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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Ex parte S.L.P.

PETITION FOR WRIT OF MANDAMUS

(In re: S.L.P.

v.

J.B.)

(Mobile Juvenile Court, CS-17-900236.05)

FRIDY, Judge.

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S.L.P. ("the mother") petitions this court for a writ of mandamus directing the Mobile Juvenile Court ("the juvenile court") to set aside its order of September 29, 2021, denying her motion to dismiss the petition to modify child custody that J.B. ("the father") filed on April 15, 2021 and to enter an order dismissing the father's modification petition. The mother also asks that this court vacate the juvenile court to vacate its order of April 16, 2021, awarding the father temporary emergency custody of C.B. ("the child"). For the reasons set forth below, we grant the mother's petition in part and deny it in part.

Background

The materials before this court indicate the following. On June 21, 2018, the juvenile court entered an order in a previous action that, among other things, directed the father to pay child support in the amount of \$732 each month retroactive to April 2017. The order directed the father to pay \$50 each month toward the resulting child-support arrearage. It also awarded custody of the child to the mother. It did not contain any visitation provisions. On December 10, 2019, the juvenile court entered an

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order directing law-enforcement officials to pick up the child and to return him to the mother.

On January 29, 2020, the juvenile court entered an order awarding the father visitation with the child every other weekend pending a hearing set for July 29, 2020. On July 29, the juvenile court entered an order dismissing the previous action because neither party had appeared in court for the hearing. On April 15, 2021, the father commenced the current action by filing in the juvenile court a petition to modify custody and an "emergency motion for custody." Those filings, neither of which was verified, were identical except for their titles. In them, the father alleged that, for the twelve months preceding the filing of the petition and the motion, the child had been "exclusively" in his custody and that the mother had abandoned the child. The father asserted that, after the child was returned to the mother as a result of the December 10, 2019, pickup order, the mother returned the child to him saying she had no place to live. He further alleged that the mother was emotionally unstable and had "communicated to the [father] that she no longer want[ed] custody." The father said that he had been unable to register the child in school and

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requested sole legal and physical custody so that he could make decisions for the child.

On April 16, 2021, the day after the father filed his petition and motion, the juvenile court entered an ex parte order awarding "temporary custody" of the child to the father. The order said that no show-cause hearing was scheduled but that one would be held upon the mother's written request. The juvenile court scheduled a hearing on the merits of the father's petition for November 29, 2021.

On September 28, 2021, the mother filed a motion to dismiss the father's petition to modify custody and his motion for emergency custody or, in the alternative, to vacate the April 16, 2021, order and to decline to exercise jurisdiction over the matter. In her motion, the mother asserted that she had never been served with the father's modification petition or his emergency-custody motion. In an affidavit attached to the motion, the mother testified that she had first learned of the current action when, on August 24, 2021, the father sent her a text message with a copy of the April 16, 2021, order attached. The mother said that an attorney had provided her with copies of the modification petition and the emergency-

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custody motion and that the allegations contained in those filings are false.

In her affidavit, the mother said that she and the child had moved to Cobb County, Georgia, in February 2019 and that the two of them had lived there ever since.¹ She also testified that the father was aware of where she lived and that, at the time the father commenced this action, both he and the mother lived in metropolitan Atlanta. The mother alleged that, because she and the child had resided in Georgia for the past two years and the father had resided outside Alabama for the last five years, the juvenile court did not have jurisdiction to consider the father's petition and motion. Finally, the mother said, in seeking emergency custody, the father had failed to comply with the requirements of Rule 65(b), Ala. R. Civ. P., which provides that a filing seeking a temporary restraining order be verified or supported by an affidavit and that the attorney certify the attempts made to provide notice to the adverse party or to state the reasons supporting a claim that notice should not be required.

¹We cannot discern from the materials with whom the child resided at the time the petition was filed.

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On September 29, 2021, the juvenile court entered an order denying the mother's motion to dismiss. The order did not mention the mother's alternative request to set aside the April 16, 2021, order. On October 5, 2021, the mother filed this petition for a writ of mandamus. The father did not file an answer to the mother's petition.

Analysis

In her petition for the writ of mandamus, the mother makes several arguments regarding why the juvenile court's April 16, 2021, order awarding temporary emergency custody of the child to the father is due to be vacated. Because of the interlocutory nature of awards of emergency custody, this court has consistently reviewed such awards by way of a petition for a writ of mandamus. See, e.g., Ex parte Couey, 110 So. 3d 378, 379 (Ala. Civ. App. 2012); Ex parte Norlander, 90 So. 3d 183 (Ala. Civ. App. 2012); Ex parte Franks, 7 So. 3d 391 (Ala. Civ. App. 2008); and Ex parte Russell, 911 So. 2d 719 (Ala. Civ. App. 2005).

