Rel: September 11, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190891

Ex parte Richard Judd Fochtmann

PETITION FOR WRIT OF MANDAMUS

(In re: Laura D. Fochtmann

v.

Richard Judd Fochtmann)

(Elmore Circuit Court, DR-13-900269.02)

THOMPSON, Presiding Judge.

Richard Judd Fochtmann ("the father") petitions this court for a writ of mandamus directing the Elmore Circuit

Court ("the trial court") to vacate its pendente lite order of August 20, 2020, granting Laura D. Fochtmann ("the mother") permission to move from Eclectic to Fairhope with the parties' child ("the child"). In seeking the writ of mandamus, the father asserts that the trial court did not obtain jurisdiction over the matter because, he says, the mother's notice of the proposed move did not substantially comply with the requirements of § 30-3-166(7), Ala. Code 1975, and, in the alternative, that the trial court erred in permitting the mother to relocate with the child without first receiving evidence on the issue.

The materials before this court indicate the following. The child was born of the marriage between the mother and the father. When the parties divorced in 2013, they reached a settlement agreement resolving all issues between them, including matters of child custody and visitation. The trial court incorporated the parties' settlement agreement into the October 9, 2013, judgment divorcing the parties. Pursuant to the divorce judgment, the mother and the father were awarded joint legal custody of the child with the mother receiving sole physical custody subject to liberal visitation by the

father. The child was one year old at the time the parties divorced.

Four years later, the mother filed a "petition to modify." The parties reached a mediated settlement agreement pursuant to which the father would have weekend visitation every other week, from Thursday to Monday. He would also have visitation on Wednesday evenings during the weeks after a weekend visitation. In addition to the holiday and vacation schedule set forth in the divorce judgment, the parties also agreed that the child "shall be with [his] half-sibling and corresponding party" on the half sibling's birthday.[1] On May 1, 2017, the trial court entered a judgment adopting and incorporating the parties' mediated settlement agreement.

On June 5, 2020, the mother sent a letter ("the notification letter") to the father notifying him of her intent to move with the child to Fairhope on August 1, 2020. On July 2, 2020, the father filed an objection to the mother's proposed relocation and a petition to modify custody. In his objection, the father maintained that the notification letter failed to comply with the requirements of § 30-3-166, Ala.

[1]The father has a child from another relationship.

Code 1975, because, he said, it did not set forth a specific proposed visitation schedule or provide him with specific reasons for the proposed change of residence of the child.

On August 20, 2020, the trial court held a hearing on the father's objection, but no testimony was taken at the hearing. On the same day, the trial court entered the following order:

> "Case called on the issue of relocation. Parties' counsel present. Argument heard on record maintained by Hon. Roy Durham [the official court reporter]. Question of substantial compliance with the notice of move. Objections to proposed dates made by the father.
>
> "PDL, mother can move and change the child's school and move to Baldwin County."

The father filed his petition for a writ of mandamus with this court on August 28, 2020.

The trial court's order appears to simply outline the issues before it without making a final determination as to those issues. In the father's petition for a writ of mandamus and the mother's answer to that petition, the parties agree that the August 20, 2020, hearing was a pendente lite hearing and that the trial court's order was a pendente lite order. The transcript of the August 20, 2020, hearing indicates that the parties acknowledged that a final hearing would be held

later. Thus, it appears that the trial court's reference to "PDL" in the order stands for "pendente lite."

> "A petition for a writ of mandamus is an appropriate 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:
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> > "'"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))."

Ex parte Pirner, [Ms. 2190644, Aug. 21, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020).

In his mandamus petition, the father first contends that the trial court did not obtain jurisdiction over this matter because, he says, the notification letter did not meet the requirements of § 30-3-165(b), Ala. Code 1975, a part of the Alabama Parent-Child Relationship Protection Act ("the Act"), § 30-3-160 et seq., Ala. Code 1975. Specifically, the father argues that the notification letter did not include all of the

information required in the notice to a noncustodial parent of a proposed relocation of a child from the child's principal residence. See § 30-3-165(b).[2] Therefore, the father

[2]Section 30-3-165(b) provides:

> "(b) Except as provided by Section 30-3-167, [Ala. Code 1975,] all of the following information, if available, must be included with the notice of intended change of principal residence of a child:
>
> > "(1) The intended new residence, including the specific street address, if known.
> >
> > "(2) The mailing address, if not the same as the street address.
> >
> > "(3) The telephone number or numbers at such residence, if known.
> >
> > "(4) If applicable, the name, address, and telephone number of the school to be attended by the child, if known.
> >
> > "(5) The date of the intended change of principal residence of a child.
> >
> > "(6) A statement of the specific reasons for the proposed change of principal residence of a child, if applicable.
> >
> > "(7) A proposal for a revised schedule of custody of or visitation with a child, if any.
> >
> > "(8) A warning to the non-relocating person that an objection to the relocation must be made within 30 days of receipt of

contends, the trial court did not obtain jurisdiction over the issue of whether the mother and the child could move from Eclectic to Fairhope. We disagree.

