REL: September 13, 2019



# ALABAMA COURT OF CIVIL APPEALS

**SPECIAL TERM, 2019**

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**2180690**

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**Ex parte Montgomery County Department of Human Resources**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Av.M., a minor child)**

**(Montgomery Juvenile Court, JU-19-277.01)**

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**Ex parte Montgomery County Department of Human Resources**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Ai.M., a minor child)**

**(Montgomery Juvenile Court, JU-19-278.01)**

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**Ex parte Montgomery County Department of Human Resources**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Ad.M., a minor child)**

**(Montgomery Juvenile Court, JU-19-279.01)**

PER CURIAM.

In these three juvenile-court cases, the Montgomery County Department of Human Resources ("MCDHR") has sought mandamus review of orders entered by Circuit Judge Anita L. Kelly ("the judge") denying motions filed by MCDHR seeking the judge's recusal; each petition requests that this court direct the judge to recuse herself not only from hearing the particular case, but also from hearing all juvenile-court actions involving MCDHR in which the judge is sitting. For the reasons stated herein, we deny the petitions.

Introduction: The Legal Background

The judge in these cases is a circuit judge of the Fifteenth Judicial Circuit, which includes Montgomery County. The judge was elected to one of three designated judicial

places in that circuit designated as "family relations" judgeships, exercising exclusive original jurisdiction over juvenile matters in that circuit pursuant to a general act of local application (Act No. 250, Ala. Acts 1959, as amended).[1] Such jurisdiction necessarily includes the authority to decide whether a particular minor child is dependent, whether an agency or a person other than a parent should exercise custody of a dependent child, and whether a parent's condition is such as to warrant termination of parental rights. See Ala. Code 1975, §§ 12-15-114(a), 12-15-314(a), and 12-15-114(c)(2).

Pursuant to Ala. Code 1975, § 38-2-6, the Alabama Department of Human Resources ("ADHR") is a state agency with the "duty and responsibility" to perform various public functions, including to "[e]xercise all the powers, duties, and responsibilities previously vested by law in the State Child Welfare Department," to "[d]esignate county departments as its agents under its rules and regulations to perform any of the [its] functions," to "[s]eek out ... the minor children in the state who are in need of its care and protection and

[1]With respect to the historical validity of such legislative acts, see generally Peddycoart v. City of Birmingham, 354 So. 2d 808 (Ala. 1978).

..., as far as may be possible, through existing agencies, public or private, or through such other resources, [to] aid such children to a fair opportunity in life," to "receive and care for dependent or neglected minor children committed to its care," to "make ... examination[s] ... of every such child," to "investigate in detail the personal and family history of [such a] child and its environment," to "place such children in family homes or in approved suitable institutions operating in accordance with the provisions of this title and supervise such children however placed," and to "[a]dvise with the judges and probation officers of the juvenile courts of the several counties of the state, and aid in perfecting the organization and work of such courts." County departments of human resources, such as MCDHR, have "[t]he broad purpose ... to meet the welfare needs of [their] respective county citizens through the exercise of the powers, duties and responsibilities designated by [ADHR] to [c]ounty [d]epartments acting as its agents." Ala. Admin. Code (ADHR), r. 660-1-2-.02(1). Among the duties identified by ADHR to be performed by county departments of human resources such as MCDHR is to "invoke legal authority of the court by petition

and secure adequate protection, care, and treatment for children whenever necessary to meet their needs and rights" when it appears that parents of abused or neglected children are unable to benefit from supportive family services. Ala. Admin. Code (ADHR), r. 660-5-34-.02(1)(d).

The Judge's Previous Judicial Discipline

In August 2017, the Alabama Judicial Inquiry Commission ("the JIC") initiated a judicial-disciplinary action against the judge in the Alabama Court of the Judiciary ("the COJ"), Case No. 50.[2] In its complaint in Case No. 50, the JIC alleged that the judge had violated the Canons of Judicial Ethics ("the Canons") in, among other areas, failing to manage court business in a timely and efficient manner. Noting that, Alabama law requires that trials in actions in which termination of parental rights is sought must be completed within 90 days from service and that judgments in such actions be entered within 30 days of the conclusion of termination-of-parental-rights trials, the JIC averred, among other things,

[2]Although, pursuant to §§ 156(a) and 157(a) of the Alabama Constitution of 1901, members of both this court and the Alabama Court of Criminal Appeals have also served ex officio as members of the JIC and the COJ at various times, no current member of this court participated in Case No. 50.

that the judge had failed or refused to comply with those time standards in 27 out of 74 termination-of-parental-rights actions assigned to her between January 2012 and July 2017. The JIC also quoted from a July 2016 decision of this court in which we had noted that

