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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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**Ex parte Montgomery County Department of Human Resources**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: The Matter of J.D.N.)**

**(Montgomery Juvenile Court, JU-11-549.01)**

EDWARDS, Judge.

In May 2018, the Montgomery County Department of Human Resources ("DHR") filed a motion in the Montgomery Juvenile Court ("the juvenile court") requesting that the juvenile

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court set a permanency hearing<sup>1</sup> in case number JU-11-549.01, relating to J.D.N. ("the child"), who had been in the permanent custody of DHR since May 2016, after the rights of his parents were terminated by the juvenile court.<sup>2</sup> The juvenile court granted the motion and, after the conclusion of the requested permanency hearing, entered an order on September 14, 2018 ("the permanency order"), determining, among other things, that DHR had made reasonable efforts to finalize the child's permanency plan and ordering that DHR "make every effort possible to allow the child to maintain contact with his siblings" and "continue to seek out viable relative resources as possible adoptive resources"; the

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<sup>1</sup>Permanency hearings are required by Ala. Code 1975, § 12-15-321, which reads:

"Where the juvenile court has terminated the parental rights and has placed legal custody of the child with the Department of Human Resources or with a public or private licensed child-placing agency, the juvenile court, at least annually, shall review the circumstances of the child to determine what efforts have been made to achieve permanency for the child."

<sup>2</sup>The May 2016 judgment terminating the parental rights of the child's parents was entered in compliance with this court's instructions in Montgomery County Department of Human Resources v. A.S.N., 206 So. 3d 661 (Ala. Civ. App. 2016).

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permanency order also required that DHR apprise the juvenile court of its efforts in regular reports to the juvenile court.<sup>3</sup> On September 28, 2018, DHR filed a motion seeking reconsideration of the permanency order, which motion the juvenile court set for a hearing to be held on October 10, 2018.<sup>4</sup> The juvenile court did not rule on DHR's motion, and, on October 24, 2018, DHR filed a notice of appeal to this court.

"'Even though this issue has not been addressed by either party, this court must first determine whether it has jurisdiction over this appeal. "'Jurisdictional matters are of such importance that a court may take notice of them ex mero motu." Naylor v. Naylor, 981 So. 2d 440, 441 (Ala. Civ. App. 2007) (quoting McMurphy v. East Bay Clothiers, 892 So. 2d 395, 397 (Ala. Civ. App. 2004)). "The question whether a judgment is final is a jurisdictional question, and the reviewing court, on

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<sup>3</sup>The juvenile court amended the permanency order on September 20, 2018, to correct a clerical error by specifying the date on which the next review hearing was set.

<sup>4</sup>At the October 10 hearing, the parties discussed extending the time for the juvenile court to rule on what the parties characterized as DHR's postjudgment motion; however, because, as discussed infra, the permanency order is an interlocutory order, see Ex parte Limestone Cty. Dep't of Human Res., 255 So. 3d 210, 216 (Ala. Civ. App. 2017) (characterizing a permanency order entered after the children's permanent custody had been vested in the Limestone County Department of Human Resources as an interlocutory order), DHR's motion was not a postjudgment motion.

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a determination that the judgment is not final, has a duty to dismiss the case." Hubbard v. Hubbard, 935 So. 2d 1191, 1192 (Ala. Civ. App. 2006) (citing Jim Walter Homes, Inc. v. Holman, 373 So. 2d 869, 871 (Ala. Civ. App. 1979)). "[A] final judgment is a 'terminal decision which demonstrates there has been a complete adjudication of all matters in controversy between the litigants.'" Dees v. State, 563 So. 2d 1059, 1061 (Ala. Civ. App. 1990) (quoting Tidwell v. Tidwell, 496 So. 2d 91, 92 (Ala. Civ. App. 1986)).'"

O.Y.P. v. Lauderdale Cty. Dep't of Human Res., 148 So. 3d 1081, 1082-83 (Ala. Civ. App. 2014) (quoting Butler v. Phillips, 3 So. 3d 922, 925 (Ala. Civ. App. 2008)).

