REL: 11/7/2014

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

2130890

Ex parte W.L.K.

PETITION FOR WRIT OF MANDAMUS

(In re: The Adoption Petition of T.C.M. and C.N.M.)

(Jefferson Probate Court, 2013-217610)

PER CURIAM.

W.L.K. ("the father") and S.F. ("the mother") were involved in a relationship between April and July 2012; they lived together in the father's house in Middleburg, Florida, during that period. The mother became pregnant early in the

relationship, and she and the father had begun preparing for the baby by purchasing baby items. However, the mother left the father in July 2013, and, after she broke into the father's house and stole several items, the father swore out a warrant against her. The mother was arrested, and, after that, the father lost contact with her. In December 2012, the father, who is in the United States Navy, contacted an attorney in the Judge Advocate General about his situation; that attorney referred the father to a nonmilitary attorney, who assisted the father by instituting a paternity and custody action in a Florida court in January 2013. The father registered with the putative father registry in Florida. The father attempted to locate the mother at nearby hospitals on January 18, 2013, the expected date of delivery. However, the father was unable to locate the mother.

On January 9, 2013, the mother gave birth to M.M. ("the child") in Montgomery, Alabama. The mother had consented to an adoption of the child by T.C.M. and C.N.M. ("the prospective adoptive parents"), who were present at the birth and who took the child home from the hospital. On January 29,

2013, the prospective adoptive parents filed a petition to adopt the child in the Jefferson Probate Court.

The father first learned of the birth of the child in Alabama on March 1, 2013. After he was served with an amended petition to adopt the child on March 25, 2013, and upon the advice of his Florida counsel, the father sought legal counsel in Alabama. He filed a contest to the adoption petition and a motion to dismiss the adoption petition on April 11, 2013.

As required by Ala. Code 1975, § 26-10A-24(a), the probate court held a contested hearing on the father's contest to the adoption petition on September 26, 2013. At issue was whether the father had impliedly consented to the child's adoption pursuant to the theory of "prebirth abandonment," under which consent to an adoption may be implied based on abandonment if a father fails, "with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to the birth." Ala. Code 1975, § 26-10A-9(a)(1). After hearing the testimony of the father and T.C.M., the probate court entered an order on March 19, 2014, concluding that the father had not impliedly consented to the adoption and specifically rejecting the contention that

the father's conduct had amounted to an abandonment of the mother during her pregnancy. The order set a hearing for June 12, 2014, "to determine the best interest of [the] child."

On April 1, 2014, the prospective adoptive parents filed a motion, purportedly pursuant to Rule 59, Ala. R. Civ. P., seeking to have the probate court amend its judgment. The father filed a motion seeking to have the probate court dismiss the adoption proceeding as required by § 26-10A-24(d). The probate court purported to deny both motions on July 22, 2014. Also on July 22, 2014, the probate court entered an order stating that, on its own motion, it was transferring the adoption proceeding to the Jefferson Juvenile Court pursuant to § 26-10A-24(e).

The father filed this petition for the writ of mandamus with this court on August 4, 2014, seeking an order prohibiting the transfer of the adoption proceeding to the juvenile court and an order requiring the probate court to dismiss the adoption proceeding as required by § 26-10A-24(d).

> "'"Mandamus is a drastic and extraordinary writ, to be issued only where 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 A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008) (quoting Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003), quoting in turn Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

To determine whether the father's mandamus petition is the proper vehicle by which to invoke this court's review, we must first consider whether the probate court's March 19, 2014, order was a final judgment or an interlocutory order. Ex parte A.M.P., 997 So. 2d at 1014 ("A petition for a writ of mandamus is an appropriate remedy for challenging an interlocutory order."). The parties indicate in their respective filings that the March 19, 2014, order was an interlocutory order because it did not dismiss the adoption petition, determine who should have custody of the child, or enter a judgment of adoption. "A final judgment is one that completely adjudicates all matters in controversy between all the parties." Eubanks v. McCollum, 828 So. 2d 935, 937 (Ala. Civ. App. 2002). The March 19, 2014, order decided the father's contest to the adoption, but it did not resolve the entire adoption proceeding. In addition, this court has

explained that an order denying a petition to set aside consent to an adoption is not a final judgment capable of supporting an appeal. Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990). Thus, we agree that the March 19, 2014, order was, in fact, an interlocutory order.

