

Rel: December 6, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte Rebecca Marie Butcher

PETITION FOR WRIT OF MANDAMUS

(In re: Jeremy Allan Butcher

v.

Rebecca Marie Butcher)

(Montgomery Circuit Court, DR-19-900329)

THOMPSON, Presiding Judge.

Rebecca Marie Butcher ("the mother") petitions this court for a writ of mandamus directing the Montgomery Circuit Court

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("the trial court") to grant her motion to dismiss the divorce action filed by Jeremy Allan Butcher ("the father") on the ground that the trial court lacks subject-matter jurisdiction. One child ("the child") was born of the parties' marriage, and, the mother contends, Alabama is not the child's home state. As a result, the mother asserts, the trial court lacks subject-matter jurisdiction under Alabama's version of the Uniform Child Custody Jurisdiction Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975.

The materials before this court indicate the following. On July 29, 2019, the trial court held a hearing on the issue of subject-matter jurisdiction. A transcript of that hearing is included in the materials the mother submitted in support of her petition for a writ of mandamus. The evidence adduced at that hearing indicates that the father serves in the United States Air Force. On February 11, 2015, the parties married in Montgomery. The father was stationed at Gunter Air Force Base in Montgomery and had lived in Alabama for about a year at that time. The mother is originally from South Carolina, but she had moved to Alabama, where she worked as a registered

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nurse at a Montgomery hospital. On February 14, 2017, the child was born in Montgomery.

The family continued to live in the Montgomery area until September 29, 2018, when the mother and the child moved to Findlay, Ohio. At that time, the father was preparing to deploy to Djibouti, in Africa, for six months. The father's parents lived in Findlay, Ohio. The mother testified that the purpose of the move was for her to be close to the father's family during his deployment so that she would have a "support system" nearby and to "build a foundation for a future in Ohio." She said that the father's term of enlistment was to be over in September 2019 and that he was going to separate from the Air Force. The mother testified that the father was then going to move to Ohio.

At the July 29, 2019, hearing, the father disputed much of the mother's testimony. He testified that, although his enlistment was set to end in September 2019, he was "working through paperwork" to reenlist and that he did not intend to leave the Air Force. Upon reenlistment, the father said, he would continue to be stationed at Gunter Air Force Base. He explained that, as a computer-software developer, he was not

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required to move often. The father also said that he had made Alabama his permanent state of residence approximately five years earlier.

The father testified that the mother made the decision to live near his parents in Ohio during his deployment rather than returning to South Carolina, where her parents lived. He said his parents were going to have "some surgeries and stuff" and that the mother had wanted to "help out with them." He said that, initially, the mother and the child were going to live in Ohio just during his deployment. When he returned from Djibouti, the father testified, the family planned to resume living in Alabama. In January 2019, about three months into his deployment, the mother "was pretty certain she was going to stay" in Ohio, the father said. It was at that time that the parties began discussing obtaining a divorce.

While in Ohio, the father said, the child was staying with his parents. He said that he "video chatted" with the child almost every day and that, during those chats, she was at the father's parents' house. Also, the father said that he had accumulated "numerous" medical bills for the child resulting from his parents' having taken her to doctors'

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appointments for checkups and illness. The bills were addressed to the father at his parents' house.

The mother testified that, when the father returned from Djibouti in April, he came to Ohio and visited the child for approximately two weeks. He then returned to Alabama. The mother said that, on Tuesday, May 15, 2019, the father returned to Ohio, picked up the child at his parents' house, and returned to Alabama with the child without the mother's knowledge or consent. The father agreed with the mother's testimony on that point. He also testified that all of the child's clothing and toys were at his parents' house. The father said that he brought the child back to Alabama to live with him because it "was her home."

On May 20, 2019, the father filed a complaint for a divorce in the trial court. In the complaint, the father sought sole physical custody of the child and an equitable division of the marital property, among other things. On June 18, 2019, the mother filed a motion to dismiss the father's divorce complaint, asserting, as previously mentioned, that the trial court did not have subject-matter jurisdiction because, she alleged, Alabama was not the child's home state

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under the UCCJEA. On June 24, 2019, the mother filed a complaint for a divorce in Ohio. She also sought an order of custody of the child. The mother testified that the Ohio court granted her request and ordered that the child not be removed from Ohio without the consent of the other party. The child was already in Alabama at the time.

