

Rel: August 16, 2019

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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

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2180697

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Ex parte K.W.

PETITION FOR WRIT OF MANDAMUS

(In re: A.J.D.

v.

K.A.W.)

(Jefferson Juvenile Court, CS-06-1957.04  
and CS-06-1957.06)

THOMPSON, Presiding Judge.

2180697

K.W. ("the mother")<sup>1</sup> petitions this court for a writ of mandamus directing the Jefferson Juvenile Court ("the juvenile court") to vacate the juvenile court's May 17, 2019, order that, among other things, denied the mother's motion to dismiss filed in case no. CS-06-1957.06 ("the .06 action") and to enter an order dismissing that action. Additionally, the mother seeks mandamus relief directing the juvenile court to vacate any order or judgment entered after February 1, 2017, in a related action involving the same parties, case no. CS-06-1957.04 ("the .04 action"), which the juvenile court purported to consolidate with the .06 action. Both the .04 action and the .06 action involve disputes between the mother and A.J.D. ("the father") concerning the custody of, specifically the father's visitation with, their child ("the child"). The mother asserts that, under the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975, the juvenile court lacked subject-matter jurisdiction to entertain the .06 action and to enter any orders in the .04 action after it had entered a

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<sup>1</sup>The materials submitted in support of this petition for the writ of mandamus indicate that, in the proceedings below, the mother was referred to as "K.A.W."

2180697

judgment dismissing that action on February 1, 2017<sup>2</sup>, from which neither party appealed. On May 31, 2019, pursuant to Rule 21(b), Ala. R. App. P., this court called for answers to the petition to be filed, but none was received from the respondent juvenile-court judge or from the father. Therefore, in assessing the merits of the mother's petition, this court will "take the averments of fact in the ... petition as true." Ex parte Allison, 238 So. 3d 1260, 1262 (Ala. Civ. App. 2017) (citing Ex parte Turner, 840 So. 2d 132, 135 (Ala. 2002)).

The petition and the materials the mother submitted to this court in support of her petition indicate the following. According to the petition, the mother and the father never married. The mother asserts that the father's paternity was established in 2006 and that he was ordered to pay child support of \$304 each month at that time, but there are no court orders to that effect in the materials submitted to us.

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<sup>2</sup>The materials before this court indicate that there were multiple actions involving these parties in the juvenile court, and the parties and the court were not consistent in identifying the action or actions to which certain filings and orders applied.

2180697

It appears that the paternity and child-support action in the juvenile court was designated case no. CS-06-1957.<sup>3</sup>

In the petition, the mother asserts that the father served an "extended period" in prison and that he was unemployed at the time his child-support obligation was established. Included in the materials submitted to this court is a motion in which the mother stated that on September 16, 2008, the juvenile court entered an order directing the father to pay \$129 each month toward a child-support arrearage that had accrued. There are no documents in the materials before us demonstrating that an action was filed to establish the father's arrearage. Also, the September 16, 2008, order is not included in the materials. However, the action resulting in the September 16, 2008, judgment was apparently designated as case no. CS-06-1957.02.

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<sup>3</sup>This court has recognized that "CS" actions are juvenile-court actions and are to be governed by the Rules of Juvenile Procedure. R.Z. v. S.W., 141 So. 3d 1099, 1101 (Ala. Civ. App. 2013); C.B. v. D.P.B., 80 So. 3d 918, 920 (Ala. Civ. App. 2011); see also R.P.M. v. P.D.A., 112 So. 3d 49, 51 (Ala. Civ. App. 2012) ("Moreover, a case designated with a "CS" case number is considered a juvenile-court action, whether it is filed in a juvenile court or in a [family division of a] circuit court. See H.J.T. v. State ex rel. M.S.M., 34 So. 3d 1276, 1278-79 (Ala. Civ. App. 2009).'" (quoting C.W.S. v. C.M.P., 99 So. 3d 864, 866 n.1 (Ala. Civ. App. 2012))).

