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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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Ex parte Matthew Lee Pirner

PETITION FOR WRIT OF MANDAMUS

(In re: Summer Francis Hawkins

v.

Matthew Lee Pirner)

(Dale Circuit Court, DR-19-900230)

DONALDSON, Judge.

Matthew Lee Pirner ("the father") petitions this court for a writ of mandamus directing the Dale Circuit Court ("the

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trial court") to vacate its orders authorizing Summer Francis Hawkins ("the mother") to apply for a passport for E.P. ("the child") without the father's consent, allowing the mother to relocate with the child to Germany, and temporarily suspending the father's visitation. The father's petition is untimely filed as to most of the orders he challenges, and his argument for vacating the order from which his petition is timely filed is not supported by any citation to legal authority. We, therefore, dismiss in part and deny in part the father's petition for a writ of mandamus.

The materials submitted by the parties indicate the following. In 2007, the child was born of the marriage between the mother and the father. In 2012, the Montgomery Circuit Court in Clarksville, Tennessee ("the Tennessee court"), entered a judgment divorcing the mother and the father. On January 30, 2018, the Tennessee court entered an order modifying the divorce judgment ("the modification order"). The modification order states that the mother is "[t]he Primary Residential Parent" and provides the father with a visitation schedule that includes extended periods during the child's

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summer vacations. The modification order contains a provision regarding notice for a parental relocation that states:

"The Tennessee statute ([Tenn. Code Ann. §] 36-6-108) which governs the notice to be given in connection with the relocation of a parent reads in pertinent part as follows:

"[I]f a parent ... desires to relocate outside the state or more than fifty (50) miles from the other parent within the state, the relocating parent shall send a notice to the other parent at the other parent's last known address by registered or certified mail ... not later than sixty (60) days prior to the move. The notice shall contain the following:

"(1) Statement of intent to move;

"(2) Location of proposed new residence;

"(3) Reasons for proposed relocation; and

"(4) Statement that the other parent may file a petition in opposition to the move within thirty (30) days of receipt of the notice."

The father is a servicemember of the United States Army. In February 2018, the father moved to Fort Rucker, Alabama. Since the parties' divorce, the mother has remarried and has had other children with her spouse, who is also a

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servicemember of the United States Army. In July 2018, the mother moved with the child and her family to Fort Rucker. In September 2019, the father moved to North Carolina.

On December 19, 2019, the mother filed a petition in the trial court seeking to register the Tennessee court's divorce judgment as amended by the modification order ("the Tennessee judgment") and a petition to "enforce" that foreign judgment. In the petition to enforce, the mother alleged that her husband had received military orders requiring him to relocate to Germany for a duty assignment, that she had provided notice to the father of her intent to relocate with the child to Germany, that the father had not responded within 30 days to her notice of intent to relocate, that the parties' divorce judgment contained a provision requiring the parties to promptly execute written instruments to carry out the terms in the judgment, and that the father had refused to provide consent to an application for a passport for the child. The mother stated that she was seeking to compel "the father to sign the minor child's passport such that the child may relocate with the Mother"

The father filed an answer to the mother's petitions. In his answer, the father consented to the registration of the Tennessee judgment "for purposes of enforcement." The father admitted that he had received notice from the mother that she desired to relocate to Germany with the child but denied that he had failed to timely submit an objection to the proposed relocation. The father alleged that he had submitted an objection to the mother by certified mail and that he had filed an objection to the proposed relocation in the Tennessee court.¹ The father stated that he did not sign the child's passport application because he believed that the mother would abscond with the child to Germany if she obtained a passport for the child. The father denied "the assertions that the child should be allowed to relocate to Germany" and requested

¹The materials submitted do not indicate whether proceedings regarding the mother's proposed relocation have been commenced in the Tennessee court. We note that § 30-3B-206(a), Ala. Code 1975, would prohibit the trial court from exercising its jurisdiction under Alabama's version of the Uniform Child Custody Jurisdiction and Enforcement Act, § 30-3B-101 et seq., Ala. Code 1975, if simultaneous proceedings have been commenced in the Tennessee court "unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum"

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that the trial court deny the mother's proposed relocation with the child.

