

REL: June 17, 2022

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is published in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2210488

Ex parte Maria I. Cortez

PETITION FOR WRIT OF MANDAMUS

(In re: Maria I. Cortez

v.

Gaston A. Vilaseca)

(Mobile Circuit Court, DR-08-501282.03)

2210488 and 2210489

2210489

Ex parte Maria I. Cortez

PETITION FOR WRIT OF MANDAMUS

(In re: Gaston A. Vilaseca

v.

Maria I. Cortez)

(Mobile Circuit Court, DR-08-501282.04)

MOORE, Judge.

Maria I. Cortez ("the mother") filed two petitions for a writ of mandamus requesting that this court direct the Mobile Circuit Court ("the trial court") to vacate its order, entered in two separate actions, denying her motion in limine and to grant that motion, which seeks to bar Gaston A. Vilaseca ("the father") and the guardian ad litem appointed to represent the interests of the parties' child in one of those actions from presenting records or testimony related to the child's counseling and psychological treatment as evidence at trial. Because we conclude that

2210488 and 2210489

the mother has an adequate remedy by appeal, we deny the mother's petitions.

Procedural History

The parties were divorced by a judgment entered by the trial court on May 6, 2010, that, among other things, awarded them joint legal and joint physical custody of the child. On December 10, 2015, the trial court entered a judgment, based on the parties' joint motion to modify custody, directing, among other things, the parties to continue to share joint custody of the child and to exchange physical custody of the child on a weekly basis.

On July 29, 2021, the mother filed a petition to hold the father in contempt, asserting that the father had failed to allow the mother to pick up the child after his custodial period with the child ("the mother's contempt action"); the action initiated by that petition ("the mother's contempt action") was assigned case number DR-08-501282.03. On August 6, 2021, the father filed a petition seeking an award of sole physical custody of the child; the action initiated by that petition ("the father's custody-modification action") was assigned case number DR-08-

2210488 and 2210489

501282.04. Also on August 6, 2021, the trial court entered an order in the mother's contempt action appointing a guardian ad litem to represent the interests of the child.

On January 20, 2022, the mother filed a motion in limine in both actions. In that motion, the mother requested that the trial court preclude the father and the guardian ad litem from introducing into evidence at the trial of the actions certain records allegedly containing privileged confidential communications that the parties' child had had with a psychologist and with a licensed professional counselor. See Rule 503 & Rule 503A, Ala. R. Evid.; Ala. Code 1975, § 34-26-2 and § 34-8A-21. After conducting a hearing on February 3, 2022, the trial court entered an order in both the mother's contempt action and the father's custody-modification action on February 4, 2022; the order denied the mother's motion in limine and found that the guardian ad litem had waived the privileges on behalf of the child.

On March 18, 2022, the mother timely filed two substantively identical petitions for the writ of mandamus arising from the order

2210488 and 2210489

denying the motion in limine that had been entered in both actions. We have consolidated the petitions.

Analysis

The mother argues in her petitions that the trial court erred in denying her motion in limine because, she says, the guardian ad litem cannot waive the child's evidentiary privileges. See Ex parte Sims, 261 So. 3d 1207 (Ala. Civ. App. 2018) (declining, on jurisdictional ground (specifically, the lack of a justiciable controversy), to conduct mandamus review to address whether a guardian ad litem could waive a child's psychotherapist-patient privilege); Ex parte Sims, 246 So. 3d 155, 159 (Ala. Civ. App. 2017) (same).

"Mandamus is an extraordinary remedy. An appellate court will grant a petition for a writ of mandamus only when '(1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked.' Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000) (citing Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997)). Review by mandamus is not appropriate where the petitioner has another adequate remedy, such as an appeal. Ex parte Jackson, 780 So. 2d 681 (Ala. 2000); Ex parte Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000); Ex parte Walters, 646 So. 2d 154 (Ala. Civ. App. 1994)."

2210488 and 2210489

Ex parte Amerigas, 855 So. 2d 544, 546-47 (Ala. Civ. App. 2003).

In Ex parte Houston County, 435 So. 2d 1268, 1271 (Ala. 1983), our supreme court observed that,

"[i]n some cases[,] an order granting a motion in limine is not absolute, but only preliminary, and the non-moving party may offer the disputed evidence at trial and, if the other party objects and the court sustains the objection, the party offering the evidence may appeal from this ruling. See C. Gamble, The Motion in Limine[: A Pretrial Procedure That Has Come of Age], ... 33 Ala. L. Rev. [1] at 16 [(1981)]."

The order at issue in Ex parte Houston County granted a motion in limine and prohibited the defendants from introducing certain evidence "without further order of th[e] Court." 435 So. 2d at 1269. Our supreme court determined that that phrase indicated that the order was preliminary, not absolute, and, thus, that a remedy by appeal existed, precluding mandamus relief. Id. at 1271. See also Ex parte Army Aviation Ctr. Fed. Credit Union, 477 So. 2d 379, 381 (Ala. 1985) (denying a petition for the writ of mandamus seeking an order excluding certain evidence because a remedy existed by appeal).¹

¹In Ex parte Burch, 730 So. 2d 143, 146 (Ala. 1999), the supreme court held that it could exercise its discretion to treat a petition for the writ of mandamus seeking review of an order denying a motion in limine

2210488 and 2210489

In the present cases, the trial court denied the mother's motion in limine but noted in its order that its ruling was "limited to the questions raised in the motion regarding privilege" and that it was "not ruling on any hearsay objections," which, it said, would be addressed during the trial if raised. Thus, like in Ex parte Houston County, the trial court's order is preliminary, rather than absolute, and, thus, not subject to mandamus review. Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003), which authorizes mandamus review of a discovery order that disregards an evidentiary privilege, does not govern this situation, in which the mother petitions this court for mandamus review of a preliminary order denying a motion in limine, not a discovery order.

In the present cases, we conclude, based on Ex parte Houston County, that mandamus relief is unavailable because the mother has another adequate remedy -- appeal -- for the review of any adverse ruling

as a permissive appeal under Rule 5, Ala. R. App. P. However, Rule 5 applies only to cases within the appellate jurisdiction of the supreme court, see Ex parte Boddie, 229 So. 3d 255, 259 (Ala. Civ. App. 2017), so this court has no similar discretionary authority to treat a petition for the writ of mandamus as a permissive appeal under Rule 5.

2210488 and 2210489

regarding the admission of the records and evidence at issue.

Accordingly, we deny the mother's petitions.

2210488 -- PETITION DENIED.

2210489 -- PETITION DENIED.

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

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