Rel: September 6, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180743 and 2180744

Ex parte L.L.H.

PETITIONS FOR WRIT OF MANDAMUS

(In re: L.L.H.

v.

M.L.L. and R.D.L.)

(Choctaw Juvenile Court, JU-16-29.02 and JU-16-30.02)

THOMPSON, Presiding Judge.

L.L.H. ("the mother") has filed petitions for a writ of mandamus from two orders of the Choctaw Juvenile Court ("the

juvenile court"), which deny the mother's motions seeking relief--under both Rule 13(a)(5), Ala. R. Juv. P., and Rule 60(b), Ala. R. Civ. P.--from prior judgments entered by the juvenile court. The materials submitted to this court in support of and in opposition to the petitions for a writ of mandamus indicate the following.

In 2016, M.L.L. and R.D.L. ("the paternal grandparents") filed in the juvenile court petitions alleging that the two minor children of the mother and M.L. ("the father") were dependent, in part because of the mother's incarceration in Mississippi, and seeking an award of custody of the children.[1] Those actions were designated as case numbers JU-16-29.01 and JU-16-30.01. On March 3, 2017, the juvenile court entered judgments in the dependency actions in which it found, in pertinent part, that the mother had received notice of the dependency actions and that the children were dependent; the juvenile court awarded custody of the children to the paternal grandparents. The March 3, 2017, dependency judgments were entered in case number JU-16-29.01 and in case number JU-16-30.01.

[1]The father is not a party before this court with regard to the mother's petitions for a writ of mandamus.

On June 19, 2018, the mother filed petitions seeking a modification of custody of the children. The mother's June 2018 actions were designated as case numbers JU-16-29.02 and JU-16-30.02 (hereinafter referred to collectively as "the .02 actions"). In those June 2018 petitions, the mother alleged that she was then willing and able to properly care for the children and that a return of custody to her would be in the children's best interests. The mother also sought an award of pendente lite visitation. On October 26, 2018, the juvenile court entered in the .02 actions pendente lite orders that incorporated an agreement of the parties. Pursuant to those orders, among other things, the children were to remain in the custody of the paternal grandparents, and the actions were set for a further hearing.

On April 12, 2019, the mother filed motions in the .02 actions seeking to have the March 3, 2017, dependency judgments declared void and to have those judgments set aside. In her April 12, 2019, motions, the mother alleged for the first time that her due-process rights had been violated because, she said, she did not receive service of process in the dependency actions. The mother later amended her April

12, 2019, motions to argue, among other things, that her due-process rights had been violated by the juvenile court's failure to appoint an attorney to represent her in the dependency actions.[2] For ease of reference, we hereinafter refer to the mother's April 12, 2019, motions and the several amendments to those motions as "the April 12, 2019, motions." The juvenile court conducted a May 2, 2019, ore tenus hearing on the mother's April 12, 2019, motions.[3]

On June 4, 2019, the juvenile court entered orders denying the mother's motions requesting that the March 3, 2017, dependency judgments be set aside as void. In those orders, the juvenile court found, in pertinent part, that the evidence it had received at the ore tenus hearing demonstrated that the mother had been properly served by law-enforcement officials in Mississippi and that the mother had not sought the appointment of an attorney to represent her in the

[2]On April 17, 2019, the juvenile court entered an order in case number JU-16-29.02 granting the mother's April 12, 2019, motion filed in that case. Thirty-two minutes later, the juvenile court entered an order in that same case in which it vacated the earlier order and stated that it had been erroneously entered.

[3]We note that, in its June 4, 2019, orders denying the April 12, 2019, motions, the juvenile court erroneously states that the ore tenus hearing occurred on April 2, 2019.

dependency actions. The juvenile court also ordered that the children were to remain in the custody of the paternal grandparents pending further orders of the court. The mother timely filed her petitions for a writ of mandamus in this court.

