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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2025-2026**

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**SC-2024-0222**

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**Ex parte Jarrod Sessions**

**PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CIVIL APPEALS**

**(In re: Jarrod Sessions**

**v.**

**Brittany Richey)**

**(DeKalb Circuit Court: DR-22-900112;  
Court of Civil Appeals: CL-2023-0432)**

PER CURIAM.

Jarrold Sessions petitioned this Court for a writ of certiorari to review the Court of Civil Appeals' unpublished-memorandum decision in Sessions v. Richey (No. CL-2023-0432, Mar. 29, 2024), 421 So. 3d 376 (Ala. Civ. App. 2024) (table), which affirmed the judgment of the DeKalb Circuit Court dismissing Sessions's petition to adjudicate his paternity of a child that he says he fathered with Brittany Richey. For the reasons stated below, we affirm the Court of Civil Appeals' judgment.

#### Facts and Procedural History

The relevant facts of the case are undisputed. Richey and Andrew Richey ("Andrew") divorced in June 2021, but they remarried on May 9, 2022. On July 7, 2022, Richey bore a child. Richey was not married to anyone when the child was conceived. Andrew is listed as the father of the child on the child's birth certificate, and Richey described Andrew as the child's "dad." However, at the evidentiary hearing in the present case, Richey was asked whether she denied that Sessions is the child's biological father, and she answered: "No."

On May 29, 2022, before the birth of the child, Sessions filed a petition to establish paternity and to obtain custody of the child. On July

26, 2022, Richey filed a counterclaim seeking "an order requiring the parties to submit to DNA paternity testing" and seeking "full care, custody and control" of the child. The counterclaim also stated that, "as a result of a romantic relationship, the parties have an unborn female minor child," and the counterclaim asked the trial court to require Sessions to pay child support. On August 26, 2022, Sessions filed a motion seeking genetic testing to establish the paternity of the child.

On September 7, 2022, Richey filed an amended counterclaim and a motion to dismiss Sessions's petition. In the motion to dismiss, Richey asserted that, because she was married to Andrew when the child was born and Andrew is persisting in his presumption of paternity of the child, Sessions had no standing to bring the paternity action. Richey attached to the motion the child's birth certificate, which listed Andrew as the child's father.

On October 4, 2022, Sessions filed a response to Richey's motion to dismiss in which he challenged the constitutionality of §§ 26-17-607 and 26-17-611, Ala. Code 1975, which are part of the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, and he requested a hearing that would allow him to demonstrate that he was

the presumed father under § 26-17-204(a)(5), Ala. Code 1975. That same day, the trial court held a brief evidentiary hearing solely on the issue raised in Richey's motion to dismiss, and Richey was the only witness who testified at the hearing.

On October 21, 2022, the trial court entered an order stating that, because Sessions had challenged the constitutionality of the AUPA, he was required to serve the attorney general with notice of the proceeding. Ultimately, the attorney general was served.

On May 2, 2023, the trial court held a second hearing during which the parties argued their positions, but no evidence was presented. On May 12, 2023, the trial court entered a judgment granting Richey's motion to dismiss. The trial court relied on this Court's plurality opinion in Ex parte Z.W.E., 335 So. 3d 650 (Ala. 2021), to conclude that Sessions could not establish that he was a presumed father under the AUPA based on his prebirth conduct toward the child. The trial court also rejected Sessions's argument that the AUPA is unconstitutional. Sessions appealed.

On appeal, the Court of Civil Appeals affirmed the judgment of the trial court in an unpublished memorandum. That court also rejected

Sessions's argument concerning the constitutionality of the AUPA, and the court also relied on this Court's plurality opinion in Z.W.E. to conclude that Sessions could not establish that he was a presumed father based on his prebirth conduct toward the child. In the memorandum, the Court of Civil Appeals stated:

"We recognize that only four justices concurred in the main opinion in Z.W.E. (two concurring specially), while three justices concurred in the result and two justices dissented. We are not prepared to reject the main opinion's analysis on the basis that it represents a plurality decision, however. Instead, we will leave it to our supreme court to revisit the reasoning of the main opinion in Z.W.E. should it so choose."

