REL: May 8, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2190520 and 2180521

Ex parte H.A.S.

PETITION FOR WRIT OF MANDAMUS

(In re: S.F.

v.

H.A.S.)

(Madison Juvenile Court, JU-18-406.01 and JU-18-406.03)

EDWARDS, Judge.

This is the third time that these parties have appeared before this court. See Ex parte H.A.S. (No. 2190447, March 2,

2020), ___ So. 3d ___ (Ala. Civ. App. 2020) (table) (petition denied as moot); H.A.S. v. S.F., [Ms. 2180278, September 6, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019). In H.A.S., we reversed the judgment of the Madison Juvenile Court ("the juvenile court") entered in case number JU-18-406.01 ("the dependency action"), in which the juvenile court had determined that M.G. ("the child") was dependent and had awarded custody of the child to S.F. ("the paternal grandmother"). Our instructions to the juvenile court were to dismiss the paternal grandmother's dependency petition and, thus, to return custody of the child to H.A.S. ("the mother"). After we overruled the paternal grandmother's application for a rehearing, she sought certiorari review in our supreme court, which was denied on January 10, 2020. We issued our certificate of judgment on January 10, 2020.

On February 24, 2020, the mother sought mandamus review in this court to compel the juvenile court to enter a judgment in compliance with this court's directive in H.A.S. On that same date, we called for answers to the mother's petition. Also on February 24, 2020, in response to the filing of the petition, the juvenile court entered a judgment in compliance

with our mandate in H.A.S., dismissing the paternal grandmother's dependency petition and returning custody of the child to the mother. Upon being notified of the entry of the juvenile court's judgment, we dismissed the mother's mandamus petition as moot. Ex parte H.A.S., supra.

During the pendency of the appeal in H.A.S., the paternal grandmother filed a verified petition to terminate the mother's parental rights to the child; that action was assigned case number JU-18-406.03 ("the termination-of-parental-rights action"). In her verified petition, the paternal grandmother asserted that the child had been found dependent in the judgment entered in the dependency action. She also alleged, in general, that the child remained dependent. To further support her petition, the paternal grandmother averred that the mother had been evicted from her last residence, that the mother had moved without notifying the paternal grandmother, that the mother's husband, Y.S., had been arrested for unlawful possession of a firearm, that the child exhibited odd behavior (crying and banging her head) upon returning from visits with the mother, and that the mother was not requiring the child to wear her eyeglasses

during visitations, resulting in a worsening of the child's eye condition. The mother answered the paternal grandmother's petition and filed a "counterclaim" in which she sought to have the termination-of-parental-rights action "denied" or "dismissed" because, she contended, it was precluded as a result of this court's opinion reversing the judgment entered in the dependency action. The mother did not specifically reference either the doctrine of res judicata or the doctrine of collateral estoppel in her "counterclaim."

After the issuance of our certificate of judgment in H.A.S., the paternal grandmother filed a petition on January 20, 2020, seeking an award of pendente lite custody in the termination-of-parental-rights action pending the trial. The paternal grandmother's motion was not verified, but it incorporated the allegations made in her termination-of-parental-rights petition, which was verified. The juvenile court apparently set the motion for pendente lite custody for a hearing to be held on February 26, 2020. However, on February 24, 2020, immediately after entering the order in the dependency action in compliance with our mandate in H.A.S., the juvenile court entered an order in the termination-of-

parental-rights action granting pendente lite custody of the child to the paternal grandmother.

The mother filed this petition for the writ of mandamus in this court on March 26, 2020, seeking review of the juvenile court's action in both the dependency action and in the termination-of-parental-rights action. Our clerk's office assigned the petition two separate appellate case numbers and consolidated the cases. In case number 2190520, the mother seeks mandamus relief based on her assertion that the juvenile court has failed to comply with this court's mandate in the dependency action by failing to enter a judgment awarding the mother custody of the child. In case number 2190521, the mother seeks mandamus relief from the February 24, 2020, order of the juvenile court granting pendente lite custody of the child to the paternal grandmother in the termination-of-parental-rights action without having held an evidentiary hearing. In addition, the mother also requests that we direct the juvenile court to dismiss the termination-of-parental-rights action on the grounds of res judicata or collateral estoppel. We called for answers to the mother's petition, and both the juvenile-court judge and the paternal grandmother filed answers.

