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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Ex parte T.J.

PETITIONS FOR WRIT OF MANDAMUS

(In re: In the Matter of P.J.)

(Montgomery Juvenile Court, JU-14-401.01 and JU-14-401.02)

DONALDSON, Judge.

T.J. ("the mother") petitions this court for writs of mandamus, challenging whether the Montgomery Juvenile Court ("the juvenile court") had jurisdiction over dependency actions involving the mother's child, P.J. ("the child"), and

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jurisdiction to determine a custody arrangement for the child. We grant the petitions in part and deny the petitions in part.

The materials submitted by the parties indicate the following. On May 20, 2014, D.H., Sr. ("the grandfather"), filed a complaint in the juvenile court alleging that the child was dependent and seeking custody of the child. In the complaint, the grandfather alleged that the child's parents were unable to discharge their responsibilities for the child. That complaint was assigned case number JU-14-401.01. On April 21, 2016, the grandfather obtained custody of the child through an order.¹ On February 22, 2017, the mother filed a complaint in which she alleged that the child was dependent and sought custody of the child. That complaint was assigned case number JU-14-401.02. The cases initiated by the complaints were assigned to Judge Anita Kelly.

¹Although an April 21, 2016, order is not present in the materials submitted, the mother and Judge Anita Kelly, the respondent judge, mention that the juvenile court had granted an emergency motion for custody of the child to be placed with the grandfather. We therefore consider the mother's assertions about an April 21, 2016, order to be true. See Ex parte Smith, 942 So. 2d 356, 358 (Ala. 2006) ("The trustee does not dispute [a particular factual] contention in his answer to the mandamus petition; we therefore take it to be true.").

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On November 8, 2017, over three years after the grandfather filed the initial complaint, a hearing was held to determine the dependency of the child. Judge Aubrey Ford, Jr., presided over the hearing held on that date.² On December 5, 2017, Judge Ford entered an order, stating:

"These cases came to be heard on the 8th day of November 2017 pursuant to the Grandfather's petition for custody of [the child] and the Mother and Father's joint petition for the custody of this child.^[3] The Mother and Father also petitioned the Court to modify the custody of [the child's sibling].

". . . .

"According to the testimony of the parties, [the child and the sibling] have been in the custody of their Grandfather for most of their lives. [The sibling] was placed with her Grandfather by a [Department of Human Resources] safety plan when she was seven weeks old, and [the child] was placed with him shortly after his birth. [The grandfather] has custody of [the sibling] pursuant to an order of this Court, and the Court has not addressed the petition filed by the Grandfather for the custody of [the child] until this proceeding.

"The Grandfather has provided a safe and stable home for the children. They're currently enrolled in

²For reasons not relevant to these mandamus petitions, Judge Ford was temporarily assigned to preside over the underlying dependency actions.

³The materials submitted indicate that only the grandfather and the mother have filed dependency complaints seeking custody of the child.

preschool ... and they are doing well there. [The sibling] is also participating in a dance class at her school. The parents have been visiting with the children on a regular basis for several months now, and the visitation is going well, however the parents did keep the children out of school for two days during one of the weekly visits. Further, the Mother and the Grandfather do not communicate well or often for the benefit of the children.

"The Court has never held an adjudicatory hearing to determine the dependency [of the child] until the date of this proceeding. The Grandfather received custody of [the sibling] pursuant to an emergency order on April 21, 2016, and the order stated that he was to have custody of this child until the dependency hearing was held.

"Although dependency is determined by the facts at a time of the hearing, this is the first proceeding held for [the child]. The Court finds that under the circumstances that led to the placement of this child with his Grandfather, the child's best interest was served but the Court should have held a hearing to consider the Grandfather's petition for custody in a more timely manner. As of the date of this proceeding [the child] is not a dependent child because of the care of his Grandfather, and not his parents, during the three years this matter has been pending for trial.

". . . .

"The Parents have made great strides in the improvement of their lifestyle and their ability to care for their children since their birth. [The mother] is now employed at [a restaurant], and she has been there for almost three years. The Father ... is also employed part-time at [a hotel]. [The mother] is the only driver in the household and her work hours vary weekly and could present a problem to get the children to and from school on time. The

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Parents live together in a mobile home in Montgomery, are trying to develop a better relationship that will not be peppered with arguments and incidents of domestic violence.

"Therefore, it is hereby ORDERED, ADJUDGED AND DECREED that [the child] is no longer a dependent child because of the care and stability he has received since he has been in the custody of his Grandfather for the last three years. However, the evidence presented clearly shows that this child was dependent when he was placed with his Grandfather.

