REL: June 2, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2190611 and 2190612

Ex parte R.H.

PETITION FOR WRIT OF MANDAMUS

(In re: Marshall County Department of Human Resources

v.

R.H.)

(Marshall Juvenile Court, JU-19-709.01 and JU-19-709.02)

MOORE, Judge.

R.H. ("the mother") has filed a petition for the writ of mandamus requesting that this court direct the Marshall

Juvenile Court ("the juvenile court") to vacate its order entered in case number JU-19-709.01 and in case number JU-19-709.02 granting Emery D. Massey the authority to execute a pediatric palliative and end-of-life ("PPEL") care order regarding K.H. ("the child").[1] We grant the petition.

Background

The child was adjudicated a dependent child by the juvenile court in 2019 in case number JU-19-709.01. The dependency judgment awarded temporary legal custody of the child to the Marshall County Department of Human Resources ("DHR"). DHR subsequently filed a complaint petitioning the juvenile court to terminate the parental rights of the mother; that action was assigned case number JU-19-709.02. The juvenile court appointed attorney Emery D. Massey as the guardian ad litem for the child in both cases.

On April 9, 2020, Massey filed in both cases a "motion for immediate court order to comply with requests of physicians." In that motion, Massey requested that the juvenile court enter an order allowing for the natural death

[1]This court assigned the petition separate case numbers corresponding to the separate actions below, and we have consolidated these mandamus proceedings ex mero motu.

of the child, who is suffering from an incurable illness known as Batten Disease and from an extremely painful condition known as toxic epidermal necrolysis. On April 10, 2020, the juvenile court, without conducting a hearing, granted the motion in case number JU-19-709.01 by entering an order providing, in pertinent part: "[The child]'s physicians may place an order to 'Allow Natural Death' in his file." Upon request by the mother, the juvenile court stayed enforcement of that order and set the matter for a hearing on May 4, 2020.

The mother did not provide this court with a transcript of the hearing. The order being challenged by the mother summarizes the hearing as follows. The parties called two attorneys to testify regarding the question whether the juvenile court had jurisdiction to enter a PPEL care order; one testified that the juvenile court lacked subject-matter jurisdiction and the other testified that the juvenile court had sufficient subject-matter jurisdiction. The juvenile court did not receive into evidence any further live testimony. Massey submitted a letter from the child's primary treating physician detailing the child's terminal condition, the efforts made to treat the child throughout his treatment

at a Birmingham hospital, and the recommendation that a PPEL care order allowing for the natural death of the child be placed in the child's medical records. In addition, the juvenile court accepted the following stipulations of the parties: that four other physicians who were also treating the child would testify similarly to the contents in the letter from the child's primary treating physician and that all four of those physicians agreed that the child should be allowed a natural death for the reasons set out in a letter by one of those physicians; that Massey would testify that it would be in the best interests of the child for a PPEL care order to be placed in the child's medical records; that the mother would testify that she had seen the child approximately 10 days earlier and that the child had said "Mama," which, the mother would assert, showed signs of the child's improvement; that the mother did not want a PPEL care order issued; and that the hospital social workers would testify that the visit the mother described had not occurred.

On May 8, 2020, the juvenile court entered an order ("the challenged order") in both cases, finding that it had jurisdiction over the controversy and authorizing Massey to

act as the representative for the child in executing a PPEL care order. The mother filed a single petition for the writ of mandamus in this court, referencing both cases, on that same date. The juvenile court has stayed enforcement of the challenged order pending this court's ruling on the petition.

Standard of Review

> "'Mandamus is an extraordinary remedy and will be granted 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."'
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> "Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003)(quoting Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)). Mandamus will lie to direct a trial court to vacate a void judgment or order. Ex parte Chamblee, 899 So. 2d 244, 249 (Ala. 2004)."

Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232 (Ala. 2004).

Analysis

I. Jurisdiction of the Juvenile Court

The mother initially argues that the juvenile court lacked jurisdiction to issue the challenged order. As explained above, the matter came before the juvenile court through a motion filed simultaneously in a dependency action

and a termination-of-parental-rights action, over which the juvenile court has statutory jurisdiction. See Ala. Code 1975, § 12-15-114(a) (setting forth the jurisdiction of juvenile courts in dependency actions), and § 12-15-114(b)(2) (setting forth the jurisdiction of juvenile courts in termination-of-parental-rights actions). Although recognizing the general subject-matter jurisdiction of the juvenile court in the underlying proceedings, the mother maintains that the juvenile court did not have the specific authority under the Alabama Juvenile Justice Act ("the AJJA"), Ala. Code 1975, § 12-15-101 et seq., to order the placement of a PPEL care order in the child's medical files. The mother argues further that the Natural Death Act ("the NDA"), Ala. Code 1975, § 22-8A-1 et seq., controls the question of jurisdiction over disputes concerning a child's PPEL care order and that the NDA does not grant such jurisdiction to juvenile courts. We consider the jurisdictional issue as a matter of first impression.

