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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Ex parte L.M. and A.M.

PETITION FOR WRIT OF MANDAMUS

(In re: In the Matter of J.M.E., a minor)

(Marshall Juvenile Court, JU-13-500.02)

HANSON, Judge.

This mandamus proceeding concerns the propriety of an order entered by the Marshall Juvenile Court ("the juvenile court") determining,

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in pertinent part, that a previous order entered in the second of three dependency actions involving a minor child, did not amount to a final custody adjudication and denying a motion to dismiss further proceedings addressing the custody of that minor child for lack of jurisdiction. Because we conclude that the juvenile court retained jurisdiction to consider the child's future custodial disposition, we deny the petition.

The exhibits to the parties' filings in this court (see generally Rule 21(a)(1)(F), Ala. R. App. P.) reveal the following pertinent procedural history. In January 2011, a child, J.M.E. ("the child"), was born to then-16-year-old K.E. ("the mother"), who is the daughter of A.M.¹ ("the maternal grandmother"). In April 2013, the maternal grandmother and her husband, L.M., filed a petition in the juvenile court alleging that the child was dependent based upon the mother's alleged inability to discharge her responsibilities as to the child. They sought awards of temporary and permanent custody of the child and requested that "such other [and] further order[s] concerning support, maintenance and

¹A.M. is also identified in documents before this court as A.B. and as A.B.M.

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well-being of the child as may be in the best interest of the child" be entered; that action was assigned case no. JU-13-500.01 ("the .01 action").

In August 2013, the juvenile court held a hearing in the .01 action at which counsel for the maternal grandmother and her husband, the mother (acting through a guardian ad litem because of her minority), and the child's guardian ad litem represented to the court that "an agreement had been reached settling all pending issues." An order was then entered in the .01 action on September 3, 2013, determining that the child was dependent; awarding joint custody of the child to the mother and to the maternal grandmother and her husband; specifying that the mother would alternate physical-custody periods with the maternal grandmother and her husband every four days; and stating that custody of the child "shall be returned to" the mother at the end of November 2013 "unless any party files an appropriate pleading on or prior to that date indicating facts or circumstances that have occurred which would support a contention that a return of custody would not be in the child's best interests."

On October 24, 2013, the maternal grandmother and her husband filed in the .01 action what they labeled a "motion for change of custody

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and/or further disposition" in which they averred, among other things, that the mother's home was unfit, that they should be awarded sole legal and physical custody of the child, and that the juvenile court should enter "such other [and] further orders concerning support, maintenance and well-being of the child as may be in the best interest of the child." However, on October 24, 2013, the juvenile-court judge then presiding over the .01 action placed on the case-action-summary sheet in that action the following signed handwritten notation: "This case point closed. New petition required." However, for all that appears in the materials submitted to this court, the judge's notation, although potentially amounting to the rendition of an order of the court under Rule 58(a)(4), Ala. R. Civ. P., indicating an intent to direct the entry of a final judgment in the .01 action notwithstanding the proviso permitting the filing of further papers in that action, was never entered as an order of the court pursuant to Rule 58(c), Ala. R. Civ. P., which requires "input of the order or judgment into the State Judicial Information System." Therefore, the .01 action remained pending.

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Notwithstanding the continued pendency of the .01 action, the maternal grandmother and her husband, acting on the juvenile court's handwritten notation, filed in the juvenile court a new verified petition essentially repeating the dependency allegations in, and requesting the same relief sought in, their October 24, 2013, motion that had been filed in the .01 action; that petition was assigned case no. JU-13-.500.02 ("the .02 action"). Among the relief sought by the maternal grandmother and her husband in the petition filed in the .02 action was "full custody of the ... child" and "such other [and] further orders concerning support, maintenance and well-being of the child as may be in the best interest of the child." The juvenile court entered a temporary order concerning the child on October 30, 2013, after which, on November 6, 2013, both the mother (who had reached the age of majority by that date) and the maternal grandmother and her husband entered into an agreement on "pending issues" and jointly filed a document labeled an "order by consent" under which the parties proposed that the parties would have joint legal custody of the child, that the maternal grandmother and her husband would have sole physical custody of the child, and that the mother would