"Be it further ORDERED that the Petition for Custody [of the child] and the Petition for Modification filed by [the father and the mother] are granted in part and they are given the joint physical and legal custody of [the child] and [the sibling] with the Grandfather ..., and the Grandfather will be the primary physical custodian.

"Be it further ORDERED that [the father and the mother] will have expanded visitation or parenting time with the children for the next 90 days to help them develop a routine for their daily care. [The mother] will continue to pay child support to [the grandfather] during this period as previously ordered.

". . . .

"Be it further ORDERED that this Court will review these cases in March 2018 to determine if the children are adjusting well and the custody arrangement is working for their benefit."

(Capitalization in original.)

On June 20, 2018, the juvenile court conducted another hearing with Judge Kelly presiding. During that hearing, the

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mother made an "oral motion"⁴ to dismiss the proceedings, because, she asserted, the December 5, 2017, order found that the child was not dependent. On June 21, 2018, Judge Kelly entered an order that stated, in part: "Counsel to file brief on jurisdiction of court to determine best interest ... of [the child] base[d] on non-dependency finding of Judge Ford. Lawyers given 25 days to submit briefs." On July 18, 2018, the mother filed a "Brief in Support of Oral Motion to Dismiss." The mother's brief stated, in part:

"5. [The December 5, 2017,] order specifically states 'As of the date of this proceeding [the child] is not a dependent child'

"6. The minor child was not dependent [at] the time of the hearing and [he is] not dependent now, therefore he should be immediately returned to the care, custody and control of his parents.

"7. The Juvenile Court lacks jurisdiction to proceed forward in this matter and only ha[s] the authority to dismiss the above-styled action.

⁴Rule 7(b)(1), Ala. R. Civ. P., made applicable to these cases by Rule 1(A), Ala. R. Juv. P., provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Although we do not have a transcript of the June 20 hearing, both the mother and Judge Kelly agree that the mother made the oral motion, and the mother's July 18, 2018, brief in support of her oral motion provides the particular grounds and relief sought.

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"8. This matter is a child custody issue and should be further litigated in the Domestic Relations Court of Montgomery County."⁵

The grandfather filed a brief in opposition to the mother's motion. A hearing was held in August 2018 on the mother's motion. No transcript of that hearing has been provided to us. On October 29, 2018, and November 27, 2018, the mother filed motions asking the juvenile court to rule on her motion.

Another hearing was held on January 16, 2019. No transcript of that hearing has been provided to us. On that same date, Judge Kelly entered an order stating: "Court heard from counsel. After reviewing the [December 5, 2017,] order of Judge Ford, the court finds that [the child] is dependent."⁶

⁵Although the mother's motion to dismiss could be construed as seeking relief pursuant to Rule 60(b)(4), Ala. R. Civ. P., we note that proceedings in the dependency actions appear to be ongoing and that the circumstances of the cases indicate an urgent need for timely mandamus review. We therefore exercise our discretion not to consider the motion as a Rule 60(b)(4) motion and not to treat the petitions for a writ of mandamus as appeals of the denial of that motion.

⁶Because the merits of the mother's motion to dismiss hinged on her assertion that the juvenile court had found the child not to be dependent in the December 5, 2017, order, the ruling in the January 16, 2019, order effectively denied the relief sought by the mother. We therefore determine that the January 16, 2019, order implicitly denied the mother's motion to dismiss. See, e.g., Ex parte Curry, 184 So. 3d 1032 (Ala.

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On January 22, 2019, the mother filed petitions for the writ of mandamus in this court. The mother seeks writs from this court ordering the juvenile court to dismiss the two dependency cases, and she also included a claim for relief seeking an order requiring the juvenile court to return custody of the child to his parents. We asked for answers to the petition. See Rule 21(b), Ala. R. App. P. Judge Kelly filed a response, but the grandfather did not respond.

"The question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus." Ex parte Liberty Nat'l Life Ins. Co., 888 So. 2d 478, 480 (Ala. 2003). This court has jurisdiction to review the mother's mandamus petitions pursuant to § 12-3-11 and § 12-15-601, Ala. Code 1975, and Rule 28, Ala. R. Juv. P.

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Civ. App. 2015) (discussing cases in which this court determined that an order implicitly granted a motion); Dungan v. Early, 142 So. 3d 1135, 1138 (Ala. Civ. App. 2013) (stating that a judgment implicitly denied a motion for an injunction by establishing a boundary that effectively precluded the relief sought).