In Ex parte Limestone County Department of Human Resources, 255 So. 3d 210 (Ala. Civ. App. 2017), this court considered a petition for the writ of mandamus seeking review of an order entered after a permanency review conducted pursuant to Ala. Code 1975, § 12-15-321. 255 So. 3d at 216. Although we did not specifically discuss in Ex parte Limestone County Department of Human Resources whether the order under review was, in fact, interlocutory, we did consider the petition and stated that a petition for the writ of mandamus was the proper vehicle for seeking review of an interlocutory order. Id. at 215 & 216. We have explained that an order entered after a permanency hearing held during the

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continuation of a dependency action pursuant to Ala. Code 1975, § 12-15-315(a), is not a final judgment, characterizing it instead as "'in the nature of an administrative matter'" because it does not finally adjudicate the rights or obligations of any litigant. O.Y.P., 148 So. 3d at 1083 (quoting Ex parte F.V.O., 145 So. 3d 27, 30 (Ala. 2013)). The permanency order in the present case, which assessed DHR's attempts to finalize the child's permanency plan and which directed that certain efforts be made to further the best interests of the child and to secure an adoptive parent for the child, is not a final judgment. Like the order in O.Y.P., it is merely administrative in nature, serving solely as a memorialization of the review of the "efforts ... made to achieve permanency for the child" as required by § 12-15-321. DHR therefore appealed from an interlocutory order.

This court has jurisdiction over appeals from final judgments of the juvenile court. See Ex parte T.C., 96 So. 3d 123 (Ala. 2012). However, this court may, at its discretion, elect to treat an appeal as a petition for the writ of mandamus. See Ex parte K.S., 71 So. 3d 712, 715 (Ala. Civ. App. 2011). In this case, because DHR filed a motion seeking

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reconsideration of the permanency order, its notice of appeal was filed outside the presumptively reasonable time to file a petition for the writ of mandamus, which, in juvenile cases, is 14 days from the entry of the order under review. See Rule 21(a)(3), Ala. R. App. P.; S.W. v. Jefferson Cty. Dep't of Human Res., 113 So. 3d 657, 659 n.1 (Ala. Civ. App. 2012) (explaining that a motion seeking reconsideration of an interlocutory order does "not toll the presumptively reasonable time to file a petition for a writ of mandamus").

That being said, however, this court may still consider the merits of a petition for the writ of mandamus "that challenges the jurisdiction of the trial court to enter the order sought to be vacated [despite the fact that the petition was] not ... filed within the presumptively reasonable period prescribed by Rule 21[, Ala. R. App. P.]." Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017) (citing Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016)). In its brief to this court, DHR argued that the juvenile court exceeded its statutory authority by ordering DHR to make efforts to maintain contact between the child and his siblings and to seek out relatives of the child to serve

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as adoptive resources. Because we construed DHR's arguments as challenging the jurisdiction of the juvenile court to make those orders, we notified the parties that we were electing to treat DHR's appeal as a petition for a writ of mandamus, ordered DHR to serve a copy of its brief on the respondent judge, and allowed the respondent judge and the child's guardian ad litem to file answers to the petition.

"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)).

Information shared at the permanency hearing indicated that the child suffers from behavioral problems and mental-health issues, including reactive attachment disorder, attention-deficit/hyperactivity disorder, "childhood abandonment," and depression. The child is currently in a therapeutic foster home in Mobile; he had recently been moved

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from one such home to another because the most recent former foster parent had had difficulty responding to near-daily telephone calls from the child's school to address the child's inappropriate conduct. The child had previously been in a foster-care placement in Selma, which he disrupted, according to the child's guardian ad litem, because "[h]e was acting out, destroying property, defiant, just really hard to maintain."

The child has assaulted one of his teachers with a broom and has been suspended from school on at least two occasions. At some point, the child was institutionalized in a facility operated by Baypointe Children's Residential Services ("Baypointe"), during which time his behavior became more regulated through medication; however, he physically attacked a Baypointe staff member. The child currently takes several medications, and, according to the guardian ad litem, "his medication balance is delicate." The juvenile court commented that the child was on seven medications and that some were "serious psychotropic medications." DHR indicated that it planned to order a "medication review" in the immediate future to assess whether the child was on the appropriate medications and receiving the right dosages.



