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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Ex parte D.L.C.

PETITION FOR WRIT OF MANDAMUS

(In re: D.T.C.

v.

D.L.C.)

(Elmore Circuit Court, DR-21-900016)

MOORE, Judge.

D.L.C. ("the mother") petitions this court for a writ of mandamus directing the Elmore Circuit Court to grant her motion to dismiss the

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action commenced by D.T.C. ("the father") or, in the alternative, to transfer the action to the Montgomery Circuit Court. We grant the petition and issue the writ.

Procedural History

On January 29, 2015, the mother and the father were divorced by a judgment entered by the Montgomery Circuit Court. That divorce judgment incorporated a settlement agreement between the parties that, among other things, awarded the mother sole physical custody of the parties' child, D.C. ("the child"), and awarded the father visitation.

On October 22, 2020, the Elmore County Department of Human Resources ("DHR") filed, in the Elmore Juvenile Court, a petition alleging that the child was dependent because of certain actions taken by the mother. The petition stated that the mother had informed DHR that the father had not had any contact with the child. The next day, the Elmore Juvenile Court entered a shelter-care order awarding pendente lite custody of the child to DHR. On January 18, 2021, the guardian ad litem who was appointed to represent the interests of the child in the dependency action filed a motion in the Elmore Juvenile Court requesting

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an emergency hearing and sanctions against the mother. The guardian ad litem alleged that the mother had lied to DHR by stating that she did not know how to contact the father and that the mother had "not allowed the father to exercise his visitation since Christmas 2019." The guardian ad litem argued that "there are no allegations of dependency as to the father" and "[t]hat the father is willing, able, and desires to provide for the health, safety, and welfare of the ... child." The guardian ad litem requested a hearing "to determine the validity of th[e] dependency action."

On January 22, 2021, the father commenced the present action in the Elmore Circuit Court, requesting a modification of the custody of the child and that the mother be held in contempt for her having failed to allow the father to visit with the child; the father also requested that he be awarded pendente lite custody of the child. The Elmore Circuit Court entered an order on January 25, 2021, awarding the father pendente lite custody of the child.

On January 26, 2021, DHR filed in the Elmore Juvenile Court a notice of dismissal of its dependency action. See Rule 41(a), Ala. R. Civ. P. DHR asserted that the Elmore Circuit Court's January 25, 2021, order

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awarding the father pendente lite custody of the child had resolved the dependency of the child. The Elmore Juvenile Court dismissed the dependency action that same day.

On January 27, 2021, the mother filed in the Elmore Circuit Court a motion to dismiss the father's action or, in the alternative, to transfer the action to the Montgomery Circuit Court. On March 16, 2021, the Elmore Circuit Court denied the mother's motion to dismiss or, in the alternative, to change venue. The mother filed her petition for a writ of mandamus on March 31, 2021.

Standard of Review

"A petition for the writ of mandamus is the appropriate means by which to challenge a trial court's order regarding a change of venue. Ex parte Sawyer, 892 So. 2d 898, 901 (Ala. 2004). The writ of mandamus is an extraordinary remedy; it will not be issued unless the petitioner shows "'(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 Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000) (quoting Ex parte Gates, 675 So. 2d 371, 374 (Ala. 1996)); Ex parte Pfizer, Inc., 746 So. 2d 960, 962 (Ala. 1999)."

Ex parte Children's Hosp. of Alabama, 931 So. 2d 1, 5-6 (Ala. 2005).

Discussion

In her mandamus petition, the mother argues that the Elmore Circuit Court erred in denying her motion to dismiss or, in the alternative, to transfer the action to the Montgomery Circuit Court. The mother argues that she, as the custodial parent, has the right to choose the venue of the action.

Section 30-3-5, Ala. Code 1975, provides:

"Notwithstanding any law to the contrary, venue of all proceedings for petitions or other actions seeking modification, interpretation, or enforcement of a final [judgment] awarding custody of a child or children to a parent and/or granting visitation rights, and/or awarding child support, and/or awarding other expenses incident to the support of a minor child or children, and/or granting post-minority benefits for a child or children is changed so that venue will lie in: (1) the original circuit court rendering the final [judgment]; or (2) in the circuit court of the county where both the current custodial parent or, in the case of post-minority benefits, where the most recent custodial parent, that parent having custody at the time of the child's attaining majority, and the child or children have resided for a period of at least three consecutive years immediately preceding the filing of the petition or other action. The current or most recent custodial parent shall be able to choose the particular venue as herein provided, regardless of which party files the petition or other action."

The mother asserts that her choice of venue for the action -- the circuit court that rendered the final divorce judgment, i.e., the Montgomery

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Circuit Court -- must be honored. The father responds, asserting that, at the time the father filed his modification petition, DHR had been awarded pendente lite custody of the child in the shelter-care order entered in the dependency action that was pending in the Elmore Juvenile Court, and, thus, he says, the mother was not the custodial parent with the right to choose the venue of the action. The father argues that DHR was the "sovereign parent ... through the doctrine of *parens patriae*." See Davis v. Turner, 337 So. 2d 355, 360 (Ala. Civ. App. 1976) (referring to the State as the "sovereign parent"); and Prince v. State, 19 Ala. App. 495, 98 So. 320 (1923) (explaining that the juvenile code reflects the *parens patriae* interest of the State in the custody of abused and neglected children). The mother, in response to the father's assertion, argues that the pendente lite custody award to DHR did not affect her status as the custodial parent.

"The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where the plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.' "

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Smith v. Smith, 836 So. 2d 893, 899 (Ala. Civ. App. 2002) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)).

Section 30-3-5 sets forth the requirements for determining venue of an action seeking to modify a judgment awarding child custody, visitation, or support. The term "custodial parent" in § 30-3-5 clearly refers to the parent who was awarded custody of a child in the judgment that is the subject of the modification proceeding; in this case, that parent is the mother. The pendente lite order entered in the dependency action did not change the fact that the mother had been designated as the custodial parent in the judgment sought to be modified.

Even if the pendente lite order could have operated to divest the mother of her status as the "custodial parent," as the father argues, that order lost all legal effect once DHR voluntarily dismissed its dependency action.

" '[T]he effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought.' In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977). Moreover, ' "[i]t carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and

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defendant, and all issues, with respect to plaintiff's claim." ' Id.
(quoting 27 C.J.S. Dismissal and Nonsuit § 39 (1959))."

Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1236 (Ala. 2004). When DHR filed its notice of voluntary dismissal on January 26, 2021, that notice nullified the dependency proceedings, including the pendente lite order, returning the parties to the same position they had occupied before the institution of that action, i.e., leaving the mother as the custodial parent.

Therefore, the mother, as the custodial parent under the terms of the judgment that the father is seeking to modify, has the right to choose the venue of the action in accordance with § 30-3-5. The mother promptly notified the Elmore Circuit Court that she was selecting the Montgomery Circuit Court to preside over the modification action, as was her unequivocal statutory right. See Ex parte Brandon, 113 So. 3d 638, 640 (Ala. 2012) . In Ex parte Hester, 682 So. 2d 6, 7 (Ala. 1996), our supreme court recognized that "§ 30-3-5 gives the trial court no discretion to grant or to deny a motion by the custodial parent to transfer; rather, it provides that the current custodial parent shall be able to choose the venue." Pursuant to Ex parte Hester, we conclude that the mother has a clear

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legal right to an order transferring the modification action to the Montgomery Circuit Court.

Conclusion

Based on the foregoing, we grant the mother's petition and issue a writ of mandamus directing the Elmore Circuit Court to transfer the modification action to the Montgomery Circuit Court.

PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur.