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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

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Ex parte M.M.

PETITIONS FOR WRIT OF MANDAMUS

(In re: Conecuh County Department of Human Resources

v.

M.M.)

(Conecuh Juvenile Court, JU-19-43.02 and JU-19-44.02)

MOORE, Judge.

M.M. ("the father") petitions this court for writs of mandamus directing the Conecuh Juvenile Court ("the juvenile court") to vacate its

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May 7, 2021, orders denying his motions to stay proceedings initiated by the Conecuh County Department of Human Resources ("DHR") to terminate his parental rights to his minor children, T.M., who was born on June 1, 2014, and A.M., who was born on November 18, 2015, and to enter orders granting a stay. We deny the petitions.

Procedural History

On February 22, 2021, DHR filed separate petitions seeking to terminate the parental rights of the father to T.M. and A.M. ("the children"). DHR alleged, among other things, that the father had been indicted for capital murder after shooting and killing the children's mother and her unborn child in the presence of the children and that the murder charges remained pending at the time the petitions were filed. The father filed motions to stay proceedings on the petitions to terminate his parental rights until the pending criminal charges against him are concluded, asserting his right against self-incrimination granted by the Fifth Amendment to the United States Constitution. DHR filed, on April 12, 2021, objections to the father's motions to stay, asserting, among other things, that the children had been in DHR's continuous care and custody

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since December 6, 2019; that a stay of the termination proceedings would be contrary to the best interests of the children; that the granting of a stay would prejudice the children; and that the petitions to terminate the father's parental rights included additional grounds unrelated to the criminal charges upon which termination of the father's parental rights could be based. DHR sought orders from the juvenile court "[s]taying any claim and/or ground that may be considered paralleled to the father's criminal case,"¹ denying the father's motion to stay as to all grounds asserted in the petitions that are independent of the father's criminal case, preventing DHR or the guardian ad litem from raising any fact or issue relating to the father's criminal case, and limiting the trial on the petitions to terminate the father's parental rights to claims or grounds unrelated to the issues involved in the father's criminal case.

On April 13, 2021, DHR filed amended termination petitions that did not contain references to the father's killing of the children's mother

¹We interpret this request as a request that the juvenile court limit the presentation of evidence to omit any mention of the father's criminal case.

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or the pending capital-murder charges against the father. DHR filed on April 29, 2021, supplemental responses to the father's motions to stay the proceedings, asserting, among other things, that, because it had amended the termination petitions to remove the murder of the mother and her unborn child as a ground for termination of the father's parental rights, there remained no criminal proceedings parallel to the termination actions.

A hearing on the father's motions to stay was conducted on May 6, 2021. The father's counsel argued at that hearing, among other things, that, even if DHR limited its evidence to the father's conduct before the murder of the children's mother, the father's defense to the criminal charges against him would also involve matters that predate the mother's death, including the state of his and the mother's relationships with one another and with the children, the environment in which they had lived, and the mental states of the father and of the mother before the mother's death. In response, DHR's counsel asserted that DHR was "not going to mention the capital murder charge."

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Dr. Jack C. Carney, a licensed psychologist who had met with the children on three occasions between September 29, 2020, and December 16, 2020, testified at the hearing as an expert witness. Dr. Carney testified that the children had disclosed to him that the father had murdered their mother and had given "very vivid and accurate descriptions" of the murder, that they do not trust the father, that they are frightened of the father, and that they do not want to be around the father. He stated that T.M. had also disclosed accusations of sexual abuse with regard to the father and had informed him that the mother had protected her from the father's abuse. Dr. Carney testified that, when the father took the mother from T.M., he also took T.M.'s sense of safety. According to Dr. Carney, the best thing for T.M. would be to "[c]ut off all communication with [the] father, cease and separate it and then also move forward towards a permanency plan with a loving and nurturing parental figure, in hopes that eventually we can move towards adoption, if appropriate." He recommended removing contact between T.M. and the father because, he said, the father is an abusive figure who is causing her trauma and is modeling to her that dangerous behavior is appropriate.

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Dr. Carney testified that A.M. had demonstrated symptoms of post-traumatic stress disorder and of "major depressive disorder with a great deal of anxiety and melancholia, separation anxiety." Dr. Carney stated that A.M. had demanded that his mother be returned to him because, Dr. Carney said, at his age, A.M. did not understand the concept of irreversibility and because every day he was "basically going through a traumatic loss, wanting to know why his mother has left him." Dr. Carney testified that it would be very important for A.M. to be available for adoption and that the delay in achieving the stability that adoption could bring was creating the possibility of long-term psychological and behavioral problems for A.M. He stated that, for both of the children, having stability and predictability would go a long way in creating a safe environment and minimizing their anxiety to allow them to address their traumatic experiences.

The juvenile court entered separate orders on May 7, 2021, denying the father's motions to stay the proceedings. In denying the father's motions, the juvenile court made the following findings, among others:

"9. Even with the amended [termination-of-parental-rights ('TPR')] petition[s] and DHR's intent to present zero evidence of the murder or since the murder, the capital murder charge against the father is so integral to the TPR proceedings, the Court finds the matters are parallel. The Court further finds that this planned course of action by DHR threatens the father's constitutional rights as neither DHR [nor] any other party can present evidence of the father's present ability to care for the child[ren] without referencing the fact the father is incarcerated without any bond pending criminal charges since December 2019 and will continue to be so for the near foreseeable future. The Court has judicial notice of the charges and the father's condition as the father's name appears on a jail list regularly provided to him as provided by Alabama law in addition to being a part of the Alacourt file system. Further, there is an active pending dependency action before this Court with the same parties. The evidence which would be presented to meet DHR's burden of proof in a TPR [action] (even the amended petition[s]) will require overlapping acts and be considered substantially similar to the criminal proceedings charging the father with murder. The Court is aware that DHR wants to proceed with an alleged sexual abuse allegation of which DHR was aware of prior to the murder of the [children's] mother and of which no criminal charges have been brought against the father over the past 18 months or longer that the allegations have been known to DHR.

"10. That part of the standard for the granting of the TPR petition[s] (necessity of present condition) is so intertwined as to be parallel to the criminal proceedings charging the father with murder (and this is not even considering the recent allegation of sexual abuse made in the amended TPR petition[s]). The father's present condition is likely to continue for a lengthy amount of time as the Court

has judicial knowledge that the capital murder case is not currently set for trial. The Court is further aware of the due process rights of the father in a capital murder charge including the automatic right of appeal assuming the father is found guilty. The Court is aware that a capital murder charge may take many years to resolve and that this length of time would be absolutely detrimental to the minor child[ren]. It is the Court's factual finding based on the expert testimony of Dr. Carney that a resolution of the TPR [petitions] and accompanying permanency must happen sooner than later for the well being of the minor child[ren] now and for the remainder of the child[ren]'s li[ves]. The child[ren]'s personalit[ies] and manner of thinking are being developed now and the child[ren]'s development will not wait for the resolution of the father's capital murder charge. Any further delay will irreparably harm the child[ren].

"11. That based on the above, the father's constitutional protection against self-incrimination will be threatened by proceeding with the TPR [actions] even if [they are] based on grounds other than the murder of the mother, should he choose to testify at all. 'Allowing the party to remain quiet only for specific questions' threatens the father's right against self-incrimination. Ex parte Rawls, 953 So. 2d 374, 381 (Ala. 2006).

"12. That the child[ren] [have] already been in the care of [DHR] for eighteen (18) months and the delay in permanency and the uncertainty caused by a delay is exacerbating the stress to the child[ren] caused by [their] separation from [their] mother which [they] still view[] as temporary. The best interests of the child[ren] are not met by a stay in these proceedings and tip the scale in this Court's balancing of the competing interests. This matter is in the juvenile court of Conecuh County and the Court believes the

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minor child[ren]'s interest is of greater importance at this time.

"13. The Court finds that the short and long terms needs of the child[ren] outweigh the father's rights against self-incrimination and therefore the stay is due to be denied. The Court further finds that the State's public interest in finding a permanent home for the children outweighs the father's rights against self-incrimination and therefore the stay is due to be denied. The public has a significant desire to see children removed from the foster care rolls as soon as possible and to obtain permanency. The father failed to show that there would be no harm to the child[ren] if this matter is delayed pending his capital murder charge. The father is not without the ability to defend the petition[s] for TPR. The father has an attorney and he has the ability to cross-examine the witnesses proffered by DHR, the father can make legal arguments and if DHR fails to prove the elements for TPR, then the father can properly move for a dismissal."

The juvenile court ordered that the father's requests to stay the termination proceedings were denied, that evidence relating to the murder of the mother and to the father's being charged with that murder shall be allowed, and that the father will not be compelled to testify. The father timely filed his mandamus petitions before this court; this court consolidated the father's petitions ex mero motu.

Standard of Review

" "A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is 'appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court.' Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001)." "

Ex parte Brown, 963 So. 2d 604, 606-07 (Ala. 2007) (quoting Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

Analysis

The father argues in his petitions before this court that the juvenile court erred in denying his requests to stay the termination-of-parental-rights proceedings based on his right against self-incrimination. In Ex parte Rawls, supra, a case in which Bryan C. Rawls had asserted his Fifth Amendment right against self-incrimination, our supreme court considered a petition for the writ of mandamus following the denial of Rawls's motion to stay his divorce proceedings pending a resolution of

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criminal charges that had been filed against him by his wife. The Alabama Supreme Court outlined the issue as follows, in pertinent part:

"This Court stated in Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988):

" 'Under the Fifth Amendment to the Constitution of the United States, "no person ... shall be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination must be liberally construed in favor of the accused or the witness, Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), and is applicable not only to federal proceedings but also to state proceedings, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). "The fact that the privilege is raised in a civil proceeding rather than a criminal prosecution does not deprive a party of its protection." Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir.1979), citing with approval Lefkowitz v. Cunningham, 431 U.S. 801, 9[7] S.Ct. 2132, 53 L.Ed.2d 1 (1977); McCarthy v. Arndstein, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed.[] 158 (1924).'

"The United States Constitution, however, does not mandate that under all circumstances the civil proceedings in which the privilege against self-incrimination is asserted be stayed; whether to stay those proceedings is within the trial court's discretion.

" 'While the Constitution does not require a stay of civil proceedings pending the outcome of potential criminal proceedings, a court has the

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discretion to postpone civil discovery when "justice requires" that it do so "to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c), Ala. R. Civ. P.'

"Ex parte Coastal Training Inst., 583 So. 2d 979, 980-81 (Ala. 1991).

"In the present case, three issues must be addressed to determine if a stay in the civil divorce proceedings based on Fifth Amendment concerns in a pending criminal action is warranted: (1) whether the civil proceeding and the criminal proceeding are parallel, see Ex parte Weems, 711 So. 2d 1011, 1013 (Ala. 1998); (2) whether the moving party's Fifth Amendment protection against self-incrimination will be threatened if the civil proceeding is not stayed, see Ex parte Windom, 763 So. 2d 946, 950 (Ala. 2000); and (3) whether the requirements of the balancing test set out in Ex parte Baugh, 530 So. 2d at 244, and Ex parte Ebbbers, 871 So. 2d 776, 789 (Ala. 2003), are met."

953 So. 2d at 378.

In Ex parte Rawls, our supreme court first concluded that the proceedings involved were parallel and that Rawls's Fifth Amendment right against self-incrimination in the criminal case against him would be threatened if the civil action was not stayed. 953 So. 2d at 381-84. Then, it concluded that the balancing test of Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988), also weighed in favor of Rawls. 953 So. 2d at 384-85. Our

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supreme court observed that, "[t]o justify a stay of a civil proceeding pending resolution of a criminal proceeding, the Fifth Amendment right of the party requesting the stay must outweigh the potential prejudice to the other party of granting the stay." Id. It then considered the following factors that might be considered in applying the balancing test, as outlined in Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003):

" '1. The interest of the [party opposing the stay] in proceeding expeditiously with the civil litigation, or any particular aspect of it, and the potential prejudice to the [party opposing the stay] of a delay in the progress of that litigation.

" '2. The private interest of the [party seeking the stay] and the burden that any particular aspect of the proceedings may impose on the [party seeking the stay].

" '3. The extent to which the ... Fifth Amendment rights [of the party seeking the stay] are implicated/the extent to which the issues in the criminal case overlap those in the civil case.

" '4. The convenience of the court in the management of its cases, and the efficient use of judicial resources.

" '5. The interest of persons not parties to the civil litigation.

" '6. The interest of the public in the pending civil and criminal litigation.

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" '7. The status of the criminal case, including whether the party moving for the stay has been indicted. ...

" '8. The timing of the motion to stay.' "

953 So. 2d at 385 (quoting Ebbers, 871 So. 2d at 789-90). Ultimately, our supreme court determined that, "although [Rawls's wife] ha[d] a strong interest in the completion of the divorce proceedings, because there [was] no evidence indicating that her case [would] be at all prejudiced or damaged by the issuance of a stay, [Rawls's] Fifth Amendment right must prevail over her interest," 953 So. 2d at 385-86, and, accordingly, it issued the writ requested by Rawls and directed that the divorce proceedings be stayed until the criminal charge had been adjudicated. 953 So. 2d at 387.

In the present case, unlike in Rawls, the juvenile court determined that the balancing test weighed in favor of denying the stay requested by the father based on the best interests of the children and the State's public interest. The father argues in his mandamus petitions that the juvenile court erred in denying his motions to stay because, he says, his constitutional right against self-incrimination outweighs any prejudice to the children. The father cites R.M. v. Elmore County Department of

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Human Resources, 75 So. 3d 1195, 1203 (Ala. Civ. App. 2011), in which this court considered the argument that motions to stay termination-of-parental-rights cases that had parallel criminal proceedings should not have been granted because, in those cases, the children's need for permanency greatly outweighed any right to a stay that R.M. and D.J.M., Jr. ("the parents"), might have had. This court agreed that the children in those cases deserved permanency; we noted, however, that "permanency ... may not be achieved at any cost." Id. Moreover, this court noted that the evidence in those cases established "that the children were settled and thriving in their placement with relatives, and no evidence was presented to indicate that that placement was unstable or at risk of being disrupted." Id. at 1203-04. Accordingly, in R.M., this court concluded that, under the circumstances, staying the termination-of-parental-rights trial until the criminal proceedings had been resolved was unlikely to prejudice the children in a way that was not outweighed by allowing the termination trials to continue despite the parents' inability to defend themselves against termination without sacrificing their constitutional rights. Id. at 1204.

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In Ex parte M.J.W., 62 So. 3d 531 (Ala. Civ. App. 2010), M.J.W. petitioned this court for a writ of mandamus directing the Baldwin Juvenile Court to enter a stay of the dependency proceeding involving her two children until after M.J.W.'s related criminal charges were resolved. In that case, the paternal aunt of M.J.W.'s children had filed a dependency petition seeking custody of the children, who remained in the care of M.J.W. Id. at 532-33. This court reviewed the Baldwin Juvenile Court's order, which granted M.J.W.'s motion to stay a final adjudication of the dependency proceeding until after her criminal charges were resolved but denied her motion to stay as to a pendente lite proceeding. Id. at 533. In denying M.J.W.'s petition for the writ of mandamus, this court determined that the risk of prejudice to M.J.W.'s children if the court had granted a stay of the entire dependency proceeding was "overwhelming" and stated further, in pertinent part:

"Undoubtedly, the state's interest in protecting the children of this state from a substantial risk of harm is not simply a 'procedural consideration' that must automatically yield to the mother's Fifth Amendment rights. See Ex parte Baugh, 530 So. 2d 238, 242 (Ala. 1988). Our supreme court has stated that '[i]t is the court's duty to scrupulously guard and protect the interests of children,' Ex parte Fann, 810 So. 2d

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631, 638 (Ala. 2001), and the stated purpose of the Alabama Juvenile Justice Act, codified at Ala. Code 1975, § 12-15-101 et seq., 'is to facilitate the care [and] protection ... of children who come under the jurisdiction of the juvenile court.' § 12-15-101(a). Furthermore, this court has recognized that the state has a compelling interest in protecting its children from harm. See E.H.G. v. E.R.G., 73 So. 3d 614[, 628] (Ala. Civ. App. 2010). The juvenile court, by denying the mother's motion to stay the proceeding so that pendente lite custody of the children could be determined, recognized that the children, as third parties to the dependency action, had a substantial interest in the matter and that, in such circumstances, the juvenile court was required to proceed in a manner so as to protect the children from the substantial risk of harm. The juvenile court, by proceeding only on a pendente lite basis and by staying a final determination of dependency and custody of the children, effectively balanced its duty to scrupulously protect the children from the substantial risk of harm and the interest of the children in living in a home free from the substantial risk of harm against the mother's interest in postponing the entire civil proceeding until after resolution of the criminal charges."

62 So. 3d at 536.

The father argues in his mandamus petitions that the juvenile court erred in concluding that the children's need for permanency is outweighed by what he asserts is the impending violation of his Fifth Amendment right against self-incrimination under the United States Constitution and his rights under Article I, § 6, Ala. Const. 1901 (Off. Recomp.), because, he

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asserts, there is no existing permanent placement for the children. The father argues that, because DHR's present plan for the children is adoption by an unknown resource, there is no guarantee that, even if the father's parental rights to the children were to be terminated, the children would achieve "speedy permanency." Thus, he asserts, maintaining the status quo "is the best avenue for the rights of all parties involved."

In the present cases, however, unlike in R.M., the evidence presented did not indicate that the children are settled or thriving. On the contrary, the testimony of Dr. Carney indicates that the children have experienced trauma that has led to a number of psychological and behavioral issues. He stated that the children are afraid of the father after experiencing traumatic loss and abuse at his hands. Dr. Carney testified that terminating the father's parental rights would allow the children predictability and that delaying that sense of security for the children creates the possibility of long-term psychological and behavioral problems for them. He testified that a delay of the termination of the father's parental rights by even a year "would more likely than not cause

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more problems for the children," particularly with regard to their sense of security and permanency. Thus, contrary to the father's assertions, the evidence does not support a finding that maintenance of the status quo, despite the present unavailability of an adoptive resource for the children, is in the children's best interests.

In light of this court's decision in M.J.W., supra, acknowledging the state's compelling interest in protecting its children from harm, and the testimony presented by Dr. Carney indicating that the children are suffering as a result of the father's actions and that their conditions will worsen the longer the termination-of-parental-rights trial is delayed, we cannot agree with the father that the juvenile court erred in denying his motions to stay. Rather, we conclude that the juvenile court properly balanced the father's right against self-incrimination and the best interests of the children, which demands immediate severance of the children from their relationship with the father.

Because the father has failed to show a clear legal right to the issuance of writs from this court directing the juvenile court to vacate its

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orders denying the father's motions to stay, and to enter orders granting a stay, we deny the father's petitions.

2200645 -- PETITION DENIED.

2200646 -- PETITION DENIED.

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