#### Discussion

Sessions asks this Court to reverse the Court of Civil Appeals' judgment, which affirmed the trial court's judgment dismissing his petition to adjudicate his paternity of a child he says he fathered with Richey. Specifically, Sessions asks this Court to decline to follow the reasoning of the plurality opinion in Z.W.E. and, instead, to follow the reasoning of some of the special writings in that case. However, the plurality opinion in Z.W.E. is not controlling in the present situation. Instead, the controlling case in the present situation is Ex parte Presse, 554 So. 2d 406 (Ala. 1989), in which a majority of this Court held that a

man claiming to be the father of a child born during the marriage of the child's mother to another man could not initiate an action under the AUPA to establish that he is the father of the child when the mother's husband persisted in the presumption that he is the father.

In Z.W.E., the alleged father and the mother conceived a child while they were in a dating relationship and cohabiting. During most of the pregnancy, both the mother and the alleged father held the child out to be the child of the alleged father, and the alleged father provided financial and emotional support to the mother. Shortly before the child's birth, the mother ceased contact with the alleged father and married another man, and the alleged father filed a petition seeking to establish the paternity of the unborn child. The child was born during the mother's marriage to the other man. The trial court dismissed the alleged father's action, and he appealed.

After the Court of Civil Appeals affirmed the trial court's judgment, this Court granted certiorari review to consider, as a question of first impression, "whether the term 'child,' as defined in the AUPA is broad enough to include unborn children." Z.W.E., 335 So. 3d at 654-55. According to the plurality opinion, if the term "child" was broad enough

to include unborn children, "it would be possible for the alleged father to establish himself as a presumed father under § 26-14-204(a)(5)[, Ala. Code 1975,] based on his prebirth conduct toward and support of the child," and, "[a]ssuming the alleged father were able to do so, he would then have the capacity to challenge the husband's presumption of paternity." Id. at 655. Ultimately, the plurality opinion concluded that "the alleged father cannot demonstrate that he is a presumed father under § 26-17-204(a)(5) because the child in this case, for whom the alleged father provided prebirth care and support, did not fit within the AUPA's definition of 'child' before the child's birth." Id. at 657.

However, whether an unborn child is considered a "child" under the AUPA is not the dispositive issue in the present case. That issue is relevant only when deciding whether it is possible for an alleged father to establish himself as a presumed father based on prebirth conduct. Under Presse, even if an alleged father who is not married to the child's mother at the time of the child's birth can establish himself as a presumed father, he will not be able to overcome the conflicting presumption under the AUPA that the father of the child is the man who is married to the child's mother at the time of the child's birth.

The AUPA has been amended since Presse was decided, but the applicable provisions either have not changed or have made it more difficult for an alleged biological father to overcome the AUPA's presumption that the father of the child is the husband of the child's mother if the child is born during their marriage.

Section 26-17-204, Ala. Code 1975, 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;

"....

"(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; [or]

"(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 established under this section may be rebutted only by an adjudication under Article 6 [of the AUPA]. 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."

Similarly, when Presse was decided, former § 26-17-5, Ala. Code 1975, which was part of the version of the AUPA in effect at that time, provided, in pertinent part:

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

"(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage ....;

"....

"(3) After the child's birth, he and the child's natural 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 Bureau 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;

"(4) While the child is under the age of majority, he receives the child into his home or otherwise openly holds out the child as his natural child; or

"(5) He acknowledges his paternity of the child in a writing filed in accordance with provisions of the legitimation statute.

"(b) A presumption of paternity under this section may be rebutted in an appropriate action only by clear and convincing evidence. 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."

Section 26-17-607(a), Ala. Code 1975, which did not have a comparable provision in the version of the AUPA in effect at the time Presse was decided, provides:

"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."

The Alabama Comment to that section explains, in pertinent part:

"Subsection (a) follows Ex parte Presse, 554 So. 2d 406 (Ala.1989) and its progeny that favor maintaining the integrity of the family unit and the father-child relationship that was developed therein. Once the presumed father ceases to persist in his parentage, then an action can be brought. If it is determined that the presumed father is not the biological father and non-parentage is found, a proceeding to adjudicate parentage may be brought under [Article 6 of the AUPA]."

