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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

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E.L.

v.

V.L.

**Appeal from Jefferson Family Court
(CS-13-719)**

PER CURIAM.

E.L. ("the mother") appeals from a judgment of the Jefferson Family Court ("the family court") awarding V.L., the mother's former same-sex partner, periodic visitation with the mother's biological children, S.L., N.L., and H.L.

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(hereinafter referred to collectively as "the children"). We reverse and remand.

Background

On October 31, 2013, V.L. filed a petition in the Jefferson Circuit Court ("the circuit court"). In that petition, V.L. asserted that she and the mother had engaged in a same-sex relationship from 1995 to 2011; that, during the course of their relationship, the mother had given birth to S.L. on December 13, 2002, and to twins, N.L. and H.L., on November 17, 2004, through the use of assisted reproductive technology; that, at all times since the birth of the children, V.L., in addition to the mother, had acted as a parent to the children; that, on May 30, 2007, with the mother's consent, the Superior Court of Fulton County, Georgia ("the Georgia court"), had entered a judgment approving V.L.'s adoption of the children ("the Georgia judgment"), which judgment, V.L. asserted, was entitled to full faith and credit by the courts of this state; and that V.L. is listed as a parent on the children's Alabama birth certificates.

V.L. further asserted that the mother had denied her the traditional and constitutional parental rights to the children

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she had secured in the Georgia judgment, including visitation and access to their educational and other information. V.L. averred that the children have known both parties as their parents since their births and that the children were being harmed by the mother's denying them association with her. V.L. further averred that she was fit to assume the children's custody.

V.L. requested that the circuit court register the Georgia judgment; declare her legal status, rights, and relations to the children pursuant to the Georgia judgment; award her custody of the children or, alternatively, award her joint custody with the mother and establish a schedule of custodial periods; order the mother to pay her child support and attorney's fees; and provide her any such other relief to which she might be entitled.

On November 4, 2013, the circuit court transferred the matter to the family court. On December 17, 2013, the mother moved the family court to dismiss V.L.'s petition, asserting, among other things, that the family court lacked subject-matter jurisdiction and that V.L. lacked standing to invoke

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the family court's jurisdiction.¹ On December 27, 2013, V.L. amended her petition to reassert the allegations in the original petition, but also to allege the dependency of the children based on their separation from her. On February 3, 2014, the mother filed a memorandum of law to support her motion to dismiss. That same date, V.L. filed a response to the motion to dismiss. On March 11, 2014, the mother "renewed" her motion to dismiss, attaching her affidavit. That same date, V.L. responded to the renewed motion to dismiss, attaching her affidavit and several exhibits.

On April 3, 2014, without a hearing, the family court denied the mother's motion to dismiss and awarded V.L. scheduled visitation with the children. On April 15, 2014, the family court entered a supplemental order specifically denying all other requested relief and closing the case. On April 17, 2014, the mother moved the family court to alter, amend, or vacate its judgment. On May 1, 2014, the mother's

¹On February 3, 2014, V.L. moved the family court to consolidate the underlying action with actions designated by case numbers "JU-55.01; JU-56.01; JU-57.01," which are referred to in the record as dependency actions. The record contains no indication that the family court acted on that motion.

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postjudgment motion was deemed denied by operation of law, and on May 12, 2014, the mother timely filed her notice of appeal.² See Rule 1(B), Ala. R. Juv. P.; Rule 4(a), Ala. R. App. P.; and Holifield v. Lambert, 112 So. 3d 489, 490 (Ala. Civ. App. 2012) ("[C]ases filed in the Jefferson Family Court and docketed with a case number having a 'CS' prefix[] are governed by the Alabama Rules of Juvenile Procedure.").

Analysis

Although the mother raises five different arguments for reversing the judgment of the family court, we find one issue to be dispositive -- that the Georgia judgment was rendered without subject-matter jurisdiction. Hence, we do not address the other arguments raised by the mother.

We begin by noting that the family court acts as a juvenile and domestic-relations court with jurisdiction equal to the circuit courts in matters relating to child custody. See Act No. 478, Ala. Acts 1935, §§ 2 & 3; and Placey v.

²Although the mother moved the family court and this court to stay enforcement of the judgment pending resolution of her postjudgment motion and appeal, those motions were denied. The mother subsequently petitioned our supreme court for mandamus relief from the denial of those motions (No. 1131084); that petition remains pending.

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Placey, 51 So. 3d 374, 375 n.2 (Ala. Civ. App. 2010). As such, the family court had the power to act on the petition filed by V.L. pursuant to the Uniform Enforcement of Foreign Judgments Act ("the UEFJA"), Ala. Code 1975, § 6-9-230 et seq. See Nix v. Cassidy, 899 So. 2d 998, 1002 (Ala. Civ. App. 2004) ("The circuit court had jurisdiction to accept the judgment creditor's filing of the Georgia judgment pursuant to § 6-9-232[, Ala. Code 1975]."). V.L. followed the procedure established under the UEFJA by filing an authenticated copy of the Georgia judgment with the clerk of the family court, see Ala. Code 1975, § 6-9-232, and by filing an affidavit setting forth the information required by Ala. Code 1975, § 6-9-233.

