REL: November 18, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2210248

Ex parte C.D.

PETITION FOR WRIT OF MANDAMUS

(In re: In the Matter of the Adoption of K.C.C.)

(Shelby Probate Court, PR-19-942)

On Application for Rehearing

EDWARDS, Judge.

The opinion of March 4, 2022, is withdrawn, and the following is substituted therefor.

C.D. ("the mother"), the biological mother of K.C.C. ("the child"), has filed a petition for the writ of mandamus in this court. This is the

fourth time that the adoption proceeding arising from the petition for the adoption of the child, which was filed in the Shelby Probate Court ("the probate court") by J.B.O. and J.H.O. ("the prospective adoptive parents"), has been at issue in this court. See C.D. v. J.B.O., [Ms. 2200485, Oct. 8, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021) ("C.D. III"); C.D. v. J.B.O. (No. 2200195, Jan. 28, 2021), ___ So. 3d ___ (Ala. Civ. App. 2021) (table); and C.D. v. J.B.O. (No. 2190755, Sept. 29, 2020), ___ So. 3d ___ (Ala. Civ. App. 2020) (table). We explained the lengthy procedural history of the adoption proceeding in our opinion in C.D. III:

> "After she was served with the [adoption] petition, [the mother] filed an answer contesting the adoption and stating that she did not consent to the adoption. ... [T]he probate court entered an order on June 12, 2020, concluding that the mother had impliedly consented to the adoption under Ala. Code 1975, § 26-10A-9(a)(3). That order also set the matter for a final dispositional hearing to be held on June 23, 2020.
>
> "On June 17, 2020, the mother filed a motion requesting that the probate court reconsider its June 12, 2020, order concluding that the mother had impliedly consented to the adoption ('the implied consent order'). The probate court set a hearing on the mother's motion for the same date and time as the dispositional hearing. However, on the motion of the mother, the June 23, 2020, hearing was reset to July 8, 2020.
>
> "On June 26, 2020, the mother filed in the probate court a notice of appeal to the Shelby Circuit Court; that notice of

appeal indicated that she was seeking review of the implied-consent order. The Shelby Circuit Court transferred the mother's appeal to this court on June 29, 2020; this court docketed the appeal as case number 2190755. This court dismissed that appeal on September 29, 2020, after concluding that the implied-consent order was not a final judgment capable of supporting an appeal. C.D. v. J.B.O. (No. 2190755, Sept. 29, 2020), ___ So. 3d ___ (Ala. Civ. App. 2020) (table). Our certificate of judgment in appeal number 2190755 issued on October 20, 2020.

"Before the issuance of this court's certificate of judgment in appeal number 2190755, the probate court entered an order on September 30, 2020, denying the mother's motion to reconsider the implied-consent order and stating that a final dispositional hearing would be set by separate order within seven days. The following day, on October 1, 2020, the probate court entered an order setting the final hearing for 2:00 p.m. on October 1, 2020.[1] Later on October 1, 2020, the probate court purported to enter a final judgment of adoption.

"On November 17, 2020, the mother filed a motion seeking reconsideration of the October 1, 2020, judgment of adoption. The probate court denied the mother's motion on November 18, 2020. The mother filed a notice of appeal to this court on November 30, 2020; that appeal was assigned case number 2200195.

"On January 28, 2021, this court dismissed the mother's appeal from the judgment of adoption. C.D. v. J.B.O. (No. 2200195, Jan. 28, 2021), ___ So. 3d ___ (Ala. Civ. App. 2021) (table). In our order dismissing the appeal, we specifically determined that the judgment of adoption was void, and we cited Raybon v. Hall, 17 So. 3d 673, 675 (Ala. Civ. App. 2009), to provide guidance on the basis for our conclusion. As

explained in Raybon, a court lacks jurisdiction to take any action in a case that is the subject of an appeal until this court issues its certificate of judgment. 17 So. 3d at 675; see also Portis v. Alabama State Tenure Comm'n, 863 So. 2d 1125, 1126 (Ala. Civ. App. 2003) (holding that a trial court is without jurisdiction to enter a judgment in a case in which an appeal has been filed until the appellate court issues the certificate of judgment in that case). In fact, in a case that has been the subject of an appeal, a judgment or order entered by a lower court before the issuance of an appellate court's certificate of judgment is void. Id.; see also Ex parte Citizens Bank, 879 So. 2d 535, 538 (Ala. 2003). Thus, our dismissal of the mother's appeal was based on the fact that the October 1, 2020, judgment of adoption was void because of the probate court's lack of jurisdiction over the matter until our certificate of judgment issued on October 20, 2020. Our dismissal of the mother's appeal in case number 2200195 was not based in any manner on the subject-matter jurisdiction of the probate court over the adoption action before the mother filed her notice of appeal or after the issuance of our certificate of judgment; that is, our dismissal was grounded solely on the fact that the probate court lacked jurisdiction to issue a judgment of adoption on October 1, 2020, because our certificate of judgment in appeal number 2190755 had not issued. Our dismissal did not declare void any other order of the probate court.

"After our certificate of judgment in appeal number 2200195 issued on February 16, 2021, the mother filed in the probate court a motion to dismiss or, in the alternative, to transfer the adoption action. In her motion, the mother contended that, based on this court's determination that the judgment of adoption was void, the implied-consent order was also void. Thus, she argued that the probate court should either dismiss the adoption action or transfer the matter to the Shelby Juvenile Court for it to conduct a termination-of-

parental-rights trial. See Ala. Code 1975, § 26-10A-3 ('If any party whose consent is required fails to consent or is unable to consent, the proceeding will be transferred to the court having jurisdiction over juvenile matters for the limited purpose of termination of parental rights.').