Further, unlike the current version of the AUPA, when Presse was decided, former § 26-17-6(b), Ala. Code 1975, which was part of the version of the AUPA in effect at that time, provided: "Any interested party may bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed under subdivision (4) or (5) of [Ala. Code 1975, former §] 26-17-5(a)."

In Presse, Norman Presse and Jean Ann (Presse) Koenemann were once married. While they were married, Jean Ann engaged in an affair with Dr. Lynn Koenemann. Thereafter, Jean Ann gave birth to a daughter. After the birth, Norman and Jean Ann lived together as husband and wife for a few years, and then they divorced. Initially, custody of the minor child, who was about three years old at the time, was awarded to Norman. After the divorce, Jean Ann married Koenemann, and, shortly after they married, custody of the minor child was "divided" between Norman and Jean Ann, with Jean Ann having primary custody. Norman was awarded liberal visitation rights, which he fully exercised, and he paid child support. Approximately six years after the custody of the child was divided, Jean Ann and Koenemann initiated an action seeking to establish that Koenemann was the father of the child. Court-ordered blood tests indicated that there was a 99% probability that Koenemann was the biological father of the child. The trial court ruled that Koenemann was the biological father of the child and that, upon application by Jean Ann and Koenemann, the child's birth certificate be amended. However, the trial court did award Norman

occasional visitation privileges. On appeal, the Court of Civil Appeals affirmed the trial court's judgment.

After granting certiorari review, this Court stated that the "dispositive issue" in Presse was: "Does a man claiming to be the father of a child conceived and born during the marriage of its mother to another man have standing under the [AUPA] to initiate an action to establish that he is the father of the child, where the presumed father persists in the presumption that he is the father?" 554 So. 2d at 411. This Court then held that the alleged father of a child conceived and born during the marriage of the child's mother to another man did not have standing under the AUPA to initiate an action to establish that he is the father of the child when the presumed father persists in the presumption that he is the father.

In Presse, this Court did not focus on whether the alleged father -- Koenemann -- could establish himself as a presumed father under the AUPA. Instead, this Court held that, "[e]ven assuming that Koenemann might fit within a presumed father category, it is clear that the presumption of Presse's paternity should prevail." Presse, 554 So. 2d at 412. This Court reasoned:

"Moreover, § 26-17-5(b) provides that, '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.' It is quite apparent that the public policy considerations causing Presse, the husband of the child's mother, to be considered as [the child's] father, are much 'weightier' than any considerations causing Koenemann (who years later married the child's mother and received the child into his home) to be considered a 'presumed father.' Thus, even if we accepted Koenemann's argument that he literally fits within the category of 'presumed father,' it is clear that that presumption in his favor would be transcended by the 'weightier' presumption in favor of Presse; it is not logical that two men could be presumed to be the child's father. The presumption in favor of Presse is an ancient one, supported by logic, common sense, and justice."

Id. To support the assertion that the presumption in favor of the husband is "an ancient one, supported by logic, common sense, and justice," id., this Court relied on, among other things, a plurality opinion authored by Justice Scalia in Michael H. v. Gerald D., 491 U.S. 110 (1989), in which he explained how our society's "traditions have protected the marital family." 491 U.S. at 124.

In summary, as it did when Presse was decided, the AUPA mandates that, "[i]n 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." § 26-17-204(b). Further, our precedent in Presse holds that, even if an alleged father who

is not married to the mother when the child is born can establish that he is a presumed father, the conflicting presumption that the man who is married to the mother when the child is born is the father will always be founded upon the weightier considerations of public policy and logic and, thus, will always control. Accordingly, in such situations, the issue discussed in Z.W.E. -- whether the term "child" in the AUPA includes unborn children and, thus, would allow an alleged father who is not married to the mother to establish himself as a presumed father based on his prebirth conduct toward the child -- is irrelevant.

