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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte John Lester

PETITION FOR WRIT OF MANDAMUS

(In re: Amber Lester

v.

John Lester)

(Lee Circuit Court, DR-10-39.07)

EDWARDS, Judge.

John Lester ("the father") has filed in this court a petition for the writ of mandamus seeking an order directing the Lee Circuit Court ("the trial court") to set aside two

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orders that restrict the father's contact with Amber Lester ("the mother"); the mother's husband, Brian Manderson; and the parties' children. The court called for expedited answers, but none were filed. The following facts and procedural history are taken from the materials submitted in support of the petition, which, because no answer controverting those facts was filed, we take as true. See Ex parte Allison, 238 So. 3d 1260, 1262 (Ala. Civ. App. 2017).

The mother and the father were previously divorced by the trial court.¹ In May 2019, the mother filed a complaint in which she requested that the trial court hold the father in contempt of a provision contained in a judgment entered by the trial court in June 2018 that prohibited contact between the father and Manderson. The provision required that, when attending events in which the parties' children participated, like ball games or church events, the father and Manderson were to remain at least 100 feet from each other. The mother alleged in her complaint that the father had violated that provision by following Manderson to a store parking lot and later attacking him while he sat in his vehicle during one of

¹The materials before us do not contain the divorce judgment or any judgment modifying the divorce judgment.

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the children's softball practices. The mother attached Manderson's affidavit and her own affidavit to her complaint. In her affidavit, she admitted that she had not been present at the time of the alleged incident but had, instead, been on the telephone with Manderson during part of the incident. Manderson stated in his affidavit that the father had followed him in his vehicle and had punched him in the face several times while screaming profanities.

Contemporaneously with her complaint, the mother filed a "motion for ex parte temporary emergency order," in which she alleged generally that the father's behavior was "putting everyone's very livelihoods [sic] in danger" and that the father's unstable conduct was causing harm to the children. The mother requested that the trial court order that the father not be permitted to attend the children's activities if she and Manderson were going to be present. She also requested that the father be ordered to undergo mental-health treatment and that, pending completion of such treatment, the father's visitation with the children be supervised.

On the same day that the mother's complaint and motion were filed, the trial court entered an order suspending the

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father's visitation and ordering that the father have no contact with Manderson or the children ("the ex parte visitation order"). In the ex parte visitation order, the trial court specifically stated that it intended to also enter a protection-from-abuse ("PFA") order under the Alabama Protection from Abuse Act ("the Act"), Ala. Code 1975, § 30-5-1 et seq. The trial court entered a PFA order on May 13, 2019. In the PFA order, the trial court found that the father represented a credible threat to the mother and Manderson; restrained the father from having any contact with the mother, the children, or Manderson; ordered that the father stay away from the facility at which the alleged incident occurred; and required the father to stay 300 feet from the mother's residence, the mother's place of employment, and the children's school. Finally, the PFA order awarded temporary sole legal and physical custody of the children to the mother.

On October 16, 2019, the father filed in the trial court a motion to set aside the PFA order; he later amended that motion to seek to have the ex parte visitation order set aside. In his initial motion, the father averred that he had

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been served with the PFA order on October 7, 2019.² In his motions, the father argued to the trial court that (1) the mother had not filed a complaint seeking a PFA order, (2) that the mother had not alleged an act of abuse against her, (3) that the motion for an ex parte temporary emergency order did not allege facts indicating that immediate and irreparable injury would result if the order were not entered, and (4) that the motion for an ex parte temporary emergency order was not supported by the attorney's Rule 65(b), Ala. R. Civ. P., certificate.

The trial court held a hearing on the father's motion and amended motion on October 31, 2019. After that hearing, the trial court entered, on November 1, 2019, an order declining to set aside the ex parte visitation order or the PFA order. The father filed a motion seeking reconsideration of the trial court's denial of his motion and amended motion to set aside those orders, but the trial court had not yet ruled on that

²In his initial motion, the father stated that he had been served with the PFA order and the mother's complaint on October 7, 2019. He further stated in his initial motion that the mother had not sought ex parte or emergency relief, indicating, perhaps, that he was not aware of the mother's motion for an ex parte temporary emergency order or of the ex parte order visitation at that time.

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motion when the father filed his petition for the writ of mandamus with this court on November 13, 2019.