In her answer, the paternal grandmother has provided a copy of an amended petition in the termination-of-parental-rights action filed with the juvenile court on April 1, 2020, in which it appears that the paternal grandmother has amended her petition "in its entirety" to instead seek a dependency determination and custody. That pleading, of course, postdates the mother's petition. In addition, the paternal grandmother has supported her answer with attachments relating to the mother's divorce action and a protection-from-abuse action filed by the mother against Y.S. Those documents do not indicate that they were filed in the juvenile court as exhibits to any pleading or motion before the February 26, 2020, pendente lite custody hearing or that they were presented to the juvenile court at that hearing.

However, the juvenile-court judge mentions the protection-from-abuse petition and the mother's divorce action in her answer to the mother's petition for the writ of mandamus, indicating that those documents and/or testimony concerning them was presented to the juvenile court at the pendente lite hearing. In addition, the juvenile court indicates that it intends to hear further testimony on the

pendente lite custody issue from the child's psychologist but that conflicts in the schedule of the attorney for the paternal grandmother and the issuance of the supreme court's administrative orders respecting the COVID-19 pandemic has prevented the setting of a hearing during which to take that testimony.

The Timeliness of the Petition

We first note that the mother's petition was not timely filed from the entry of the February 24, 2020, pendente lite order. The mother has included a statement of good cause for the tardy filing of her petition. See Rule 21(a)(3), Ala. R. App. P. (requiring a statement of good cause to be included with the petition if it is filed outside the presumptively reasonable time for filing). The mother's stated good cause is that her former counsel in the termination-of-parental-rights action had to request approval from a superior to file a petition for the writ of mandamus, that her former counsel did not communicate to the mother that a petition would not be filed until March 13, 2020 (which was 4 days after the 14-day period for filing the petition expired), and that the mother immediately located replacement counsel, who filed the

petition within 14 days of the mother's being notified that her former counsel would not be filing the petition for the writ of mandamus on her behalf. She also points out that she had hoped that, after the hearing held on February 26, 2020, the juvenile court would issue an order rescinding or modifying the February 24, 2020, pendente lite custody order.

We have previously considered whether a statement of good cause for the tardy filing of a petition for the writ of mandamus under Rule 21 is sufficient. See Ex parte J.B., 223 So. 3d 251, 254 (Ala. Civ. App. 2016); Ex parte K.A.S., 197 So. 3d 503, 507 (Ala. Civ. App. 2015). We have explained that,

> "[p]ursuant to Rule 21(a)(3), '[i]f a petition is filed outside th[e] presumptively reasonable time, it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time.' ... As we explained in Ex parte Fiber Transport, L.L.C., 902 So. 2d 98, 100-01 (Ala. Civ. App. 2004), a party seeking to convince this court to consider an untimely filed petition should discuss the factors set out in
>
> > "'[t]he "Committee Comments to Amendments to Rule 21(a) and 21(e)(4)[, Ala. R. App. P.,] Effective September 1, 2000," [which are as follows]:

> "'"[T]he prejudice to the petitioner of the court's not accepting the petition and the prejudice to the opposing party of the court's accepting it; the impact on the timely administration of justice in the trial court; and whether the appellate court has pending before it other proceedings relating to the same action, and as to which the jurisdiction of the appellate court is unchallenged."'"

Ex parte J.B., 223 So. 3d at 254.

In Ex parte J.B., in addition to discussing the facts relating to the trial court's conduct of the hearing at issue, the petitioner's statement of good cause relied upon

> "the fact that the prejudice to him will be considerable, because, he says, he will be required to litigate the Alabama action, in violation of his due-process rights, while, he states, 'the [respondent] will face little prejudice.' Regarding the 'impact on the timely administration of justice' in the Alabama court, the [petitioner] contends that the timely administration of justice 'will be served by prompt and final ruling' on this petition."

Id. We were further convinced that we should consider the petition in its entirety by the fact that, because we could consider that portion of the petition asserting a lack of subject-mater jurisdiction in spite of the untimeliness of the petition, see Ex parte K.R., 210 So. 3d 1106, 1112 (Ala.