In the present case, even if Sessions can establish that he is a presumed father based on his prebirth conduct toward the child, the conflicting presumption that Andrew is the father will prevail because the presumption that Andrew is the father is based on the fact that he was married to Richey when the child was born. That marital presumption will always control in a situation like the present one because, according to our precedent, it is "founded upon the weightier considerations of public policy and logic." § 26-17-204(b).

### Conclusion

Based on the foregoing, the judgment of the Court of Civil Appeals is affirmed.<sup>1</sup>

AFFIRMED.

Stewart, C.J., concurs.

Cook, J., concurs specially, with opinion, which Parker, J., joins.

McCool, J., concurs specially, with opinion.

Wise and Bryan, JJ., concur in the result.

Mendheim, J., concurs in the result, with opinion.

Shaw, J., dissents, with opinion.

Sellers, J., dissents.

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<sup>1</sup>We note that, in his brief to this Court, Sessions makes a very short argument concerning the constitutionality of the AUPA. The Court of Civil Appeals rejected that argument, and, in his petition for a writ of certiorari, Sessions did not allege any Rule 39(a)(1), Ala. R. App. P., ground for review concerning that issue. Thus, we did not grant certiorari review concerning that issue, and it is not properly before us.

COOK, Justice (concurring specially).

I fully concur with the well-reasoned main opinion. This Court's decision in Ex parte Presse, 554 So. 2d 406 (Ala. 1989), is controlling and forecloses Jarrod Sessions's attempt to establish paternity in this case. I likewise agree that Sessions's due-process argument fails for the reasons set out in the main opinion and in the plurality opinion authored by Justice Scalia in Michael H. v. Gerald D., 491 U.S. 110 (1989). See Gregory C. Cook, Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process, 14 Harv. J.L. & Pub. Pol'y 853 (1991). Further, although the Alabama Constitution employs different language in its due-process provision, Sessions has not argued that its guarantee should yield a result different from that required by the United States Constitution. In the absence of such an argument, I must conclude that the same outcome is required.

With that said, I am concerned about the precedent established in Ex parte Presse. The facts of Ex parte Presse are these. While Norman Presse and his wife, Jean Ann, were married, Jean Ann engaged in an affair with Dr. Lynn Koenemann and became pregnant. After the child was born, Presse and Jean Ann remained married for approximately

three more years. Following her divorce from Presse, Jean Ann married Koenemann. When the child reached the age of three, custody was divided between Presse and Jean Ann, with Jean Ann receiving primary custody. At that point, the child began living with Jean Ann and Koenemann. Presse was granted generous visitation rights, which he fully exercised, maintaining an active and meaningful presence in the child's life.

Six years later, Jean Ann and Koenemann filed a complaint seeking, among other relief, a judgment declaring that Koenemann was the child's father. At their request, blood tests were conducted, conclusively demonstrating that Presse could not be the biological father and indicating a 99.32% probability that Koenemann was. The trial court entered an order declaring Koenemann to be the biological father, and the Court of Civil Appeals affirmed.

This Court, however, reversed, concluding (1) that Koenemann (the biological father who had helped care for the child for six years) lacked standing to bring a paternity action and (2) that, even assuming Koenemann did have standing, "the public policy considerations causing Presse, the husband of the child's mother, to be considered as [the child's]

father, [were] much 'weightier' than any considerations causing Koenemann (who years later married the child's mother and received the child into his home) to be considered a 'presumed father.'" Ex parte Presse, 554 So. 2d at 412.

In the wake of our decision in Ex parte Presse, the Legislature effectively codified its holding through the enactment of § 26-17-607(a), Ala. Code 1975, which 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." As the main opinion notes, the Alabama Comment accompanying § 26-17-607(a) expressly states that "[s]ubsection (a) follows Ex parte Presse ... and its progeny," signaling a legislative intent to adopt the principles established in that case.