The father is seeking relief from May 2019 orders of the trial court. His petition, which was filed in November 2019, is therefore untimely. See Rule 21(a)(3), Ala. R. App. P. He did not, as did the petitioner in Ex parte Franks, 7 So. 3d 391 (Ala. Civ. App. 2008), include with his petition a statement of good cause for his failure to file the petition within the presumptively reasonable time.³ However, the father is challenging the trial court's orders on jurisdictional grounds, and 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[(a)(3)]." Ex parte Madison Cty. Dep't of Human Res.,

³The petitioner in Ex parte Franks presented in his petition a statement of good cause for failing to file his petition within the presumptively reasonable 42-day period following the entry of the ex parte order being challenged. Ex parte Franks, 7 So. 3d at 393. That statement included an averment that he had not been served with the complaint or the ex parte order until after the 42-day period had elapsed. Id. We concluded that that fact constituted good cause for the late filing of the petition. Id. at 794.

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261 So. 3d 381, 385 (Ala. Civ. App. 2017) (citing Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016)). We have explained that the principle allowing us to consider untimely petitions for the writ of mandamus "applies in cases in which a party argues that an order is void for want of due process." Ex parte Murray, 267 So. 3d 328, 332 (Ala. Civ. App. 2018); see also Ex parte M.F.B., 228 So. 3d 460, 462 (Ala. Civ. App. 2017) (explaining that "contentions regarding lack of notice and a hearing in connection with a court's ex parte limitation of [a parent's] visitation rights implicate due-process guarantees ... and do in fact go to the power of the juvenile court to enter [ex parte] orders [and] warrants consideration of the merits [of a petition for the writ of mandamus], notwithstanding the [petitioner's] noncompliance with Rule 21(a) (3), Ala. R. App. P.").

"'A writ of mandamus is an extraordinary remedy ... that should be granted only if the trial court clearly abused its discretion by acting in an arbitrary or capricious manner.' Ex parte Edwards, 727 So. 2d 792, 794 (Ala. 1998). The petitioner must demonstrate:

""(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;

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and (4) properly invoked jurisdiction of the court."'

"Ex parte Edwards, 727 So. 2d at 794 (quoting Ex parte Adams, 514 So. 2d 845, 850 (Ala. 1987))."

Ex parte D.J.B., 859 So. 2d 445, 448 (Ala. Civ. App. 2003).

The father argues that the ex parte visitation order should be vacated because the mother's motion for an ex parte temporary emergency order was not supported by the certification required by Rule 65(b). Rule 65(b) states, in pertinent part:

"A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

Indeed, the mother did not provide a Rule 65(b) certification in support of her request for ex parte relief. We have explained that the failure to provide a Rule 65(b) certification requires that an ex parte order be set aside. See Ex parte Hutson, 201 So. 3d 570 (Ala. Civ. App. 2016).

"In International Molders & Allied Workers Union, AFL-CIO-CLC v. Aliceville Veneers Division, Buchanan Lumber Birmingham, 348 So. 2d 1385, 1390 (Ala. 1977), our supreme court concluded that the earlier issuance of a temporary restraining order ('TRO'), which was not challenged in an appellate court, did not create a presumption favoring the granting of subsequent injunctive relief. The court explained:

"Rule 65(b), [Ala. R. Civ. P.], does not permit an ex parte [temporary restraining order] without a certification in writing to the trial court showing the efforts, if any, made to give notice to the adversary, accompanied by reasons supporting [the] claim that notice should not be required. The plain language of this rule assumes that notice is prima facie required and is intended to allow the trial court a studied opportunity to weigh the effect of an absence of notice in deciding to grant or refuse such extraordinary relief.... [T]he validity of the later injunction is not to be governed by the existence of the temporary restraining order which, had the motion been insisted upon, would have been subject to dissolution for the deficiencies identified.'

"Id. (emphasis added); see also Jacobs Broad. Grp., Inc. v. Jeff Beck Broad. Grp., LLC, 160 So. 3d 345, 354 (Ala. Civ. App. 2014).

"Similarly, commentators have pointed out that a federal court may issue a TRO without notice to the adverse party only if both prongs of Rule 65(b)(1), Fed. R. Civ. P., which is substantially the same as the pertinent portion of Rule 65(b), Ala. R. Civ. P., are met. 13 James Wm. Moore, Moore's Federal Practice § 65.32 (Matthew Bender 3d ed. 2014). 'Because an ex parte order "runs counter

to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute," the requirements of Rule 65(b)(1) must be scrupulously observed.' Id. (footnotes omitted). As the United States Supreme Court observed in Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 438-39, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974): 'The stringent restrictions imposed by [Rule 65(b), Fed. R. Civ. P.,] on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.' (Footnote omitted.)