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Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

The mother contends that the juvenile court was compelled to dismiss the dependency actions because, she asserts, the juvenile court found that the child was no longer dependent in the December 5, 2017, order. "[T]his court has held that, in a dependency action, '[i]f a juvenile court determines that the child is not dependent, the court must dismiss the dependency petition.'" J.A. v. C.M., 93 So. 3d 953, 954 (Ala. Civ. App. 2012) (quoting K.C.G. v. S.J.R., 46 So. 3d 499, 501-02 (Ala. Civ. App. 2010)). Section 12-15-102(8)a., Ala. Code 1975, defines a "dependent child," in pertinent part, as follows:

"A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:

"....

"2. Who is without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child.

"....

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"4. Whose parent, legal guardian, legal custodian, or other custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the compulsory school attendance laws of this state.

". . . .

"6. Whose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.

". . . .

"8. Who, for any other cause, is in need of the care and protection of the state."

Section 12-15-102(15) defines a "legal custodian" as "[a] parent, person, agency, or department to whom legal custody of a child under the jurisdiction of the juvenile court pursuant to this chapter [i.e., the Alabama Juvenile Justice Act, § 12-15-101 et seq., Ala. Code 1975,] has been awarded by order of the juvenile court or other court of competent jurisdiction."

Section 12-15-102(16) defines "legal custody" as

"[a] legal status created by order of the juvenile court which vests in a legal custodian the right to have physical custody of a child under the jurisdiction of the juvenile court pursuant to this chapter and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, clothing, education, and medical care, all subject to the powers, rights, duties, and

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responsibilities of the legal guardian of the person of the child and subject to any residual parental rights and responsibilities. A parent, person, agency, or department granted legal custody shall exercise the rights and responsibilities personally, unless otherwise restricted by the juvenile court."

The child was claimed to be dependent in the grandfather's complaint based on the allegation that the child's parents were unable to discharge their responsibilities for the child. The December 5, 2017, order found that the parents were unable to care for the child during the time that the child was placed with the grandfather. Although the December 5, 2017, order describes the child as "no longer a dependent child" because of the care the child received since being placed in the grandfather's custody, the grandfather had received only emergency custody of the child. See note 1 and accompanying text, *supra*. Upon a motion for an order of emergency custody, the juvenile court entered an order on April 21, 2016, stating that the child shall remain in the grandfather's custody pending a dependency hearing. Section 12-15-138, Ala. Code 1975, provides that "[t]he juvenile court, at any time after a dependency petition has been filed, or on an emergency basis, may enter an order of protection or restraint to protect the health or safety of

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a child subject to the proceeding." Accordingly, the juvenile court was required to have determined that the grandfather's care was needed to protect the child during the dependency proceedings before granting the grandfather emergency custody. Because § 12-15-102(8)a.8. provides that a child is dependent if he or she is "in need of the care and protection of the state," the grandfather's care of the child could not have eliminated the possibility that the child was still dependent because of the circumstances created by the parents.

Moreover, this court has held that the care of a child under pendente lite custody was not a proper ground for finding that child not dependent, stating:

"[T]he premise under which the juvenile court, in its May 24, 2018, judgment, purported to determine that the child was not dependent is erroneous. The juvenile court found that the child was not dependent because the paternal grandmother was a legal guardian or custodian willing and able to properly care for the child. See § 12-15-102(8)2., Ala. Code 1975 (defining 'dependent child' as, among other things, a child whose parent, legal guardian, or legal custodian is not 'willing and able to provide for the care, support, or education of the child'). However, the juvenile court had previously awarded the paternal grandmother only pendente lite custody of the child. There is no final, appealable order that awarded custody of the child to the paternal grandmother, other than the December 22, 2016, judgment and the October 11, 2017, judgment, both of which were reversed by this court. Thus, the

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paternal grandmother, although she had pendente lite custody of the child while the dependency action was being determined, was not the child's legal custodian or legal guardian such that a determination could be made as to whether the child was dependent while in her care. To decide otherwise would be to hold that any award of pendente lite custody in a dependency action would end the dependency of the child at issue in the action and result in an automatic transfer of custody of the child from his or her parent to the person or persons awarded pendente lite custody. See, e.g., J.P. v. S.S., 989 So. 2d 591, 599 (Ala. Civ. App. 2008) ('The father would have this court hold that the dependency statute would no longer apply to protect a dependent child once it is established that [the Department of Human Resources], as the legal custodian of the dependent child, had successfully placed the child in a suitable home for care when the child's parents were unwilling or unable to appropriately care for the child. Such a holding would defeat the intent of the Alabama Juvenile Justice Act'). Also, such a decision would not serve the purposes of this state's dependency statutes, which include the preservation of families and the reunification of families when a parent has lost custody of his or her child. § 12-15-101(b), Ala. Code 1975."