On January 31, 2020, the mother filed a motion to compel, seeking an order directing the father to take the necessary steps for the child to obtain a passport. The mother asserted that she intended to relocate with the child to Germany on March 1, 2020. On February 3, 2020, the father filed a response to the motion to compel. Also on February 3, 2020, the father filed a motion to stay the proceedings under the Servicemembers' Civil Relief Act, 50 U.S.C. § 3901 et seq. ("the SCRA"). In that motion, he asserted that he had "received temporary change of station orders and ha[d] been deployed to ... Kuwait." The father sought a stay "until such time as [he] may complete his temporary tour of duty in Kuwait, and return to Defend himself in this matter."

On February 7, 2020, the mother filed a motion seeking an order to allow her to unilaterally apply for a passport for the child. In that motion, she alleged that federal law permitted the application to be submitted by one parent under certain circumstances. On the same day, the trial court entered an order granting that motion, and, on February 10,

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2020, it entered another order stating that it was authorizing the mother to apply for, and to obtain, a passport for the child without the consent of the father and authorizing the child to travel with the mother outside the country. On February 12, 2020, the mother filed a motion to withdraw her January 31, 2020, motion to compel, asserting that the issue raised in that motion was moot because the February 7 and 10, 2020, orders granted her authorization to unilaterally apply for the child's passport. In the February 12, 2020, motion, the mother also specifically indicated her willingness to consent to the father's request for a stay of further proceedings while he was deployed. The trial court entered an order denying the mother's motion to withdraw her motion to compel. On February 13, 2020, the father filed a motion seeking an injunction prohibiting the mother from relocating to Germany with the child.

On February 14, 2020, the trial court conducted a hearing on the pending motions. On the same day, the trial court entered an order finding that the Tennessee judgment had not been "domesticated" and that, therefore, the trial court did not have jurisdiction to address the issue of relocation. The

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trial court set aside its February 10, 2020, order regarding the application for a passport for the child, stayed the proceedings pursuant to the SCRA, and ordered that the child could not leave the county until the stay was lifted and the Tennessee judgment was domesticated.

On February 20, 2020, the mother filed a motion to reconsider the February 14, 2020, order or, in the alternative, for pendente lite relief allowing her to relocate with the child to Germany. In her motion, the mother asserted that she had complied with the requirements for the registration or domestication of the Tennessee judgment. On February 28, 2020, the trial court entered the following order:

"[The mother's] Emergency Motion to Reconsider is hereby granted. The Order of February 14, 2020 is hereby set aside. [The mother] is Ordered pendente lite to temporar[ily] relocate with the minor child until such time that the Stay is lifted and [the father] is present to resume these proceedings."

On February 28, 2020, the father filed an "Emergency Motion to Alter, Amend or Vacate" the February 28, 2020, order. In his motion, the father argued, among other things, that the trial court did not have jurisdiction to allow the mother's relocation with the child because, he asserted, the

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Tennessee judgment had not been properly registered or domesticated in Alabama and, thus, could not be modified by the trial court; that the mother had not complied with Tennessee statutory requirements to allow the relocation; that the trial court had entered relief beyond the relief requested; that the trial court could not enter any orders after February 14 because of the stay entered under the SCRA; and that the mother's actions had caused the alleged emergency circumstances. The father specifically asked the trial court to prohibit the mother from relocating with the child or, in the alternative, to hold an immediate hearing. On March 9, 2020, the trial court denied the father's motion.

On May 19, 2020, the mother filed a "Motion to Lift Stay and Motion for Emergency Hearing." In that motion, the mother asserted that her relocation date had changed to May 31, 2020; that the father had returned from his deployment and was stationed in North Carolina; and that the father had notified her that he was seeking to exercise his summer visitation with the child and that he would be sending "someone" to pick up the child on May 25, 2020. In the motion, the mother stated:

"Given that the mother and her family are scheduled via military orders to depart for Germany in exactly

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twelve (12) days, and given the father's recent threats of unilaterally invoking his visitation rights in flagrant disregard of said travel orders as well as the General Orders governing Forts Rucker and Bragg, the mother asks this court to lift the Stay and grant an immediate emergency hearing so as to establish the parties' respective rights with regard to the custody and care of their minor child."

On May 19, 2020, the father filed a response to the mothers' motion, agreeing that he was back from military deployment and that the stay entered pursuant to the SCRA should be lifted but opposing any denial of his anticipated summer visitation with the child. The father filed a separate motion seeking to compel the mother to permit his summer visitation to occur.