That being determined, we note that the father did not seek mandamus relief within 14 days of the entry of the March 19, 2014, order. According to Rule 21(a)(3), Ala. R. App. P., "[t]he presumptively reasonable time for filing a petition seeking review of an order of a trial court ... shall be the same as the time for taking an appeal." A judgment of adoption must be appealed within 14 days. Ala. Code 1975, § 26-10A-26(a). Instead of filing a petition for the writ of mandamus, the father filed a motion seeking to have the probate court enter an order dismissing the adoption proceeding in April, and he waited until the probate court entered an order purporting to deny that motion in July.[1] To

[1]We note that our supreme court has indicated that a postjudgment motion directed to a judgment of adoption is timely filed when filed within 14 days of the entry of the judgment and that such a postjudgment motion is denied by operation of law if not ruled upon within 14 days. See Ex parte A.M.P., 997 So. 2d at 1013 n.3 and accompanying text (explaining that the adoption judgment was entered on November 8, 2005, that the postjudgment motion was "timely filed" on

the extent that the father's motion was an attempt to have the probate court reconsider its March 19, 2014, order, we note that, "'unlike a postjudgment motion following a final judgment, a motion to reconsider an interlocutory order does not toll the presumptively reasonable time period that a party has to petition an appellate court for a writ of mandamus.'" Ex parte C.J.A., 12 So. 3d 1214, 1216 (Ala. Civ. App. 2009) (quoting Ex parte Onyx Waste Servs. of Florida, 979 So. 2d 833, 834 (Ala. Civ. App. 2007)). Although the father's petition was not timely filed in connection with the March 19, 2014, order, the father's petition was timely filed in connection with the probate court's July 22, 2014, order transferring the adoption proceeding to the juvenile court. Thus, we will consider the petition to have timely invoked this court's jurisdiction.

The father contends that, pursuant to § 26-10A-24(d), the probate court was required to dismiss the adoption proceeding once it resolved the adoption contest in the father's favor and that it lacked jurisdiction to transfer the proceeding to

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November 22, 2005, that the postjudgment motion was denied by operation of law, and that the appeal, which was filed on December 16, 2005, had been timely filed).

the juvenile court. Indeed, the language of the statute supports that conclusion:

> "(d) After hearing evidence at a contested hearing, the court shall dismiss the adoption proceeding if the court finds:
>
> "(1) That the adoption is not in the best interests of the adoptee.
>
> "(2) That a petitioner is not capable of adopting the adoptee.
>
> "(3) That a necessary consent cannot be obtained or is invalid.
>
> "(4) That a necessary consent may be withdrawn. Otherwise the court shall deny the motion of the contesting party."

§ 26-10A-24(d) (emphasis added).

The probate court relied on § 26-10A-24(e) for its transfer order. That provision provides that, "[o]n motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile matters." § 26-10A-24(e). The probate court, however, had already held the contested hearing when it entered its July 22, 2014, order, and transfer was therefore not proper under § 26-10A-24(e).

However, as the prospective adoptive parents point out, another statute provides a potential basis for the probate

court's July 22, 2014, order transferring the adoption proceeding to the juvenile court. Section 26-10A-3 grants the probate court original jurisdiction over adoption proceedings, but it further states that, "[i]f 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." Thus, the prospective adoptive parents contend, under § 26-10A-3, the probate court properly transferred the adoption proceeding to the juvenile court for that court to consider the termination of parental rights.