H.C. v. S.L., [Ms. 2170819, Oct. 5, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018). Accordingly, the care of the child by the grandfather under a pendente lite order granting him custody was not a valid ground for finding the child not dependent.

In the December 5, 2017, order, the juvenile court explained that "[the child] is not a dependent child because

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of the care of his Grandfather, and not his parents, during the three years this matter has been pending for trial." (Emphasis added.) Although the December 5, 2017, order determined that the grandfather was providing proper care for the child, the order does not include a dependency determination regarding the parents' ability at that time to discharge their duties to the child. Without that determination, the juvenile court's findings of December 5, 2017, remained incomplete as to whether the child was still dependent. We conclude that the juvenile court did not fully adjudicate whether the child was dependent or not dependent at the time the December 5, 2017, order was entered. Thus, because the December 5, 2017, order did not fully adjudicate the child as being not dependent, it does not contain a basis for dismissing the dependency actions.

The December 5, 2017, order also purported to make a custodial disposition of the child. The mother argues that the juvenile court lacked the jurisdiction to determine a custodial disposition, citing K.C.G. v. S.J.R., 46 So. 3d at 502, for the proposition that "if, and only if, a juvenile court finds that the child is dependent, the court may then

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conduct proceedings to determine the custodial disposition of the child."

"Once the dependency jurisdiction of a juvenile court has been properly invoked, the juvenile court has an imperative statutory duty to conduct an evidentiary hearing to determine the dependency of the child.' K.C.G. v. S.J.R., 46 So. 3d 499, 501 (Ala. Civ. App. 2010). If the juvenile court finds, based on clear and convincing evidence presented at the evidentiary hearing, that the child is dependent, it has jurisdiction to order a disposition, such as an award of custody, of the child. See § 12-15-311(a), Ala. Code 1975 ('If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that a child is dependent, the juvenile court may proceed immediately ... to make proper disposition of the case.');

K.C.G. v. S.J.R., 46 So. 3d at 502 ('[I]f, and only if, a juvenile court finds that the child is dependent, the court may then conduct proceedings to determine the custodial disposition of the child.'). However, if, after receiving evidence, the juvenile court determines that the child at issue is not dependent, it lacks jurisdiction "to enter a judgment affecting the custody of the child." J.A. v. C.M., 93 So. 3d 953, 955 (Ala. Civ. App. 2012) (quoting L.R.J. v. C.F., 75 So. 3d 685, 687 (Ala. Civ. App. 2011)); see also C.C. v. B.L., 142 So. 3d 1126, 1129 (Ala. Civ. App. 2013) (same). This court has explained:

"Juvenile courts are purely creatures of statute and have extremely limited jurisdiction. See Ex parte K.L.P., 868 So. 2d 454, 456 (Ala. Civ. App. 2003). That limited jurisdiction allows a juvenile court to make a disposition of a child in a dependency proceeding only after finding the child dependent. V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting

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K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result) ("[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in fact be dependent at the time of that disposition.'").'

"T.B. v. T.H., 30 So. 3d 429, 431 (Ala. Civ. App. 2009) (some emphasis added)."

M.D. v. S.C., 150 So. 3d 210, 212 (Ala. Civ. App. 2014).

Accordingly, the juvenile court had the jurisdiction to make a custodial disposition only if it found that the child was dependent at the time of that disposition.