On May 21, 2020, the trial court entered an order requiring the parties to attend mediation. Later that day, the mother filed a motion to reconsider the mediation order and renewed her motion for an emergency hearing. In her motion, the mother pointed out the urgency of the situation based on the travel arrangements for relocating to Germany on May 31, 2020. The father filed a response also asking for the mediation order to be rescinded but maintaining his opposition to any denial of his summer visitation. The father also filed

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a renewal of his motion to compel the mother to permit him to exercise visitation.

On May 22, 2020, the trial court entered the following order:

"The Court has reviewed the file and all recent filings by counsel concerning visitation. It is hereby ORDERED as follows:

"[The father's] visitation is hereby temporarily suspended.

"The Mediation Order will remain in place. Mediation may take place virtually. Counsel and parties are expected and ordered to mediate in good faith."

On May 22, 2020, the father filed a motion to reconsider or to set aside the May 22 order. The materials submitted to this court do not indicate a ruling on the father's motion.

On May 29, 2020, the father filed his petition for a writ of mandamus. The mother filed a brief in response. This court has jurisdiction to review the father's mandamus petition pursuant to § 12-3-10 and § 12-3-11, Ala. Code 1975.

The father seeks a writ of mandamus directing the trial court to vacate its orders entered on February 7, 2020, February 10, 2020, February 28, 2020, March 9, 2020, and May 22, 2020. A petition for a writ of mandamus is an appropriate

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means to review pendente lite orders. P.B. v. P.C., 946 So. 2d 896, 898 (Ala. Civ. App. 2006). We apply the following standard of review to the father's petition:

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

The father contends that he was entitled to an immediate stay of further proceedings under the SCRA upon his motion made on February 3, 2020, and that, therefore, any order entered between February 3, 2020, and May 19, 2020, when the mother filed her motion to lift the stay, should be vacated. The father specifically states that he seeks a writ directing the trial court to vacate orders entered on February 7, 2020, February 10, 2020, February 28, 2020, and March 9, 2020. In addition, the father contends that the trial court exceeded its discretion in entering orders on February 7, 2020, and February 10, 2020, authorizing the mother to apply for a

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passport for the child without the consent of the father, and the father challenges the February 28, 2020, order allowing the mother to relocate pendente lite with the child.

The mother argues that the father's mandamus petition was untimely filed as to those orders. Rule 21(a)(3), Ala. R. App. P., provides:

"The petition shall be filed within a reasonable time. The presumptively reasonable time for filing a petition seeking review of an order of a trial court or of a lower appellate court shall be the same as the time for taking an appeal. If a petition is filed outside this 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."

"[T]he presumptively reasonable period within which to file a petition for a writ of mandamus is the same 42-day period allowed for an appeal." SouthernCare, Inc. v. Cowart, 48 So. 3d 632, 633 n.1 (Ala. Civ. App. 2009). The filing of a motion to reconsider an interlocutory order does not toll the 42-day presumptively reasonable period. Id.

The father filed his mandamus petition on May 29, 2020, more than 42 days after the entry of the orders on February 7, 2020, February 10, 2020, February 28, 2020, and March 9, 2020. The father asserts that his military deployment constituted

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good cause for filing his mandamus petition outside the presumptively reasonable time for challenging those orders. According to the father, no communication was available with his counsel while he was deployed. Although, in other contexts, a party's military deployment could constitute good cause for filing a petition outside the presumptively reasonable period, the materials submitted to this court establish that the father, through counsel, filed a motion for an injunction on February 13, 2020, and a motion to alter, amend, or vacate on February 28, 2020. We conclude that the father's mandamus petition was untimely filed as to the February 7, 2020, February 10, 2020, February 28, 2020, and March 9, 2020, orders and that the father has not established good cause for this court to consider the father's arguments regarding those orders. Therefore, we dismiss the father's mandamus petition insofar as it challenges those orders.

The father also seeks a writ of mandamus directing the trial court to vacate the May 22, 2020, order that temporarily suspended his visitation. The mandamus petition is timely filed as to that order. The father argues that the trial court exceeded its authority by suspending his visitation without a

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hearing. We, however, are not directed to citations to legal authority in support of this argument. Rule 21(a)(1)(E), Ala. R. App. P., requires that a petition for a writ of mandamus contain "[a] statement of the reasons why the writ should issue, with citations to the authorities and the statutes relied on." Rule 28(a)(10), Ala. R. App. P., requires that arguments in appellate briefs contain "citations to the cases, statutes, other authorities, and parts of the record relied on." "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998). Accordingly, the failure to comply with Rule 28(a)(10) provides an appellate court with a basis for disregarding the argument. "If anything, the extraordinary nature of a writ of mandamus makes the Rule 21 requirement of citation to authority even more compelling than the Rule 28 requirement of citation to authority in a brief on appeal." Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001). Therefore, we decline to further address the father's argument regarding the

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suspension of his visitation. As a result, the father has not established a ground for vacating the May 22, 2020, order, and we deny his mandamus petition insofar as it challenges that order.