> "the ... judge has, in the past, engaged in a pattern and practice of failing to comply with statutory requirements only to take steps to comply after DHR has filed a petition for the writ of mandamus with this court. In no less than five cases in the last year, DHR has sought this court's intervention to direct the ... judge to comply with the time requirements set out in Ala. Code 1975, § 12-15-320(a), and to either set a termination-of-parental-rights trial or to enter a termination-of-parental-rights judgment. All but one of those petitions had been mooted by the action of the ... judge upon her receipt of the petition; one petition was not mooted only because the ... judge thought that she required our permission or instruction to enter the requested termination-of-parental-rights judgment while the petition for the writ of mandamus was pending before this court. Deliberate or not, the ... judge's continued neglect of her duty to comply with the statutorily prescribed time requirements and to enter proper and compliant judgments unless and until threatened with the supervisory action of this court causes the members of this court great concern."

Ex parte Montgomery Cty. Dep't of Human Res., 215 So. 3d 582, 583-84 (Ala. Civ. App. 2016) (citations omitted). In the first two counts of its complaint, the JIC asserted that the

judge's conduct with respect to delay in completing termination-of-parental-rights trials and entering judgments in termination-of-parental-rights cases amounted to violations of 10 discrete provisions of the Canons.

In September 2017, counsel for the judge filed an unsworn answer in Case No. 50 to the complaint filed by the JIC. In that answer, counsel for the judge sought to deflect blame for the judge's conduct by asserting that ADHR had been the "main complainant triggering the 'pattern and practice' investigation ... by JIC," that she had been "singled out ... for complaint," and that ADHR (rather than the JIC) had "made the complaint for improper purposes." Counsel for the judge further alleged that ADHR had presented the JIC a "'laundry list' of grievances against" the judge, that ADHR was a "'frequent flyer' in family court ... involved in all or nearly all dependency cases in Alabama," that ADHR had "rais[ed] a variety of gripes" as to the judge, that ADHR had conducted "a 'full-court press' review" of the judge's dependency caseload, that ADHR had later "recycled its complaints against [the judge] ... for impermissible reasons" (suggesting that ADHR had had "some ... improper motive"), and

that the judge had been singled out among the three designated family-relations judges in Montgomery County with respect to seeking mandamus relief regarding matters of timeliness in dependency actions. Finally, in addition to responding directly to the allegations of the JIC complaint, counsel for the judge asserted a number of affirmative defenses and specifically pleaded "misrepresentation of fact by [A]DHR." In addition to making those statements in that answer, counsel for the judge reiterated some of those contentions during closing arguments in the May 2018 trial before the COJ, during which one of the judge's attorneys stated:

> "Is it somebody that has it in for her? It's just the person who brought the first letter in and brought the other cases in. It's just the people that she ruled against nine times on the [termination of parental rights]. Because they wanted her to terminate some parental rights, and she only wanted to keep a family together."

Notwithstanding the efforts of the judge and her counsel to oppose the imposition of disciplinary sanctions, the members of the COJ entered a final judgment in Case No. 50 in May 2018 publicly reprimanding the judge and suspending her without pay for 180 days (subject to a reduction to 90 days if the judge elected to comply with certain conditions involving

reporting of progress in termination-of-parental-rights cases). The COJ expressly found in favor of the JIC on all counts of its complaint, including the two counts alleging that the judge had violated the Canons as to her conduct with respect to delay in completing termination-of-parental-rights trials and entering judgments in termination-of-parental-rights cases, stating that the JIC had proved its allegations "by clear and convincing evidence."

Procedural History

The mandamus petitions filed by MCDHR indicate that three actions were commenced in 2019 in the Juvenile Division of the Montgomery Family Court involving three different minor children, Av.M., Ai.M., and Ad.M. The three actions were given consecutive case numbers, and each was assigned to the judge for disposition. On May 10, 2019, MCDHR, identifying itself as "the Alabama Department of Human Resources in Montgomery County," filed a motion in each action seeking the judge's recusal not only from each of those three actions, but also from hearing all juvenile cases in Montgomery County "in which DHR appears as a party." In each motion, MCDHR asserted that the judge had "demonstrated a pattern of bias and

prejudice against [it] which impairs her ability to execute her duties impartially," that the judge had "failed to avoid conduct prejudicial to the administration of justice," that the judge had "failed to maintain professional competence unswayed by fear of criticism," that the judge had "continue[d] to express opposition to the very duties required of [MCDHR]," and that the judge had "referred to petitions for termination of parental rights as 'the most draconian option.'" On May 14, 2019, the judge rendered an order in each of the three cases denying MCDHR's motions to recuse, stating in each order that she "ha[d] been and continue[d] to be able to preside and rule, fairly and objectively, over any and all cases ... wherein MCDHR appears as a party."