The NDA was enacted in 1981 to authorize physicians to follow the directives of adults regarding the withholding or withdrawal of life-sustaining treatment. See Act No. 81-722, Ala. Acts 1981. In 2018, the legislature passed the Alex

Hoover Act ("the AHA"), Act No. 2018-466, Ala. Acts 2018, which governs the application of the NDA in cases involving a "qualified minor," i.e., a minor "who has been diagnosed as a terminally ill or injured patient and whose diagnosis has been confirmed by at least one additional physician who is not the patient's attending physician." Ala. Code 1975, § 22-8A-3(17).[2] Section 22-8A-15(a), Ala. Code 1975, the operative section of the AHA, provides, in pertinent part:

> "The representative of a qualified minor may execute a directive with respect to the extent of medical treatment, medication, and other interventions available to provide palliative and supportive care to the qualified minor by completing and signing an Order for PPEL Care form. Once completed and signed by the representative, the attending physician may complete and sign the executed directive and enter the directive into the medical record of the qualified minor. Once properly entered and received into the medical record, the directive is deemed a valid Order for PPEL Care ...."

A PPEL care order is

> "[a] directive that, once executed by the representative of a qualified minor and entered into the record by the attending physician of the qualified minor in accordance with Section 22-8A-15, becomes the medical order for all health care providers with respect to the extent of use of

[2]The legislature has amended the NDA several times. However, only the amendments enacted pursuant to the AHA are generally at issue in this case.

> emergency medical equipment and treatment, medication, and any other technological or medical interventions available to provide palliative and supportive care to the qualified minor."

§ 22-8A-3(12).

The challenged order basically adjudicated a dispute among the parties arising under § 22-8A-15(a) by directing Massey to execute and to have placed in the child's medical records a PPEL care order. The mother claims that Ala. Code 1975, § 22-8A-9(e), required the parties to submit that controversy to the Jefferson Circuit Court.

Section 22-8A-9(e) provides, in pertinent part:

> "Nothing in [the NDA] shall impair or supersede the jurisdiction of the circuit court in the county where a patient is undergoing treatment to determine whether life-sustaining treatment or artificially provided nutrition and hydration should be withheld or withdrawn in circumstances not governed by [the NDA] or to determine if the requirements of [the NDA] have been met."

Section 22-8A-9(e) recognizes the jurisdiction of a circuit court in the county where the patient is undergoing treatment to adjudicate a dispute regarding, among other things, whether the requirements of the NDA have been met. Assuming, without deciding, that § 22-8A-9(e) applies in this case, the Jefferson Circuit Court would have jurisdiction to decide the

dispute among the parties regarding whether the requirements of the NDA have been met. However, § 22-8A-9(e) does not provide that the jurisdiction of that court shall be "exclusive."[3]

In Worley v. Jinks, 361 So. 2d 1082 (Ala. Civ. App.), writ quashed, 361 So. 2d 1089 (Ala. 1978), this court considered a similar situation. The Worleys commenced an adoption proceeding in the DeKalb Probate Court. The probate court eventually transferred the adoption proceedings to the

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[3]Section 22-8A-11(j), Ala. Code 1975, provides:

> "If any relative, health care provider who is involved directly in the care of the patient, or other individual who is involved directly in providing care to the patient desires to dispute the authority or the decision of a surrogate to determine whether to provide, withhold, or withdraw medical treatment from a patient, he or she may file an action for declaratory and injunctive relief in the circuit court for the county where the patient is under treatment. A health care provider who is confronted by more than one individual who claims authority to act as surrogate for a patient may file an action for declaratory relief in the circuit court for the county where the patient is under treatment."

Assuming, without deciding, that § 22-8A-11(j) applies to this case, that statute also does not vest "exclusive" jurisdiction in the circuit court to decide surrogacy disputes arising under the NDA.

DeKalb District Court, Juvenile Division, pursuant to Ala. Code 1975, § 12-12-35(a) ("Adoption proceedings, primarily cognizable before the probate court, may be transferred to the district court on motion of a party to the proceeding in probate court."). The Worleys argued that the DeKalb District Court could not exercise jurisdiction over the adoption proceedings because Article VI, § 144, of the Alabama Constitution of 1901 provides, in pertinent part: "There shall be a probate court in each county which shall have general jurisdiction of ... adoptions ...." This court rejected that argument, concluding that the constitutional provision granted probate courts "general," but not "exclusive," jurisdiction over adoption proceedings. 361 So. 2d at 1086. Under Worley, a statute vesting jurisdiction in one court, without specifying that the jurisdiction is "exclusive," does not divest another court of any concurrent jurisdiction that court has been granted over the same subject matter.

The mother maintains that the juvenile courts do not have concurrent jurisdiction over cases arising under the NDA because, she says, the legislature has not granted juvenile courts any statutory authority over PPEL care orders

concerning a dependent child. This argument actually does not concern the general subject-matter jurisdiction of the juvenile court; rather, it pertains to the separate jurisdictional question of the specific authority of the juvenile court to make a particular order in a case within its general subject-matter jurisdiction. "'The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.'" Espinosa v. Espinosa Hernandez, 282 So. 3d 1, 12 n.9 (Ala. Civ. App. 2019) (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317 (1870)). We therefore examine the AJJA to determine if the juvenile court had statutory authority to enter the challenged order.

Section 12-15-103(f), Ala. Code 1975, provides that "[t]he juvenile court shall have and exercise equity power," which includes the parens patriae power. See Ex parte Department of Mental Health, 511 So. 2d 181, 185 (Ala. 1987). The parens patriae power is the power of the state, acting as the sovereign parent, to assume custody and control of a dependent child in order to take all actions necessary to

protect the welfare and best interests of the child, see York v. Willingham, 18 Ala. App. 59, 60, 88 So. 218, 218 (1920), which includes, in appropriate circumstances, the power to issue orders relating to PPEL care orders regarding a "qualified minor" under the AHA.