At first blush, it appears that § 26-10A-24(d) and § 26-10A-3 conflict. One statute, § 26-10A-24(d), directs the probate court to dismiss the adoption proceeding if, after a contested hearing, it concludes that, among other things, "consent cannot be obtained or is invalid." The other statute, § 26-10A-3, indicates that, when a parent "fails to consent or is unable to consent," the proceeding should be transferred to the juvenile court for the limited purpose of considering termination of parental rights.

We are not unaware that this court and our supreme court have indicated that the transfer language contained in § 26-10A-3 mandates transfer to the juvenile court of adoption proceedings lacking implied or express consent from a parent. Ex parte A.M.P., 997 So. 2d at 1018 ("It is only when there is no express or implied consent or relinquishment from a parent of the adoptee that the mandatory transfer portion of § 26-10A-3 applies .... When applicable, this transfer provision is mandatory ...."); R.L. v. J.E.R., 69 So. 3d 898, 901 (Ala. Civ. App. 2011) ("The mother refused to consent to the adoption; therefore, pursuant to § 26-10A-3, the probate court was required to transfer the matter to the court having jurisdiction to determine whether the mother's parental rights were due to be terminated."). In Ex parte A.M.P., our supreme court further opined that, "[w]hen § 26-10A-3 is read in para materia with [Ala. Code 1975,] § 26-10A-9, it is clear that if the probate court finds that the evidence does not prove implied consent ..., then the probate court must transfer the case to juvenile court for a determination of whether to terminate parental rights." Ex parte A.M.P., 997 So. 2d at 1019. However, our supreme court did not consider the

language of § 26-10A-24(d) in its analysis in Ex parte A.M.P. and neither Ex parte A.M.P. nor R.L. involved the resolution of an adoption contest in favor of the objecting parent under § 26-10A-24(d). Thus, we are presented with a question that cannot be answered by reliance on those cases.

To resolve this conflict, we turn to the rules of statutory construction.

> "This court must consider statutory provisions in the context of the entire statutory scheme, rather than in isolation. Siegelman v. Alabama Ass'n of School Bds., 819 So. 2d 568, 582 (Ala. 2001). In ascertaining legislative intent, we must look to the entire act instead of isolated phrases or clauses. Lambert v. Wilcox County Comm'n, 623 So. 2d 727, 729 (Ala. 1993). Moreover, it is 'the duty of the Court to harmonize and reconcile all parts of a statute so that effect may be given to each and every part: conflicting intentions in the same statute are never to be supposed or so regarded unless forced on the Court by unambiguous language.' Leath v. Wilson, 238 Ala. 577, 579, 192 So. 417, 419 (1939). When construing the language of a statute, this court must presume '"'that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.'"' Ex parte Uniroyal Tire Co., 779 So. 2d 227, 236 (Ala. 2000) (quoting Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997))."

Hays v. Hays, 946 So. 2d 867, 877 (Ala. Civ. App. 2006); see also Dollar v. City of Ashford, 677 So. 2d 769, 770 (Ala. Civ.

App. 1995) (quoting Ex parte Jones Mfg. Co., 589 So. 2d 208, 211 (Ala. 1991)) (stating that "'[s]tatutes should be construed together so as to harmonize the provisions as far as practical'"). "Furthermore, we must give the words in a statute their plain, ordinary, and commonly understood meaning, and where plain language is used we must interpret it to mean exactly what it says." Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) (citing Ex parte Shelby Cnty. Health Care Auth., 850 So. 2d 332 (Ala. 2002)).

Our consideration of the entire Alabama Adoption Code, Ala. Code 1975, § 26-10A-1 et seq., given the principles of statutory construction, convinces us that § 26-10A-3 and § 26-10A-24(d) each have specific fields of operation. In a situation in which a probate court has resolved a contest in favor of the parent objecting to the adoption, the plain language of § 26-10A-24(d) must control.[2] That statute addresses a specific form of hearing held in an adoption

[2]We note that a probate court may transfer a pending contest to the juvenile court for determination under § 26-10A-24(e), which states: "On motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile matters."