2180697

In 2009 the mother and the child moved to Atlanta, Georgia, where they still reside. In January 2015, the father filed a petition in the juvenile court seeking visitation with the child. That petition was designated as case no. CS-06-1957.03 ("the .03 action"). According to the mother, the petition in the .03 action was dismissed because the father failed to timely serve the mother.

On June 10, 2016, the father, appearing pro se, filed a second petition in the juvenile court seeking visitation with the child. That petition was designated as case no. CS-06-1957.04 ("the .04 action"). When that petition was filed, the father resided in Birmingham and, as mentioned, the mother and the child were living in Atlanta.

On November 18, 2016, the mother filed a petition in the juvenile court for a rule nisi and for modification of the father's child-support obligation. Although it is not entirely clear from the materials before us, it appears that the juvenile court designated the mother's petition as case no. CS-06-1957.05 ("the .05 action"). In her petition, the mother alleged that, as of November 4, 2016, the father's child-support arrearage was \$55,052.28. Furthermore, the mother alleged, the father had obtained employment since the

2180697

entry of the 2006 judgment originally establishing child support. Therefore, she said, a material change in circumstances had occurred warranting a modification of his monthly child-support obligation.

On February 1, 2017, the juvenile court entered the following judgment, apparently addressing both the .04 action and .05 action:

"The child and mother are both residents of the State of Georgia, Fulton County, and this court lacks jurisdiction to hear the [father's] petition for visitation and the [mother's] petition for modification and Rule Nisi. Issue of jurisdiction was invoked by the [mother]. Parties ordered to seek relief in Fulton County, Georgia. Cases dismissed, remove from docket."

Neither party appealed that February 1, 2017, judgment, and this court will not reach the merits of that judgment.<sup>4</sup> On February 2, 2017, the Alabama Department of Human Resources ("DHR") filed a motion and a separate petition to intervene in the action regarding child support -- i.e., the .05 action. However, both the motion and the petition are designated as

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<sup>4</sup>However, we note that it appears that the UCCJEA would not have been a jurisdictional bar to the mother's claims in the .05 action, seeking to hold the father in contempt and to modify the father's child-support obligation, because those claims do not involve a child-custody determination. See Ex parte Gallant, 221 So. 3d 1120, 1122-23 (Ala. Civ. App. 2016).

2180697

having been filed in the .04 action. From the materials submitted to us, we cannot discern how or if the juvenile court disposed of DHR's request.

On February 15, 2017, the guardian ad litem for the child filed a motion to alter, amend, or vacate the February 1, 2017, judgment, arguing that the juvenile court still retained jurisdiction. That postjudgment motion was denied by operation of law on March 1, 2017. See Rule 59.1, Ala. R. Civ. P.; Rule 1(B), Ala. R. Juv. P. At that point, the juvenile court no longer had jurisdiction over the parties' claims in the .04 action and the .05 action. See H.C. v. S.L., 251 So. 3d 793, 794 (Ala. Civ. App. 2017) (once a postjudgment motion has been denied by operation of law, the juvenile court loses jurisdiction over the matter).

Despite the February 1, 2017, judgment and its explicit instruction that the parties were to seek relief in a Georgia court, the father continued to file in the juvenile court petitions or motions related to visitation with the child. The materials submitted to us indicated that on June 19, 2018, the juvenile court entered a judgment referring to a June 13,

2180697

2018, trial.<sup>5</sup> In that judgment, among other things, the juvenile court purported to "grant[ the father] relief pertaining to visitation with the minor child" and established a visitation schedule. On June 29, 2018, the mother, appearing pro se, filed in the juvenile court a motion to "change venue," in which she argued, as she had previously, that the juvenile court did not have jurisdiction to decide the issues of visitation.

On October 3, 2018, the father filed in the juvenile court a petition to hold the mother in contempt for failing to allow visitation as ordered in the June 19, 2018, judgment. That petition was designated as case no. CS-06-1957.06--i.e., the .06 action. On February 19, 2019, the juvenile court entered an order, purportedly in the .04 action that had already been dismissed, setting forth the times when the father was to have visitation and establishing guidelines for the father to follow when the child was visiting with him. In the order, the juvenile court purported to consolidate the .04 action with the .06 action and set a hearing for May 17, 2019.