"The prospective adoptive parents filed a response to the mother's motion. In that response, they contended that the probate court had jurisdiction over the adoption action and that no need for a termination-of-parental-rights trial existed because the probate court had previously determined that the mother had impliedly consented to the adoption. In addition, the prospective adoptive parents contended that the implied-consent order was still effective and that 'the time [to] appeal ... the June 12, 2020, [implied-consent] order has passed.'[2]

"On March 1, 2021, the probate court entered a lengthy order detailing the procedural history of the adoption action. The probate court correctly construed our January 28, 2021, dismissal order in appeal number 2200195 as having dismissed the mother's appeal from the October 1, 2020, judgment of adoption based on the probate court's lack of jurisdiction to enter that judgment because our certificate of judgment had not yet issued in appeal number 2190755. The probate court denied the mother's motion to dismiss or, in the alternative, to transfer. After referencing the fact that it had previously determined that the mother had impliedly consented to the adoption, the probate court stated: '[T]his court expressly directs entry of this judgment as a final judgment pursuant to Ala. R. Civ. P., Rule 54(b), as this court has determined that there is no just reason for delay in the entry of a final judgment.'

"On April 6, 2021, the mother filed in this court a petition for the writ of mandamus directed to the March 1, 2021, order. After review of the materials attached to the

> petition, this court determined that the petition should be converted to an appeal because the mother was appealing from an order expressly made final pursuant to Rule 54(b). See Ex parte W.H., 941 So. 2d 290, 298 (Ala. Civ. App. 2006) (treating a petition for the writ of mandamus directed to a final judgment as a notice of appeal).
>
> "_____
>
> "[1]We note that the October 1, 2020, order setting the hearing for that same date indicates that it was copied solely to the attorney for the prospective adoptive parents.
>
> "[2]The prospective adoptive parents are incorrect. We dismissed the appeal in case number 2190755 because the implied-consent order was not a final judgment. See Ex parte W.L.K., 175 So. 3d 652, 656 (Ala. Civ. App. 2015) (explaining that an order resolving an adoption contest but not resolving the entire adoption proceeding was an interlocutory order); see also Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990) (holding that the denial of a motion to set aside consent to an adoption was not a final judgment). Therefore, the mother may challenge the implied-consent order in an appeal from any valid adoption judgment that might be entered in this matter."

___ So. 3d at ___.

In C.D. III, we again dismissed the mother's appeal. After explaining that the mother's mandamus petition, which this court had converted to an appeal, had been filed more than 14 days after entry of the March 1, 2021, order that the probate court had certified as a final

judgment and, thus, was untimely, we explained that the probate court's certification of the March 1, 2021, order was improper and did not render that order a final judgment because the March 1, 2021, order denying the mother's motion to dismiss or, in the alternative, to transfer did not dispose of any claim. ___ So. 3d at ___ (explaining that a court may certify as final only an order dismissing a claim or claims or a party or parties but not an order disposing of only a portion of a claim). We further noted that the certification of the March 1, 2021, order could not have served as a certification of the June 2020 implied-consent order, because the mother's contest to the adoption was also not a separate claim. Id. at ___.

After the issuance of our opinion and our certificate of judgment in C.D. III, the mother filed in the probate court on November 11, 2021, a "Renewed Motion to Transfer and, in the Alternative, Motion for Entry of Final Order for Purposes of Appeal." In that motion, she recounted the procedural history of the case and her various petitions and appeals in this court. She pointed out that we had observed in C.D. III that the issue of adoption remained not fully adjudicated. Thus, the mother requested that the probate court transfer the adoption action to the

juvenile court for the limited purpose of determining whether to terminate the mother's parental rights, see Ala. Code 1975, § 26-10A-3, or "issue an order of proper finality for the purposes of allowing [the mother] to obtain appellate review of [the] previous finding of implied consent."

On November 18, 2021, the probate court denied the mother's motion. On December 2, 2021, the mother filed her current petition for the writ of mandamus in this court. In her petition, she argues that the probate court abused its discretion by failing to transfer the proceeding to the Shelby Juvenile Court ("the juvenile court") for the limited purpose of determining whether to terminate the mother's parental rights or by refusing to enter a final judgment of adoption in order for the mother to seek appellate review of the June 2020 order determining that she had impliedly consented to the adoption of the child. As directed, the prospective adoptive parents answered the mother's mandamus petition, arguing that the mother's petition should be dismissed because this court had "essentially closed the door on any further challenge to the probate court's denial of the mother's motion to transfer without an effective

challenge to the implied consent order." That is, the prospective adoptive parents contend that, because we had determined that the mother's previous appeal in C.D. III had been untimely filed from the March 1, 2021, order that the probate court made final pursuant to Rule 54(b), the mother could not further challenge the probate court's denial of her motion to transfer the adoption case to the juvenile court. On original submission, we granted the mother's petition, in part, and directed the probate court to enter a final judgment on the prospective adoptive parents' adoption petition. The prospective adoptive parents then filed an application for a rehearing.

For the first time in their application for a rehearing filed on March 15, 2022, the prospective adoptive parents informed this court that the probate court had, in fact, entered a final judgment of adoption on March 19, 2021, nearly a year earlier. However, the prospective adoptive parents failed to include a copy of that judgment with their application for a rehearing. After being ordered by this court to supplement the application for a rehearing with a copy of the March 19, 2021, final adoption judgment, and after a significant delay, the prospective

adoptive parents finally provided this court with a copy of that judgment on May 26, 2022. Although we granted the mother and the child's guardian ad litem 14 days to respond to the supplemented application for a rehearing, neither did so. We held oral argument on the application for a rehearing on August 24, 2022. At oral argument on the application for a rehearing, we were informed that the mother's counsel had not been provided a copy of the final adoption judgment attached to the supplemented rehearing application until that day.

The March 19, 2021, final adoption judgment was inexplicably omitted from the record in C.D. III, and the prospective adoptive parents declined to mention the existence of that judgment in their motion to dismiss the appeal in C.D. III or in their brief filed in that appeal. After the mother filed her April 2021 mandamus petition, we directed the probate court and the prospective adoptive parents to answer that petition. The probate court declined to answer the petition, so that court did not take the opportunity to inform this court of the existence of the

March 19, 2021, adoption judgment.[1] Furthermore, although the prospective adoptive parents filed an answer to the mother's petition for the writ of mandamus, they failed to provide this court with a copy of the March 19, 2021, judgment as an exhibit to that answer. We are deeply disappointed in counsel for the prospective adoptive parents for her failure to show proper candor to this court and in failing to take action to correct the record in C.D. III to include the March 19, 2021, final adoption judgment or to timely provide this court a copy of that judgment in the answer to the mother's current petition for the writ of mandamus. Counsel's failure to take appropriate and timely action to present the March 19, 2021, final adoption judgment to this court resulted in further litigation of the adoption action and the issuance of an opinion directing the entry of a judgment that had long been entered and wasted the time and judicial resources of both the probate court and this court.