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The child testified at the permanency hearing. He asked if he could live with his sister in the home of a former foster parent. He admitted that he had been kicked out of after-school care for bad behavior, which he admitted was his fault for making "bad decisions." He testified that he "needs to learn how to act right, to be obedient."

DHR contends that the juvenile court exceeded the authority granted to it by § 12-15-321 by ordering DHR to make efforts to maintain contact between the child and his siblings and to search out suitable relatives as potential adoptive resources for the child. DHR relies on this court's discussion of the limits of a juvenile court's power under § 12-15-321 in Ex parte Alabama Department of Human Resources, 154 So. 3d 1060, 1065 (Ala. Civ. App. 2014), overruled on other grounds by S.H. v. Macon County Department of Human Resources, 195 So. 3d 311, 314 (Ala. Civ. App. 2015). We have explained that

"[n]othing in § 12-15-321 ... bestows upon a juvenile court the power to determine the permanency plan for the child, which power it does have under § 12-15-315, Ala. Code 1975, before parental rights are terminated.<sup>5</sup> To the contrary, § 12-15-321 specifically provides that a juvenile court may only 'review the circumstances of the child to determine what efforts have been made to achieve permanency

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for the child.' In other words, the purpose of a permanency hearing under § 12-15-321 is not to determine the appropriate permanent placement of the child, but to ensure that 'the Department of Human Resources' is using reasonable efforts to achieve the permanency plan it has formulated for the child under the authority granted to it by § 12-15-320(b) [, Ala. Code 1975].

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"<sup>5</sup>Section 12-15-315(a), Ala. Code 1975, provides that a juvenile court must hold periodic permanency hearings in certain cases and that the 'purpose of the permanency hearing shall be to determine the permanency plan for the child....' (Emphasis added.)."

Ex parte Alabama Dep't of Human Res., 154 So. 3d at 1065.

Indeed, Ala. Code 1975, § 12-15-320(b)(1), provides that, once permanent legal custody of a child is awarded to a department of human resources, the department "shall have authority to make permanent plans for the child, including the authority to place for adoption and consent to adoption." Section 12-15-321 authorizes a juvenile court to "review the circumstances of the child to determine what efforts have been made to achieve permanency for the child" but does not otherwise grant the juvenile court the power to revise or amend the permanency plan. Thus, DHR contends, it alone is vested with the power to determine the child's associations

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and to determine the appropriate actions to take on behalf of the child in order to secure permanency and, therefore, the juvenile court has no authority to order DHR to institute or maintain visitation between the child and his siblings or to require it to seek out relative-placement alternatives after a termination of parental rights.

In Ex parte Limestone County Department of Human Resources, we considered, among other things, whether the Limestone Juvenile Court's post-termination permanency order requiring particular placements for children in the legal custody of the Limestone County Department of Human Resources ("the Limestone County DHR") exceeded that court's statutory authority under § 12-15-321. 255 So. 3d at 216. In its permanency order, the court had determined that the Limestone County DHR had not exerted reasonable efforts to achieve permanency for the children and had instructed it to place one of the children in a therapeutic foster home and to place the other child in a preadoptive foster home with a particular individual. 255 So. 3d at 214-15. The Limestone County DHR sought review of the order, and we determined that "the ... juvenile court exceeded its statutory authority and invaded

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[the Limestone County] DHR's authority insofar as it purported to override [the Limestone County] DHR's permanency plan by directing particular placements for the children in its permanency review orders." Id. at 217. We further noted that,

"[a]lthough it is unclear what recourse a juvenile court has once it determines, pursuant to § 12-15-321, that a department of human resources has not exerted appropriate efforts aimed at achieving permanency for a child in its permanent legal custody, we are not called upon to answer that question, which is a question better answered by the legislature."

Id. at 217 n.4.