First, I question whether Ex parte Presse was correctly decided. I find the vigorous and well-reasoned dissent of Justice Maddox particularly persuasive. Moreover, I am troubled by the Court's apparent holding that the marital presumption of paternity automatically outweighs any other statutory presumptions, including those set forth in § 26-17-204(a)(2)-(6). This interpretation appears inconsistent with the

plain language of § 26-17-204(b), which states that, "[i]n 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." (Emphasis added.) To the extent that Ex parte Presse elevates the marital presumption above all others as a matter of law, without regard to the factual circumstances, it arguably undermines § 26-17-204(b)'s statutory directive to balance conflicting presumptions according to the relative weight of public policy and logic "as evidenced by the facts."

Second, a blanket, irrebuttable presumption of paternity for the husband at the time of birth is poor policy, illogical, and unfair. The circumstances in R.D. v. S.S., 309 So. 3d 146 (Ala. Civ. App. 2020), illustrate why. As the Court of Civil Appeals explained, in that case there was evidence indicating that the child's mother had

"separated from [her] husband because of domestic abuse with the intention of divorcing him but that she failed to obtain a divorce. While the mother's husband was incarcerated for domestic violence, she invited the alleged father to live with her. During their cohabitation, the mother and the alleged father conceived the child. The alleged father [was] not listed on the birth certificate as the father of the child, but the child [was] named after him in recognition of his paternity. The alleged father ... consistently held out the child as his own."

309 So. 3d at 158. Further, when the child was still an infant, a juvenile court determined that the best interests of the child would be served by awarding custody of the child to the alleged father's mother. Id. The evidence presented indicated that the alleged father (that is, the biological father) had

"been raising the child in the same home with the alleged paternal grandmother since the child was three years old. The alleged father stated that he provide[d] the child love, companionship, and emotional and financial support. He also claim[ed] that he educate[d], fe[d], bathe[d], and otherwise care[d] for the child on a daily basis. The alleged father assert[ed] that he ... served as the exclusive paternal figure for the child for nearly six years and that the child underst[ood] that the alleged father [was] his father."

Id. Importantly, the juvenile court also "determined that the mother's husband [was] a violent person who should have no contact with the child." Id.

Despite this, when the biological father sought an adjudication of his paternity, the mother "asserted that the mother's husband had previously indicated that he was persisting in his status as the presumed father of the child and that the juvenile court should honor his previous statement by dismissing the alleged father as a party in both actions and denying his requests for genetic testing and an adjudication of paternity."

Id. at 150. The juvenile court subsequently dismissed the biological father as a party.

Under those circumstances, allowing the marital husband's mere status at the time of birth to block the biological father -- the child's only reliable father figure -- from establishing legal paternity is neither supported by sound public policy nor consistent with the statutory directive to weigh competing presumptions according to their relative significance as reflected by the facts. To prioritize the marital presumption over the clear reality of the child's ongoing care and attachment to the biological father undermines both the child's welfare and the purpose of § 26-17-204(b).

Third, the world has changed dramatically since the common law first established the marital presumption. Historically, the marital presumption existed because there was no reliable way to determine biological paternity. Thus, the law presumed that a child born during marriage belonged to the husband -- promoting family stability and ensuring that a child had a single, legally recognized father. Those are important public-policy values, and I am confident that I would have agreed with that rationale in 1819 (the date Alabama became a state).

Today, however, technological advances have eliminated the very uncertainty the presumption was designed to address.

Finally, there is at least some reason to question whether the inflexible rule set forth in Ex parte Presse satisfies the requirements of the Equal Protection Clause. While I concur with Justice Scalia that the rule does not violate the Due Process Clause, his opinion in Michael H. v. Gerald D. did not reach the equal-protection implications of the biological father's claims.

Regardless, unless the statute itself violates equal protection, our Court lacks the authority to overrule Ex parte Presse without legislative action. Those difficult policy judgments lie squarely within the Legislature's domain, and that body has not yet acted to address the concerns arising from Ex parte Presse. Indeed, the Alabama Comment to § 26-17-607(a) underscores this point, reflecting the Legislature's seemingly purposeful effort to preserve the framework and rationale articulated in that case.

