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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

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Ex parte Marshall County Department of Human Resources

PETITION FOR WRIT OF MANDAMUS

(In re: Marshall County Department of Human Resources

v.

J.V.)

(Marshall Juvenile Court, JU-09-300067.05)

THOMAS, Judge.

The Marshall County Department of Human Resources ("DHR") seeks a writ of mandamus directing the Marshall Juvenile Court

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(the juvenile court") to terminate the "visitation" of J.V. ("the father") with J.J.V. ("the child"). This is the second time the parties have appeared before this court. See Marshall Cty. Dep't Human Res. v. J.V., [Ms. 2140825, February 26, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016).

On July 2, 2015, the juvenile court entered a judgment awarding legal and physical custody of the child to the father and ordering that the transition of custody of the child, who had been in the care of foster parents, be accomplished no later than July 27, 2015. J.V., ___ So. 3d at ___. DHR appealed the juvenile court's judgment to this court, arguing both that the award of custody to the father was not supported by the evidence and that such an immediate transition of custody was not in the child's best interest. Id. at ___. DHR sought, and this court granted, a stay of the transition of custody pending resolution of DHR's appeal. Id. at ___. On February 26, 2016, this court issued its opinion affirming the award of custody to the father but reversing the immediate transition of the child to the father's custody. Id. at ___. This court suggested that further transitioning be instituted

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so as to strengthen the relationship between the child and the father. Id. at ____.

In compliance with our decision, the juvenile court entered an order on April 3, 2016, setting out the transition plan to which the parties had agreed, which included increasingly longer periods of visitation with a custody-transition date of July 1, 2016. That order provided that the father was to have unsupervised visitation with the child from May 27, 2016, to May 30, 2016. On May 26, 2016, DHR filed what it describes in its mandamus petition as a "Motion for Emergency Order to Cease Visitation"¹ in the juvenile court, which, we presume, was supported by the report of Lois W. Petrella, a psychologist who had evaluated the child on May 13, 2016. Although we do not have the motion that DHR filed in the juvenile court before us, DHR appears to have sought an order terminating what it described as the father's visitation based on allegations that the child was threatening to harm herself or to run away from the father's home if forced to visit or to live with him. The juvenile court denied DHR's motion. DHR then filed a motion to stay the impending May 27

¹DHR has not provided a copy of that motion in the materials appended to its petition for the writ of mandamus.

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through 30, 2016, visitation, which the juvenile court also denied.

DHR then filed an emergency motion to stay and a petition for the writ of mandamus in this court. The mandamus petition seeks an order from this court compelling the juvenile court to "terminate visitation between the child and the father," based on the premise that the juvenile court abused its discretion in not terminating visitation as requested. This court granted the stay pending resolution of this petition, which we now deny.

""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)).

DHR cannot show a clear legal right to the relief it seeks in its petition. The visitation of which DHR now

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complains is not true visitation. The visitation awarded in the April 3, 2016, order is transitional visitation aimed at preparing the child for the transition of custody to the father. DHR's request that we order the juvenile court to "terminate" the father's visitation is in essence a request that we order the juvenile court to modify the award of custody to the father.

However, this court has affirmed the award of custody of the child to the father. J.V., ___ So. 3d at ___. DHR did not seek certiorari review of this court's February 26, 2016, decision. The award of custody to the father has therefore become the law of the case. Ex parte S.T.S., 806 So. 2d 336, 341 (Ala. 2001).

"The issues decided by an appellate court become the law of the case on remand to the trial court, and the trial court is not free to reconsider those issues. Murphree v. Murphree, 600 So. 2d 301 (Ala. Civ. App. 1992). According to the doctrine of the law of the case, 'whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case.' Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987)."

Ex parte S.T.S., 806 So. 2d at 341. The child's custody is to be vested in the father at the completion of the transitional

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period, and the juvenile court is not free to alter the custody award merely upon motion of the parties.

DHR's allegations that the child has harmed herself and has threatened to run away from the father's residence, although nearly identical to testimony presented at the July 2015 evidentiary hearing before the entry of the July 2, 2015, judgment giving rise to the appeal in J.V., are, in fact, allegations, presumably supported by new evidence, regarding the child's best interests. The juvenile court may consider those allegations and any such new evidence in a modification action. However, DHR's attempt to present new evidence to alter the award of custody in this action cannot succeed.

Accordingly, DHR's petition for the writ of mandamus is denied. This court's stay order is lifted.

PETITION DENIED.

Pittman and Moore, JJ., concur.