In the present case, the juvenile court determined that DHR had made reasonable efforts to finalize the child's permanency plan. Thus, the provisions in the permanency order requiring DHR to maintain the child's relationships with his now-adopted siblings and to seek out suitable relatives, even more than the provisions of the permanency order in Ex parte Limestone County Department of Human Resources, appear to usurp the powers granted to DHR in § 12-15-320(b)(1) by

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amending or revising an otherwise acceptable permanency plan that DHR has been properly attempting to effectuate.<sup>5</sup>

The guardian ad litem for the child and the juvenile-court judge have answered DHR's petition, and they both maintain that the juvenile court was acting within its discretion to suggest continued visitation between the child and his now-adopted siblings because the juvenile court has concluded that such visitation would serve the child's best interest and promote his welfare by perhaps easing his depression and, as a byproduct, improving his behavioral issues.<sup>6</sup> Moreover, both suggest that the requirement that DHR

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<sup>5</sup>In contrast to § 12-15-320(b)(1), Ala. Code 1975, § 12-15-503(a), which governs the disposition of multiple-needs children, permits the juvenile court to develop and govern the implementation of a service plan for a multiple-needs child. See Ex parte Montgomery Cty. Dep't of Human Res., 10 So. 3d at 38 (affirming a juvenile court's decision to implement an earlier service plan for a multiple-needs child when DHR's change to a new service plan was not in the best interest of the child).

<sup>6</sup>In addition, the guardian ad litem suggests that DHR's complaints about the requirement that it make efforts to maintain sibling contact should be considered waived because DHR complied with the permanency order by submitting a report to the juvenile court on October 10, 2018, indicating that the adoptive parent of the child's sister "stated that she does not want to facilitate visits if there is court involvement" and that the adoptive parent of the child's brother had indicated her willingness to allow telephone communication

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seek out suitable relatives is nothing more than a request that DHR seek out and consider any potential adoptive parents, especially those that might have some existing relationship with the child.

The juvenile-court judge contends that

"[t]here is no language in [§ 12-15-321] that prohibits the court from taking any action that is deemed to be in the best interest of the child. The best interest standard is undisputed and understood to be the desired goal of court action at every phase of litigation with dependency cases, whether or not parental rights have been terminated. The undersigned directs the reader's attention to [Ala. Code 1975, §] 12-15-314[,<sup>7</sup>] which provides that the juvenile judge 'may make any other order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child.'"

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between the child and the brother. We cannot agree that DHR's filing of the report required by the permanency order before seeking review of that order amounts to a waiver by DHR of its right to challenge that order, especially because DHR's failure to comply with the permanency order might have been construed as contempt of that order. See Bateh v. Brown, 289 Ala. 699, 709, 271 So. 2d 833, 843 (1972). Furthermore, we note that the permanency order imposes on DHR a continuing monthly duty to provide reports relating to DHR's efforts to maintain contact between the child and his siblings.

<sup>7</sup>Alabama Code 1975, § 12-15-314, governs the disposition of dependent children. However, § 12-15-320 governs the disposition of children after the termination of parental rights.

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Based on this argument, the juvenile-court judge further contends that she is required to consider the best interest and welfare of the child when conducting her annual permanency hearings under § 12-15-321 and that, if she is not permitted to make any orders that she determines are in the best interest of the child, the permanency reviews required by § 12-15-321 are "primarily for the benefit of [DHR]."

Certainly, "the duty of a juvenile court to determine whether a minor child's best interests are being protected overlaps with the duty of a State agency to care for and treat juveniles who have been committed to its custody." Ex parte Montgomery Cty. Dep't of Human Res., 10 So. 3d 31, 38 (Ala. Civ. App. 2008) (citing Alabama Dep't of Mental Health & Mental Retardation v. Andres, 515 So. 2d 9, 11 (Ala. Civ. App. 1987)), superseded by statute on another issue, as recognized in Ex parte Limestone Cty. Dep't of Human Res., 255 So. 3d at 219. We have noted that the overlapping duties may create "a conflict between two separate branches of state government on a matter whose outcome, at least in some degree, is entrusted to the authority of both of them." Andres, 515 So. 2d at 11. Our caselaw is clear that a juvenile court cannot interfere

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before a State agency like DHR has had the opportunity to carry out its mandate of caring for a child in its custody by implementing its plan for that child's care or treatment. Id. However, when a department of human resources has not properly carried out its mandate to develop and implement a permanency plan for a child committed to its legal custody after the termination of parental rights, sadly, as noted in Ex parte Limestone County Department of Human Resources, 255 So. 3d at 217 n.4, § 12-15-321 does not make clear "what recourse a juvenile court has once it determines, pursuant to § 12-15-321, that a department of human resources has not exerted appropriate efforts aimed at achieving permanency for a child in its permanent legal custody."