For these reasons, I respectfully urge the Legislature to reexamine this area of the law. The existing framework no longer aligns with the nuanced realities that courts frequently encounter in parentage disputes.

A revised statutory scheme need not abandon the marital presumption altogether. Rather, it should modernize that presumption to reflect the need for a careful, fact-specific evaluation of each family's circumstances, including consideration of an alleged father's demonstrated commitment to a child. To that end, I believe the marital presumption should be rebuttable and should not, in every instance, override the other presumptions set forth in § 26-17-204(a)(2)-(6). At the same time, even if the presumption were made rebuttable and the statutory framework altered, it is not clear that the facts of this case -- where Sessions, the alleged father, unlike the alleged father in Ex parte Presse, has not maintained long-standing contact with the child -- would justify a different outcome or allow the alleged father to prevail. I note one particularly important factual difference -- the alleged support and contact by Sessions in this case was only before the birth. In contrast, in Ex parte Presse, the biological father had many years of postbirth support and contact with the child and had an established relationship with the child.

That said, I am confident that the Legislature can craft a balanced approach that preserves the traditional purposes of the marital

SC-2024-0222

presumption, reflects present-day realities, and -- above all -- promotes the best interests and well-being of children.

Parker, J., concurs.

McCOOL, Justice (concurring specially).

I agree that the present case is controlled by this Court's prior decision in Ex parte Presse, 554 So. 2d 406 (Ala. 1989), and therefore I concur fully with the main opinion. Specifically, Presse held that, in a situation like the present one, even assuming that the alleged biological father might fit within a presumed-father category, the presumption that the man who is married to the mother at the time of the child's birth is the father will always prevail. I acknowledge that there are some factual distinctions between the present case and Presse. In particular, in Presse the child was conceived during an extramarital affair, while in the present case the mother was not married when the child was conceived. However, under the reasoning in Presse, I do not believe that this factual distinction would make a difference in the outcome. In either scenario, the presumption that the husband is the father of the child will always prevail over any conflicting presumption, because the moment of birth, not the moment of conception, is what matters under Presse.

But like Justice Cook, I question whether Presse was rightly decided. Most glaringly, in the present case, Presse requires us to conclusively assume something to be true that all the parties involved

know is not true. In the present case, it appears to be undisputed that Jarrod Sessions, not Andrew Richey, is the biological father of the child and that all the parties knew that fact from the beginning. However, under the law in Presse, we must hold that Andrew, and not Sessions, is presumptively and conclusively the father -- a result that seems to me to be contrary to common sense. But unfortunately the law does not always follow common sense, and in any event this Court has not been asked to overrule Presse. Moreover, as Justice Cook points out, the Legislature appears to have codified the holding in Presse through the enactment of § 26-17-607(a), Ala. Code 1975. Therefore, I agree that, even if Sessions can establish that he is a presumed father based on his prebirth conduct toward the child, the conflicting presumption that Andrew is the father will prevail because the presumption that Andrew is the father is based on the fact that he was married to Brittany Richey, the mother, when the child was born.

I write separately, however, to point out the somewhat strange posture of this case, and to express my disagreement with the plurality opinion in Ex parte Z.W.E., 335 So. 3d 650 (Ala. 2021). This Court originally granted certiorari review to reconsider the reasoning of the

plurality in Z.W.E., which dealt with the issue whether an unborn child is a "child" for purposes of the Alabama Uniform Parentage Act ("AUPA"), § 26-17-101 et seq., Ala. Code 1975, and which was relied on by the Court of Civil Appeals and the trial court in the present case. Now, after considering Z.W.E., this Court correctly concludes that Z.W.E. is irrelevant in the present situation. For this reason, it would be entirely appropriate for this Court to quash the writ as improvidently granted, and in most instances I would probably cast my vote to do so. However, in this case I believe it is appropriate to affirm the lower court's judgment with an opinion because of the need for clarity in the law regarding situations like the one before us. Thus, I fully concur with the main opinion.