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<sup>5</sup>The materials indicate that a different juvenile-court judge presided over these matters after the February 1, 2017, judgment was entered.



2180697

The mother was directed to bring the child to that hearing.

The mother filed a second motion to "change venue" on March 5, 2019, and she requested that the February 19, 2019, order be set aside. The mother again asserted that the juvenile court did not have jurisdiction over issues concerning visitation with the child. On March 22, 2019, the mother, for the first time represented by counsel, filed a motion to dismiss. On May 17, 2019, the juvenile court entered an order that, among other things, denied the mother's motions to "change venue" and to dismiss.

"This court may review an order denying a motion to dismiss for lack of subject-matter jurisdiction under the UCCJEA via a petition for a writ of mandamus. See Ex parte Holloway, 218 So. 3d 853 (Ala. Civ. App. 2016).

"'A writ of mandamus is an extraordinary remedy that requires a showing of: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.'

"Ex parte McNaughton, 728 So. 2d 592, 594 (Ala. 1998). This court may issue a writ of mandamus compelling a trial court to dismiss a child-custody action if the trial court lacks subject-matter jurisdiction. Ex parte Holloway, supra.

2180697

"'The UCCJEA is a jurisdictional act that establishes subject-matter jurisdiction over child-custody proceedings.' H.T. v. Cleburne Cty. Dep't of Human Res., 163 So. 3d 1054, 1062 (Ala. Civ. App. 2014). A 'child custody proceeding' is '[a] proceeding in a court in which legal custody, physical custody, or visitation with respect to a child is an issue.' Ala. Code 1975, § 30-3B-102(4). ..."

Ex parte Gallant, 221 So. 3d 1120, 1122-23 (Ala. Civ. App. 2016).<sup>6</sup>

In her petition for a writ of mandamus, the mother relies on §§ 30-3B-201 and 30-3B-202, Ala. Code 1975, of the UCCJEA, to support her contention that the juvenile court does not have jurisdiction to determine the father's visitation rights with the child. In the petition, the mother asserts that an

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<sup>6</sup>As mentioned earlier, the juvenile court purported to consolidate the .04 action and the .06 action. To the extent that it could be argued that the mandamus petition is untimely as to any order entered in the .04 action between the entry of the February 1, 2017, judgment in that action and the entry of the May 17, 2019, order denying the mother's motion to dismiss, we note that "this court may still consider the merits of a petition for the writ of mandamus 'that challenges the jurisdiction of the trial court to enter the order sought to be vacated [despite the fact that the petition was] not ... filed within the presumptively reasonable period prescribed by Rule 21[, Ala. R. App. P.]." Ex parte Montgomery Cty. Dep't of Human Res., [Ms. 2180103, June 14, 2019] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala Civ. App. 2019) (quoting Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017), citing in turn Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016)).

2180697

Alabama court has not made an initial custody determination between the parties. However, this court has determined that an award of support to one parent constitutes an implicit award of custody to that parent. See Ex parte Washington, 176 So. 3d 852, 853-54 (Ala. Civ. App. 2015) (citing T.B. v. C.D.L., 910 So. 2d 794, 796 (Ala. Civ. App. 2005); M.R.J. v. D.R.B., 17 So. 3d 683, 686 (Ala. Civ. App. 2009)). Accordingly, we conclude that the 2006 judgment ordering the father to pay child support was an implicit award of custody to the mother. Therefore, our inquiry is whether the juvenile court had continuing, exclusive jurisdiction to decide issues of custody and visitation.