We note that the prospective adoptive parents suggested at oral argument that the mother's only route for review of the June 2020

[1]We further note that the guardian ad litem appointed for the child also chose not to participate in the appellate proceedings in C.D. III.

implied-consent order was via a petition for the writ of mandamus. This court has, in the past, considered an interlocutory order resolving an adoption contest on mandamus review, typically after converting an appeal to a petition for the writ of mandamus. See, e.g., Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990); Smith v. Jones, 554 So.2d 1066, 1067 (Ala. Civ. App. 1989); Kinkead v. Lee, 509 So. 2d 247, 248 (Ala. Civ. App. 1987); Ex parte Department of Hum. Res., 502 So. 2d 771, 772 (Ala. Civ. App. 1987); Alabama Dep't of Pensions & Sec. v. Johns, 441 So. 2d 947, 948 (Ala. Civ. App. 1983); see also Ex parte Fowler, 564 So. 2d 962, 964 (Ala. 1990) (treating petition for the writ of certiorari as a petition for the writ of mandamus). However, mandamus is an extraordinary writ, and a mandamus petition is not a proper vehicle for review of every type of interlocutory order. See Ex parte Spears, 621 So. 2d 1255, 1258 (Ala. 1993); Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014) (listing those types of interlocutory orders for which mandamus is an appropriate remedy); see also Ex parte M.A.D., 830 So. 2d 751, 753 (Ala. Civ. App. 2002). More recently, this court has consistently reviewed orders concluding that a parent had impliedly consented to adoption on

appeal from the final judgment of adoption. See, e.g., S.P. v. J.R., 206 So. 3d 637 (Ala. Civ. App. 2016); J.D.S. v. J.W.L., 204 So. 3d 386 (Ala. Civ. App. 2016); and I.B. v. T.N., 194 So. 3d 221 (Ala. Civ. App. 2015).

Accordingly, we are unconvinced by the prospective adoptive parents' argument that the mother's only possible method for seeking review of the June 2020 implied-consent order was to have timely petitioned for the writ of mandamus. A petition for the writ of mandamus is not an appropriate vehicle for the review of an order resolving an adoption contest. Our dismissal of the mother's appeal in case number 2190755 presumed that the issue of implied consent could be reviewed in an appeal from the final adoption judgment, once it was entered, and this court certainly did not expect that the mother's right to due process would be violated by the failure to provide her with notice of the entry of the final adoption judgment.

At oral argument, counsel for the prospective adoptive parents and the guardian ad litem admitted that the probate court had not provided notice of the entry of the March 19, 2021, final judgment of adoption to the mother or her counsel. As the prospective adoptive parents had

argued in their answer to the mother's mandamus petition, counsel for the adoptive parents and the guardian ad litem explained that, in their opinion, the Alabama Adoption Code ("the adoption code"), Ala. Code 1975, § 26-10A-1 et seq., did not provide for the mother to receive notice of the entry of the final adoption judgment once she was determined to have impliedly consented to the adoption in the June 2020 order. The prospective adoptive parents admitted that Ala. Code 1975, § 26-10A-17(a)(1), provides that the mother was a party entitled to receive notice of the adoption proceeding via service of the petition and that Ala. Code 1975, § 26-10A-24(b), provides that she was entitled to receive notice via certified mail of the contested hearing. They contended that the adoption code does not provide that the mother is entitled to notice of any other portion of the proceeding or of the entry of the final judgment of adoption. We agree with the prospective adoptive parents that the adoption code contains no provisions specifying how, when, or to whom notice of the entry of orders or judgments of the probate court is to be provided. However, we do not, based on the silence of the adoption code on that procedural matter, arrive at the conclusion that notice of the entry of

orders and judgments of the probate court is not to be given to any party at any time.

Instead, we turn to Ala. Code 1975, § 26-10A-37, which specifically provides that "[t]he Rules of Civil Procedure and the Rules of Evidence apply to the probate court in adoption proceedings to the extent they apply under [Ala. Code 1975, §] 12-13-12." In the Rules of Civil Procedure, the procedure for supplying notice of the entry of orders and judgments is governed by Rule 77(d), Ala. R. Civ. P. Rule 77(d) provides, in pertinent part:

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail or by electronic transmittal in the manner provided for in Rule 5[, Ala. R. Civ. P.,] upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing or electronic transmittal."

We have previously applied Rule 77(d) to a probate court in an appeal from a judgment entered in an adoption action. See J.D. v. M.B., 226 So. 3d 706, 709-10 (Ala. Civ. App. 2016); see also Mousseau v. Wigley, 227 So. 3d 73, 75 (Ala. Civ. App. 2017) (quoting Hutchinson v. Miller, 962 So. 2d 884, 886 n.1 (Ala. Civ. App. 2007)) (applying Rule 77(d) in an appeal

from a probate-court judgment involving a conservatorship or guardianship and stating that "'[t]he Rules of Civil Procedure, which govern "evidence, pleading and practice, judgments and orders in the circuit court," likewise govern probate-court proceedings "in the absence of express provision" to the contrary. Ala. Code 1975, § 12-13-12.'").

Although the prospective adoptive parents concede that Rule 77(d) generally applies in probate courts to govern the method of providing notice to the parties to the adoption proceeding of the entry of orders and judgments of the probate court,[2] they assert that, once the mother was determined to have impliedly consented to the adoption, she was no longer a party to the adoption proceeding. They also contend that § 26-10A-17(a)(1) prohibited the mother from having further notice of any

[2]In fact, the prospective adoptive parents themselves cited Rule 77(d) in their brief in C.D. III to support their argument that the mother's appeal from the March 1, 2021, order that was purportedly "certified as a final judgment" should be dismissed, because, they argued, the mother had been provided proper notice of that "judgment" by the probate-court clerk pursuant to Rule 77(d) and had not timely filed an appeal from that "judgment."

aspect of the adoption proceeding after the entry of the June 2020 order.