The standard our appellate courts apply when reviewing a petition for the writ of mandamus is well settled.

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"[M]andamus is a drastic and extraordinary writ that will be issued only when 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 Horton, 711 So. 2d 979, 983 (Ala. 1998).

Among the grounds the mother asserts in her petition is that the juvenile court erred in refusing to set aside the April 16, 2021, order because the father's attorney did not comply with the Rule 65(b), Ala. R. Civ. P., certification requirements to obtain the ex parte relief requested without providing notice to the mother. The mother notes that, as of the time her mandamus petition was filed -- more than five months after the juvenile court had entered the April 16, 2021, ex parte order -- she still has not been served with the father's custody petition and motion and the juvenile court has not held a hearing on the merits of the action.

The juvenile court had not explicitly ruled on the mother's motion seeking to vacate the April 16, 2021, order at the time she filed her mandamus petition. Nonetheless, we have considered petitions challenging the propriety of the issuance of such orders involving the

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change of custody of children in similar circumstances, even in the absence of a ruling from the juvenile court denying relief from such an order. See, e.g., Ex parte Fancher, 272 So. 3d 654, 657-58 (Ala. Civ. App. 2018); Ex parte B.J.C., 248 So. 3d 988 (Ala. Civ. App. 2017); Ex parte Hutson, 201 So. 3d 570 (Ala. Civ. App. 2016); Ex parte Franks, 7 So. 3d 391 (Ala. Civ. App. 2008); Ex parte Russell, 911 So. 2d 719 (Ala. Civ. App. 2005). Therefore, we will address the mother's mandamus petition insofar as it challenges the propriety of the issuance of the April 16, 2021, order.

Rule 65(b) provides, in pertinent part:

"A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

(Emphasis added.)

The father's custody-modification petition and his motion for emergency custody were not verified, and neither filing had an affidavit

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attached. Thus, in seeking emergency custody, the father failed to meet the first prong of Rule 65(b). Furthermore, the father's attorney failed to certify the efforts, if any, made to give the mother notice or to cite reasons why notice to the mother should not be required. Therefore, the second prong of Rule 65(b) also was not met.

"Rule 65(b), [Ala. R. Civ. P.], does not permit an ex parte [temporary restraining order] without a certification in writing to the trial court showing the efforts, if any, made to give notice to the adversary, accompanied by reasons supporting [the] claim that notice should not be required. The plain language of this rule assumes that notice is prima facie required and is intended to allow the trial court a studied opportunity to weigh the effect of an absence of notice in deciding to grant or refuse such extraordinary relief."

International Molders & Allied Workers Union v. Aliceville Veneers Div., Buchanan Lumber Birmingham, 348 So. 2d 1385, 1390 (Ala. 1977); Ex parte Hutson, 201 So. 3d 570 (Ala. Civ. App. 2016). Because the father and his attorney failed to comply with the requirements of Rule 65(b), the juvenile court erred by issuing the April 16, 2021, order. The mother has demonstrated a clear legal right to the relief she seeks, and her petition for the writ of mandamus is due to be granted as to this issue.

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In her petition, the mother also asserts that, under the Uniform Child Custody Jurisdiction and Enforcement Act, § 30-3B-101 et seq., Ala. Code 1975, the juvenile court no longer has continuing, exclusive jurisdiction over issues involving the child's custody and, therefore, that the juvenile court erred when it denied the mother's motion to dismiss the father's current action. Based on the materials submitted to us, it appears that there may be merit to the mother's contention as to this issue. However, the juvenile court denied the mother's motion to dismiss the day after that motion was filed without conducting an evidentiary hearing or hearing arguments of the parties on this issue. The father has not yet had the opportunity to respond to the mother's assertion in the juvenile court. See Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1228 (Ala. 2001) ("When [an appellate court] considers a petition for a writ of mandamus the only materials before it are the petition and the answer and any attachments to those documents."). Based on the materials before us, the mother has failed to demonstrate a clear legal right to the relief sought, and, thus, we deny the petition as to this issue; however, we encourage the juvenile court to allow the parties to present argument and evidence on

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the issue of jurisdiction before going forward with the hearing scheduled for November 29, 2021. See Rule 12(h)(3), Ala. R. Civ. P.

For the reasons set forth above, the mother's petition for a writ of mandamus is granted in part and denied in part, and the juvenile court is directed to vacate the order of April 16, 2021. The mother's request for an attorney fee is denied.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

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