However, I disagree with the plurality opinion's conclusion in Z.W.E. Importantly, that plurality opinion concluded that the definition of the term "child" in the AUPA does not include an unborn child. And while Z.W.E. is not relevant in the case before us, it might nonetheless still be relevant in other situations: for example, in a situation where the mother has not married by the time the child is born, but there is more than one suitor claiming to be the father of the child. As I have stated, I

do not agree with the plurality's conclusion in Z.W.E., because I believe a reasonable interpretation of the definition of "child" in the AUPA includes unborn individuals. I believe that interpretation is consistent with the present statutory scheme and with the ordinary definition of child used elsewhere in our law. Thus, I believe that unborn children are not excluded from the definition of child in the AUPA. Accordingly, under different circumstances than we have before us, there might be a time when it would be possible for an alleged father like Sessions to demonstrate that he is a presumed father under § 26-17-204(a)(5) by evidence of his prebirth conduct and, thus, that he has the capacity to challenge another man's paternity of the child. However, in the case before us, because Andrew was married to Richey when the child was born, Andrew's presumption would prevail under Presse even if Sessions could demonstrate that he is a presumed father.

Because I believe the analysis in Z.W.E. is incorrect, I believe this Court should reanalyze and reject its conclusion in an appropriate case. However, because this is not that case, I will not delve into a deeper analysis of my position that the definition of "child" under the AUPA

SC-2024-0222

includes an "unborn child," but will leave that for another case and another day. Thus, I concur fully with the main opinion.

MENDHEIM, Justice (concurring in the result).

Andrew Richey's legal relationship with the child at issue -- the father-child relationship -- was established upon the child's birth because Andrew was married to the child's mother, Brittany Richey, at that time. See Ala. Code 1975, § 26-17-201(b)(1) & § 26-17-204(a)(1). It is undisputed that Andrew persisted in his presumption of paternity, see Ala. Code 1975, § 26-17-607(a), yet Jarrod Sessions alleged that he was entitled to establish a presumption of paternity pursuant to § 26-17-204(a)(5) based on actions he took before the child's birth. However, no prebirth actions taken by Sessions established a parent-child relationship with the child or impaired the establishment of Andrew's legal relationship with the child. See Ala. Code 1975, § 26-17-102(14) (defining "parent"), § 26-17-102(15) (defining "parent-child relationship"), and § 26-17-102 (17) (defining "presumed father"); see also Ex parte Z.W.E., 335 So. 3d 650 (Ala. 2021) (plurality opinion); Ex parte Presse, 554 So. 2d 406, 412 (Ala. 1989).<sup>2</sup>

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<sup>2</sup>The Alabama Uniform Parentage Act, § 26-17-101 et seq., Ala. Code 1975, addresses the adjudication of the parent-child relationship under most circumstances where that is at issue. See Ala. Code 1975, § 26-17-103(b). If it had been at issue, Brittany's mother-child relationship

The plurality opinion in Ex parte Z.W.E. concluded that an alleged father cannot be considered a presumed father under § 26-17-204(a)(5) based on his conduct toward an unborn child. 335 So. 3d at 658. I concurred in Ex parte Z.W.E. and continue to believe that that case was correctly decided. Thus, in my opinion, the Court of Civil Appeals and the trial court correctly relied on that case in determining that Sessions's paternity claim must be dismissed. Nevertheless, because it is undisputed that Andrew persisted in his presumption that he is the father of the child born during his marriage to Brittany, I agree with the main opinion's conclusion that Sessions's paternity claim also fails based on the application of § 26-17-607(a), by which the legislature ensconced the holdings in Ex parte Presse and its progeny, such as Ex parte C.A.P., 683 So. 2d 1010 (Ala. 1996), in our law governing the adjudication of the father-child relationship. See Alabama Comment to § 26-17-607(a). The present case is not one where the presumed father does not rely on his presumption as conclusive and opens the door for other presumptions or

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likewise would have been established upon the birth of the child. See Ala. Code 1975, § 26-17-201(a)(1).

for evidence to rebut his presumption of paternity, as described in § 26-17-607(b). See also § 26-17-204(b).<sup>3</sup>

Notwithstanding the foregoing, I strongly disagree with the main opinion and Justice McCool's special concurrence that Ex parte Z.W.E. is irrelevant. The plurality rationale in Ex parte Z.W.E. remains as relevant in paternity proceedings as it was before the decision in this case. The main opinion simply chose to pursue an alternative rationale that made it unnecessary to consider Sessions's chosen ground for certiorari review, namely whether Ex parte Z.W.E. should be overruled.