In her petitions for a writ of mandamus, the mother argues that the March 3, 2017, dependency judgments are void for lack of service and that the juvenile court erred in denying her request to set aside those judgments and return custody of the children to her. It is established that a parent must be served with a petition that seeks a determination that his or her child is dependent. § 12-15-122, Ala. Code 1975; Rule 13(A)(1), Ala. R. Juv. P. The mother argued before the juvenile court that she did not receive service of process of the dependency petitions, and she presented evidence in support of that claim at the May 2, 2019, ore tenus hearing.

We note that, in their filings in the juvenile court and in their arguments before this court, the parties have referenced some cases citing Rule 60(b), Ala. R. Civ. P. That rule governs actions seeking relief from a judgment for

reasons including that the judgment is void. See Rule 60(b)(4), Ala. R. Civ. P. However, the parties agree, and our caselaw establishes, that one portion of the mother's motions was filed pursuant to Rule 13(a)(5), Ala. R. Juv. P. That rule provides:

> "(5) A party not served under this rule may, for good cause shown, petition the juvenile court in writing for a modification of any order or judgment of the juvenile court. The juvenile court may dismiss this petition if, after a preliminary investigation, the juvenile court finds that the petition is without substance. If the juvenile court finds that the petition should be reviewed, the juvenile court may conduct a hearing upon the issues raised by the petition and may make any orders authorized by law relative to the issues as it deems proper."

Thus, the mother's April 12, 2019, motions, insofar as they sought to modify the dependency judgments on the basis that the mother allegedly had not been served with process, were filed pursuant to Rule 13(a)(5). T.L. v. W.C.L., 203 So. 3d 66, 71 (Ala. Civ. App. 2016); M.R. v. C.A., 273 So. 3d 846, 849 (Ala. Civ. App. 2018). In T.L. v. W.C.L., supra, a child's grandparents, who had custody of the child by virtue of a custody award made pursuant to a dependency judgment, sought to modify the visitation provisions of that dependency judgment. The child's mother and the child's father each

filed separate motions seeking to set aside the dependency judgment by asserting arguments that the dependency judgment was void. The juvenile court in that case denied the parents' motions to set aside the dependency judgment, and each parent appealed. 203 So. 3d at 69. This court determined that the father's motion, which sought to set aside the dependency judgment on the basis that he had not been served with process in the dependency action was one made pursuant to Rule 13(a)(5); we further held that the evidence in that case supported the juvenile court's judgments denying the parents' motions to set aside the dependency judgments. T.L. v. W.C.L., 203 So. 3d at 72.

In M.R. v. C.A., supra, a father sought to set aside an earlier judgment based on his argument that he did not receive service of process. The juvenile court in that case determined that the earlier judgment was final and that it lacked jurisdiction to consider modifying or setting aside that judgment; it therefore dismissed the motion. The father appealed to the circuit court, which dismissed the appeal. This court held that the father's motion had been one filed pursuant to Rule 13(a)(5), Ala. R. Juv. P., and it reversed

the circuit court's dismissal of the father's appeal to that court and ordered the circuit court to consider the merits of the father's appeal from the juvenile court's dismissal of the Rule 13(a)(5) motion.

The judgments at issue in T.L. v. W.C.L., supra, and M.R. v. C.A., supra, disposed of all of the claims at issue before the courts in those cases, and, therefore, those judgments supported the appeals taken in those cases. However, in these cases, although the June 4, 2019, orders addressed the mother's claims seeking to set aside the dependency judgments pursuant to Rule 13(a)(5), the mother's initial modification claims seeking the return of custody of the children remain pending. The juvenile court's June 4, 2019, orders determined, in part, only that the mother's due-process rights had not been violated by the alleged failure to serve her with process in the dependency actions and that the March 3, 2017, dependency judgments were not due to be set aside as void on that basis. The June 4, 2019, orders also specified that the children were to remain in the custody of the paternal grandparents pending further orders of the juvenile court. Thus, because the mother's custody-modification claims remain