proceeding, at which a contest to an adoption -- including a contest based on an argument that an express or an allegedly implied consent is invalid -- is determined. See § 26-10A-24(a)(3) (stating that one issue a probate court may determine at a contested hearing is "[w]hether an actual or implied consent or relinquishment to the adoption is valid"). Moreover, although, according to the adoptive parents, § 26-10A-3 appears to require the transfer of an adoption proceeding in every situation where a parent has failed to give his or her consent, enforcing the transfer provision contained in § 26-10A-3 after a parent has successfully contested the adoption would leave no field of operation for the requirement in § 26-10A-24(d) that the adoption proceeding be dismissed after a successful contest. Enforcing § 26-10A-24(d) and requiring dismissal of an adoption proceeding after a successful contest, however, leaves room for the operation of § 26-10A-3 in those adoption proceedings in which a parent does not mount a contest to the adoption but fails to consent or is unable to do so. Such a construction of the two provisions is supported by the language used in the statutes, and it also meets our duty "'to harmonize and reconcile all

parts of a statute so that effect may be given to each and every part.'" Hays, 946 So. 2d at 877 (quoting Leath v. Wilson, 238 Ala. 577, 579, 192 So. 417, 419 (1939)).

Because we have concluded that the juvenile court's July 22, 2014, order transferring the adoption proceeding to the juvenile court is not proper under either § 26-10A-24(e) or § 26-10A-3, we grant the petition for the writ of mandamus and order the probate court to rescind its July 22, 2014, order transferring the adoption proceeding to the juvenile court and to comply with § 26-10A-24(d) and § 26-10A-24(h).[3]

The father also requests that this court order the probate court to vacate its interlocutory order awarding temporary custody of the child to the prospective adoptive parents. The father maintains that, because he never consented to the adoption of the child, the probate court never acquired jurisdiction to enter the interlocutory custody order, thus rendering that order void. His contention is legally correct. See J.L.F. v. B.E.F., 571 So. 2d 1135, 1136

[3]In deciding whether the probate court properly transferred the adoption proceeding, we have not considered whether the probate court correctly decided the father's contest, because that issue is not before us in this petition.

(Ala. Civ. App. 1990) ("[W]here a required consent is never given the trial court never obtains jurisdiction."). Based on its determination of the consent issue, the probate court should have vacated its prior orders due to lack of jurisdiction.

The prospective adoptive parents contend that the probate court should not be required to vacate its void order because they have appealed the judgment finding that the father did not consent to the adoption. However, as the prospective adoptive parents concede, the Adoption Code contains no provision granting a probate court jurisdiction to maintain an interlocutory custody order or to adjudicate the custody of a child during the pendency of an appeal. Act No. 1144, Ala. Acts 1971, does invest the probate court with the equitable power to decide custody disputes, just as a circuit court, but that jurisdiction has not been invoked, and the probate court never considered the custody claim of the father in entering the interlocutory order. Presumptively, the father has the superior claim. See Ex parte Terry, 494 So. 2d 628 (Ala. 1986). The prospective adoptive parents maintain custody of the child solely based on the interlocutory order, which was

issued pursuant to Ala. Code 1975, § 26-10A-18, and which is void for the reason set out above.[4] Based on the foregoing, we further order the probate court to vacate its interlocutory order awarding temporary custody of the child to the prospective adoptive parents.

PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.

Moore, J., concurs in the result, with writing.

[4]Arguably, the probate court could have stayed a judgment of dismissal pending appeal, which would have left the interlocutory custody order intact. However, the record of the appeal filed by the prospective adoptive parents does not contain a stay order or even a motion to stay. See Veteto v. Swanson Servs. Corp., 886 So. 2d 756, 764 n.1 (Ala. 2003) (holding that appellate court can take judicial notice of record of other appellate proceedings before the same court).

MOORE, Judge, concurring in the result.