I further note that Sessions argued in his petition for a writ of certiorari that Ex parte Z.W.E. had interpreted the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, in a

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<sup>3</sup>I see no need to question the wisdom of the legislature regarding how it chose to address the issue discussed in Ex parte Presse. The relevant interests reflected in paternity law have not changed significantly since the 2008 adoption of § 26-17-607(a), see Act No. 2008-376, Ala. Acts 2008, and the legislature has chosen how to balance those interests. I also believe I can confidently assume that the legislature was aware of history, current technology, and common sense when it made its decision. See generally 1 William Blackstone, Commentaries on the Laws of England \*454-56 (discussing the multiple considerations at issue regarding bastardy and the common-law preference for establishing the father-child relationship based on marital status at the time of the child's birth). The legislature needs no input from me, as a judge, about what the law ought to be.

manner that "unconstitutionally denie[d] capacity of a biological father who initiate[d] a prebirth custody action to challenge paternity when a presumed father exists." The main opinion states that Sessions made no attempt to allege the ground listed in Rule 39(a)(1), Ala. R. App. P., as a ground for certiorari review, see \_\_ So. 3d at \_\_ n.1, which is true. But Sessions's constitutional argument was made in support of overruling Ex parte Z.W.E., not as a separate ground for certiorari review. Thus, the main opinion is wrong in concluding that Sessions's constitutional argument in support of overruling Ex parte Z.W.E. is not before us. That argument is before us, but the main opinion's decision to articulate an alternative rationale for affirmance has obviated any need to consider Sessions's constitutional argument. However, had the main opinion chosen to address the ground for review that Sessions alleged in his petition and argued in his brief in support thereof, Sessions's conclusory, one-page constitutional argument is wholly inadequate and does not even engage the limited constitutional analysis that was articulated by the Court of Civil Appeals in its unpublished-memorandum decision. See Rule 39(g)(1), Ala. R. App. P. (noting that Rule 28, Ala. R. App. P., applies to a brief on certiorari review); Rule 28(a)(10), Ala. R. App. P.; see also,

SC-2024-0222

e.g., Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994). Thus, Sessions established no constitutional basis for overruling Ex parte Z.W.E. and reversing the judgment dismissing his paternity claim.

SHAW, Justice (dissenting).

I respectfully dissent. The petition for a writ of certiorari granted in this case alleged a ground solely under Rule 39(a)(1)(E), Ala. R. App. P., which provides that a petition for certiorari review may be considered "[w]here the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals." Here, the petitioner sought to have this Court overrule the plurality decision in Ex parte Z.W.E., 335 So. 3d 650 (Ala. 2021).<sup>4</sup> If the decision in Ex parte Z.W.E. is not material to the ultimate resolution of this appeal, then I would quash the writ.

I further note that the discussion in Ex parte Presse, 554 So. 2d 406 (Ala. 1989), that, under what is now § 26-17-204(b), Ala. Code 1975, public policy and logic favor the presumption of paternity provided to an alleged father who was married to the mother when a child was born, to the exclusion of any presumption provided an alleged father who was not

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<sup>4</sup>A plurality opinion is not binding precedent. See State v. Boys & Girls Clubs of S. Alabama, Inc., 163 So. 3d 1007, 1012 (Ala. 2014), and Moore v. State, 183 So. 3d 1005, 1008 (Ala. 2015) (Shaw, J., dissenting). I was not a member of the division of this Court that granted this certiorari petition, and I express no opinion at this time as to whether a plurality decision constitutes a "controlling" case for purposes of Rule 39(a)(1)(E).

SC-2024-0222

married to the mother when the child was born, was a hypothetical discussion based on a premise that was rejected in that case. Thus, it appears to be dicta.