> "The court has an equitable duty to protect the welfare of the children within its jurisdiction. 'The state has a "parens patriae interest in preserving and promoting the welfare of the child...."' (In re Sade C. (1996) 13 Cal. 4th 952, 989 [55 Cal. Rptr. 2d 771, 920 P.2d 716], quoting Santosky v. Kramer (1982) 455 U.S. 745, 766 [102 S.Ct. 1388, 1401, 71 L.Ed.2d 599].) The parens patriae power permits a court with jurisdiction over an individual under a disability to order withdrawal of his or her life-sustaining medical treatment. (In re Quinlan (1976) 70 N.J. 10 [355 A.2d 647, 665–666, 79 A.L.R.3d 205].) As the court explained in In re Quinlan, the first significant case considering the rights of the incompetent with respect to withdrawal of life-sustaining medical treatment, the courts have a nondelegable responsibility to make these decisions as a result of their inherent equitable powers. (Ibid.)"

In re Christopher I., 106 Cal. App. 4th 533, 557, 131 Cal. Rptr. 2d 122, 139 (2003), overruled by implication on other grounds by In re Zeth S., 31 Cal. 4th 396, 73 P.3d 541, 2 Cal. Rptr. 3d 683 (2003); see also Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982) (holding that the issue whether to withhold medical treatment for a child in the care of a

welfare agency properly falls within the jurisdiction of the juvenile court insofar as that court is a statutory court charged with the care of dependent children).

The legislature has codified the parens patriae power of a juvenile court over a dependent child at § 12-15-314, Ala. Code 1975, which provides, in pertinent part, that,

> "[i]f a child is found to be dependent, the juvenile court may make any of the following orders of disposition to protect the welfare of the child:
>
> "....
>
> "... any other order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child."

§ 12-15-314(a). In In re K.I., 735 A.2d 448, 453 (D.C. 1999), the Court of Appeals for the District of Columbia considered a District of Columbia statute containing similar language to authorize the Family Division of the Superior Court, the District of Columbia's version of our juvenile court, to enter a do-not-resuscitate order regarding a neglected child.

The neglected child at issue in K.I., K.I., had been neurologically devastated and had become unresponsive. K.I.'s doctors believed that K.I. would inevitably succumb to the

injuries and therefore should not be subjected to painful resuscitation techniques. The District of Columbia's child-welfare agency had been awarded legal custody of K.I., but it excluded itself from making the decision to authorize a do-not-resuscitate order for the child. The mother and the father of K.I. disagreed as to the best course for the child. The controversy eventually went before the Family Division of the Superior Court, which authorized the do-not-resuscitate order. On appeal, the District of Columbia Court of Appeals relied on D.C. Code § 16-2320(a)(5) in determining that the Family Division of the Superior Court had been vested with the parens patriae power to enter the order. Section 16-2320(a)(5) provided the Family Division of the Superior Court the power to "'make such ... disposition [of a dependent child] as is not prohibited by law and as the Division deems to be in the best interests of the child.'"

The facts of K.I. bear a striking resemblance to those in this case in which the juvenile court received evidence indicating that the child suffers from a terminal illness that has blinded the child and has left the child unresponsive to any stimuli other than pain and discomfort. According to the

child's physicians, the child will, as his disease progresses, inevitably go into respiratory distress. The techniques that would be used to resuscitate the child, including chest compressions and placing the child on a ventilator, would themselves be painful and would only prolong the agony of the child. The medical experts involved opined that the child should not undergo those resuscitation techniques but should be allowed to die a natural death. DHR has been awarded legal custody of the child, but it asserts that it lacks the authority to make a decision regarding a PPEL care order for the child. Massey and the mother disagree as to the best course for the child. Like the Family Division of the Superior Court in K.I., the juvenile courts of this state are vested with the parens patriae power to make any order of disposition the court determines to be in the welfare and best interests of a dependent child. See Ala. Code 1975, § 12-15-314(a)(4). Following the reasoning in K.I., that grant of power gives juvenile courts of this state the statutory authority to determine whether a PPEL care order should be executed and placed in the medical file of a dependent child.

Contrary to the mother's contention, the absence of more specific statutory language authorizing juvenile courts to withhold medical treatment from a dependent child does not preclude a juvenile court from exercising its general parens patriae power to adjudicate issues involving a PPEL care order. Section 12-15-115(b)(1)[4] and § 12-15-130(f),[5] Ala. Code 1975, among other things, authorize juvenile courts to determine whether a dependent child requires medical care and to order appropriate and necessary medical care as the

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[4]Section 12-15-115(b)(1) provides:

> "(b) A juvenile court also shall have original jurisdiction in proceedings concerning any child in ... the following instances:
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> > "(1) The child requires emergency medical treatment in order to preserve his or her life, prevent permanent physical impairment or deformity, or alleviate prolonged agonizing pain."

[5]Section 12-15-130(f) provides, in pertinent part:

> "Upon examination, if it appears that the child is in need of surgery, medical treatment or care, hospital care, or dental care, the juvenile court may cause the child to be treated by a competent physician, surgeon, or dentist or placed in a public hospital or other institution for training or care or in an approved private home, hospital, or institution, which will receive him or her for like purposes. ..."

circumstances require. As other jurisdictions have recognized,

> "the empowerment to determine medical care of a child includes the [c]ourt's power to enter [o]rders terminating those procedures. The mandate of juvenile courts to act in furtherance of the child's welfare provides the authority to make medical care decisions, including the entry of a DNR [Do Not Resuscitate] Order, where the child is in the custody of the state."