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have "reasonable visitation" with the child "as agreed to by the parties," but that the mother "may be returned physical custody of the ... child upon the latter of her turning twenty-one years of age or completing at least a two-year college degree, and otherwise being able to provide a safe and sound environment conducive to the upbringing of the ... child." That document further bears the notation: "done and ordered this the 21 day of Nov., 2013"; the signature of the juvenile-court judge then presiding over the .02 action; and the juvenile-court clerk's filing stamp dated November 21, 2013. There is no indication, however, that the presiding juvenile-court judge intended to close the .02 action to further review after entering the "order by consent".

No further pleadings or other papers concerning the child's custody were apparently filed for almost seven years after the "order by consent" was judicially ratified. However, on August 21, 2020, after the juvenile-court judge who had previously presided over the .01 action and the .02 action had left office, the maternal grandmother and her husband, acting through new counsel, again filed a dependency petition as to the child, averring that the child either "remains dependent or is without a physical

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placement or custodian fit and capable of caring for and supporting" the best interests of the child; that the mother had unilaterally relocated the child to Iowa within the preceding week; and that the mother had "demonstrated erratic behavior and decision-making," had "neglect[ed] ... the [c]hild's special needs and healthcare," and had entered into romantic relationships with people "of ill repute," including drug abusers with criminal histories. The August 2020 petition was accompanied by a completed Form JU-6A, "Juvenile Court Intake Officer's Endorsement on a Petition," listing the case number as that of the .02 action; however, the petition bears a handwritten notation striking the printed ".02" identifier and listing a new ".03" identifier. Also on August 21, 2020, the juvenile court entered an order, bearing case no. JU-13-500.03, directing the mother to return the child to Alabama pending the entry of further orders and setting a pendente lite hearing for September 2020; for the sake of simplicity, the juvenile court's initial treatment of the August 2020 petition as commencing a new case warrants reference to that matter as "the .03 action."

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On October 13, 2020, the maternal grandmother and her husband filed in the .03 action what they labeled a "second amended petition"; that filing asserted, among other things, that the provision in the "order by consent" in the .02 action specifying that the mother "may be returned physical custody" of the child upon her satisfying one of two identified conditions and "otherwise being able to provide a safe and sound environment conducive to" the child's upbringing was a void custodial-reversionary clause under such authority as Hovater v. Hovater, 577 So. 2d 461 (Ala. Civ. App. 1990); that that clause should be stricken as void pursuant to Rule 60(b)(4), Ala. R. Civ. P., which pertains to void judgments; and that the child's having resided with the mother did not divest the maternal grandmother and her husband of their physical-custody rights specified in other portions of the "order by consent." On October 27, 2020, the juvenile court entered an order in the .02 action purporting to grant the request made in the .03 action to strike the challenged clause in the "order by consent" in the .02 action pursuant to Rule 60(b)(4), specifying that the "order by consent" was a temporary order, determining that the .02 action remained pending, and stating that

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the juvenile court would "hear argument" concerning the appropriate custody standard to be applied in the .02 action. The juvenile court also entered an order dismissing the .03 action because, it determined, the .02 action "remains pending."² Two days later, the juvenile court entered an order in the .02 action acknowledging the agreement of the parties that they would share custody of the child on an alternating weekly basis pending a final hearing and the entry of a judgment concerning the child's custody.

Although the juvenile court set a final hearing in the .02 action to occur in August 2021, an order issued by that court in the .02 action on August 12, 2021, indicates that, before that scheduled hearing, the maternal grandmother and her husband filed a motion seeking a summary judgment in their favor that, according to the order, was

²No review by appeal or petition for an extraordinary writ was sought by any party as to the order dismissing the .03 action; further, because it is unnecessary to our decision, we express no opinion regarding the correctness of the proposition that the challenged clause in the "order by consent" was invalid as mandating a custodial reversion, despite its reference to the mother's "otherwise being able to provide a safe and sound environment conducive to the upbringing of the ... child."