"The Rules of Civil Procedure cannot be ignored with impunity. Because the mother's attorney failed to comply with the requirements of Rule 65(b), Ala. R. Civ. P., we conclude that the trial court's orders are due to be set aside. International Molders & Allied Workers Union, AFL-CIO-CLC v. Aliceville Veneers Div., Buchanan Lumber Birmingham, supra."

Ex parte Hutson, 201 So. 3d at 572-73. Furthermore, as the father also contends, the trial court is required to hold an evidentiary hearing as soon as practicable after the entry of an ex parte order. See Ex parte Hutson, 201 So. 3d at 574. Thus, the trial court is directed to set aside the ex parte visitation order and to hold further proceedings as necessary in a manner consistent with this opinion.

Regarding the PFA order, the father contends that the trial court lacked subject-matter jurisdiction to enter that order solely because the mother had not filed a protection-from-abuse complaint.⁴ He relies on LaRose v. LaRose, 114 So. 3d 822, 827 (Ala. Civ. App. 2012), in which this court determined that a trial court lacked subject-matter jurisdiction to modify an existing PFA order when the trial court in that case had not been presented with a petition to modify that PFA order. However, LaRose, which involved a trial court's power to modify a judgment, is not applicable to the situation in the present case, which involves whether the mother's complaint and motion for an ex parte temporary emergency order were sufficient to invoke the trial court's power to afford relief under the Act.

"Subject-matter jurisdiction is a simple concept:

⁴The father contended before the trial court that the mother did not meet the requirements for a PFA order because she had not alleged that she was a victim of any of the acts defined in Ala. Code 1975, § 30-5-2(1), as giving rise to an "abuse" for which a protection order may issue. See also Ala. Code 1975, § 30-5-5(a) (describing those persons entitled to file an action seeking protection from abuse as a victim of such abuse or, among others, the parent of a minor child). However, he does not make that argument in his mandamus petition, and we will not consider it in this opinion.

"Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong. The principle of subject matter jurisdiction relates to a court's inherent authority to deal with the case or matter before it. The term means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs.'

"21 C.J.S. Courts § 11 (2006). In determining a trial court's subject-matter jurisdiction, this Court asks "only whether the trial court had the constitutional and statutory authority" to hear the case.' Russell v. State, 51 So. 3d 1026, 1028 (Ala. 2010) (quoting Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006)). Problems with subject-matter jurisdiction arise if, for example, a party files a probate action in a juvenile court, a divorce action in a probate court, or a bankruptcy petition in a circuit court, because the nature or class of those actions is limited to a particular forum with the authority to handle them. There are, however, no problems with subject-matter jurisdiction merely because a party files an action that ostensibly lacks a probability of merit."

Ex parte Safeway Ins. Co. of Alabama, Inc., 148 So. 3d 39, 42-43 (Ala. 2013).

The circuit court is a court of general jurisdiction with jurisdiction over the parties' dispute, which arose out of their divorce judgment, as amended by the 2018 judgment. A party need not institute a separate action to secure a PFA order; "[a] protection order may be requested in any pending

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civil or domestic relations action" § 30-5-3(b). Although the mother may not have filed a pleading entitled "Protection From Abuse Complaint," she did seek relief afforded by the Act in her motion for an ex parte temporary emergency order. The mother filed a complaint seeking to hold the father in contempt and also sought ex parte relief to restrain the father's conduct and to limit his contact with her, the children, and Manderson, all of which is relief that may be afforded under the Act. See Ala. Code 1975, § 30-5-7(1), (2), (3), and (4) (providing that a trial court may enter an ex parte PFA order restraining harassing or threatening conduct; ordering the defendant to remain 300 feet away from residences, places of employment, schools, or other designated areas; and awarding temporary custody of children to the plaintiff); see also Rule 8(a) & (f), Ala. R. Civ. P. (requiring notice pleading and directing that we construe a pleading to do substantial justice based on the relief that the pleading requests); and Rule 54(c), Ala. R. Civ. P. (stating that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's

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pleadings"). The father has not presented a persuasive argument that the mother's complaint and motion did not invoke the subject-matter jurisdiction of the trial court to enter the PFA order.

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

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