In re Truselo, 846 A.2d 256, 266 (Del. Fam. Ct. 2000) (citing In re C.A., 236 Ill. App. 3d 594, 603 N.E.2d 1171, 177 Ill. Dec. 797 (1992), and Custody of a Minor, supra) (footnotes omitted).

The Illinois Juvenile Court Act contained provisions authorizing the juvenile courts of that state to approve medical procedures necessary to safeguard the life or health of a dependent child in the temporary custody of the state, but the Act did not specify that the juvenile courts could also order the withholding or withdrawal of life-sustaining medical treatment. In construing those provisions, the Fourth Division of the Appellate Court of Illinois held:

> "In our view, these provisions support the guardian's general standing to petition the court for authority to consent to a medical judgment made by the ward's treating physicians, even when that judgment is to discontinue life-sustaining medical

treatment. The court is charged with ruling on all matters presented to it regarding the welfare of the child. Moreover, the Juvenile Court Act provides for court review of matters affecting the ward on a regular basis. For example, the guardian is required, periodically, to file reports in the court to ensure that case plans involving the wards are being implemented. See Ill. Rev. Stat. 1991, ch. 37, par. 802-28(2).

"In Illinois, no court of review has addressed whether the Juvenile Court Act provides judges with authority to consent to the placement of a DNR [do not resuscitate] order on a minor ward's medical chart. Other jurisdictions have accepted the authority of a juvenile court to approve such an order, however. In Custody of a Minor (1982), 385 Mass. 697, 434 N.E.2d 601, the child was suffering from a terminal cardiac condition with no known cure and was on a respirator. The hospital sought entry of a DNR order and the Massachusetts trial court found that it would be in the child's best interest not to be resuscitated if he went into cardiac or respiratory arrest. On appeal, the Supreme Judicial Court affirmed, holding that once a child in need of care and protection is committed to the Department of Social Services, the juvenile court has authority to make medical care decisions, including the one in question. See also In re Guardianship of Hamlin (1984), 102 Wash. 2d 810, 689 P.2d 1372 (Court held that court-appointed guardian of ward with mental age of one year had statutory authority to consent to termination of life support systems, even without court intervention, but that any interested party could file petition in court and court would intervene in cases of conflict between hospital, prognosis committee, attending physicians, or guardian); In re L.H.R. (1984), 253 Ga. 439, 321 S.E.2d 716 (Subject to certain safeguards, parents or legal guardian of terminally ill infant or incompetent adult in comatose state could consent to removal of life support without prior judicial

> intervention). See also Annot., Judicial Power To Order Discontinuance of Life-Sustaining Treatment (1986), 48 A.L.R. 4th 67.
>
> "Our juvenile court is charged with implementing its legislative mandate to care for those minors found to be in need of the State's protection. We believe that the court acted properly in hearing the petition and in concluding that C.A.'s guardian could consent to the placement of a DNR order on her charts under certain conditions."

In re C.A., 236 Ill. App. at 605–06, 603 N.E.2d at 1178, 177 Ill. Dec. At 804; see also In re Interest of Tabatha R., 252 Neb. 687, 695, 564 N.W.2d 598, 604, opinion amended on denial of reh'g, 252 Neb. 864, 566 N.W.2d 782 (1997) (holding that juvenile court had authority to decide whether to remove a dependent child from life-support measures and whether to resuscitate child as part of its statutory oversight power of "medical services" provided to dependent children).

In line with those cases, we hold that the provisions of the AJJA governing medical care for dependent children do not limit the juvenile courts' parens patriae power to authorize PPEL care orders. In so holding, we join the other courts that have considered essentially the same jurisdictional question under their respective statutes and have unanimously reached the same conclusion. See, e.g., In re Christopher I.,

supra; Lovato v. District Court In & For Tenth Judicial Dist., 198 Colo. 419, 424, 601 P.2d 1072, 1075 (1979); Hunt v. Division of Family Servs., 146 A.3d 1051, 1064 (Del. 2015); In re Truselo, supra; In re K.I., supra; D.K. v. Commonwealth of Kentucky ex rel. Cabinet for Health & Family Servs., 221 S.W.3d 382 (Ky. Ct. App. 2007); In re C.A., supra; In re P.V.W., 424 So. 2d 1015 (La. 1982); Custody of a Minor, supra; and In re AMB, 248 Mich. App. 144, 640 N.W.2d 262 (2001). Therefore, we reject the mother's contention that the juvenile court lacked jurisdiction to enter the challenged order.

II. Alleged Violations of the NDA

A. Alleged Violation of PPEL Care Order Format

The mother next argues that the challenged order does not comport with the NDA because, she says, the juvenile court did not fill out an "Order for PPEL Care Form" approved by the Alabama Department of Public Health and signed by the representative of the child and the child's attending physician, as required by § 22-8A-15(a). The mother contends that the challenged order also does not comply with the rules and requirements promulgated by the Alabama Department of Public Health, which establish the specific PPEL Care Order

Form and the protocol for filling out and placing the form in the qualified minor's medical file. See Regulation 420-5-19-.03, Ala. Admin. Code (Dep't of Public Health), and Appendix III to Regulation 420-5-19-.03. Based on those alleged violations, the mother contends that the juvenile court did not effectively enter a PPEL care order.