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predicated upon their contention that the applicable substantive standard for determining who should have custody of the child was the "material-promotion" standard specified in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), which, the maternal grandmother and her husband stated, was the mother's burden to meet. The juvenile court's August 12, 2021, order, which was entered after having heard arguments on that motion, directed the parties to file briefs concerning the appropriate substantive custody standard.

Rather than brief that issue as directed, however, the maternal grandmother and her husband responded by filing a motion on August 17, 2021, seeking dismissal of all pending proceedings, asserting that the juvenile court lacked jurisdiction to modify the "order by consent" and directly challenging, for the first time, the determination made by the juvenile court on October 27, 2020, that the .02 action had remained pending even after the striking of the clause in the "order by consent" specifying that the child's physical custody "may be returned" to the mother. The mother, for her part, responded to the juvenile court's direction in its August 12, 2021, order in the .02 action by filing a brief

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taking the position that the "order by consent" was a pendente lite order and not a final judgment; averring that the maternal grandmother and her husband had "returned custody" of the child "to the mother" per the terms of the agreement set forth in the "order by consent," "having intended to do so from the beginning"; and asserting that the question of the child's custody was governed by a best-interest-of-the-child standard.

In response to the parties' filings, and after holding a scheduling conference, the juvenile court entered an order on September 2, 2021, in the .02 action. The maternal grandmother and her husband's mandamus petition acknowledges that their petition "arises from [that] order." That order, in effect, denied the relief desired by the maternal grandmother and her husband as stated in their August 17, 2021, motion seeking the dismissal of all pending custody proceedings based upon those parties' claim of lack of jurisdiction. In pertinent part, the September 2, 2021, order transferred all filings in the .02 action to the .01 action, which earlier action the juvenile court (correctly) concluded "had never been closed" by an effective order entered by that court (see Rule 58(c), Ala. R. Civ. P., and our discussion, supra); it further observed that the "order by

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consent" had effectively modified the child's custody, which had previously been governed by the nonfinal order entered on September 3, 2013, but rejected the proposition advanced by the maternal grandmother and her husband that "a new petition from the ... mother is ... required" for the juvenile court to finally dispose of the child's custody, opining that "she may continue to pursue her relief in" the .01 action.³

The maternal grandmother and her husband reiterate in their mandamus petition their position asserted in their response to the juvenile court's August 12, 2021, order: they posit that the juvenile court lacked jurisdiction to conduct any proceedings concerning the custody of the child after 14 days had elapsed from the juvenile court's ratification of the "order by consent" on November 21, 2013. However, as this court recently observed in Ex parte M.D., [Ms. 2200205, Feb. 12, 2021] ___ So.

³The September 2, 2021, order also provided that the custody matter was "being set for trial on the merits by" a separate order. Although an earlier order of the juvenile court had set a trial in the .02 action for October 21, 2021, no filing in this court indicates that any trial was held by the juvenile court on that date regarding the child's custody, and no party has suggested that the mandamus petition has been rendered moot by subsequent proceedings.

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3d ___ (Ala. Civ. App. 2021), that, under § 12-15-117(a), Ala. Code 1975, "when a juvenile court has previously adjudicated a child to be dependent, the juvenile court retains continuing jurisdiction over the child" until one of two events: (1) "the child attains the age of 21" years or (2) "the juvenile court terminates its jurisdiction over the case involving the child before the child's attainment of the age of 21"; thus, in the absence of either exception, the juvenile court "remains the proper forum in which to seek a custody modification in the case of a child who has been adjudicated to be dependent." ___ So. 3d at ___ n.2.