For the reasons stated, we dismiss in part and deny in part the father's petition for a writ of mandamus.

PETITION DISMISSED IN PART AND DENIED IN PART.

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

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

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

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MOORE, Judge, concurring in the result.

I concur with the main opinion's determination that the petition for a writ of mandamus filed by Matthew Lee Pirner ("the father") is due to be dismissed in part and denied in part; however, I do not completely agree with the reasoning of the main opinion.

The father filed a petition for a writ of mandamus with this court on May 29, 2020. That petition is not timely as to the orders of the Dale Circuit Court ("the trial court") entered in February 2020 ("the February orders").² In his mandamus petition, the father asserts that he had good cause for delaying the filing of the petition as to the February orders, stating:

"[The father] was deployed involuntarily to Kuwait where there was no communication available with undersigned counsel. [The father] was unaware of the filings in this matter and was reliant on his request that the trial court stay the proceedings pursuant to the Servicemembers Civil Relief Act. When the trial court failed to honor said request to stay, the [father's attorney] was unable to contact [the father] to inform him of the developments in this matter and, therefore, was unable to seek guidance from [the father] regarding his wishes and

²The father also cites a March 9, 2020, order, but that order only denied a motion to reconsider an order entered on February 28, 2020.

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desires in how to respond to [the trial court's] unlawful orders. The [father's attorney] was unable to determine if [the father] wished to go through the time and expense of filing this writ at the time of the entry of the [February] orders and [the father] should not be punished by a denial of this petition for untimeliness due to his military service."

In summary, the father asserts that he was unable to communicate with his attorney to authorize the filing of a timely petition for the writ of mandamus while deployed in Kuwait.

Summer Francis Hawkins ("the mother") responds in her answer to the father's mandamus petition that, after the father was deployed to Kuwait on January 17, 2020, the father communicated with her via e-mail on several occasions in February 2020 and that he also communicated with his family through an application known as "Signal," which, she said, he had asked her to download so he could communicate with E.P. ("the child"). That information indicates that the father was capable of communicating electronically with persons in this country while he was stationed in Kuwait. Furthermore, as the main opinion notes, the father's attorney actually did respond to the February orders by filing objections and motions to reconsider in the trial court, which we must presume he was

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authorized by the father to file. See M.L.M. v. Madison Cty. Dep't of Human Res., [Ms. 2180509, Jan. 10, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020) ("The weight of authority appears to indicate that, when an attorney acts on behalf of a client, his or her authority to do so is presumed unless and until other facts indicate otherwise." (citing HICA Educ. Loan Corp. ex rel. Sallie Mae, Inc. v. Fielding, 953 So. 2d 1261, 1263-64 (Ala. Civ. App. 2006))). Based on those circumstances, I agree with the main opinion that the father has not presented good cause for delaying the filing of the petition for a writ of mandamus as to the February orders.

The father's petition for the writ of mandamus is timely in regard to the May 22, 2020, order in which the trial court summarily suspended the summer visitation between the father and the child. The main opinion correctly holds that the father did not cite any legal authority to support his position that the trial court exceeded its discretion by ordering the suspension of his visitation rights without conducting an evidentiary hearing. As a result of the father's noncompliance with Rule 28(a)(10), Ala. R. App. P., which requires citations to legal authority, this court may

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disregard the father's argument on this point. See Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001) (discussing predecessor to Rule 28(a)(10)). Because Alabama law does allow trial courts to enter custody and visitation orders in some limited situations without an evidentiary hearing, see Ex parte Williams, 474 So. 2d 707 (Ala. 1985), and Pratt v. Anderson, 170 So. 3d 677, 680 (Ala. Civ. App. 2014), it was incumbent upon the father to develop an argument supported by appropriate legal authority explaining why an evidentiary hearing was required in this case. This court cannot assume that the trial court committed legal error. Dais v. State ex rel. Davis, 420 So. 2d 278 (Ala. Civ. App. 1982). Thus, I agree that the father's failure to make a proper legal argument requires denial of his petition for a writ of mandamus insofar as it challenges the May 22, 2020, order.