The mother misapprehends the substance of the challenged order. The juvenile court did not purport to make a PPEL care order itself. Instead, the juvenile court appointed Massey as the representative of the child to execute the PPEL care order form for placement in the child's medical file. The challenged order specifically requires Massey to follow the pertinent regulations and to execute and submit the form promulgated by the Alabama Department of Public Health. We find no merit in the mother's argument that the juvenile court improperly circumvented § 22-8A-15(a) and the regulations and procedures for making an effective PPEL care order.

B. Appointment of Guardian Ad Litem As Representative

Finally, we judicially notice that the challenged order appoints Massey, a guardian ad litem, as the representative of

the child for the purpose of executing the PPEL care order. A "representative of a qualified minor" is defined as

> "[a]ny of the following:
>
> > "a. A parent of a qualified minor whose medical decision-making rights have not been restricted.
> >
> > "b. A legal guardian of a qualified minor.
> >
> > "c. A person acting as a parent, as the term is defined in [Ala. Code 1975, §] 30-3B-102, of a qualified minor."

Ala. Code 1975, § 22-8A-3(18) (emphasis added). A guardian ad litem is not a legal guardian. See Ala. Code 1975, § 26-2A-20(7) (defining "guardian" to exclude "one who is merely a guardian ad litem"), and § 12-15-102(17) (defining "legal guardian" to exclude a guardian ad litem). A guardian ad litem also is not a parent or a person acting as a parent under Ala. Code 1975, § 30-3B-102.[6]

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[6]Section 30-3B-102(13), Ala. Code 1975, defines "person acting as a parent" as:

> "A person, other than a parent, who:
>
> > "a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

The members of this court disagree as to whether the mother argued in her mandamus petition that the juvenile court violated § 22-8A-3(18) by improperly appointing a guardian ad litem, Massey, as the child's representative. Regardless, the mother has failed to present any materials showing that she raised this issue in the juvenile-court proceedings. The materials attached to the mandamus petition and the answers do not reference any such argument. None of the parties attached the mother's motion to set aside the April 10 order or the transcript of the May 4 hearing, which would have revealed to this court the exact arguments made before the juvenile court. See Rule 21(a)(1)(F), Ala. R. App. P. (requiring parties to append to the mandamus petition and answer "any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition"). The challenged order itself does not indicate that the parties questioned the capacity of Massey to act as a representative of the child under § 22-8A-3(18) or that they submitted that question to the juvenile court for adjudication.

> "b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this state."

Ordinarily, when a petitioner has not raised a point in support of the issuance of a writ of mandamus before the lower court, that point is not preserved for the appellate court's consideration. See State v. Reynolds, 887 So. 2d 848, 851-52 (Ala. 2004) ("This Court will not ... issue a writ of mandamus commanding a trial judge to rescind an order[] based upon a ground asserted in the petition for the writ of mandamus that was not asserted to the trial judge, regardless of the merits of a petitioner's position in the underlying controversy."). Furthermore, an appellate court cannot consider issues not argued by a petitioner, which are considered to be waived. See Braxton v. Stewart, 539 So. 2d 284, 286 (Ala. Civ. App. 1988) ("An appeals court will consider only those issues properly delineated as such, and no matter will be considered ... unless presented and argued in brief."). However,

> "'[a]n exception to the rule that an unpreserved issue will not be considered on appeal exists where the interests of minors or incompetents are involved. [...] The duty to protect the rights of minors and incompetents has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors can be considered by this court ex mero motu.'"

Berry v. Berry, 2018 Pa. Super. 276, 197 A.3d 788, 797 (2018) (quoting South Carolina Dep't of Soc. Servs. v. Roe, 371 S.C.

450, 463, 639 S.E.2d 165, 172 (2006)); see also In re J.E.G., 144 Vt. 309, 313, 476 A.2d 130, 133 (1984) (addressing unpreserved issue because of "protective nature" of juvenile hearings).

In Stevens v. Everett, 784 So. 2d 1054, 1055 (Ala. Civ. App. 2000), overruled on other grounds by Ex parte Fann, 810 So. 2d 631 (Ala. 2001), this court recognized that exception by stating:

> "Although [Becky Stevens] did not specifically raise the [Alabama Custody and Domestic or Family Abuse Act] in the trial court or on appeal, and although Judge Robertson is correct in stating that this court generally does not review on appeal arguments not raised either in the trial court or in the appellant's brief, a case involving child custody is not the 'general' case. Alabama courts have historically held that when a trial 'court has acquired jurisdiction of a child as to the child's custody and control, the child becomes a ward of the court and the parties to the suit are of secondary importance.' Thorne v. Thorne, 344 So. 2d 165, 168 (Ala. Civ. App. 1977) (citation omitted). In addition, our supreme court has held that '[t]he question of the custody of infant children is not an adversary proceeding between parents in the eyes of the law, but is a matter within the peculiar discretion of the [trial court] as to the welfare of wards of the court.' Stephens v. Stephens, 253 Ala. 315, 319-20, 45 So. 2d 153, 157 (1950)."

Although in Ex parte Fann, 810 So. 2d at 635, our supreme court criticized Stevens, the court did not overrule that part of this court's decision recognizing that the interests of minors may in some cases justify addressing an issue not otherwise preserved for appellate review.[7] In Pritchett v. Dixon, 222 Ala. 597, 600, 133 So. 283, 285 (1931), Doss v. Terry, 256 Ala. 218, 218, 54 So. 2d 451, 452 (1951), and Citizens Walgreen Drug Agency, Inc. v. Gulf Insurance Co., 282 Ala. 648, 213 So. 2d 814 (1968), the supreme court itself held that it could, ex mero motu, notice and correct an irregularity in the proceedings involving the failure to appoint a guardian ad litem for a minor child.