MCDHR timely filed a petition seeking a writ of mandamus in each of the three cases, attaching, among other exhibits, its recusal motion and the judge's order denying that motion; in addition to reiterating all the grounds presented in MCDHR's motions to recuse, the mandamus petitions also assert that MCDHR did not have the burden of showing actual bias to demonstrate the judge's disqualification but, instead, was required to show only "a reasonable basis for questioning the

judge's impartiality" pursuant to Canon 3.C(1) and caselaw decided thereunder. After the three mandamus petitions had been consolidated and answers had been sought from the respondents (the judge and the mother of the children at issue), the judge filed an answer in which she averred that "there is no basis in law or fact to justify the relief sought by [MCDHR]" and that she is "committed to faithfully and diligently upholding the law and performing her duties in an equitable manner"; she further opined that MCDHR "is persistent in its desire to control the outcome of [her] decisions." This court subsequently heard oral arguments from counsel for MCDHR, from the judge, and from counsel for A.M., the mother of the children at issue in the three pending juvenile-court cases at issue.

Analysis

As previously stated, MCDHR asserted in its recusal motions several distinct grounds that, it claimed, not only required that the judge recuse herself from the three subject cases, but also required that she recuse herself from all cases in which MCDHR or ADHR is a party. However, under Alabama law, mandamus relief will not issue from a supervisory

court unless it is shown both that a respondent has a clear duty to perform and that the respondent has refused to perform it. "A writ of mandamus will not issue to compel the respondent to act when the respondent has not refused to do so." Ex parte CUNA Mut. Ins. Soc'y, 822 So. 2d 379, 384 (Ala. 2001). Merely because the judge has, in the three instances brought before this court via MCDHR's mandamus petitions, denied motions filed by MCDHR seeking her recusal will not properly support the inference that the judge will act in the same manner when presented with recusal motions by MCDHR or ADHR in the future.

The view of the Indiana Supreme Court as to this issue may properly be said to be an apt summary of the relative narrowness that is called for with respect to the scope of a writ of mandamus in this setting:

> "[E]ach trial court must first be given the opportunity to act by direct application and request to it in order to correct its alleged errors or rectify an alleged wrong. The record must show that such request has been made and the court has had an opportunity to act, or that circumstances have made it impossible to make such a request before we, as a higher court, see fit to intervene. ...
>
> "....

> "Judges should be sensitive to any indication of parties to an action that they hold any bias and prejudice in a case, and are duty bound in the interest of upholding the dignity and respect of the judiciary, to disqualify themselves where such indication is made at the proper time and under circumstances where a change may be made without prejudice to other parties involved. We assume a judge who is prejudiced or partial will disqualify himself upon request, until the contrary is shown."

State ex rel. Anderson-Madison Cty. Hosp. Dev. Corp. v. Superior Court of Madison Cty., 245 Ind. 371, 385-87, 199 N.E.2d 88, 95-96 (1964) (emphasis added). Because the three petitions before this court make no argument that the judge has denied any motions to recuse in civil actions involving MCDHR or ADHR other than in the three cases before this court or that making such motions in other cases would be impossible, we confine ourselves to the issue whether MCDHR has demonstrated a clear right to relief as to the three cases in which the judge has denied recusal motions.

The grounds asserted by counsel for MCDHR in its recusal motions purportedly requiring the judge's recusal were: (1) that the judge had "demonstrated a pattern of bias and prejudice against [it] which impairs her ability to execute her duties impartially," (2) that the judge had "failed to avoid conduct prejudicial to the administration of justice,"

(3) that the judge had "failed to maintain professional competence unswayed by fear of criticism," (4) that the judge had "continue[d] to express opposition to the very duties required of [MCDHR]," and (5) that the judge had "referred to petitions for termination of parental rights as 'the most draconian option.'" The last of these contentions, which refers to the judge's use of the term "draconian"[3] to describe the termination-of-parental-rights remedy, does not demonstrate a basis for requiring recusal; as was noted by counsel for the mother at oral argument, persons serving on the appellate courts of this state have used similar terminology to that of which MCDHR has complained in these cases. See Ex parte M.D.C., 39 So. 3d 1117, 1143 n.14 (Ala. 2009) (Murdock, J., dissenting) ("We should not lose sight of the fact that the termination of parental rights is the most Draconian of measures taken by the civil law, resulting in a complete and permanent severance of the most precious of all