We cannot agree.

Section 26-10A-17 provides, in its entirety:

> "(a) Unless service has been previously waived, notice of pendency of the adoption proceeding shall be served by the petitioner on:
>
> > "(1) Any person, agency, or institution whose consent or relinquishment is required by Section 26-10A-7, [Ala. Code 1975,] unless parental rights have been terminated pursuant to Section 12-15-319[, Ala. Code 1975].
> >
> > "(2) The legally appointed custodian or guardian of the adoptee.
> >
> > "(3) The spouse of any petitioner who has not joined in the petition.
> >
> > "(4) The spouse of the adoptee.
> >
> > "(5) The surviving parent or parents of a deceased parent of the adoptee unless parental rights have been terminated pursuant to Section 12-15-319.
> >
> > "(6) Any person known to the petitioners as currently having physical custody of the adoptee, excluding foster parents or other private licensed agencies, or having visitation rights with the adoptee under an existing court order.

> "(7) The agency or individual authorized to investigate the adoption under Section 26-10A-19[, Ala. Code 1975].
>
> "(8) Any other person designated by the court.
>
> "(9) The State of Alabama Department of Human Resources.
>
> "(10) The father and putative father of the adoptee if made known by the mother or otherwise known by the court unless the court finds that the father or putative father has given implied consent to the adoption, as defined in Section 26-10A-9, [Ala. Code 1975,] or unless parental rights have been terminated pursuant to Section 12-15-319.

"(b) The notice shall specifically state that the person served must respond to the petitioner within 30 days if he or she intends to contest the adoption. A copy of the petition for adoption shall be delivered to those individuals or agencies in subdivisions (a)(2) through (a)(10). Any notice required by [the adoption code] may be served on a natural parent prior to birth.

"(c) Service of the notice shall be made in the following manner:

> "(1) Service of process shall be made in accordance with the Alabama Rules of Civil Procedure except as otherwise provided by the Alabama Rules of Juvenile Procedure. If the identity or whereabouts of the parent is unknown, or if one parent fails or refuses to disclose the identity or whereabouts of the other parent, the

> court shall then issue an order providing for service by publication, by posting, or by any other substituted service.
>
> "(2) As to the agency or individual referred to in subdivisions (a)(7) and (a)(9), notice shall be by certified mail.
>
> "(3) As to any other person for whom notice is required under subsection (a), service by certified mail, return receipt requested, shall be sufficient. If such service cannot be completed after two attempts, the court shall issue an order providing for service by publication, by posting, or by any other substituted service.
>
> "(d) The notice required by this section may be waived in writing by the person entitled to receive notice.
>
> "(e) Proof of service of the notice on all persons for whom notice is required by this section must be filed with the court before the adjudicational hearing, provided in Section 26-10A-24[, Ala. Code 1975]."

The prospective adoptive parents contend circularly that, although the mother was initially entitled to notice of the adoption proceeding under § 26-10A-17(a)(1), once the contested hearing provided for in Ala. Code 1975, § 26-10A-24, was concluded adversely to the mother by a determination that she had impliedly consented to the adoption under Ala. Code 1975, § 26-10A-9, the mother was then no longer entitled under

§ 26-10A-17(a)(1) to notice of any order or judgment entered in the adoption proceeding because she had impliedly consented to the adoption. According to its language, § 26-10A-17 governs initial notice of the pendency of the adoption proceeding. Nothing in § 26-10A-17 addresses the probate court's provision of notice of the entry of its orders or judgments. Thus, because § 26-10A-17 deals with the notice to be provided to inform those required to consent to the adoption (and others not relevant here) of the fact that an adoption proceeding has been commenced, we cannot conclude that, after such notice has been provided, § 26-10A-17 applies to terminate the right of those who have been determined to have impliedly consented to the adoption to further notice of the entry of orders or judgments of the probate court.

As previously mentioned, the prospective adoptive parents also contend that, once the mother was determined to have impliedly consented, she lost her status as a party to the adoption proceeding. Thus, they argue, even if Rule 77(d) requires the probate-court clerk to provide notice to the parties of the entry of a probate-court order or judgment, the mother was not entitled to notice of any order or judgment,

including the final adoption judgment, entered after the entry of the June 2020 order on implied consent. See Rule 77(d) (requiring the clerk to serve notice of the entry of judgments or orders on parties). The prospective adoptive parents have not cited to a provision in the adoption code indicating that the status of a parent or a contestant as a party to an adoption proceeding is terminated upon an adverse decision on his or her contest. We have previously held that an order deciding an adoption contest is not a final judgment capable of supporting an appeal and that no appeal may be taken from such an order until the probate court enters a final adoption judgment. Merkle, 564 So. 2d at 961 (stating that an order denying a petition to set aside consent to an adoption is not a final judgment capable of supporting an appeal.); see also D.M.G. v. C.W.S., [Ms. 2200427, Jan. 7, 2022] ___ So. 3d ___ (Ala. Civ. App. 2022) (recognizing the rule set out in Merkle); Ex parte W.L.K., 175 So. 3d 652, 656 (Ala. Civ. App. 2015) (per curiam opinion in which two judges concurred and three judges concurred in the result regarding the relevant issue) (same). Thus, it would stand to reason that the status of the contestant as a party to the adoption proceeding must continue through

the entry of the final judgment so that the contestant may exercise his or her right to appeal granted in Ala. Code 1975, § 26-10A-26. To read the statutes otherwise would be to read them in a manner that would deny to the mother her right to appellate due process. See Ex parte Johnson, 806 So. 2d 1195, 1197 (Ala. 2001) (explaining that the failure of the trial court to provide an inmate notice of the denial of a Rule 32, Ala. R. Crim. P., petition denied him his right to appellate due process). We cannot conceive of a reason to do so in a case involving the extinguishment of a fundamental right. Crews v. Houston Cnty. Dep't of Pensions & Sec., 358 So. 2d 451, 454 (Ala. Civ. App. 1978) (citing May v. Anderson, 345 U.S. 528 (1953)) (stating that "the fundamental nature of parental rights is protected by the constitutional guarantees of due process under the fourteenth amendment" and that "the preservation of the family unit is zealously guarded by the courts").