2016), "we [had] pending before us 'other proceedings relating to the same action, and as to which the jurisdiction of the appellate court [may not be] []challenged.' Committee Comments to Amendments to Rule 21(a) and 21(e)(4), Ala. R. App. P." Ex parte J.B., 223 So. 3d at 255.

In Ex parte K.A.S., the petitioner explained in her statement of good cause that, despite working diligently after returning from a holiday, the attorney had been unable to complete the petition and file it until 1 day after the presumptively reasonable 14-day deadline. 197 So. 3d at 507. "[T]his court concluded that the one-day delay would not prejudice [the respondent] or impact the timely administration of justice but that not allowing the petition could prejudice the [petitioner] and the parties' child. Therefore, this court accepted the petition outside the presumptively reasonable time." Id.

The mother's statement of good cause does not address prejudice or the impact of her tardy petition on the timely administration of justice. She indicates her awareness of the need for the filing of the petition, but she relies on the fact that her former attorney in the termination-of-parental-

rights action failed to file the petition and waited to so inform her. This might indicate that the mother was prejudiced by the mishandling of the situation by that former attorney. Certainly, in light of our previous reversal of the judgment in the dependency action in H.A.S., we are aware of the prejudice to the mother inherent in the juvenile court's handling of the two cases so as to prevent the mother from receiving custody of the child, despite our mandate. Neither the paternal grandmother nor the juvenile-court judge challenges the mother's petition as being untimely. Thus, although the mother's statement of good cause might not be entirely sufficient, we will consider the mother's petition on the merits.

Standard of Review

> "'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; 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 Merits of the Mother's Petition in Case Number 2190520

Insofar as the mother challenges what she describes as the juvenile court's failure to follow this court's mandate in the dependency action, her petition in case number 2190520 lacks merit. The juvenile court entered the appropriate order dismissing the paternal grandmother's dependency petition and awarding the mother custody of the child, albeit after the mother filed the previous mandamus petition, on February 24, 2020. That concluded the dependency action in full compliance with our mandate. Thus, the petition in case number 2190520 is denied.

The Merits of the Mother's Petition in Case Number 2190521

The mother's arguments relating to the termination-of-parental-rights action also fail. She first contends that the pendente lite custody order was entered without taking evidence, thus violating her due-process rights. See Ex parte Russell, 911 So. 2d 719, 724-25 (Ala. Civ. App. 2005). However, the paternal grandmother's motion seeking pendente lite custody, although unverified, incorporated the verified

allegations made in her termination-of-parental-rights petition, some of which were quite factually specific, including allegations that the mother had been evicted again since the conclusion of the trial of the dependency action, that the mother's husband had been arrested and charged with the unlawful possession of a handgun, that the child's eye condition continued because the mother was not requiring the child to wear her glasses, and that the child cried and banged her head against objects upon returning from visits with the mother. See Ex parte Quinlan, 922 So. 2d 914, 917 (Ala. 2005) (quoting 5A Charles Alan Wright & Arthur K. Miller, Federal Practice and Procedure: Civil § 1339 (3d ed. 2004)) (explaining that "'[a] verified pleading may be treated as an affidavit and used in the action in any way in which an affidavit would be suitable," provided that it "contain[s] facts that the affiant knows to be true of his or her own knowledge and ha[s] a certain level of factual specificity"). Thus, although the juvenile court had not held an evidentiary hearing at the time of the entry of the February 24, 2020, pendente lite custody order, the juvenile court had before it some evidence relating to the mother's fitness for custody.

See Ex parte A.J., 108 So. 3d 1040, 1046 (Ala. Civ. App. 2012).

Furthermore, although it is quite clear that the juvenile court had not yet held a hearing on the pendente lite custody issue at the time it entered the February 24, 2020, order, it did hold a hearing two days later, on February 26, 2020, at which the mother was, presumably, able to present evidence refuting the paternal grandmother's verified allegations. The mother does not contend that, like the court in Ex parte Russell, the juvenile court took no evidence at that hearing. In fact, according to her mandamus petition, the mother herself had hoped that the February 26, 2020, hearing would result in the juvenile court's either rescinding or amending the February 24, 2020, pendente lite custody order. Moreover, the answers of the paternal grandmother and of the juvenile-court judge make clear that testimony was taken on that date, some of which supported the allegations of the paternal grandmother. Thus, although the juvenile court should perhaps have waited to enter the pendente lite custody order until after the February 26, 2020, hearing, or perhaps should have entered a new order reaffirming the February 24, 2020, order