[3]"Draconian ... is derived from the name Draco, a Greek legislator of the 7th century B.C. who drafted a code of severe laws that included the death penalty for anyone caught stealing a cabbage. Today, draconian ... refers to any cruel or excessively severe rule or punishment, not necessarily just legislation." Bryan A. Garner, Garner's Dictionary of Legal Usage 298 (3d ed 2011).

human relationships."), and D.T. v. Cullman Cty. Dep't of Human Res., 221 So. 3d 467, 469 (Ala. Civ. App. 2016) (Moore, J., concurring specially) (suggesting that the "most draconian remedy" of termination of parental rights should not be implemented when "the child and the parents share a beneficial relationship worthy of protection"); cf. In re D.M., 928 So. 2d 624, 627 (La. Ct. App. 2006) (referring to "the draconian nature of an involuntary termination proceeding").

Similarly, we conclude that MCDHR's fourth contention does not warrant mandamus relief. Neither a juvenile-court judge's use of rhetoric nor that judge's having ruled against MCDHR in previous cases on substantive points would, in and of themselves, be evidence that that judge is intractably opposed to a child-protective agency's carrying out its legislatively and administratively delegated duties with respect to protection of children. See Ex parte Adams, 211 So. 3d 780, 790 (Ala. 2016) (holding that the fact of trial judge's previous judicial rulings in favor of clients of particular attorney, although warranting appellate reversal, did not constitute valid basis for seeking recusal on basis of bias or partiality).

The second and third bases asserted by MCDHR in its recusal motions (and reiterated in its mandamus petitions) focus on whether the judge has acted in a manner that is "prejudicial to the administration of justice" and/or has not exhibited "professional competence unswayed by fear of criticism" (invoking Canon 2.B. and Canon 3.A(1), Ala. Canons of Jud. Ethics). However, the principal support for those contentions invoked by MCDHR is the judgment of the COJ, which, MCDHR says, determined that the judge was "guilty of six charges involving comprehensive delays of cases in her caseload and failure to manage dockets." Assuming that MCDHR's characterization of the judgment of the COJ is accurate, that judgment necessarily refers to <u>past</u> conduct of the judge and not to the judge's <u>current</u> practices with respect to cases on her dependency docket. Without more of a showing from MCDHR tending to demonstrate that the judge has "relapsed" into old habits or otherwise has failed to maintain progress in timely disposing of matters involving dependent children, no basis exists for requiring recusal in these cases, which (based on their case numbers) were filed well after the COJ's judgment was entered.

We finally turn to MCDHR's allegations of "a pattern of" bias or prejudice of the judge against MCDHR or ADHR, which we may equate with a claim that the judge has "an attitude of extra-judicial origin" that is "personal" rather than "judicial." Ex parte White, 53 Ala. App. 377, 387, 300 So. 2d 420, 430 (Crim. App. 1974), cert. denied, 293 Ala. 778, 300 So. 2d 439 (1974). The standard by which such an "attitude" is to be judged as far as warranting recusal is that set forth in Canon 3.C(1)(a), under which "[a] judge should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned, including but not limited to instances where ... [h]e has a personal bias or prejudice concerning a party."[4] That standard is substantially similar to that followed in federal courts, which are governed by the mandates of 28 U.S.C. § 455; although that statute formerly

[4]MCDHR did not cite to Canon 3.C(1) as authority in its motions to recuse, although it did so in its mandamus petitions. To the extent that mandamus review can be said to mirror appellate review with respect to presentation and preservation of issues, cf. Ex parte Smalls, 244 So. 3d 102, 105 (Ala. Civ. App. 2017), it should be noted that our supreme court has opined that "'[n]ew arguments or authorities may be presented on appeal, although no new questions can be raised.'" Ex parte Jenkins, 26 So. 3d 464, 473 n.7 (Ala. 2009) (quoting 4 C.J.S. Appeal and Error § 297) (emphasis added in Jenkins). Accordingly, MCDHR has not waived this court's consideration of that canon.

required disqualification if the pertinent judge had "a substantial interest" in a case so "as to render it improper, in [the judge's] opinion, ... to sit" therein (emphasis added), Congress acted in 1974 to require disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned" and "where [the judge] has a personal bias or prejudice concerning a party." 2d U.S.C. § 455(a) and (b)(1). On a number of occasions, the Alabama Court of Criminal Appeals has noted both the similarity between 28 U.S.C. § 455 and Canon 3.C(1) and the interpretation of the federal statute by the United States Supreme Court as requiring that bias and prejudice grounds be "'"evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance."'" Ex parte Atchley, 951 So. 2d 764, 767 (Ala. Crim. App. 2006) (quoting Ex parte Fowler, 863 So. 2d 1136, 1139 (Ala. Crim. App. 2001), quoting in turn Liteky v. United States, 510 U.S. 540, 548 (1994)); accord State v. Moore, 988 So. 2d 597, 600 (Ala. Crim. App. 2007).