"[O]nce a circuit court has acquired jurisdiction over a child pursuant to a divorce and decides the question of custody, that court retains jurisdiction over custody until the child reaches majority." P.R.G. v. W.P.R., 590 So. 2d 913, 914 (Ala. Civ. App. 1991); see also A.G. v. Ka.G., 114 So. 3d 24, 26 (Ala. 2012)("Subject to two exceptions [not applicable here], when a circuit court acquires jurisdiction regarding an issue of child custody pursuant to a divorce action, it retains jurisdiction over that issue to the exclusion of the juvenile court."); K.A.B. v. J.D.B., 279 So. 3d 607, 613 (Ala. Civ. App. 2018)(same).

The Act provides that a custodial parent may relocate with a child "after providing notice as provided [in the Act] unless a person entitled to notice files a proceeding seeking a temporary or permanent order to prevent the change of

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> the notice or the relocation will be permitted."

(Emphasis added.)

principal residence of a child within 30 days after receipt of such notice." § 30-3-169, Ala. Code 1975 (emphasis added). Additionally, "[a] person entitled to custody of or visitation with a child may commence a proceeding objecting to a proposed change of the principal residence of a child and seek a temporary or permanent order to prevent the relocation." § 30-3-169.1(a), Ala. Code 1975 (emphasis added). Thus, it is the filing of an objection to a proposed move that invokes the jurisdiction of the trial court, not the letter to the noncustodial parent notifying that parent of the intended move.

Moreover, pursuant to the Act, if a person required to give notice fails to do so or fails to provide the information required by § 30-3-165(b), as the father claims occurred in this case,

> "the court shall consider the failure to provide such notice or information as a factor in making its determination regarding the change of principal residence of a child; a factor in determining whether custody or visitation should be modified; a factor for ordering the return of the child to the former residence of the child if the change of principal residence of a child has taken place without notice; a factor meriting a deviation from the child support guidelines; a factor in awarding increased transportation and communication expenses with the child; and a factor in considering whether

> the person seeking to change the principal residence of a child may be ordered to pay reasonable costs and attorney's fees incurred by the person objecting to the change."

§ 30-3-168(a), Ala. Code 1975. For the trial court to be able to consider the failure of proper notification in determining whether to permit a challenged relocation, it necessarily has to have jurisdiction over the matter. For example, in Larue v. Patterson, 163 So. 3d 356, 357 (Ala. Civ. App. 2014), one of the issues before the trial court in that case was the contention that the mother in that case had relocated with the children without providing notice as required by the Act. Under the rationale of the father in this case, a trial court would never obtain jurisdiction over situations like the one in Larue. See also § 30-3-169.2(a), Ala. Code 1975 (providing that a court may grant a temporary order restraining the change of a child's principal residence if notice of the relocation was untimely, inaccurate, insufficient, or nonexistent and there is a likelihood that, on final hearing of the matter, the court will not approve the move). Accordingly, we conclude that, to the extent, if any, the notification letter failed to comply with the requirements of

§ 30-3-165(b), that failure did not divest the trial court of jurisdiction to consider the father's objection to the move.

The father also contends that the trial court could not enter an order permitting the mother to relocate with the child because no evidence had been presented on the issue. The Act provides that the trial court

> "may grant a temporary order permitting the change of principal residence of a child and providing for a revised schedule for temporary visitation with a child pending a final hearing if the court finds that the required notice of a proposed change of principal residence of a child as provided in this [Act] was provided in a timely manner, contained sufficient and accurate information, and if the court finds from an examination of the evidence presented at a hearing for temporary relief that there is a likelihood that on final hearing the court will approve the change of the principal residence of the child."

§ 30-3-169.2(b), Ala. Code 1975 (emphasis added).