In the January 16, 2019, order, the juvenile court stated that, after reviewing the December 5, 2017, order, it found the child to be dependent. As we have discussed, the December 5, 2017, order made no such finding as to the parents. The December 5, 2017, order actually states that "[the child was] no longer a dependent child because of the care and stability he has received since he has been in the custody of his Grandfather for the last three years. However, the evidence presented clearly shows that this child was dependent when he was placed with his Grandfather." The December 5, 2017, order, thus, states only a finding that the child was dependent when

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the grandfather began caring for him three years earlier. Because the juvenile court did not find the child dependent at the time of the custodial disposition, the juvenile court could not have made the custodial disposition. As a result, the portion of the December 5, 2017, order directing a custodial arrangement for the child is void.⁷

In conclusion, the December 5, 2017, order does not fully adjudicate whether or not the child was dependent at that time because there is no finding regarding the ability of the parents to care for the child at that time. Without that adjudication, there is no basis for dismissing the dependency actions or for the juvenile court's custodial disposition. Therefore, we deny the mandamus petitions insofar as the mother seeks the dismissal of the dependency actions, but we grant the petitions, in part, and issue writs of mandamus ordering the juvenile court to vacate the portion of the December 5, 2017, order determining a custody and visitation arrangement. The juvenile court may determine a custody disposition only when it has conducted another evidentiary

⁷The placement of the child with the grandfather pursuant to the emergency order of the juvenile court on April 21, 2016, is not affected by this determination.

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hearing and only if it then adjudicates the child dependent at that time. We note that, "'[o]nce the dependency jurisdiction of a juvenile court has been properly invoked, the juvenile court has an imperative statutory duty to conduct an evidentiary hearing to determine the dependency of the child.'" M.D. v. S.C., 150 So. 3d at 212 (quoting K.C.G. v. S.J.R., 46 So. 3d at 501) (emphasis added). Therefore, the juvenile court has an imperative duty to conduct an evidentiary hearing in an expedited manner and to fully adjudicate whether the child is dependent.

2180350 -- PETITION GRANTED IN PART AND DENIED IN PART;
WRIT ISSUED.

2180351 -- PETITION GRANTED IN PART AND DENIED IN PART;
WRIT ISSUED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Edwards, J., dissents, with writing.

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EDWARDS, Judge, dissenting.

In December 2017, the Montgomery Juvenile Court ("the juvenile court") entered a judgment awarding joint custody of P.J. ("the child") to D.H., Sr. ("the paternal grandfather"), and T.J. ("the mother") and D.H., Jr. ("the father"). In that judgment, the juvenile court indicated that the child was no longer dependent because the child had been in the care of the paternal grandfather since he was awarded pendente lite custody in April 2016. However, the judgment, although noting the positive improvements the parents had made in their circumstances, indicated that the parents were not ready to assume full custody of the child because of certain issues and awarded joint custody of the child to the paternal grandfather and the parents, which it could not have done if the child was not dependent in the care of his parents. I conclude, therefore, that the December 2017 judgment was a final dependency judgment. See L.L.M. v. S.F., 919 So. 2d 307, 311 (Ala. Civ. App. 2005) ("Given the factual findings contained in the November 15, 2004, judgment, we conclude that a finding of dependency was implicit in the trial court's judgment.").

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The mother did not appeal the December 2017 judgment. Instead, six months later, at a hearing before the juvenile court, she made an oral "motion to dismiss," which, in substance, was a Rule 60(b)(4), Ala. R. Civ. P., motion seeking relief from the December 2017 judgment on the basis that the juvenile court had lacked jurisdiction to enter a custody disposition because, she asserted, the juvenile court had not determined that the child was dependent at the time of the entry of the December 2017 judgment. See, e.g., Ex parte Alfa Mut. Gen. Ins. Co., 684 So. 2d 1281, 1282 (Ala. 1996) (quoting Union Springs Tel. Co. v. Green, 285 Ala. 114, 117, 229 So. 2d 503, 505 (1969)) ("The 'character of a [motion] is determined and interpreted from its essential substance, and not from its descriptive name or title.'). In January 2019, the juvenile court entered an order stating that, "[a]fter reviewing the [December 2017 judgment], the court finds that the child ... is dependent." The main opinion construes the January 2019 order to be a denial of the mother's motion; I do not disagree, although I construe the January 2019 order to be specifically a denial of the mother's Rule 60(b)(4) motion.

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The denial of a Rule 60(b) motion is reviewable on appeal. Ex parte R.S.C., 853 So. 2d 228, 235 (Ala. Civ. App. 2002). Accordingly, I would deny the mother's petitions because she had an adequate remedy for review of the denial of her Rule 60(b) (4) motion by way of appeal. See Ex parte S.B., 164 So. 3d 599, 602 (Ala. Civ. App. 2014) (denying a mother's petitions for the writ of mandamus, insofar as they sought review of the denial of Rule 60(b) motions, because "[t]he mother failed to file an appeal from the denial of her Rule 60(b) motions, and we cannot consider the propriety of the denial of her motions on a petition for the writ of mandamus"). Therefore, I respectfully dissent.