Our supreme court has similarly recognized the objective nature of the recusal standard set forth in Canon 3.C(1):

> "Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982). Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety. Id.; see Ex parte Balogun, 516 So. 2d 606 (Ala. 1987); see, also, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983)."

Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994) (emphasis added). Thus, the judge's profession in her answers to MCDHR's petitions that she is "committed to faithfully and diligently upholding the law and performing her duties in an equitable manner," although in accord with the expectations of judges held by litigants and the general public, does not control the proper resolution of the pertinent question: whether a reasonable person might question her impartiality in light of her counsel's attacks on ADHR's motives and credibility made in the course of unsuccessful attempts to prevent the COJ from disciplining her.

Although counsel for MCDHR was asked at oral argument what evidence that agency had of a "pattern of bias and prejudice" on the part of the judge against MCDHR, counsel for MCDHR eschewed reliance upon any ruling or rulings that the judge had made in cases involving MCDHR or ADHR, choosing instead to meet MCDHR's burden of showing that the judge had a fixed "attitude of extra-judicial origin" by relying upon the answer filed in response to the JIC's complaint and the arguments made by the judge's counsel in open court before the COJ. As we have noted, counsel for the judge accused ADHR in those proceedings of having referred the judge to the JIC for "improper purposes" or "impermissible reasons" and of having an "improper motive" for making that referral; counsel for the judge further asserted as an affirmative defense to the JIC's complaint that ADHR had made misrepresentations of fact to, i.e., had defrauded, the JIC; and the judge's counsel pointedly asserted in closing arguments before the COJ that ADHR had "ha[d] it in for her."

However, the judge and counsel for the mother correctly noted at oral argument that statements of a party in unsworn pleadings, such as the answer filed by counsel for the judge

in response to the JIC's complaint, are "the mere suggestion or declarations of [that] party's counsel" and "are not admissible as evidence against" the party on behalf of whom the pleadings are filed. Charlie's Transfer Co. v. W.B. Leedy & Co., 9 Ala. App. 652, 656, 64 So. 205, 206 (1913). Similarly, "'arguments of counsel are not evidence.'" Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000) (quoting Williams v. Akzo Nobel Chems., Inc., 999 S.W.2d 836, 845 (Tex. App. 1999)). Without any indication in the materials before this court tending to show that the judge's answer and the closing arguments presented to the COJ on her behalf were "verified by oath" or were prepared "under the direction of the" judge, the judge's impartiality may not properly be impeached by such filings or statements by third parties. Birmingham Elec. Co. v. Wood, 222 Ala. 103, 105, 130 So. 786, 787 (1930). We thus have been presented no evidence from which we may properly conclude that the judge's impartiality toward MCDHR could reasonably be questioned under the objective standard set forth in the authorities quoted above, and we deem distinguishable on its unique facts Ex parte Smith, [Ms. 1171025, Jan. 11, 2019] ___ So. 3d ___ (Ala.

2019), in which our supreme court reversed a trial judge's order denying recusal in a criminal case brought against a particular police-officer defendant notwithstanding that judge's widely reported statement, made at the close of a pretrial immunity hearing in the same case, that he "did not find [that defendant's] testimony to be credible." ___ So. 3d at ___.

Conclusion

As is set forth in the introductory paragraphs of this opinion, ADHR and (by extension) MCDHR are state agencies tasked with the protection of what few would dispute is this state's most vulnerable human capital asset -- its children. However, such agencies have a interventionary role to play only to the extent that it is demonstrated that parents or guardians have failed in fulfilling duties owed to those children. Much of what ADHR and MCDHR seek to accomplish in achieving their goals in individual cases, therefore, cannot, and arguably should not, take place in a vacuum, and it is the role of this state's juvenile courts to ensure that all competing interests, including those of parents, children, other potential and actual caregivers, and ADHR or MCDHR, are

heard and that adjudications such as pickup orders, dependency orders, and termination-of-parental-rights judgments are not entered except as may be consistent with federal and state constitutional, statutory, and regulatory precepts. Those present at oral argument agreed that the paramount factor in such cases is the best interests of the children, and we are confident that, despite their competing positions in this matter, MCDHR and the judge will be able to put aside their differences and return to that firmer, common ground.

The mandamus petitions filed by MCDHR in these actions are denied in their entirety.

2180690 -- PETITION DENIED.

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Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.

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