Section 30-3B-202 governs the juvenile court's continuing, exclusive jurisdiction to modify custody. That statute provides:

"(a) Except as otherwise provided in Section 30-3B-204[, Ala. Code 1975, pertaining to temporary emergency jurisdiction], a court of this state which has made a child custody determination consistent with Section 30-3B-201[, Ala. Code 1975, pertaining to jurisdiction to make an initial custody determination,] or Section 30-3B-203[, Ala. Code 1975, pertaining to the modification of a child-custody determination made by a court of another state] has continuing, exclusive jurisdiction over the determination until:

"(1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

"(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

"(b) A court of this state which has made a child custody determination and does not have continuing, exclusive jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 30-3B-201."

The mother and the child had lived in Georgia for seven years at the time the father filed his 2016 petition seeking visitation. In her petition for a writ of mandamus, the mother avers that the child and she have no connections with Alabama. We must take that averment as true. Ex parte Allison, supra. Furthermore, the materials before us contain an assertion by the mother that she had followed the juvenile court's February 1, 2017, directive and had commenced an action in a court in Georgia. Again, we must take that averment as true. Allison, supra. The mother did not advise

2180697

the juvenile court of the specific claims pending in the Georgia court. Given the foregoing and the language of the February 1, 2017, judgment, we conclude that the February 1, 2017, judgment constituted a determination pursuant to § 30-3B-202(a)(1) that the mother and the child did not have sufficient contacts with Alabama and that the juvenile court no longer had continuing, exclusive jurisdiction to determine the father's visitation claim.

"Once a court loses continuing, exclusive jurisdiction to modify a custody determination, § 30-3B-202(b)[, Ala. Code 1975,] provides that a trial court "may modify that determination only if it has jurisdiction to make an initial determination under Section 30-3B-201[, Ala Code 1975]." Section 30-3B-201 provides:

""(a) Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975,] a court of this state has jurisdiction to make an initial child custody determination only if:

""(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

""(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 30-3B-207 or 30-3B-208, [Ala. Code 1975,] and:

""a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

""b. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

""(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 30-3B-207 or 30-3B-208; or

""(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

""(b) Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

""(c) Physical presence of a child is not necessary or sufficient to make a child custody determination.""

"Baker[ v. Baker], 25 So. 3d [470] at 473-74 [(Ala. Civ. App. 2009)]. Section 30-3B-102(7), Ala. Code 1975, defines 'home state' as the '[t]he state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.' If the circuit court found that the child had lived with a parent in Alabama for at least six consecutive months immediately before the father filed his modification petition, then it could have determined that it had jurisdiction under § 30-3B-201(a)(1), Ala. Code 1975."

McGonagle v. McGonagle, 218 So. 3d 1208, 1213-14 (Ala. Civ. App. 2016).

In this case, there is no dispute that the mother and the child left Alabama in 2009 and had not resided in the state for more than six consecutive months at the time the father filed his petition in June 2016. Therefore, Alabama is not the child's home state for the purposes of resolving custody or visitation claims pursuant to the UCCJEA. Accordingly, not only did the juvenile court no longer have continuing,

2180697

exclusive jurisdiction, it did not have subject-matter jurisdiction to consider the issues regarding visitation.

For the reasons discussed, the juvenile court did not have subject-matter jurisdiction to enter any orders or judgments concerning custody and visitation after the February 1, 2017, judgment was entered. McGonagle, supra. Any orders and judgments of the juvenile court addressing those issue are therefore void. MPQ, Inc. v. Birmingham Realty Co., 78 So. 3d 391, 394 (Ala. 2011) ("A judgment entered by a court lacking subject-matter jurisdiction is absolutely void . . . ." (quoting Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008))).

The mother has demonstrated that she has a clear legal right to a dismissal of the .06 action and to have all judgments and orders regarding custody and visitation that were entered in the .04 action after February 1, 2017, set aside based on the juvenile court's lack of subject-matter jurisdiction. Accordingly, we grant the mother's petition for a writ of mandamus and direct the juvenile court to dismiss the .06 action and to vacate all orders and judgments regarding custody and visitation entered in the .04 action after February 1, 2017.



2180697

PETITION GRANTED; WRIT ISSUED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.