In the present case, DHR has had the opportunity to carry out its mandate, and the juvenile court, unlike the Limestone Juvenile Court in Ex parte Limestone County Department of Human Resources, has determined that DHR has made reasonable efforts to finalize the appropriate and existing permanency plan for the child. Thus, based on our caselaw and § 12-15-321, the juvenile court has no further duty or authority to direct DHR's decisions regarding how to implement its



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permanency plan. DHR has therefore established that it has a clear legal right to the remedy it seeks.<sup>8</sup>

PETITION GRANTED; WRIT ISSUED.

Hanson, J., concurs.

Donaldson, J., concurs specially.

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

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

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<sup>8</sup>We are not unsympathetic to the concerns expressed by the juvenile-court judge and the guardian ad litem that DHR's refusal to accept reasonable suggestions from the juvenile court like those in the permanency order might further delay permanency for the child. We are also well aware that the requirement in § 12-15-321 that the juvenile court hold annual (or more frequent) permanency reviews appears to be unaccompanied by any actual oversight authority on the part of the juvenile court. However, as we noted in Ex parte Limestone County Department of Human Resources, the legislature, and not this court, is the most appropriate forum in which to address the authority of the juvenile court to address deficiencies in the implementation of a permanency plan.

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DONALDSON, Judge, concurring specially.

I concur in the main opinion because I believe it is consistent with the cases cited as precedent in the opinion and, in particular, with our current interpretation of Ex parte K.R., 210 So. 3d 1106 (Ala. 2016), and its application to petitions for the writ of mandamus that do not comply with Rule 21(a)(3), Ala. R. App. P. See Ex parte J.B., 223 So. 3d 251, 254 (Ala. Civ. App. 2016). I remain hopeful that Ex parte K.R., or our interpretation of it, will be clarified, modified, or vacated in the future. See, e.g., Ex parte B.J.C., 248 So. 3d 988, 992 (Ala. Civ. App. 2017) (Pittman, J., concurring specially, joined by Donaldson, J.); Ex parte J.L.P., 230 So. 3d 396, 401 (Ala. Civ. App. 2017) (Pittman, J., concurring specially, joined by Donaldson, J.); and Ex parte M.F.B., 228 So. 3d 460, 462-63 (Ala. Civ. App. 2017) (Pittman, J., concurring specially, joined by Thomas and Donaldson, JJ.).

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THOMPSON, Presiding Judge, dissenting.

In a September 14, 2018, order entered in this action, the Montgomery Juvenile Court ("the juvenile court") ordered the Montgomery County Department of Human Resources ("DHR") to make efforts to allow J.D.N. ("the child") to continue to see his siblings and to provide monthly reports documenting DHR's efforts to do so; the juvenile court also ordered that DHR seek relatives as potential adoptive resources for the child. Given the facts and posture of the underlying action, I agree with the main opinion to the extent that it concludes that the September 14, 2018, order was an interlocutory order not capable of supporting an appeal. \_\_\_ So. 3d at \_\_\_.

DHR has not requested that this court treat its appeal as a petition for a writ of mandamus. Rather, this court, ex mero motu, has elected to treat DHR's appeal as a petition for a writ of mandamus. There is no bright-line formula for determining when an appeal should be treated as a petition for a writ of mandamus. Ex parte Burch, 730 So. 2d 142, 146 (Ala. Civ. App. 1999). However, a writ of mandamus is an extraordinary remedy. Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). Given the nature of this dispute and the

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arguments asserted by DHR, I disagree with treating DHR's appeal as a petition for a writ of mandamus.

Regardless, even assuming that this matter is properly treated as a petition for a writ of mandamus, it is not timely, and, therefore, this court lacks jurisdiction over it. Rule 2(a)(1), Ala. R. App. P. As noted in the main opinion, DHR's purported September 28, 2018, postjudgment motion did not extend the time for reviewing the September 14, 2018, order by way of a petition for a writ of mandamus. \_\_\_ So. 3d at \_\_\_ (citing Rule 21(a)(3), Ala. R. App. P., and S.W. v. Jefferson Cty. Dep't of Human Res., 113 So. 3d 657, 659 n.1 (Ala. Civ. App. 2012)). DHR therefore had until September 28, 2018, to file a timely petition for a writ of mandamus. Rule 21(a)(3), Ala. R. App. P.; Rule 4(a)(1)(E), Ala. R. App. P. DHR's October 24, 2018, notice of appeal, which the main opinion treats as a petition for a writ of mandamus, was not timely filed so as to invoke the jurisdiction of this court.