after the hearing (which, it appears from the juvenile-court judge's answer, the juvenile court had intended to do after the conclusion of the testimony of the child's psychologist, which was never taken), this court cannot conclude, under the facts and circumstances of this case, that the juvenile court did not provide the mother sufficient process or that the juvenile court lacked any evidence in support of the February 24, 2020, pendente lite custody order. Thus, insofar as the mother's petition in case number 2190521 seeks a writ directing the juvenile court to set aside the February 24, 2020, pendente lite custody award on the ground that no evidentiary hearing was held, the petition is denied.

The mother also requests a writ directing the juvenile court to dismiss the paternal grandmother's termination-of-parental-rights action, which, as noted above, appears to have been amended to seek only a dependency finding and not the termination of the mother's parental rights. Although the mother did not file a motion to dismiss the paternal grandmother's termination-of-parental-rights action on the basis of either the doctrine of res judicata or the doctrine of collateral estoppel, she did file a "counterclaim" in which

she requested a dismissal of the action based on this court's reversal of juvenile court's judgment in the dependency action. Assuming, without deciding, that the "counterclaim" was sufficient to apprise the juvenile court that the mother had requested dismissal of the paternal grandmother's termination-of-parental-rights (now dependency) action on the basis of either res judicata or collateral estoppel, the mother is not entitled to have the paternal grandmother's termination-of-parental-rights (now dependency) action dismissed.

> "Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.
>
> > "'The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label "claim preclusion," while collateral estoppel ... refers to "issue preclusion," which is a subset of the broader res judicata doctrine.'
>
> "Little v. Pizza Wagon, Inc., 432 So. 2d 1269, 1272 (Ala. 1983) (Jones, J., concurring specially). See also McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998). In Hughes v. Martin, 533 So. 2d 188 (Ala. 1988), this Court explained the rationale behind the doctrine of res judicata:

> "'Res judicata is a broad, judicially developed doctrine, which rests upon the ground that public policy, and the interest of the litigants alike, mandate that there be an end to litigation; that those who have contested an issue shall be bound by the ruling of the court; and that issues once tried shall be considered forever settled between those same parties and their privies.'

"533 So. 2d at 190. The elements of res judicata are

> "'(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions.'

"Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). 'If those four elements are present, then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation.' 723 So. 2d at 636. Res judicata, therefore, bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action.

"The corollary to the above-stated rationale is that the doctrine of res judicata will not be applied to bar a claim that could not have been brought in a prior action. Old Republic, ... 790 So. 2d at 928. See also United States v. Maxwell, 189 F. Supp. 2d 395, 406 (E.D. Va. 2002); Restatement (Second) of Judgments, § 26(1)(c) (1982), Restatement (Second) of Judgments, § 51(1)(a). 'In order for a judgment between the same parties to be res judicata, it must, among other things, ... involve a question that could have been litigated in the former cause or proceeding.' Stephenson v. Bird, 168 Ala. 363, 366, 53 So. 92, 93 (1910)."

Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 516-17 (Ala. 2002) (footnotes omitted).

Insofar as the mother sought to have the paternal grandmother's termination-of-parental-rights action dismissed, we note that a dependency action and a termination-of-parental-rights action are not identical causes of action. Thus, the doctrine of res judicata would not have been applicable to the mother's argument before the paternal grandmother amended the termination-of-parental-rights petition. Now that the paternal grandmother's petition has been amended and appears to be a new dependency action, we will address the mother's argument that the doctrine of res judicata bars the paternal grandmother's petition.

Based on our caselaw, the application of a preclusive doctrine like the doctrine of res judicata is not appropriate in the present case. First, our supreme court has explained that "two causes of action are the same for res judicata purposes '"when the same evidence is applicable in both actions."'" Chapman Nursing Home, Inc. v. McDonald, 985 So. 2d 914, 921 (Ala. 2007) (quoting Old Republic Ins. Co. V. Lanier, 790 So. 2d 922, 928 (Ala. 2000), quoting in turn

Hughes v. Martin, 533 So. 2d 188, 191 (Ala. 1988)). As discussed below, the allegations contained in the paternal grandmother's termination-of-parental-rights petition and her amended petition include facts that did not exist at the time of the entry of the judgment in the dependency action.