pending, the June 4, 2019, orders are nonfinal orders. Therefore, the mother could not immediately appeal the June 4, 2019, orders insofar as they denied the mother's motions to set aside the dependency judgments pursuant to Rule 13(a)(5). See A.A. v. v. Jefferson Cty. Dep't of Human Res., [Ms. 2180368, Aug. 30, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019) ("A nonfinal order cannot support an appeal."). However, we must still determine whether mandamus relief is appropriate with regard to this issue. See S.W. v. Jefferson Cty. Dep't of Human Res., 113 So. 3d 657, 659 n.1 (Ala. Civ. App. 2012) (quoting Norman v. Norman, 984 So. 2d 427, 429 (Ala. Civ. App. 2007)) ("'The proper means of seeking appellate review of an interlocutory order in this court is to petition for a writ of mandamus.'").

"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." Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). In her brief submitted to

this court, the mother argues only cursorily that she has no adequate remedy by way of an appeal. See Ex parte Integon Corp., supra. She cites Ex parte Russell, 911 So. 2d 719 (Ala. Civ. App. 2005), in which this court considered a mother's challenge by way of a petition for a writ of mandamus of an order removing pendente lite custody from her in a divorce action. However, the issue of pendente lite custody would be mooted by the entry of a final judgment. Hughes v. Hughes, 253 So. 3d 423, 433 (Ala. Civ. App. 2017) ("Because the trial court's entry of a final judgment superseded the pendente lite order, which was interlocutory in nature, it rendered any issues [raised in an appeal of the final judgment] concerning the propriety of the pendente lite order moot."). Therefore, the mother in Ex parte Russell, supra, had no adequate remedy concerning the propriety of the pendente lite order through an appeal of the final judgment, and, therefore, it was appropriate to review the issue in that case by way of a petition for a writ of mandamus. Ex parte Russell, supra.

> "Generally, an 'adequate remedy' exists if the petitioner will be able to raise the issue on appeal. See Ex parte Daimler Chrysler Corp., 952 So. 2d 1082 (Ala. 2006); Ex parte Jackson, 780 So. 2d

> 681 (Ala. 2000); Ex parte Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000). '"A writ of mandamus will issue only in situations where other relief is unavailable or is inadequate, and it cannot be used as a substitute for appeal."' Ex parte Flexible Prods. Corp., 915 So. 2d 34, 39 (Ala. 2005) (quoting Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998)). We agree that a petition for a writ of mandamus cannot be used as a substitute for an appeal."

Ex parte A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008).

The mother argues in her petitions for a writ of mandamus that the juvenile court erred in determining, based on the evidence, that she was properly served with process in the dependency actions that resulted in the March 3, 2017, dependency judgments. That argument raises an evidentiary issue, and, given the posture of these actions, the mother has an adequate remedy with regard to this issue by way of an appeal when the juvenile court enters final judgments on her custody-modification claims. Ex parte Gallant, 261 So. 3d 350, 356 (Ala. Civ. App. 2017); Ex parte Landry, 117 So. 3d 714, 719 (Ala. Civ. App. 2013); and Ex parte C & D Logging, 3 So. 3d 930, 937 (Ala. Civ. App. 2008). "'It is now a well-established general rule in this state that if the matters complained of can ultimately be presented by an appeal, a writ of mandamus will not be issued.'" Ex parte

R.S.C., 853 So. 2d 228, 234 (Ala. Civ. App. 2002) (quoting Ex parte Spears, 621 So. 2d 1255, 1256 (Ala. 1993)).

Accordingly, with regard to her argument under Rule 13(a)(5), the mother has an adequate remedy by way of an appeal once a final judgment is entered in these actions, and, therefore, we deny the mother's petitions for a writ of mandamus as to that issue. Ex parte Smith, 196 So. 3d 284, 285 (Ala. Civ. App. 2015) ("The [petitioner] has not demonstrated that she lacks an adequate remedy by way of appeal. Thus, she has not shown that she is entitled to the extraordinary remedy of a writ of mandamus.").