The main opinion has determined that this court may review this matter under the authority of Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016), and Ex parte Madison County Department of Human Resources, 261 So. 3d 381, 385 (Ala. Civ.

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App. 2017). In Ex parte K.R., supra, K.R., the petitioner, filed a petition for a writ of mandamus, arguing, in part, that the Mobile Probate Court was without jurisdiction to enter certain orders because a temporary probate judge appointed to preside over the action had not been properly appointed pursuant to applicable statutes. Our supreme court recognized that the petition for a writ of mandamus was not timely filed. However, the court held that, because the petition challenged the jurisdiction of the probate court and because it could take notice of the jurisdictional issue on its own, it would consider the untimely petition. The court explained that "[t]he timeliness of K.R.'s challenge to [the temporary probate judge's] appointment to serve as a temporary judge of probate is insignificant because 'we take notice of the lack of jurisdiction ex mero motu.'" Ex parte K.R., 210 So. 3d at 1112 (emphasis added). The court granted K.R.'s petition for a writ of mandamus to the extent that the petition challenged orders entered by the temporary probate judge; the court held that those orders were void for want of jurisdiction. Ex parte K.R., 210 So. 3d at 1113.

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In Ex parte J.B., 223 So. 3d 251, 254-55 (Ala. Civ. App. 2016), this court explained:

"[O]ur supreme court recently determined that, in situations in which a petition for the writ of mandamus challenges the subject-matter jurisdiction of the court in which the challenged interlocutory order was rendered, the petition need not timely invoke the jurisdiction of the appellate court. Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016). Instead, relying on the principle that an appellate court may review the issue of subject-matter jurisdiction regardless of whether that issue was raised in the trial court or even on appeal, our supreme court stated that subject-matter jurisdiction could be raised ex mero motu at any time despite the lack of a timely filed petition invoking the appellate court's jurisdiction. Ex parte K.R., 210 So. 3d at 1112. Thus, regarding the alleged father's issue relating to the subject-matter jurisdiction of the Alabama court, we must consider that issue regardless of the failure of the alleged father to timely invoke our jurisdiction."

Similarly, in Ex parte Madison County Department of Human Resources, supra, this court treated a notice of appeal as a petition for a writ of mandamus, and, although that "petition" was not timely filed, this court considered the matter because the petition raised a jurisdictional issue. Specifically, the petitioner in that case alleged that a postjudgment motion had been untimely filed and, for that reason, that the juvenile court in that case had lacked jurisdiction to enter an order

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purporting to grant that untimely postjudgment motion. Ex parte Madison Cty. Dep't of Human Res., supra. This court agreed, and it granted the petition and issued a writ of mandamus on the basis that, because the postjudgment motion was not timely filed, any orders entered after the filing of that motion were void for want of jurisdiction. Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d at 386. See also Ex parte B.W., 257 So. 3d 334, 335 n.1 (Ala. Civ. App. 2018) (noting that, although the petition for a writ of mandamus was untimely, the court would consider the merits of the argument because it challenged the trial court's subject-matter jurisdiction); and Ex parte J.L.P., 230 So. 3d 396 (Ala. Civ. App. 2017) (considering an untimely petition for a writ of mandamus in which the petitioner argued that the lower court did not have subject-matter jurisdiction over the action); but see Ex parte B.J.C., 248 So. 3d 988, 991 (Ala. Civ. App. 2017) (stating that the untimely petition for a writ of mandamus raised an issue that "went to the power of the juvenile court" to enter the challenged order and concluding that the juvenile court erred in entering the order without conducting a

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hearing); and Ex parte Limestone County Department of Human Resources, 255 So. 3d 210 (Ala. Civ. App. 2017).<sup>9</sup>