The prospective adoptive parents point to no other provision of the adoption code that they say prohibits the mother from receiving notice of the orders and judgments entered by the probate court. Pursuant to Ala. Code 1975, § 26-10A-11(a)(11), a written relinquishment must contain a

provision "waiv[ing] further notice of the adoption proceeding," while a written consent must contain a provision "waiv[ing] further notice of the adoption proceedings, unless there is a contest or appeal," § 26-10A-11(a)(12). Because §§ 26-10A-11(a)(11) and (12) require a waiver of "further notice of the adoption proceeding," a parent consenting to the adoption or relinquishing his or her rights to a child must have had a right to such notice in order to waive it. Unlike §§ 26-10A-11(a)(11) and (12), § 26-10A-9 does not indicate that a parent's implied consent results in a waiver of the right to "further notice of the adoption proceeding," and we will not imply such a waiver.

As we considered the issues presented by this application for a rehearing, we pondered whether we should reexamine our previous holdings that an order concluding an adoption contest adversely to the contestant is not final for purposes of appeal and therefore may not be appealed until the entry of a final judgment of adoption. Pursuant to § 26-10A-26(a), an appeal to this court lies from "any final decree of adoption." The only exception to the requirement that an appeal be taken from a final judgment of adoption appears in Ala. Code 1975, § 26-10A-

14(e), which provides for an immediate appeal from any order resolving a petition to withdraw consent or relinquishment.[3] If the legislature had desired that a contestant be permitted to take an immediate appeal of an adverse order on an adoption contest, the legislature could have so provided.

We therefore make clear that, in an adoption proceeding, a parent or contestant who is given notice pursuant to § 26-10A-17, and who has suffered an adverse conclusion to his or her adoption contest, remains a party to the adoption proceeding and is entitled to notice of the entry of the final adoption judgment under Rule 77(d), so that he or she may exercise the statutory right to take an appeal as provided in § 26-10A-26. To hold otherwise would strip the parent or contestant of the right to appeal provided in § 26-10A-26 and would also fail to comport with even the minimum provision of due process. See, e.g., Ex parte Miles, 841 So. 2d 242, 244 (Ala. 2002) (concluding that Miles, an inmate, had not

[3]Section 26-10A-14(e) provides, in pertinent part: "Any order made by the court upon a petition to withdraw consent or relinquishment under this section shall be deemed a final order for the purpose of filing an appeal under Section 26-10A-26[, Ala. Code 1975]."

received notice of the denial of his Rule 32, Ala. R. Crim. P., petition within time for him to file an appeal "through no fault of his own" and stating that "to not allow Miles an opportunity to file a notice of appeal under these circumstances would violate his clear legal right to procedural due process"). This conclusion, however, does not resolve the quandary presented to us in this application for a rehearing.

The final adoption judgment in this adoption proceeding was entered on March 19, 2021, just over a year before the prospective adoptive parents filed their application for a rehearing after the issuance on original submission of our opinion ordering the probate court to enter a final adoption judgment so that the mother could appeal the determination that she had impliedly consented to the adoption of the child. The current petition for the writ of mandamus was filed more than 14 days after the entry of the final adoption judgment, but, as noted above, the mother had not received notice of the entry of that judgment.

Although our supreme court has indicated that the language of Rule 77(d) requiring a clerk to provide notice of the entry of a judgment is "not 'aspirational,'" Bacon v. Winn-Dixie Montgomery, Inc., 730 So. 2d

600, 602 (Ala. 1998); see also Turner v. Barnes, 687 So. 2d 197, 198 (Ala. 1997) ("Nothing in Rule 77 indicates that [the] language [requiring clerks to give notice of the entry of orders or judgments] is aspirational ...."), the appellate courts have required would-be appellants to adhere to the procedure set out in Rule 77(d) to secure an extension of the time for taking an appeal. Corretti v. Pete Wilson Roofing Co., 507 So. 2d 408, 409 (Ala. 1986); J.D., 226 So. 3d at 710 (quoting Hopper v. Sims, 777 So. 2d 122, 125 (Ala. Civ. App. 2000)) ("'Rule 77(d), Ala. R. Civ. P., exclusively governs situations in which a party claims lack of notice of the entry of a judgment or order.'"). We have explained that a party must keep apprised of the status of his or her case, see, e.g., Pettiway v. Wexford Health Sources, Inc., 327 So. 3d 1168, 1174 (Ala. Civ. App. 2020) (quoting Ex parte Weeks, 611 So. 2d 259, 262 (Ala. 1992)) ("[O]ur supreme court has recognized that 'it is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se.'"), and that a failure of the clerk to notify a party of the entry of a final judgment cannot form the basis for relief under Rule 60(b), Ala. R. Civ. P. Corretti, 507 So. 2d at 409; J.C.T. v. Mobile

Cnty. Dep't of Hum. Res., 142 So. 3d 705, 707 (Ala. Civ. App. 2013) (stating that "a Rule 60(b) motion cannot be substituted for the exclusive remedy provided by Rule 77(d) and thereby be used as a method to extend the time within which to appeal"). We recognize that, in this particular situation, such precedents compel a harsh result, mainly because of the peculiarly confidential nature of adoption proceedings and the statutes and probate-court practices that prevent a parent or a contestant from monitoring an adoption proceeding for the entry of a final judgment.

The adoption code safeguards the privacy of adoption proceedings. The confidentiality of an adoption proceeding and its records is addressed in Ala. Code 1975, § 26-10A-31. Pursuant to § 26-10A-31(a), a parent is not included within the persons or entities expressly permitted to inspect the record of the adoption proceeding during its pendency, unless the probate court grants access "for good cause shown." Moreover, § 26-10A-31(c) provides that, after the entry of the adoption judgment, "all papers, pleadings, and other documents pertaining to the adoption shall be sealed" and that no person shall be permitted to access them unless he or

she secures, for good cause shown, an order of the probate court so permitting.