In her April 12, 2019, motions, the mother also argued that the March 3, 2017, dependency judgments were void because, she argued, the juvenile court improperly failed to appoint an attorney to represent her in the dependency actions. An argument that a party was denied due process based on the failure to appoint counsel, or that the juvenile court failed to advise a party of the right to counsel, does not come within the governance of Rule 13(a)(5). In T.L. v. W.C.L., supra, this court addressed a mother's argument that the juvenile court in that case had erred in failing to

appoint an attorney to represent her in a dependency action despite her completion of an affidavit of indigency. This court treated the mother's motion to set aside the dependency judgment as void on that basis to be a motion seeking relief from a judgment pursuant to Rule 60(b)(4), Ala. R. Civ. P. T.L. v. W.C.L., 203 So. 3d at 69. This court stated that "[a] judgment is void and may be set aside at any time under Rule 60(b)(4), Ala. R. Civ. P., if it was entered in a manner inconsistent with due process," and it addressed the issue on appeal of the denial of the mother's motion. T.L. v. W.C.L., 203 So. 3d at 69.

"The denial of a Rule 60(b) motion is reviewable on appeal." Ex parte R.S.C., 853 So. 2d at 235; see also T.L. v. W.C.L., supra. In these cases, the mother was required to appeal that part of the juvenile court's June 4, 2019, orders that denied her April 12, 2019, motions to set aside the dependency judgments based on the argument that the dependency judgments were void because the juvenile court did not appoint counsel to represent the mother in the dependency actions. The mother did not appeal from those parts of the June 4, 2019, orders that constituted a denial of relief under Rule

60(b). This court "cannot consider the propriety of the denial of her [Rule 60(b)] motions on a petition for the writ of mandamus." Ex parte S.B., 164 So. 3d 599, 602 (Ala. Civ. App. 2014).

We acknowledge that, under certain circumstances, an appellate court may exercise its discretion and treat a petition for a writ of mandamus as an appeal. McWhorter v. Parsons, 215 So. 3d 577, 580 (Ala. Civ. App. 2016); Weaver v. Weaver, 4 So. 3d 1171, 1172 (Ala. Civ. App. 2008). The dissent contends that this court should exercise its discretion to treat the mother's petitions for a writ of mandamus as appeals. Ex parte Taylor, 252 So. 3d 637, 642 (Ala. 2017) ("It is well settled that, where '"the facts of the particular case"' warrant our 'treat[ing] a petition for a writ of mandamus as a notice of appeal,' this Court will do so."). "There is no bright-line test for determining when this Court will treat a particular filing as a mandamus petition and when it will treat it as a notice of appeal." Ex parte Burch, 730 So. 2d 143, 146 (Ala. 1999). See also Weaver v. Weaver, supra (same).

> "'[W]e consider the facts of the particular case in deciding whether to treat the filing as a petition or as an appeal:
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> > "'"The question we come to, then is this: Do the circumstances of this case make it such that the policies set forth in Rule 1[, Ala. R. App. P.,] will be served by resolving the matter presented to us? Or, will those policies be better served by requiring, as we do in the normal case, strict compliance with our appellate rules and thus not reviewing the trial court's interlocutory ruling?"
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> "'[Ex parte Burch,] 730 So. 2d [143,] 147 [(Ala. 1999)].'"

Kirksey v. Johnson, 166 So. 3d 633, 644 (Ala. 2014) (quoting F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So. 2d 366, 372 (Ala. 2006)).

In these cases, we decline to exercise our discretion to consider these petitions as appeals. The mother is represented by able counsel. The mother did not elect to file her motions in the dependency actions. Rather, she filed the motions in the .02 actions, in which she asserts that custody of the children should be returned to her. The materials submitted to this court by the mother indicate that the dependency judgments were entered on March 3, 2017; that the mother was released from incarceration on June 5, 2017; that

over a year later, on June 19, 2018, the mother filed her petitions to modify in which she alleged that the juvenile court "has jurisdiction of the parties and the subject matter pursuant to the [dependency] order[s] entered herein on March 3, 2017"; and that the mother first raised the issues of an alleged lack of service of process and failure to appoint her counsel in the dependency actions in her April 12, 2019, motions filed nine months after she had initiated her custody-modification claims. Thus, in these cases, the mother did not initiate her actions by alleging that she was unaware of the dependency actions or judgments. Rather, as the materials indicate and as her choice to seek mandamus review reflects, she asserted her lack-of-service and failure-to-appoint-counsel arguments as alternative claims in seeking a modification of the dependency judgments.