In this case, the juvenile court committed an indisputable error of law in appointing Massey as the representative of the child because Massey is not within the

[7]In Ex parte Fann, our supreme court did not reject the entirety of the main opinion in Stevens. The supreme court criticized this court only for acting sua sponte to reverse a judgment for a purported error that the court determined was not error at all, namely, the omission of an express finding regarding the impact of domestic violence in a child-custody case. 810 So. 2d at 635. The supreme court did not express any opinion in Ex parte Fann that this court could never raise an issue sua sponte in order to correct an actual legal error harming the best interests and welfare of a child.

class of persons eligible to act as a representative for a qualified minor under § 22-8A-3(18). That error has far more profound implications than a mere irregularity in the proceedings. The challenged order allows Massey to execute a PPEL care order designed to withhold life-sustaining treatment from the child although Massey does not have any custodial power over the child. That error directly impacts the fundamental right of the child to life. See United States Constitution, amend. V ("No person shall be ... deprived of life ... without due process of law ...."), and amend. XIV, § 1 ("... nor shall any State deprive any person of life ... without due process of law ....). The child lacks any capacity, legal or actual, to raise this issue on his own. His fundamental rights should not be disregarded based on the failure of the mother to comply with technical procedural rules for preserving issues for mandamus review. To prevent an injustice of such magnitude, this court exercises its limited discretion to correct the error sua sponte.

We understand that Massey and the juvenile court were attempting to provide relief that they deemed to be in the best interest of the child in dire circumstances, but the AHA

controls the manner in which a PPEL care order may be effected. The AHA mandates that only a "representative" of a qualified minor may execute a PPEL care order, Ala. Code 1975, § 22-8A-15(a), and restricts the class of persons who may be appointed a representative of a qualified minor. Ala. Code 1975, § 22-8A-3(18). The juvenile court was required to adhere to those specific statutory requirements. Because the juvenile court deviated from the AHA and NDA by appointing Massey as the representative of the child and authorizing Massey to execute a PPEL care order for the child, the challenged order is due to be vacated.

III. Conclusion

Although the mother is not entitled to the relief she seeks based on the alleged lack of jurisdiction of the juvenile court to enter the challenged order and on the juvenile court's alleged error in failing to follow the regulations and procedures governing PPEL care orders, we nonetheless grant the petition on the basis that the juvenile court erred in appointing Massey as the representative of the child and authorizing Massey to execute a PPEL care order for

the child, and we order the juvenile court to vacate the challenged order for that reason.

2190611 -- PETITION GRANTED; WRIT ISSUED.

2190612 -- PETITION GRANTED; WRIT ISSUED.

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

Hanson, J., concurs in part and concurs in the result, with writing.

Edwards, J., concurs in the result, with writing.

HANSON, Judge, concurring in part and concurring in the result.

I concur in the main opinion with one limited exception. I do not agree that Stevens v. Everett, 784 So. 2d 1054 (Ala. Civ. App. 2000), is in any way authoritative as to the question whether an appellate court considering a petition for a writ of mandamus may properly reach a ground that was not first asserted in the tribunal to which the writ is to be directed. Our supreme court, in Ex parte Fann, 810 So. 2d 631 (Ala. 2001), overruled Stevens and quoted with approval Presiding Judge Robertson's dissent criticizing the fundamental flaw of the main opinion in that case: undertaking "'a sua sponte search for error [in violation of] the fundamental precepts of appellate procedure.'" 810 So. 2d at 635 (quoting Stevens, 784 So. 2d at 1056 (Robertson, P.J., dissenting)). Because the main opinion in Stevens was rejected 19 years ago in Ex parte Fann, I do not believe it should be now invoked in order to reach "plain error" that was not raised in the juvenile court, and I thus do not join Part

II(B) of the main opinion (although I have no quarrel with that opinion's reading of Ala. Code 1975, § 22-8A-3(18)).[8]

[8]I do not express any opinion regarding the potential availability of surrogacy procedures set forth in Ala. Code 1975, § 22-8A-11.

EDWARDS, Judge, concurring in the result.

I disagree with much of the analysis in the main opinion. Nevertheless, I concur in the result.

Emery D. Massey, the guardian ad litem for K.H. ("the child"), sought and obtained two orders from the Marshall Juvenile Court ("the juvenile court") -- the April 10, 2020, order and the May 8, 2020, order -- that authorized the implementation of orders to withhold life-sustaining treatment from the child without obtaining the consent of R.H. ("the mother"). See Ala. Code 1975, § 22-8A-3(10) (defining "life-sustaining treatment" as including "assisted ventilation [and] cardiopulmonary resuscitation").[9] Massey sought those orders

[9]Based on the letter submitted to the juvenile court from Dr. Lauren Nassetta, the child's physicians do not want to resuscitate the child when his respiratory system eventually fails; there is no issue concerning whether palliative care should be administered or whether nutrition and hydration or life-sustaining treatment should be withdrawn. Dr. Nassetta's letter states:

> "[W]e know that [the child's] respiratory system will eventually fail. An 'Allow Natural Death' order will prevent him from having to receive painful chest compressions and be [placed] on mechanical ventilation machine[, from which he had developed severe complications in the past]. ... [W]e will continue the antibiotics that are treating his current infection and start new antibiotics if he needs them in the future. We will also continue

purportedly under the authority of certain provisions of the Natural Death Act ("the NDA"), Ala. Code 1975, § 22-8A-1 et seq., and at the request of the child's physicians, who were "asking those who are legally able to make decisions for [the child] to allow his physicians to place an order to 'Allow Natural Death'" in the child's medical file.