Here, the now-10-year-old child was adjudicated to be dependent by the juvenile court in the .01 action on September 3, 2013, yet no order was entered closing that action (or the subsequent .02 action in which the "order by consent" was ratified, for that matter) to further court review, much less was any written order of the juvenile court entered " 'explicitly stating ... that [that court wa]s terminating jurisdiction over the case involving the child.' " M.P.G. v. Jefferson Cnty. Dep't of Hum. Res., 215 So. 3d 1096, 1101 (Ala. Civ. App. 2016) (quoting Ala. Code 1975, § 12-15-117(a)). Further, the "order by consent," by its express terms, envisioned

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that the custodial status of the child was subject to potential change by the juvenile court upon demonstration that particular changes in the mother's circumstances had occurred (although the parties currently appear to be in agreement that those changed circumstances could not ipso facto divest the maternal grandmother and her husband of the child's physical custody), and the parties did not expressly agree that any pending action should be closed. Thus, notwithstanding the "order by consent," which has -- along with any other pending matters left over from the now-terminated .02 action -- been ordered transferred to the .01 action for further consideration and final disposition, the juvenile court has subject-matter jurisdiction to determine through the entry of a final judgment in the .01 action (which is the sole remaining action involving the child), whether the child should be in the physical custody of either the maternal grandmother and her husband or in the physical custody of the mother. We thus conclude that the maternal grandmother and her husband have not demonstrated a clear legal right to the juvenile court's issuance of an order granting a dismissal of all further custody proceedings involving the child in the manner they requested in their

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August 17, 2021, motion such that the writ of mandamus should issue from this court.

PETITION DENIED.

Fridy, J., concurs.

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

Moore, J., concurs in the result, with writing, which Thompson, P.J., joins.

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MOORE, Judge, concurring in the result.

L.M. and A.M. ("the maternal grandparents") petition this court to issue the writ of mandamus to the Marshall Juvenile Court ("the juvenile court") directing that court to cease exercising jurisdiction over a dispute between the maternal grandparents and K.E. ("the mother") as to the custody of J.M.E. ("the child"). I concur with the main opinion that the petition should be denied, but not for the reasons set forth therein.

The maternal grandparents acknowledge that the juvenile court properly acquired jurisdiction over the custody dispute through a dependency proceeding that was assigned case number JU-13-500.01 ("the .01 action"). The maternal grandparents maintain, however, that the juvenile court finally adjudicated the custody dispute between the parties when it awarded the parties joint legal custody and the maternal grandparents sole physical custody of the child in an "Order By Consent" ratified by the juvenile court on November 21, 2013, in case number JU-13-500.02 and that the mother has not invoked the jurisdiction of the juvenile court to modify that order by filing a new petition and paying a filing fee. The juvenile court rejected that argument when it determined

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that the November 21, 2013, order was not a final judgment and that, in fact, the custody dispute remained an extant controversy over which it retained jurisdiction in the .01 action without the necessity of a new petition or filing fee.

In their mandamus petition, the maternal grandparents argue at length that the November 21, 2013, order was a final judgment, although they candidly acknowledge that the order did not dispose of their claim for child support. However, a judgment finding a child dependent and disposing of the custody of the child is not a final judgment when a pleaded claim for child support remains unadjudicated. See, e.g., T.H. v. Jefferson Cnty. Dep't of Hum. Res., 100 So. 3d 583 (Ala. Civ. App. 2012). In light of the consistent line of cases on this point, I find unavailing the maternal grandparents' argument that the failure of the juvenile court to adjudicate their child-support claim amounts only to reversible error and does not affect the finality of the order.

The maternal grandparents do not argue that the juvenile court erred in determining that the .01 action had never been "closed" or that the juvenile court erred in transferring the custody dispute to the .01

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action. The main opinion posits that the juvenile court did not err in those rulings primarily because the juvenile court did not effectively enter an order on October 24, 2013, closing the case. I do not join in any aspect of that discussion because I believe it is unnecessary to the disposition of the petition and, further, confuses the manner in which a dependency proceeding terminates with the manner in which a juvenile court's continuing jurisdiction over the custody of a dependent child terminates. Suffice it to say that the materials before us do not show an apparent lack of subject-matter jurisdiction of which this court would have to take notice.

Thompson, P.J., concurs.