We further note that, at the beginning of the hearing on the mother's April 12, 2019, motions, the mother's attorney requested that, if it denied those motions, the juvenile court move up the date for the scheduled hearing on the merits of the mother's modification petitions. The mother's attorney argued that the mother wanted to proceed quickly so as to

regain custody of the children. If this court were to elect to treat these petitions as appeals, further delays in the hearing of the merits of the mother's custody-modification claims would occur as the record on appeal is compiled.

The appellate courts of this state do not favor piecemeal review. Ex parte Spears, 621 So. 2d 1255, 1258 (Ala. 1993).

> "We note that an appellate court may treat a petition for the writ of mandamus as an appeal in certain circumstances. See Ex parte Burch, 730 So. 2d 143, 146 (Ala. 1999) (noting that there is no 'bright-line test' for such action). '[The appellate court] consider[s] the facts of the particular case in deciding whether to treat the filing as a petition or as an appeal.' F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So. 2d 366, 372 (Ala. 2006). Under the facts and circumstances presented here, we decline to convert the petition for a writ of mandamus into an appeal."

Ex parte Boddie, 229 So. 3d 255, 259-60 n.2 (Ala. Civ. App. 2017).

Given the posture of these actions, the findings in the juvenile court's June 4, 2019, orders, and the lack of a developed argument on this issue in the mother's brief submitted to this court, we decline to convert to appeals the mother's petitions for a writ of mandamus. Ex parte Boddie, 229 So. 3d at 260 n. 2.

2180743--PETITION DENIED.

2180744—-PETITION DENIED.

Donaldson and Hanson, JJ., concur.

Moore, J., dissents with writing, which Edwards, J., joins.

MOORE, Judge, dissenting.

The Choctaw Juvenile Court ("the juvenile court") entered two separate, but almost identical, judgments ("the dependency judgments") on March 3, 2017 -- one was entered in case number JU-16-29.01 and the other was entered in case number JU-16-30.01 ("the .01 actions"). Those judgments found J.I.L. and D.C.L. ("the children") dependent and awarded their custody to M.L.L. and R.D.L. ("the paternal grandparents"). L.L.H. ("the mother") subsequently filed separate petitions to modify those judgments, which were docketed as case numbers JU-16-29.02 and JU-16-30.02 ("the .02 actions"), respectively, in which she sought to regain custody of the children. On April 12, 2019, the mother filed motions in both of the .02 actions, requesting that the juvenile court declare the dependency judgments void because, she argued, they had been entered in a manner inconsistent with her rights to due process. In a subsequent series of "supplements" to her motions, the mother asserted that she had not been properly served with the complaint and summons in the .01 actions, that she had not been provided notice of the dependency hearing in the .01 actions, and that she had not been advised of her right to

appointed counsel in the .01 actions. The juvenile court originally granted the motions and vacated the dependency judgments, but the juvenile court subsequently withdrew its orders granting the motions and entered orders in the .02 actions on June 4, 2019, denying the motions. On June 17, 2019, the mother filed in this court petitions for a writ of mandamus seeking review of the orders denying the motions.