"A judgment [filed pursuant to the UEFJA] has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a circuit court of this state and may be enforced or satisfied in like manner" § 6-9-232. "Therefore, once the judgment is domesticated, [a party attacking the validity or enforceability of the judgment] must resort to procedures applicable to any other judgment originally entered by a circuit court in order to set it aside." Greene v. Connelly,

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628 So. 2d 346, 350 (Ala. 1993), abrogated on other grounds, Ex parte Full Circle Distrib., L.L.C., 883 So. 2d 638 (Ala. 2003). In this case, the mother argued in her renewed motion to dismiss that the Georgia judgment should be set aside because it is void for lack of subject-matter jurisdiction, a ground recognized by Rule 60(b)(4), Ala. R. Civ. P. We, therefore, treat that portion of her motion to dismiss as a Rule 60(b)(4) motion, which is an appropriate mechanism to vacate a domesticated foreign judgment. See Bartlett v. Unistar Leasing, 931 So. 2d 717, 720 n.2 (Ala. Civ. App. 2005).

"Before giving effect to a foreign judgment, Alabama courts are permitted to inquire into the jurisdiction of the foreign court rendering the judgment." Feore v. Feore, 627 So. 2d 411, 413 (Ala. Civ. App. 1993); see also Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 295 (Ala. 2010). Generally speaking, "[t]he scope of inquiry is limited to, '(1) whether the issue of jurisdiction was fully and fairly litigated by the foreign court and (2) whether the issue of jurisdiction was finally decided by the foreign court.'" Feore, 627 So. 2d at 413 (quoting Alston Elec. Supply Co. v. Alabama Elec.

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Wholesalers, Inc., 586 So. 2d 10, 11 (Ala. Civ. App. 1991)). However, if the court entering the foreign judgment did not litigate and decide the question of its subject-matter jurisdiction, an Alabama court may make its own determination of subject-matter jurisdiction on a Rule 60(b)(4) motion. See Lanier v. McMath Constr., Inc., 141 So. 3d 974 (Ala. 2013). "[T]here is a presumption that the court rendering the judgment had the jurisdiction to do so, and the burden is placed on the party challenging the judgment to overcome the presumption." McGouryk v. McGouryk, 672 So. 2d 1300, 1302 (Ala. Civ. App. 1995).

In this case, the Georgia court rendered a three-page judgment in which it found that the mother had conceived the children via artificial insemination through an anonymous sperm donor. According to the judgment, V.L. acted as "an equal second parent to the children" after their births. The judgment recites that it would be in the best interests of the children, and consistent with their life-long parenting arrangement, to allow V.L. to adopt the children without terminating the parental rights of the mother. In that judgment, the Georgia court did not expressly address its

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legal authority to approve the adoption of the children by the same-sex partner of the biological mother without terminating the biological mother's parental rights. From the affidavit filed by the mother in support of her renewed motion to dismiss, it is apparent that she fully supported V.L.'s petition and that she never contested the subject-matter jurisdiction of the Georgia court.³ Because that issue was not fully and fairly litigated, the family court could have determined for itself whether the Georgia court had jurisdiction to enter the Georgia judgment.

In the proceedings below, the mother raised the lack of subject-matter jurisdiction of the Georgia court, but not specifically the Georgia court's inability to approve an

³The mother's failure to contest subject-matter jurisdiction before the Georgia court does not prevent her from now challenging subject-matter jurisdiction in Alabama because subject-matter jurisdiction cannot be conferred by estoppel, see Cedartown North P'ship, LLC v. Georgia Dep't of Transp., 296 Ga. App. 54, 56, 673 S.E.2d 562, 565 (2009) ("It is well established that '[j]urisdiction of the subject matter of a suit cannot be conferred by agreement or consent, or be waived or based on an estoppel of a party to deny that it exists.'" (quoting Redmond v. Walters, 228 Ga. 417, 417, 186 S.E.2d 93, 94 (1971))); see also Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008), and may be raised at any time. Abushmais v. Erby, 282 Ga. 619, 652 S.E.2d 549 (2007); and Ex parte Ortiz, 108 So. 3d 1046 (Ala. Civ. App. 2012).

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adoption by a same-sex partner. Nevertheless, lack of subject-matter jurisdiction may be raised at any time, even for the first time on appeal. Ex parte Ortiz, 108 So. 3d 1046, 1048 (Ala. Civ. App. 2012). Thus, although the family court did not consider the issue, this court can now determine for itself the authority of the Georgia court to enter the Georgia judgment.