On September 5, 2019, the trial court entered an order denying the mother's motion to dismiss. In that order, the trial-court judge explained that he had conferred with the judge of the Ohio court and that they both agreed that

"the Ohio pleadings were subsequent to the Alabama pleadings, that Alabama is the current residence of the [father] and the prior residence of the [mother], and that Alabama is the proper jurisdiction on the issue of the marriage, divorce and custody. The Court further noted several deficiencies and/or misrepresentations in the Ohio filing such that the [mother] did not properly alert the Court as to the proceeding in Alabama so that an initial deferral of jurisdiction could be made at the outset. The initial communication between the courts left no issue that was in dispute among the conferring Judges or Judicial Officials, or that were otherwise in question under [the] UCCJEA such that an immediate agreement and decision on jurisdiction could not be reached. Both courts agreed that Alabama was the proper jurisdiction as to all issues relative to the divorce of the parties and custody of the child born of the marriage; the State of Ohio thereafter relinquished any purported jurisdiction."

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On October 17, 2019, the mother filed her petition for a writ of mandamus. As she did in the trial court, the mother asserts that the trial court lacks subject-matter jurisdiction because, she says, Alabama is not the child's home state. The mother did not address the issue of the trial court's jurisdiction over the divorce and the marital res. Nevertheless, she argues, she is entitled to a writ of mandamus directing the trial court to dismiss the father's divorce action in its entirety. "We note that a lack of subject-matter jurisdiction may be raised at any time, and that the question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus. Ex parte Johnson, 715 So. 2d 783, 785 (Ala. 1998)." Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000).

"Mandamus is an extraordinary remedy. An appellate court will grant a petition for a writ of mandamus only when '(1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked.' Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000) (citing Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997)). Review by mandamus is not appropriate where the petitioner has another adequate remedy, such as an appeal. Ex parte Jackson, 780 So. 2d 681 (Ala. 2000); Ex parte Inverness Constr. Co., 775 So. 2d

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153 (Ala. 2000); Ex parte Walters, 646 So. 2d 154 (Ala. Civ. App. 1994)."

Ex parte Amerigas, 855 So. 2d 544, 546-47 (Ala. Civ. App. 2003).

"[T]he [UCCJEA], codified at Ala. Code 1975, § 30-3B-101 et seq., controls decisions regarding whether a court of this state has jurisdiction to make a child-custody determination or to modify another state's child-custody determination. M.J.P. v. K.H., 923 So. 2d 1114, 1116-17 (Ala. Civ. App. 2005). A "child-custody determination," as defined in the UCCJEA, includes any judgment providing for the legal or physical custody of a child or providing visitation with a child. § 30-3B-102(3). A "child-custody proceeding" is defined in the UCCJEA to include not only divorce actions involving the custody of a child, but also "neglect, ... dependency, ... [and] termination of parental rights" actions in which the issue of child custody is addressed. § 30-3B-102(4).'

"R.W. [v. G.W.], 2 So. 3d [869,] 871 [(Ala. Civ. App. 2008)]."

J.D. v. Lauderdale Cty. Dep't of Human Res., 121 So. 3d 381, 384 (Ala. Civ. App. 2013) (emphasis added).

Section 30-3B-201, Ala. Code 1975, a part of the UCCJEA, sets forth the following bases pursuant to which a court may make an initial custody determination:

"(a) Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975, dealing with temporary emergency jurisdiction,] 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 of the child 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

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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."

Contrary to the assertion the mother makes in her petition for a writ of mandamus, the relevant facts were in dispute. "'[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.'" Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005) (quoting Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002)).

"'The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses.'" Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995).

The ore tenus standard of review, succinctly stated, is as follows:

""[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence.""

"Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977))."

Spencer v. Spencer, 258 So. 3d 326, 327-28 (Ala. 2018).

It is undisputed that the child's home state was Alabama before the father deployed to Djibouti. The trial court could have believed the father's testimony over the mother's testimony and determined that, when the mother and the child went to Ohio while the father was deployed, the parties had intended that their stay would be temporary and that the mother and child would return to the father's duty station in Alabama when his deployment ended. Evidence supports a conclusion that the child's belongings were at her paternal grandparents' home in Ohio and that there was no intention for

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the child to remain with them once the father returned from Djibouti. "'[A] period of temporary absence of the child or any of the mentioned persons is part of the period' of six consecutive months immediately before the custody proceeding commences. § 30-3B-102(7), Ala. Code 1975." Ex parte Siderius, 144 So. 3d 319, 325 (Ala. 2013) (discussing the definition of "home state" in the UCCJEA).

Based on the materials before us, we conclude that substantial evidence supported a determination that the child's absence from Alabama was temporary and, therefore, that Alabama remained the child's home state under the UCCJEA. Furthermore, the Ohio court declined to exercise jurisdiction over the issue of custody of the child. Thus, the mother has failed to demonstrate that she had a clear legal right to have the Alabama divorce action dismissed. Ex parte Americas, supra. Accordingly, the petition for a writ of mandamus is due to be denied.

PETITION DENIED.

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