In my opinion, this court should convert the petitions for a writ of mandamus to appeals. I agree with the main opinion that the motions filed by the mother should be considered as having been filed under Rule 13(A)(5), Ala. R. Juv. P., insofar as they sought to have the dependency judgments vacated based on the alleged lack of service, and under Rule 60(b)(4), Ala. R. Civ. P., insofar as they sought to have the dependency judgments vacated based on lack of notice of the dependency hearing and the alleged failure of the juvenile court to advise the mother of her right to appointed counsel. See T.L. v. W.C.L., 203 So. 3d 66 (Ala. Civ. App. 2016). Pursuant to Ala. Code 1975, § 12-15-601, which provides, in pertinent part, that "[a] party ... has the right to appeal a judgment or order from any juvenile court

proceeding pursuant to this chapter [i.e., the Alabama Juvenile Justice Act, § 12-15-101 et seq., Ala. Code 1975]," the mother has a right to appeal from an order denying a Rule 13(A)(5) motion. Our caselaw further provides that a party has a right to appeal from an order denying a Rule 60(b) motion. See Ex parte R.S.C., 853 So. 2d 228, 235 (Ala. Civ. App. 2002).

The mother apparently sought review of the orders by petitions for a writ of mandamus because the motions were denied in the .02 actions in which her petitions for modification of the dependency judgments remain pending. In ordinary civil cases, an appeal will not lie from a judgment until all pending claims have been adjudicated. See, e.g., Day v. Davis, 989 So. 2d 1118 (Ala. Civ. App. 2008). However, in dependency cases, a juvenile court may enter a series of "final" judgments, any of which may be reviewed on appeal despite the ongoing nature of the proceedings. See S.P. v. E.T., 957 So. 2d 1127, 1131 (Ala. Civ. App. 2005). Regardless of context, if an order of a juvenile court "addresses crucial issues that could result in depriving a parent of the fundamental right to the care and custody of his or her child,

whether immediately or in the future, the order is an appealable order." D.P. v. Limestone Cty. Dep't of Human Res., 28 So. 3d 759, 764 (Ala. Civ. App. 2009).

In these cases, the mother moved the juvenile court to vacate the dependency judgments and to immediately return custody of the children to her. The orders denying the motions effectively deprived the mother of her fundamental right to custody of the children, and, as such, should be considered as final judgments subject to review by appeal. The mere fact that the motions were filed in the .02 actions[4] in which the mother's custody-modification petitions remain pending should not be an impediment to our review.

This court has the discretion to convert a petition for the writ of mandamus to an appeal. McWhorter v. Parsons, 215 So. 3d 577, 580 (Ala. Civ. App. 2016). Given the nature of

[4]I note that the mother could have, and probably should have, filed the same motions in the .01 actions, in which case there would be no question that the orders denying the motions would be immediately reviewable by appeal. The fact that the mother elected to file the motions in the .02 actions and to join the motions with her modification petitions should not affect her right to appeal. Rule 1, Ala. R. App. P., encourages this court to place substance over form in order to assure "the just, speedy, and inexpensive determination of every appellate proceeding on its merits."

the fundamental rights at issue, this court should exercise that discretion to convert the petitions for a writ of mandamus to appeals in order to immediately address the mother's contention that the dependency judgments are void. I note that the issues raised by the mother are ripe for review and will not be affected in any manner by the outcome of the custody-modification petitions.[5] Furthermore, our immediate review may even obviate the need for the custody-modification petitions to be addressed should we determine that the juvenile court erred in denying the mother's motions.[6] Every relevant factor mitigates toward converting the petitions for the writ of mandamus into appeals in order to afford the mother immediate appellate review, as the legislature envisioned when it enacted § 12-15-601. See T.C. v. Mac.M., 96 So. 3d 115, 123 (Ala. Civ. App. 2011) (Moore, J., dissenting) ("If the juvenile court has overreached in

[5]For that reason, if it had been requested, the juvenile court could have certified the orders denying the motions as final under Rule 54(b), Ala. R. Civ. P., although I do not believe such action was necessary to perfect the right to appeal.

[6]I do not wish to be understood as making any comment as to the merits of the appeals.

separating the family, that error should be promptly corrected so as to minimize the harm to the family unit; if the juvenile court has acted properly, immediate appellate approval ends any uncertainty that may cloud further proceedings and jeopardize the stability of the child."). Because the main opinion postpones appellate review of the orders unnecessarily, I respectfully dissent.

Edwards, J., concurs.