In Ex parte Murray, 267 So. 3d 328 (Ala. Civ. App. 2018), a husband filed an untimely petition for a writ of mandamus from an interlocutory protection-from-abuse order, arguing that a lack of notice of the hearing on the protection-from-abuse petition rendered that order void for want of due process. However, citing Ex parte K.R., supra, this court elected to address the merits of the petition because it challenged the personal jurisdiction of the juvenile court to enter the order. Ex parte Murray, supra. The court noted that, under some circumstances, an order or judgment may be void for lack of notice or other due-process issue. Ex parte Murray, 267 So. 3d at 334 (quoting Stribling Equip., Inc. v. Crager, 891 So. 2d 299, 303-04 (Ala. 2004)). See also D.T. v. W.G., 210 So. 3d 1143, 1148 (Ala. Civ. App. 2016) (holding that an absence of personal jurisdiction, if timely raised, renders a judgment or order void). The court in Ex parte

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<sup>9</sup>For the reasons set forth in this dissent, I now conclude that this court improperly considered the merits of the untimely petition for a writ of mandamus in Ex parte Limestone County Department of Human Resources, 255 So. 3d 210 (Ala. Civ. App. 2017).



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Murray, however, concluded that the petitioner had not met his burden of demonstrating a lack of personal jurisdiction that would render the challenged order void. See also Ex parte M.F.B., 228 So. 3d 460, 462 (Ala. Civ. App. 2017) (considering an untimely petition for a writ of mandamus in which the petitioner's "contentions regarding lack of notice and a hearing in connection with a court's ex parte limitation of her visitation rights implicate due-process guarantees ... and do in fact go to the power of the juvenile court to enter the [challenged] orders").

As had the petitioner in Ex parte Murray, supra, the alleged father in Ex parte J.B., supra, in his untimely petition for a writ of mandamus, asserted that the juvenile court in that case had erred in determining that the Alabama courts had personal jurisdiction over him. This court agreed with the alleged father that the juvenile court had erred in determining that there existed personal jurisdiction over him, and we granted the petition for a writ of mandamus. Ex parte J.B., 223 So. 3d at 260.

However, in Ex parte Gentry, 228 So. 3d 1016 (Ala. Civ. App. 2017), this court refused to consider a father's untimely

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petition for a writ of mandamus in which, under the authority of Ex parte K.R., supra, and Ex parte J.B., supra, the father challenged the earlier of two orders entered in the action. In that case, the maternal grandmother, the maternal stepgrandfather, the paternal grandfather, and the paternal stepgrandmother sought awards of grandparent visitation with the father's minor child. The trial court, among other orders, entered an October 3, 2016, order denying the father's motion to dismiss the petitions as they pertained to the maternal stepgrandfather and the paternal stepgrandmother. In a petition for a writ of mandamus, the father challenged the October 3, 2016, order and other orders. The father's petition for a writ of mandamus was not timely filed from the October 3, 2016, order. The father argued, however, that that order was void because, he said, the two stepgrandparents lacked standing to initiate grandparent-visitiation claims with regard to the child. This court held, however, that the father's argument did not actually implicate the issue of standing, but, rather, that it was an argument that the two stepgrandparents lacked capacity or were not real parties in interest. This court held that it could not review the

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father's untimely petition for a writ of mandamus under the authority of Ex parte K.R., supra, or Ex parte J.B., supra, and explained:

"We need not decide whether the father's challenge to the ability of the maternal stepgrandfather and the paternal stepgrandmother to bring a grandparent-visitation action is a challenge to their capacity or a claim that they are not real parties in interest, see Dennis v. Magic City Dodge, Inc., 524 So. 2d 616, 618 (Ala. 1988) (quoting 6 C. Wright & A. Miller, Federal Practice and Procedure § 1542 (1971)) ('[T]he real party in interest principle is a means to identify the person who possesses the right sought to be enforced. Therefore, the term directs attention to whether plaintiff has a significant interest in the particular action he has instituted. By way of contrast, capacity is conceived to be a party's personal right to litigate....'), because a challenge premised on either concept does not implicate the trial court's subject-matter jurisdiction. See CAG MLG, L.L.C. v. Smelley, 163 So. 3d 346, 350 (Ala. 2014) (indicating that capacity does not implicate subject-matter jurisdiction); Ex parte Sterilite Corp. of Alabama, 837 So. 2d 815, 819 (Ala. 2002) (stating that 'objections based upon an action's not being prosecuted in the name of the real party in interest can be waived,' which supports the conclusion that the real-party-in-interest issue does not implicate subject-matter jurisdiction, which cannot be waived); see also Hamm v. Norfolk Southern Ry. Co., 52 So. 3d 484, 500 (Ala. 2010) (Lyons, J., concurring specially) ('Obviously, an absence of a real party in interest does not implicate subject-matter jurisdiction....'). Because the subject-matter jurisdiction of the trial court is not at issue, the father's petition is untimely insofar as he seeks review of the October 3, 2016,