In the May 2020 order, the juvenile court expressly authorized the use of an "order for pediatric palliative and end of life care" ("a PPEL care order"), as defined in Ala. Code 1975, § 22-8A-3(12), to facilitate the result sought by Massey. See Ala. Code 1975, § 22-8A-15.[10] The May 2020 order stated that Massey

> "and treating physicians shall fill in the appropriate form provided for [a PPEL care] order.

> nutrition through his IV and the therapies that help him stretch and prevent painful contractures of his joints."

[10]The parties apparently agree that a PPEL care order may include the same subject matter as a "do not attempt resuscitation (DNAR) order," as defined in § 22-8A-3(7), and provisions for withholding or withdrawing "artificially provided nutrition and hydration," as defined in § 22-8A-3(2), and "life-sustaining treatment," as defined in § 22-8A-3(10). Because the specific contours of a PPEL care order are not at issue in the present petition for the writ of mandamus, I will assume that the parties' position is correct.

> "This Order and forms once applied shall be placed in the child's medical file and will go with the child at any hospital, medical facility, nursing home, hospice, or doctor where the child may be located and shall govern an end of life situation."

The NDA clearly provides that a PPEL care order may be executed by

> "a. A parent of a qualified minor whose medical decision-making rights have not been restricted.
>
> "b. A legal guardian of a qualified minor.
>
> "c. A person acting as a parent, as the term is defined in [Ala. Code 1975, §] 30-3B-102, of a qualified minor."

§ 22-8A-3(18) (defining "representative of a qualified minor" for purposes of a PPEL care order); see also § 22-8A-15(a) ("The representative of a qualified minor may execute a directive with respect to the extent of medical treatment, medication, and other interventions available to provide palliative and supportive care to the qualified minor by completing and signing an Order for PPEL Care form.").[11] The

[11]In appropriate circumstances in dependency proceedings and termination-of-parental-rights proceedings, a juvenile court has the power to appoint a person who might qualify as "[a] person acting as a parent, as the term is defined in [Ala. Code 1975, §] 30-3B-102[(13)] ...." § 22-8A-3(18)c.; see also Ala. Code 1975, § 30-3B-102(13) (defining a "person acting as a parent" as "[a] person, [which includes an individual and a governmental agency,] other than a parent, who: ... [h]as physical custody of the child ... and ... [h]as

NDA makes no provision for a PPEL care order to be executed by a guardian ad litem. In other words, the May 2020 order does not reflect an authorization to execute a PPEL care order that complies with the NDA; the May 2020 order reflects an authorization to execute a PPEL care order that would allow the child's physicians to withhold life-sustaining treatment

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been awarded legal custody by a court or claims a right to legal custody under the law of this state"). In the May 2020 order, however, the juvenile court determined that the Marshall County Department of Human Resources was not "a person acting as a parent," and neither the mother nor the Marshall County Department of Human Resources has contested that determination.

Also, in appropriate circumstances in a dependency proceeding or termination-of-parental-rights proceeding, a juvenile court might restrict a parent's "medical decision-making rights," as that term is used in § 22-8A-3(18)a. However, such a decision would merely restrict the exercise of particular parental rights, not automatically result in the appointment of another person with those rights, and whether such a restriction would be proper in the present case and what procedures must be followed in order to properly impose such a restriction are not issues that are before us. The juvenile court cannot appoint a legal guardian as described in § 22-8A-3(18)b.; appointment of a legal guardian is a matter that is within the exclusive jurisdiction of the probate court, see Ala. Code 1975, § 26-2A-31(c).

from the child without complying with the NDA.[12] The April 2020 order likewise was not in compliance with the NDA.

Regarding subject-matter jurisdiction, the NDA specifically states that the circuit court in the county where a patient is receiving treatment has jurisdiction over cases "to determine if the requirements of [the NDA] have been met" and "to determine whether life-sustaining treatment or artificially provided nutrition and hydration should be withheld or withdrawn in circumstances not governed by [the

[12]The May 2020 order potentially places the child's physicians at legal risk. It is compliance with the NDA that provides protection from civil liability, criminal prosecution, and ethical sanction when certain decisions are made that may have the secondary result (presumably not directly intended) of causing an innocent parties' death. See Ala. Code 1975, § 22-8A-7(d) ("Any health care provider or health care facility acting within the applicable standard of care who is signing, executing, ordering, or attempting to follow the directives of an Order for PPEL Care in compliance with [the NDA] shall not be subject to criminal or civil liability and shall not be found to have committed an act of unprofessional conduct."); see also Ala. Code 1975, § 22-8A-10. The guardian ad litem did not represent the child's physicians, although he purportedly sought the PPEL care order on their behalf. Under the circumstances, it is at least arguable that the April 2020 and May 2020 orders should be vacated on the ground that the physicians' interests "may, as a practical matter," be impeded by Massey's obtaining an order that was not in compliance with the NDA but purportedly authorized the physicians to withhold life-sustaining treatment. See Rule 19(a)(ii), Ala. R. Civ. P.