In this case, the probate court determined that W.L.K. ("the father") had not impliedly consented to the adoption of M.M., his child. At that point, the probate court did not dismiss the action in accordance with Ala. Code 1975, § 26-10-24(d)(3); instead, it purported to transfer the proceedings to the juvenile court "in accordance with [Ala. Code 1975, § 26-10A-24(e)]." Subsection (e) of § 26-10A-24 provides that, "[o]n motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile matters." By its plain language, § 26-10A-24(e) authorizes a probate court to transfer a pending adoption contest to a juvenile court for hearing and resolution; however, the probate court had already adjudicated the adoption contest at the time of its purported transfer, so § 26-10A-24(e) no longer applied. Thus, the probate court could not have transferred the adoption proceeding pursuant to § 26-10A-24(e).

T.C.M. and C.N.M. ("the prospective adoptive parents") argue that the probate court could have transferred the adoption proceedings to the juvenile court under Ala. Code

1975, § 26-10A-3. However, I find nothing in the materials submitted to this court to indicate that the probate court intended to transfer the case to the juvenile court for the purpose of terminating the father's parental rights. The probate court did not refer to § 26-10A-3 in its order, and the prospective adoptive parents do not cite to any document purporting to be a motion to transfer the proceedings to the juvenile court under § 26-10A-3 or in order to terminate the father's parental rights. Hence, I cannot agree that the transfer order should be considered valid for that reason, and I find no need to discuss the interplay between § 26-10A-24(d) and § 26-10A-3.

Because the probate court did not transfer the case to the juvenile court under § 26-10A-3, and because it could not have transferred the case to the juvenile court under § 26-10A-24(e), its only remaining option was to dismiss the adoption proceedings. Hence, I concur with the main opinion that the petition for a writ of mandamus should be granted, that the transfer order should be vacated, and that the probate court should dismiss the case under § 26-10A-24(d)

after complying with the costs provisions set out in Ala. Code 1975, § 26-10A-24(h).

I also concur that the probate court should vacate its interlocutory order granting the prospective adoptive parents custody of the child, which order was entered without subject-matter jurisdiction, as the main opinion concludes. ___ So. 3d at ___. I note that, because the interlocutory order is void, the prospective adoptive parents are not exercising physical custody of the child pursuant to a valid child-custody determination. In his petition, the father argues that, because he had not consented to the adoption and the interlocutory order is void, "an order should be entered granting [him] custody of the child." However, the father has not shown the prerequisites to mandamus relief on that issue, namely, a clear legal right to the custody of the child, an imperative duty on the part of the probate court to award him custody of the child, a refusal by the probate court to grant him custody of the child, the lack of another adequate remedy to obtain custody of the child, and the properly invoked jurisdiction of this court. See generally Ex parte S.T., [Ms. 2130132, March 21, 2014] ___ So. 3d ___ (Ala. Civ. App. 2014).

The Alabama Adoption Code does not specifically provide that a biological parent who has not consented to adoption shall be entitled to custody of a child following dismissal of an adoption proceeding. In fact, the Alabama Adoption Code does not address at all the issue of the custody of a child whose adoption is denied, although ineffective adoptions have often led to complex and protracted litigation over the custody of a child. See Ex parte D.B., 975 So. 2d 940, 956-59 (Ala. 2007) (Bolin, J., concurring specially) (citing in notes 6 and 7 Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992); In re Baby Girl Clausen, 442 Mich. 648, 502 N.W.2d 649 (1993); and In re Petition of Kirchner, 164 Ill. 2d 468, 208 Ill. Dec. 268, 649 N.E.2d 324 (1995)). The father has not cited any legal authority providing that the dismissal of an adoption proceeding ipso facto vests in him an automatic right to the custody of the child. From our caselaw, it appears that the father, as the biological parent of the child, has only a prima facie right to custody, see Ex parte Terry, 494 So. 2d 628 (Ala. 1986), which right may be contested by the prospective adoptive parents, or any other interested person, in an appropriate forum. In the underlying proceedings, the

father seemed to recognize that fact by moving the probate court to dismiss the adoption proceedings in order that the custody of the child might be determined in a Florida court and by asserting a right to custody only toward the very end of the proceedings below.