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

Thompson, P.J., dissents, with writing.

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THOMPSON, Presiding Judge, dissenting.

In our February 26, 2016, decision, this court reversed that part of the judgment of the Marshall Juvenile Court ("the juvenile court") transferring immediate custody of J.J.V. ("the child") to J.V. ("the father") because of our concern for the welfare and safety of the child and to allow a more appropriate relationship between the father and the child to develop. Marshall Cty. Dep't of Human Res. v. J.V., [Ms. 2140825, Feb. 26, 2016] ___ So. 3d ___ (Ala. Civ. App. 2016). This court held that the father and the child did not "have a relationship strong enough to accomplish the transition of custody" and that "[b]oth the child and the father would be ill-served by a transition of custody at this time and under these circumstances." Marshall Cty. Dep't of Human Res. v. J.V., ___ So. 3d at ___.

Following this court's decision in Marshall County Department of Human Resources v. J.V., supra, the parties arrived at and the juvenile court sanctioned a "visitation plan to transition to legal and physical custody" of the child to the father, which began with supervised visitation and gradually increased to unsupervised, overnight visitation.

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The ultimate goal of the transition was to have the father assume legal and physical custody of the child on July 1, 2016. The transition plan also provided that "[t]he child and [the] father shall continue to participate and cooperate with counseling with Dr. [Elaine] Eassa, a licensed psychologist."

In its petition for a writ of mandamus filed in this court, the Marshall County Department of Human Resources ("DHR") alleges that certain events have occurred during the transition period, and it requests that this court order the juvenile court to "cease visitation in order to preserve the health and safety of the child." In support of its petition, DHR presented evidence indicating that Dr. Lois W. Petrella, a licensed psychologist, evaluated the nine-year-old child in mid-May 2016. Dr. Petrella diagnosed the child as having post-traumatic stress disorder, among other things. The child cut herself with a can while visiting her father and attempted to shock or electrocute herself in order to avoid being forced to visit the father. This child has also stated that--at nine years of age--she has had thoughts of suicide when faced with having to visit the father. The evidence presented in Ex parte Marshall County DHR, supra, indicated that, because the

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Georgia home study regarding the father's home had not approved, the Georgia child-protection agency would not monitor the family in connection with this case when the child visits the father or after the child is placed in the father's custody in Georgia.

I do not agree with the main opinion when it states that "DHR's request that we order the juvenile court to 'terminate' the father's visitation is in essence a request that we order the juvenile court to modify the award of custody to the father." ____ So. 3d at ____ . I view DHR's petition as requesting that this court order the juvenile court to exercise its power to protect the health and safety of the child. See § 12-15-138, Ala. Code 1975 ("The juvenile court, at any time after a dependency petition has been filed, or on an emergency basis, may enter an order of protection or restraint to protect the health or safety of a child subject to the proceeding.").

Regardless of whether this court affirmed the initial award of custody to the father, the juvenile court possesses the power to halt visitation based upon the best interests and welfare of the child and to consider any properly filed

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modification action. Although I understand that the juvenile court is attempting to meet one of the goals of the Alabama Juvenile Justice Act ("the AJJA"), § 12-15-101 et seq., Ala. Code 1975, by seeking to reunite the father and the child, I note that the AJJA requires that reunification be achieved in a manner that ensures the child's safety. See § 12-15-101(b)(3), Ala. Code 1975 (A goal of the AJJA is "[t]o reunite a child with his or her parent or parents as quickly and as safely as possible when the child has been removed from the custody of his or her parent or parents unless reunification is judicially determined not to be in the best interests of the child.").

The evidence from the most recent psychological evaluation of the child is consistent with previous evidence indicating that the child has engaged in self-destructive behavior, and it appears to me that the situation has deteriorated rather than improved since the issuance of our last opinion. I can see no reason to alter my position that an immediate transfer of custody to the father is not presently in the best interests of the child. It is the function of the courts of this state to protect the children

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before them. J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1211 (Ala. Civ. App. 2007); C.S. v. Mobile Cty. Dep't of Human Res., 166 So. 3d 680, 684 (Ala. Civ. App. 2014). The juvenile court appears to have rejected the allegations that the father sexually abused the child. In any regard, whether the child needs protection from the father or not, it is clear that the child needs protection from her own potential conduct if she is forced to visit the father or transition to his home. Accordingly, I would grant DHR's petition for a writ of mandamus and direct the juvenile court to end the visitation or at least temporarily suspend the transition until a more acceptable solution can be reached.