NDA]." Ala. Code 1975, § 22-8A-9(e). The present circumstance, authorizing a person to execute an order to withhold life-sustaining treatment without complying with the requirements of the NDA, qualifies as a circumstance "not governed by [the NDA]." Thus, jurisdictional-conflict issues aside, arguably the Jefferson Circuit Court (the circuit court with jurisdiction in the county where the child is hospitalized) would have jurisdiction to consider whether the law permitted a PPEL care order to be executed by a person other than a representative of a qualified minor. Nevertheless, the fact that the Jefferson Circuit Court might have jurisdiction to consider the type of case at issue does not mean that the juvenile court might not also have jurisdiction over that type of case. The NDA does not expressly state that the circuit court has exclusive jurisdiction over such cases.

The main opinion concludes that the juvenile court has subject-matter jurisdiction over the type of case at issue and that the mother otherwise has made an inadequate argument to support granting her petition based on the juvenile court's lack of jurisdiction. Regarding the former, I do not agree

that the jurisdiction of the juvenile court is as broad as the main opinion suggests, and I see no need for the dicta regarding the purportedly expansive nature of the juvenile court's equity jurisdiction regarding health-care decisions impacting the death of a child.[13] The juvenile court has subject-matter jurisdiction over the underlying dependency proceeding and termination-of-parental-rights proceeding, and Massey's motion concerns issues within that jurisdiction, namely, (1) whether certain unquestionably medical interventions (resuscitation measures) should be administered to a dependent child when those interventions might briefly prolong a child's life but also will purportedly cause substantial harm to the child and (2) who is authorized, by law, to make the decision regarding whether to administer such interventions to the dependent child.

Regarding the mother's argument, the issues before us involve matters of first impression under the NDA, and the pertinent facts are undisputed and are straightforward. The mother has focused primarily on the issue of the juvenile

[13]Indeed, I question whether the duty to provide medical care that is in the best interest of a child is equivalent to the power to withhold, withdraw, or terminate life-sustaining medical care for that child.

court's purported lack of subject-matter jurisdiction, but even within that issue she has emphasized concern about the basis on which a juvenile court could "enter an order and or disposition 'allowing natural death' for a child in [the Department of Human Resources'] custody ... over the objection of a mother whose rights have not been terminated." (Emphasis added.) See Espinosa v. Espinosa Hernandez, 282 So. 3d 1, 12 n.9 (Ala. Civ. App. 2019) (noting the ambiguity of the concept of jurisdiction, including regarding those questions of authority that may be "implicit in the concept of subject-matter jurisdiction [and those that are] beyond 'the nature and extent of authority vested in [a particular court] by law' ...." Quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317 (1870).). Also, the mother has posited the issue whether, "even if the juvenile court has jurisdiction, ... the order allowing natural death comports with [the NDA]." And the mother has correctly noted that "[t]he issue of whether the [juvenile] court entered an order in compliance with [the NDA] is a matter of law and is reviewed de novo."

The Marshall County Department of Human Resources has filed an answer in support of the mother's petition for the

writ of mandamus and likewise has questioned the juvenile court's authority to issue an order granting Massey's request over the objection of the mother. DHR argues that it has been awarded only "temporary legal custody" of the child,[14] that the mother's parental rights have not been terminated, that the mother had the "right to give or withhold consent to medical treatment for her child ... and to authorize pediatric palliative and end of life care ... pursuant to Ala. Code [1975,] § 22-8A-3(12)," and that "[the mother] has not authorized medical personnel caring for [the child] to proceed with the 'allow death naturally' protocol." Also, Massey has stated in his answer to the mother's petition for a writ of mandamus that the mother "argues that the [NDA] should apply and was not properly followed." Massey takes the position not only that the juvenile court properly applied the NDA but also that he, as a guardian ad litem, had the legal right and legal responsibility to make decisions regarding the best interest of the child and that the NDA does not "impair or supersede" his rights and responsibilities.

[14]DHR sought and obtained from the juvenile court an order to approve a tracheostomy for the child in October 2019 and two orders approving separate surgeries for the child in January 2020.

Unlike the main opinion, I do not believe that this court must adopt plain-error review in order to address the mother's argument, nor do I believe that the mother failed to raise the issue whether the juvenile court's jurisdiction extended so far as to allow that court to violate the law governing a PPEL care order -- or to judicially legislate into existence a fourth category of representative of a qualified minor -- by appointing Massey to execute such an order when the mother refused to consent to such an order before the juvenile court and DHR took the position that it had no statutory authority to execute the order. In my opinion, the mother adequately raised the issue whether the NDA authorized the juvenile court to appoint Massey to execute a PPEL care order under the circumstances presented to that court, and this court has the discretion to address that issue based on the petition, answers, and supporting materials before us.[15] There simply

[15]In the present case, the decision whether to execute a PPEL care order for this child has arisen in a manner that likely precludes appellate review of the decision because, at this time, the mother's rights to the child have not yet been terminated and no final judgment exists. Thus, I am even more inclined to exercise our discretion to seek to resolve this issue on the merits as opposed to denying the petition based on technical infirmities as to which reasonable jurists might differ.

is no basis in the NDA for a guardian ad litem to exercise such authority, much less over the objection of a parent whose parental rights have not been terminated, and, given the condition of the child and the likelihood that the child will die when the guardian ad litem's PPEL care order is followed, it is likewise clear that the mother will have no viable remedy by way of appealing from a final judgment in the dependency proceeding or the termination-of-parental rights proceeding. Accordingly, I conclude that the mother has a clear legal right to a writ of mandamus directing the juvenile court to vacate the April 2020 order and May 2020 order. See Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995).