The Georgia Supreme Court has not yet construed the provisions of the Georgia Adoption Code, Ga. Code Ann., § 19-8-1 et seq., to determine if it allows adoption by a same-sex partner who has assumed a de facto parental role. However, in Wheeler v. Wheeler, 281 Ga. 838, 642 S.E.2d 103 (2007) (Carley, J., dissenting), Justice Carley asserted that Georgia law does not authorize a court to approve an adoption by a person who is not a stepparent or a spouse of the biological parent unless the parents of the child surrender their parental rights or their parental rights are involuntarily terminated. In Bates v. Bates, 317 Ga. App. 339, 730 S.E.2d 482 (2012), the Georgia Court of Appeals recognized that it is "doubtful" that Georgia law permits such "second parent"

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adoptions⁴ and that arguments against the validity of an adoption decree approving such an adoption "might well have some merit." 317 Ga. App. at 342, 730 S.E.2d at 484. However, in Bates, the Georgia Court of Appeals did not have to decide the issue in order to dispose of the appeal before it, which was decided on res judicata grounds.

Our independent review of the Georgia Adoption Code fully supports Justice Carley's position. Because Georgia does not recognize same-sex marriages, even those validly made in foreign jurisdictions, see Ga. Code Ann., § 19-3-3.1(b), V.L. did not stand in the position of a spouse of the mother or a stepparent to the children but, for purposes of Georgia's adoption law, occupied the position of a third party who may adopt a child only upon the surrender or termination of the parental rights of the parents of the child. See Ga. Code Ann., §§ 19-8-5(a) and 19-8-7(a). It follows that, regardless

⁴"A 'second parent' adoption apparently is an adoption of a child having only one living parent, in which that parent retains all of [his or] her parental rights and consents to some other person -- often [his or] her spouse, partner, or friend -- adopting the child as a 'second parent.' See Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1044 ... (N.D. Cal. 2007) (describing 'second parent' adoption under California law)." Bates, 317 Ga. App. at 340 n.1, 730 S.E.2d at 483 n.1.

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of the legal theory employed, a judgment purporting to approve an adoption by a same-sex partner, which preserves the parental rights of the biological mother, would be invalid under Georgia law. Hence, a court, even one vested with general subject-matter jurisdiction over adoptions, would not be empowered to enter a judgment approving such an adoption, even if the adoption served the best interests of the children involved. See In the Interest of Angel Lace M., 184 Wis. 2d 492, 506, 516 N.W.2d 678, 681 (1994) (holding that, before a trial court may find "that a second parent adoption is in a child's best interests, it must first determine whether it has the power to grant such an adoption under the existing adoption statutes" (quoting Emily C. Patt, Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests, 3 Berkeley Women's L.J. 96, 111 (1987-88))). Based on the foregoing, we conclude that the Georgia court lacked subject-matter jurisdiction to enter the Georgia judgment and, thus, that the Georgia judgment is void.

In its final judgment, the family court rejected the mother's subject-matter-jurisdiction arguments, but it denied all other requests for relief. We construe that judgment as

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premising the award of visitation solely on the terms of the Georgia judgment and as rejecting any alternative bases offered by V.L. See Moore v. Graham, 590 So. 2d 293, 295 (Ala. Civ. App. 1991) (requiring judgments to be construed in light of all the circumstances). However, because the Georgia judgment is void, V.L. did not acquire any parental rights, including the right to visitation with the children, by virtue of that judgment. See generally Sarazin v. Union R.R., 153 Mo. 479, 55 S.W. 92 (1900) (holding that, when articles of adoption are void, adoptive parent cannot recover for wrongful death of child). Thus, the family court erred in relying on that void judgment as a basis for awarding V.L. visitation.

Although the family court did not hold a hearing on the matter, it appears that it determined from the fact that V.L. had acted as a "second parent" of the children since their births that it would be in the best interests of the children to allow continuing contact with her. We are aware that our disposition of this appeal overrides that determination, and we are not unsympathetic to the plight of V.L. and, more importantly, the children in this case; however, we cannot give effect to a void judgment or make alternative legal

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arguments for V.L. that might enable her to gain visitation rights. The family court's judgment is therefore reversed, and the case is remanded for such further proceedings as are consistent with this opinion.

In earlier proceedings before this court, the mother moved for a stay of enforcement of the family court's judgment. This court denied that motion. In light of our opinion in this case, we hereby reconsider our ruling and grant the stay pending further proceedings in this or our supreme court. If no further appellate proceedings are undertaken, upon the issuance of this court's certificate of judgment the judgment of the family court will be annulled and the stay dissolved for lack of necessity. See Shirley v. Shirley, 361 So. 2d 590, 591 (Ala. Civ. App. 1978) ("The reversal of a judgment, or a part thereof, wholly annuls it, or the part of it, as if it never existed. ... Another judgment rendered by a court with jurisdiction must thereafter replace it.").

The mother's request for the award of attorney's fees on appeal is denied.

STAY GRANTED; REVERSED AND REMANDED.

All the judges concur.