Secondly, as we have explained in the context of successive petitions seeking the termination of parental rights, the doctrine of res judicata does not prevent a juvenile court from terminating parental rights on a successive petition based upon both previous evidence and new evidence relating to a child's dependency and a parent's ability and willingness to parent the child. L.M. v. Shelby Cty. Dep't of Human Res., 86 So. 3d 377, 384 (Ala. Civ. App. 2011). We explained in L.M. that

> "[the Department of Human Resources] presented new evidence at the second termination trial that could not have been presented at the first termination trial, and, thus, the second termination actions were not based on evidence that was the same as the evidence presented at the first trial. Accordingly, we conclude that the doctrine of res judicata did not prevent presentation of evidence of matters that occurred before the first termination trial in the second termination trial and that the juvenile court properly weighed all the existing evidence to determine whether there was clear and convincing evidence sufficient to support the termination of the parental rights of the mother and the father.[4]

"_____

> "[4]Such a conclusion finds support in our caselaw regarding termination of parental rights, such as the well settled principle that, 'when deciding whether grounds to terminate parental rights exist, the juvenile court is not limited to evidence of current conditions; it may also consider the past history of a parent.' R.L.M.S. v. Etowah Cnty. Dep't of Human Res., 37 So. 3d 805, 808 (Ala. Civ. App. 2009). This court has also recognized that a finding of dependency may be based on the totality of the circumstances. See V.G. v. Madison Cnty. Dep't of Human Res., 989 So. 2d 550, 554 (Ala. Civ. App. 2008); J.W. v. C.H., 963 So. 2d 114, 120 (Ala. Civ. App. 2007); and R.G. v. Calhoun Cnty. Dep't of Human Res., 716 So. 2d 219, 221–22 (Ala. Civ. App. 1998)."

86 So. 3d at 384.

Furthermore, our supreme court has pointed out that, "by its very nature, custody is always temporary and never permanent." Ex parte J.P., 641 So. 2d 276, 278 (Ala. 1994). As a result, "matters of child custody are never res judicata, and the circuit court retains jurisdiction over the matter for modification upon a showing of changed circumstances." Ex parte Lipscomb, 660 So. 2d 986, 989 (Ala. 1994). In the context of juvenile-court matters, our caselaw provides that a juvenile court is not required to ignore the past history of the family, see Ex parte State Dep't of Human Res., 624 So. 2d 589, 593 (Ala. 1993) ("A court may consider the past history

of the family, as well as evidence of its present conditions."), while also requiring that the juvenile court have before it evidence relating to current conditions of the parents in order to conclude that a child is dependent and that the termination of parental rights is appropriate. D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003) ("This court has consistently held that the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence.").

Based on the holding in L.M. and the principles governing custody, dependency, and termination-of-parental-rights actions, we see no reason not to conclude, similarly as we did in L.M., that, despite the fact that the paternal grandmother's action might involve reliance, in part, on facts underlying the previous determination of dependency, which this court reversed, the doctrine of res judicata does not bar the paternal grandmother's action. The paternal grandmother also alleged new facts in her original petition in the

termination-of-paternal-rights action and in her amended petition, including the arrest of the mother's husband, which could further prove the paternal grandmother's allegation that the child's exposure to him might present safety issues and is not in the child's best interest; the mother's most recent eviction, which may well indicate a continuing pattern of instability that the paternal grandmother could link to an impact on the child; the child's responses to visitation, which might indicate that the child is being harmed by exposure to the mother and/or the mother's husband; the mother's failure to take action to treat the child's eye condition, which the paternal grandmother could use to establish the child's current dependency or the unwillingness of the mother to fulfill her parental responsibilities; and the mother's allegations in her protection-from-abuse action and divorce action indicating that the child has been exposed to domestic violence between the mother and Y.S. Our reversal of the judgment in the dependency action does not prevent the paternal grandmother from presenting new and further evidence of the current conditions of the mother and the child that might support a conclusion that the child is currently

dependent. Thus, the mother's petition in case number 2190521, insofar as it requests that this court order the juvenile court to dismiss the paternal grandmother's termination-of-parental-rights (now dependency) petition, is denied.

2180520 -- PETITION DENIED.

2180521 -- PETITION DENIED.

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

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