This court's research has revealed no authority directly on point. However, in Ex parte Russell, 911 So. 2d 719 (Ala. Civ. App. 2005), a case involving a pendente lite custody order, this court held that due process required that, before the trial court could award the father in that case custody, the father was required to introduce evidence establishing that an award of pendente lite custody to him was in the best

interest of the child. Id. at 725. We held that, because the pendente lite custody order in Russell was entered in the absence of any supporting evidence, the order violated the mother's due-process rights; therefore, this court determined, mother was entitled to a writ of mandamus directing the trial court to vacate its order awarding the father pendente lite custody. Id.

"'The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party.'" Toler v. Toler, 947 So. 2d 416, 419 (Ala. Civ. App. 2006)(quoting § 30-3-169.4, Ala. Code 1975) (emphasis omitted). There is a rebuttable presumption that a change of the child's principal residence is not in the child's best interests. § 30-3-169.4. The mother bore the initial burden of proof as to whether a change of principal residence was in the child's best interests in light of the factors described in § 30-3-169.3(a), Ala. Code 1975. Toler, 947 So. 2d at 421.

In this case, the transcript of the proceedings confirms that no evidence was presented at the August 20, 2020,

hearing. Thus, the mother provided no evidence from which the trial court could find that the proposed relocation was in the child's best interest or that there was a likelihood that, on final hearing, the court would approve the change of the principal residence of the child, as required by § 30-3-169.2(b). We agree with the father that the trial court's order permitting the mother to relocate with the child, even temporarily, was improper in the absence of an evidentiary hearing. See Russell, supra; Ex parte Ausmus, 184 So. 3d 406, 408 (Ala. Civ. App. 2015). Accordingly, the father's petition for a writ of mandamus is granted, and the trial court is directed to vacate its pendente lite order of August 20, 2020, permitting the mother to relocate with the child, and to hold an evidentiary hearing on the proposed relocation.

PETITION GRANTED; WRIT ISSUED.

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

Donaldson, J., concurs specially.

DONALDSON, Judge, concurring specially.

I concur. Our supreme court has held that mandamus relief is available in Alabama even when the issue raised is one of first impression or when there is no direct authority on the issue. Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060 (Ala. 2014). Based on the pleadings on file at the time of the August 20, 2020, hearing that were included in the materials presented with this petition for the writ of mandamus and on the arguments of counsel at the hearing, the Elmore Circuit Court ("the trial court") could have had the impression that the only issue that required a ruling pendente lite was whether Laura D. Fochtmann ("the mother") had sufficiently complied with the provisions of Alabama Parent-Child Relationship Protection Act ("the Act"), § 30-3-160 et seq., Ala. Code 1975, so the trial court could approve her plan to relocate with the child she had with Richard Judd Fochtmann ("the father"). Specifically, the father had argued that the mother's notice to him of her plan to relocate did not sufficiently comply with portions of § 30-3-165, Ala. Code 1975. Indeed, the August 20, 2020, order of the trial court appears to reflect that impression:

> "Case called on the issue of relocation. Parties' counsel present. Argument heard on record maintained by [the official court reporter]. Question of substantial compliance with the notice of move. Objections to proposed dates made by the father."

(Emphasis added.)

An evidentiary hearing would not have been required if the only issue to be decided pendente lite was a legal question of jurisdiction or if the decision did not require the resolution of disputed facts (e.g., if the only issue was whether a relocating party's notice substantially complied with the Act). Moreover, an evidentiary hearing would not have been necessary if the parties had agreed to submit evidence to the trial court in another manner. See Rule 43(a), Ala. R. Civ. P. In this case, however, there were factual disputes material to the decision to be made and there was no agreement to submit the evidence to the trial court in a manner other than through an evidentiary hearing. Although I do not think the provision of § 30-3-169.2(b), Ala. Code 1975, referring to an "examination of the evidence" was sufficiently brought to the attention of the trial court, the transcript shows that the father's counsel objected to the introduction

of facts through arguments by the mother's counsel and also stated:

> "And we say that in no way has there been any evidence produced that the burden has been met by the mother.
>
> "....
>
> "...[T]hey have not shown or met their burden of proof that it is in the child's best interest to move.
>
> "....
>
> "It is no way on this PDL hearing with no testimony being taken that ... the mother has met her burden of proof to overcome the presumption that a move is in the child's best interest."

Therefore, I concur to grant the father's petition for a writ of mandamus.