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order denying his motion to dismiss. The father's petition, insofar as it seeks review of the October 3, 2016, order, is therefore dismissed."

Ex parte Gentry, 228 So. 3d at 1020-21 (emphasis added).

Similarly, in Ex parte A.J., 256 So. 3d 671 (Ala. Civ. App. 2018), a mother filed a petition for a writ of mandamus challenging four of a juvenile court's orders. This court concluded that the mother's petition was untimely with regard to three of those orders. The mother argued that those three orders were void for failure to join an indispensable party. This court, however, declined to consider the merits of the petition based on that argument; this court noted that the absence of an indispensable party does not deprive a lower court of subject-matter jurisdiction. Ex parte A.J., 256 So. 3d at 674 n.2 (citing Miller v. City of Birmingham, 235 So. 3d 220, 230 (Ala. 2017), and Campbell v. Taylor, 159 So. 3d 4, 10 (Ala. 2014)). Accordingly, this court dismissed the petition as untimely filed. Ex parte A.J., 256 So. 3d at 674.

In this case, in order to reach the merits of the arguments asserted in DHR's brief, the main opinion has necessarily concluded that the issues raised by DHR implicate the jurisdiction of the juvenile court in some manner.

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However, nothing in DHR's brief filed in this court mentions or challenges the subject-matter jurisdiction of the juvenile court. Both DHR and the main opinion agree that the juvenile court has jurisdiction over matters concerning the permanency of a child after parental rights have been terminated. See, generally, § 12-15-101 et seq., Ala. Code 1975; and, specifically, § 12-15-321, Ala. Code 1975. Additionally, DHR has not contended, and it does not appear that, in the main opinion, this court, ex mero motu, has concluded that a due-process issue rendered the September 14, 2018, order void or that there was a lack of personal jurisdiction that rendered the order void. See Ex parte J.B., supra; Ex parte Murray, supra.

In its brief submitted to this court, DHR argues that the September 14, 2018, order was a final judgment that was subject to being appealed. DHR contends that the juvenile court "erred" in entering the September 14, 2018, order and that the juvenile court "exceeded its discretion" in entering that order. Although in its brief DHR also briefly asserts that the juvenile court "exceeded its authority" in entering some portions of the September 14, 2018, order, that

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contention is made in connection with DHR's argument that the evidence did not support the order and that the September 14, 2018, order was due to be reversed. It is clear that, in arguing that the juvenile court "exceeded its authority," DHR was not challenging the subject-matter jurisdiction of the juvenile court or alleging that the September 14, 2018, order was void for a want of due process or a lack of personal jurisdiction. DHR's argument that the juvenile court "exceeded its authority" in certain aspects of the September 14, 2018, order is, in substance, merely an argument that the juvenile court erred in placing certain restrictions or imposing certain obligations on DHR. Such an error is not reviewable by way of an untimely petition for a writ of mandamus under the authority of Ex parte K.R., supra, and other, similar authority. Ex parte Gentry, supra.

I disagree with the main opinion's conclusion that the issue raised by DHR is jurisdictional. This court erred in determining that there was a lack of jurisdiction in the juvenile court to enter the September 14, 2018, order, and, therefore, in declaring, ex mero motu, that the order was void. Ex parte K.R., 210 So. 3d at 1112. The main opinion

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has erred in treating DHR's appeal as a petition for a writ of mandamus and in applying the authority of Ex parte K.R., supra, and similar cases to reach the merits of nonjurisdictional arguments asserted in the untimely purported petition for a writ of mandamus. For the foregoing reasons, I dissent.