At oral argument, counsel for the prospective adoptive parents and the guardian ad litem stated that the probate court treated the denial of the mother's adoption contest as terminating the party status of the mother and admitted that the probate-court clerk had not issued notice of the entry of the final adoption judgment to the mother.[4] Counsel for the mother indicated at oral argument and in documents presented to the probate court in 2020 that he had inquired of the probate-court clerk on more than one occasion and by more than one method whether a final judgment of adoption had been entered and that he had been informed that he could not have access to that information. The mother was therefore unable to learn of the March 19, 2021, final adoption judgment in time to file a timely appeal or to seek an extension of the time for taking an appeal pursuant to Rule 77(d).

---

[4]We will take these factual statements, which were not only not controverted but affirmed by the mother, as true. Ex parte J.M., 707 So. 2d 271, 273 (Ala. Civ. App. 1997) ("It is well settled that averments of fact in the response to a mandamus petition, when not controverted, are to be taken as true.").

Insofar as the mother's petition for the writ of mandamus seeks an order compelling the probate court to enter a final adoption judgment so that she can perfect an appeal and challenge the implied-consent order, we are constrained to dismiss the mother's petition for the writ of mandamus because it is moot. The final adoption judgment was entered on March 19, 2021, and any action by this court on the mother's mandamus petition could not afford her any relief. See K.L.R. v. K.G.S., 201 So. 3d 1200, 1203 (Ala. Civ. App. 2016) ("'"The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties."'" (citations omitted)); Parkerson v. Seventeenth Jud. Cir. Ct., Sumter Cnty., 277 Ala. 345, 346, 170 So. 2d 491, 491 (1965) (denying a petition for the writ of mandamus where the trial court had entered the requested order before the petition was filed).

Insofar as the mother advances an argument regarding the sufficiency of the evidence presented to the probate court in the June 4, 2020, hearing on her contest to the adoption, we deny the petition. Review of the June 2020 implied-consent order could have been

accomplished only through a timely appeal of the March 19, 2021, final adoption judgment.

APPLICATION GRANTED; OPINION OF MARCH 4, 2022, WITHDRAWN; OPINION SUBSTITUTED; PETITION DISMISSED IN PART AND DENIED IN PART.

Thompson, P.J., and Hanson, J., concur.

Edwards, J., concurs specially.

Moore, J., concurs in the result, with opinion, which Fridy, J., joins.

EDWARDS, Judge, concurring specially.

Although I concur in the main opinion, I remain deeply disturbed over the lack of due process afforded C.D. ("the mother") in the final stages of this adoption proceeding and the failure of counsel for the prospective adoptive parents, J.B.O. and J.H.O., to supply this court with an adoption judgment that was entered before the mother filed the petition for the writ of mandamus that resulted in this court's opinion in C.D. v. J.B.O., [Ms. 2200485, Oct. 8, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021) ("C.D. III"), and well before the mother filed the December 2021 petition for the writ of mandamus that resulted in the March 4, 2022, opinion on original submission currently being reconsidered on application for rehearing. In preparing the opinion on application for rehearing, I considered various approaches to reach a result that restored the mother's right to seek an appeal from the final adoption judgment, including (1) concluding that the requirements of Rule 77(d), Ala. R. Civ. P., applicable to the extension of the time for taking an appeal could not apply in an adoption proceeding because of the confidential nature of those proceedings and the limited access to the records of the proceedings

provided in Ala. Code 1975, § 26-10A-31(a) and (c), and (2) applying the principles espoused by our supreme court in Ex parte Johnson, 806 So. 2d 1195, 1197 (Ala. 2001), in which our supreme court required a trial court to set aside an order denying a Rule 32, Ala. R. Crim P., petition because the defendant had not received notice of that ruling. However, our role as an intermediate appellate court prevents any attempt to modify the precedents of our supreme court. Ala. Code 1975, § 12-3-16; C.B.W.N. v. K.P.R., 266 So. 3d 47, 49 (Ala. Civ. App. 2018). Accordingly, despite my concerns about the violation of the mother's due-process rights, I am unable to reach a result other than the one reached by the main opinion.

MOORE, Judge, concurring in the result.

In her petition, filed on December 2, 2021, C.D. ("the mother") requested that this court order the Shelby Probate Court ("the probate court") either to transfer the underlying adoption proceeding involving her child, K.C.C. ("the child"), to the Shelby Juvenile Court, pursuant to Ala. Code 1975, § 26-10A-3, or to enter a final judgment. On March 4, 2022, this court issued an opinion in which we determined that we could review the order of the probate court denying the motion to transfer only on appeal following the entry of a final judgment and that, "based on the materials before this court," a valid final judgment had not yet been entered. This court ordered the probate court to enter a judgment "as soon as practicable" so that the mother could validly appeal to this court and obtain review of a June 12, 2020, order in which the probate court determined that the mother had impliedly consented to the adoption of the child by J.B.O. and J.H.O. ("the adoptive parents").

In their application for a rehearing, filed on March 15, 2022, the adoptive parents informed this court, for the first time, that the probate court had, in fact, entered a final judgment of adoption on March 19,

2021. After searching the records and materials of the various appellate proceedings concerning this case, this court determined that the March 19, 2021, judgment had never been supplied to this court either by the parties, the probate judge, or the clerk of the probate court, so we ordered the adoptive parents to supplement the materials provided to the court to include the final judgment of adoption. On May 26, 2022, the adoptive parents filed with this court a copy of the final judgment of adoption entered by the probate court on March 19, 2021. That part of the mother's petition for the writ of mandamus requesting an order directing the probate court to enter a final judgment has thus been rendered moot. See Ex parte McDaniel, 291 So. 3d 847, 851 n.2 (Ala. 2019) (citing Ex parte Southeastern Energy Corp., 203 So. 3d 1207, 1212 (Ala. 2016)) (stating that, "if the trial court grants the relief that is sought in this Court in the mandamus petition, then the petition may be mooted").

At oral argument on the application for rehearing, the mother requested that this court order the probate court to vacate the final judgment of adoption and to reenter the same judgment for the purpose of restarting the period for her to exercise her right to appeal. See Ala.

