological connection to the child is not determinative of whether he is the child's presumed father under the AUPA. Accordingly, given the current posture of this case, the order requiring DNA paternity testing is improper. We grant Robbins's petition for a writ of mandamus and direct the trial court to set aside that part of its September 18, 2018, order requiring paternity testing.

Robbins's motions to strike certain portions of the mother's petition for a writ of mandamus in case number 2180041 is denied as moot.

2180012--PETITION GRANTED; WRIT ISSUED.

2180041--PETITION DENIED.

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