Code 1975, § 26-10A-26(a) ("Appeals from any final decree of adoption shall be taken to the Alabama Court of Civil Appeals and filed within 14 days from the final decree."). However, the mother had not previously requested the probate court to take that requested action, and "this court will not issue a writ of mandamus to compel a trial court to perform an act that the trial court was never requested to perform." Ex parte City of Prattville, 56 So. 3d 684, 689 (Ala. Civ. App. 2010).

Moreover, a writ of mandamus will not issue when a party already has an adequate remedy, such as a motion for relief from a judgment under Rule 60(b), Ala. R. Civ. P. See Ex parte Gallant, 261 So. 3d 350, 355 (Ala. Civ. App. 2017). Rule 60(b)(6) allows a court to grant relief from a judgment when extraordinary circumstances would lead to extreme hardship or injustice so as to make it inequitable to maintain the judgment. See R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229-31 (Ala. 1994). Thus, if the mother can obtain relief from the final judgment of adoption under Rule 60(b)(6), that remedy would be adequate so that mandamus relief would not be available.

Rule 77(d), Ala. R. Civ. P., provides, in pertinent part:

> "Lack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions."

Rule 77(d), Ala. R. Civ. P., is patterned after Rule 77(d), Fed. R. Civ. P., as it existed in 1973, and former Rule 73(a), Fed. R. Civ. P. See Bacon v. Winn-Dixie Montgomery, Inc., 730 So. 2d 600, 603 n.3 (Ala. 1998).[5] At

---

[5]Former Rule 73(a), Fed. R. Civ. P., before it was abrogated effective July 1, 1968, provided, in pertinent part:

> "An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appeals from, except that: ... (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed.... "

In 1973, Rule 77(d), Fed. R. Civ. P., provided:

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5[, Fed. R. Civ. P.,] upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is

the time Alabama adopted Rule 77(d), federal courts had determined that Rule 77(d), Fed. R. Civ. P., excluded relief from a judgment under Rule 60(b)(1), Fed. R. Civ. P., when a party failed to obtain notice of the entry of a final judgment due to his or her own excusable neglect; however, a party could, under Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), apply for relief from a judgment under Rule 60(b)(6) when "unique circumstances" indicated that the failure to receive notice resulted from conduct of the judiciary that prevented the party from obtaining notice despite his or her diligent efforts to keep apprised of the case. See, Files v. City of Rockford, 440 F.2d 811, 814-15 (7th Cir. 1971) (discussing "unique circumstances" exception that would allow for an untimely appeal); see also Radack v. Norwegian America Line Agency,

---

> sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

Inc., 318 F.2d 538 (2d Cir. 1963); Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970).

Eventually, Rules 4(a)(5) and 4(a)(6), Fed. R. App. P., were adopted, and, under those rules, a party to a federal-court civil action who was not provided notice of the entry of a final judgment may either, under Rule 4(a)(5), obtain an extension of time to file a notice of appeal by showing excusable neglect or, under Rule 4(a)(6), reopen the time for filing an appeal upon a showing of a lack of prejudice to any other party.[6]

---

[6]Rules 4(a)(5) and 4(a)(6), Fed. R. App. P., provide, in pertinent part:

> "(5) Motion for Extension of Time.
>
> "(A) The district court may extend the time to file a notice of appeal if:
>
> "(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> "(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Following those changes, the federal circuit courts of appeal have held that Rules 4(a)(5) and 4(a)(6) are exclusive and mandatory and not subject to any equitable modification. See Bowles v. Russell, 432 F.3d 668, 673 (6th Cir. 2005); see also 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3950.6 at 228 (3d ed. 1999) ("Rule 4(a)(6) provides the exclusive means for extending appeal time for failure to learn that judgment has been entered. Once the 180-day period has expired, a district court cannot rely on the one-time practice of vacating

---

> "(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > "(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry o the judgment or order sought to be appealed within 21 days after entry;
> >
> > "(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
> >
> > "(C) the court finds that no party would be prejudiced."

the judgment and reentering the same judgment in order to create a new appeal period."). In light of the changes, the United States Supreme Court, in Bowles v. Russell, 551 U.S. 205, 214 (2007), overruled Harris, supra, and the line of cases allowing federal courts to utilize Rule 60(b) to vacate and reenter a judgment based upon a showing of unique circumstances.

Alabama has not adopted the relevant changes made to the federal rules of civil procedure and the federal rules of appellate procedure, and Rule 77(d), Ala. R. Civ. P., retains substantially the same language as when it was originally adopted. Nevertheless, some Alabama caselaw indicates that, when a party fails to timely appeal due to the lack of notice of the entry of a final judgment, a party may not obtain relief from the judgment under Rule 60(b) but that the exclusive remedy is that provided by Rule 77. See Corretti v. Pete Wilson Roofing Co., 507 So. 2d 408 (Ala. 1986). Under Alabama law, normally "[i]t would be improper for a court to circumvent the Rules of Procedure in an attempt to artificially renew the period in which a party may appeal." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cobb, 717 So. 2d 355, 356 (Ala. 1998). However, that

caselaw seems to address the situation in which the party's own excusable neglect resulted in a failure to obtain notice of the entry of the final judgment within the appeal period. See Bacon, 730 So. 2d at 602 ("That is, when nothing can be shown beyond a party's simple reliance on the notification process of the clerk's office, the plain language of Rule 77(d)[, Ala. R. Civ. P.,] prohibits the granting of an extension of time within which to appeal."); see also Wal-Mart Stores, Inc. v. Edwards, 735 So. 2d 1721 (Ala. Civ. App. 1998). When the judiciary itself intentionally prevents a party from obtaining any information as to the entry of a final judgment that commences the appeal period, Rule 60(b)(6) may yet provide an avenue for a party to obtain relief from a judgment so that the right to appeal may be preserved. See generally Etherton v. City of Homewood, 700 So. 2d 1374, 1378 (Ala. 1997) (holding that, when a trial-court clerk fails to comply with Rule 77(d), thereby preventing a timely appeal, "[i]t would be inequitable and unjust to hold a party strictly to the provisions of Rule 77(d) if the judiciary itself does not comply with them").

In Park v. Strick, 137 Ariz. 100, 104, 669 P.2d 78, 82 (1983), the Supreme Court of Arizona succinctly stated the state of the law prevailing in this country:

> "[Former] Rule 77(g) [now Rule 58(c), Ariz. R. Civ. P., which was premised on Rule 77(d), Fed. R. Civ. P.,] restricts the power of an Arizona trial court to grant relief [under former Rule 66(c)(6), now Rule 60(b)(6), Ariz. R. Civ. P., which is the equivalent of Rule 60(b)(6), Ala. R. Civ. P.,] where the only ground is the failure to give or receive the notice required by [former] Rule 77(g). Where, however, an aggrieved party establishes lack of knowledge that judgment has been entered, and asserts additional reasons that are so extraordinary as to justify relief, we hold that the trial court has authority under [former] Rule 60(c)(6) to vacate the judgment and reenter a new judgment in order to allow the party to file a timely appeal. In other words, relief under [former] Rule 60(c)(6) may be considered where the party did not have knowledge from any source that judgment had been entered and where there are extraordinary circumstances. However, where the complaint is only that the party did not have or get the formal notice to which a party is entitled by [former] Rule 77(g), the relief is not available."

See also Minor v. Springfield Baptist Church, 964 A.2d 205, 206 (D.C. 2009); Old Republic Ins. Co. v. O'Neal, 237 W.Va. 512, 520, 522, 788 S.E.2d 40, 48, 50 (2016); Brandt v. Menard, 212 Vt. 547, 237 A.3d 1251 (2020); Ahearn v. Anderson-Bishop P'ship, 946 P.2d 417, 422-23 (Wyo. 1997). I find no binding opinion in Alabama indicating that this state

applies a different understanding of the interplay between Rule 77(d) and Rule 60(b)(6), and I believe our supreme court would be persuaded by the reasoning of the foregoing cases holding that, in exceptional cases, a party can avail himself or herself of Rule 60(b)(6) for relief from the judgment so that it may be vacated and reentered in order to start a new appeal period.

In this case, the mother asserts, and counsel for the adoptive parents and the child's guardian ad litem agree, that the probate-court clerk intentionally refused to notify the mother of the entry of the final judgment and to respond to multiple direct inquiries from the mother's counsel regarding whether a final judgment of adoption had been entered. Counsel for all parties informed this court that, once the probate court denied the mother's contest to the adoption, the probate-court clerk considered the mother to no longer be a party to the adoption proceeding with a right to notice of the entry of court orders under Rule 77(d) and that the final judgment of adoption was a confidential record that the mother was not entitled to inspect. See Ala. Code 1975, § 26-10A-31(a). Consequently, the probate-court clerk refused to mail the mother a notice

of the entry of the final judgment of adoption or even to divulge any information as to whether a final judgment of adoption had been entered. Moreover, the adoptive parents did not provide the mother with notice of the entry of the final judgment of adoption as allowed under Rule 77(d) ("[A]ny party may in addition serve a notice of such entry in the manner provided in Rule 5[, Ala. R. Civ. P.,] for the service of papers."), and, in fact, counsel for the mother informed the court that he did not actually receive a copy of the final judgment until August 24, 2022, the date of oral argument on the application for a rehearing.

The decision of the probate-court clerk to deny the mother's counsel notice of the entry of the final judgment of adoption is clearly erroneous. Rule 77(d), which is applicable to adoption proceedings, see J.D. v. M.B., 226 So. 3d 706, 709-10 (Ala. Civ. App. 2016), requires that,

> "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail or by electronic transmittal in the manner provided for in Rule 5[, Ala. R. Civ. P.,] upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing or electronic transmittal."

A parent contesting an adoption is a party to the adoption proceeding, see J.D. v. D.P.D., [Ms. 2190884, Aug. 27, 2021] ___ So. 3d ___, ___ n.6 (Ala. Civ. App. 2021), and, thus, has a right to notice of the entry of court orders under Rule 77(d). An interlocutory order denying a parent's adoption contest does not end the litigation, see Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1989), and nothing in the Alabama Adoption Code, § 26-10A-1 et seq., Ala. Code 1975, indicates that an order denying a contest to the adoption terminates the status of the contesting parent as a party to the adoption proceeding. Even when a parent is unable to access the confidential records in the probate-court file, see § 26-10A-31(a), the parent, at a minimum, remains entitled to notice of the entry of the final judgment of adoption so that he or she may exercise the right to appeal granted in Ala. Code 1975, § 26-10A-26(a). To be specific, once a probate court enters a final judgment of adoption, the clerk of the probate court should immediately notify a contestant of the entry of the final judgment in compliance with Rule 77(d).

If the facts are as asserted, the mother may have a basis for obtaining Rule 60(b)(6) relief from the judgment. However, I express no

authoritative opinion on this point or regarding whether § 26-10A-25(d), Ala. Code 1975, would preclude the mother from obtaining Rule 60(b)(6) relief.[7] As the case stands, the mother has not moved the probate court for relief from the final judgment under Rule 60(b)(6). This court has no record before it to substantiate the allegations made by the mother that would support Rule 60(b)(6) relief. The burden would be on the mother to satisfactorily prove, through evidence and not merely the assertions of counsel, the facts that would justify Rule 60(b)(6) relief. See generally McDaniel v. McDaniel, 694 So. 2d 34, 37 (Ala. Civ. App. 1997). Whether the mother is entitled to such relief rests in the judicial discretion of the probate court, not this court, which, at this point, can do nothing to rectify any injustice committed upon the mother. See Long v. Chicago Title Ins. Co., 646 So. 2d 589, 591 (Ala. 1994) (holding that "[r]elief under Rule 60(b)(6) is discretionary with the trial court").

Fridy, J., concurs.

---

[7]Section 26-10A-25(d), Ala. Code 1975, provides: "A final decree of adoption may not be collaterally attacked, except in cases of fraud or where the adoptee has been kidnapped, after the expiration of one year from the entry of the final decree and after all appeals, if any."