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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

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B.V.

v.

J.M. and T.M.

**Appeal from Calhoun Probate Court
(18-113)**

EDWARDS, Judge.

On March 22, 2018, J.M. and T.M. ("the prospective adoptive parents") commenced in the Calhoun Probate Court ("the Alabama court") an action ("the adoption action")

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seeking to adopt S.G. ("the child"), who was born on February 10, 2018, in Texas. On March 27, 2018, the prospective adoptive parents amended their adoption petition to indicate that B.V. ("the alleged biological father") had initiated a paternity and custody action relating to the child in Texas. On May 2, 2018, the alleged biological father made a limited appearance in the adoption action, seeking the dismissal of that action because, he asserted, the Alabama court lacked jurisdiction to entertain the adoption action under the Paternal Kidnapping Prevention Act ("the PKPA"), 28 U.S.C. § 1738A. The alleged biological father presented to the Alabama court a copy of the complaint he had filed on March 7, 2018, in the District Court of Hays County, Texas ("the Texas court"), in which he sought an adjudication of his paternity and an award of custody of the child, and orders subsequently entered by the Texas court.¹ The Alabama court denied the alleged biological father's motion to dismiss and set the adoption action for a trial on his contest to the adoption,

¹In general, those orders, among other things, determined that the Texas court had jurisdiction, restrained the child's biological mother, H.G., from placing the child for adoption, awarded the alleged biological father and the biological mother temporary joint custody, and ordered that the child be surrendered to the alleged biological father.

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which was held on November 16, 2018. After the conclusion of the trial on the alleged biological father's contest, the Alabama court entered an order on March 25, 2019, denying the alleged biological father's contest; the Alabama court explicitly determined that the alleged biological father had impliedly consented to the child's adoption under Ala. Code 1975, § 26-10A-9. The alleged biological father filed a notice of appeal on April 8, 2019.

As a preliminary matter, we agree with the prospective adoptive parents that the alleged biological father has appealed from an interlocutory order. The order resolving his contest to the adoption does not contain the necessary language to serve as a final judgment of adoption and, in fact, contains certain information that is not permitted to be included in an adoption judgment. See Ala. Code 1975, § 26-10A-25(c) (indicating, among other things, that an adoption judgment should contain the new name of the adoptee and order that the adoptee shall be the child of the petitioners from the date of entry of the judgment and not contain any other name by which the adoptee has been known or the names of the natural parents). Thus, we agree with the prospective

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adoptive parents that the appeal, at least insofar as it concerns the resolution of the alleged biological father's contest to the adoption, is not properly before this court, and we dismiss his appeal as to that issue.

However, we disagree with the prospective adoptive parents regarding whether this court may treat the alleged biological father's appeal, insofar as he asserts arguments relating to the jurisdiction of the Alabama court to entertain the adoption action, as a timely filed petition for the writ of mandamus. We first note that this court has the discretion to treat an appeal as a petition for the writ of mandamus when appropriate. See, e.g., Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990). Although we understand that the alleged biological father did not timely seek review of the initial denial of his motion to dismiss, the alleged biological father's jurisdictional arguments concern the subject-matter jurisdiction of the Alabama court under the PKPA. See Ex parte D.B., 975 So. 2d 940, 946 (Ala. 2007). Our supreme court has held that this court may entertain an otherwise untimely petition for the writ of mandamus when the issue pertains to subject-matter jurisdiction. Ex parte K.R.,

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210 So. 3d 1106, 1112 (Ala. 2016). We therefore exercise our discretion and treat the alleged biological father's notice of appeal as a petition for the writ of mandamus insofar as he asserts that the Alabama court lacked jurisdiction over the adoption action.

"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)).

The issue before this court is whether the alleged biological father has established a clear legal right to the dismissal of the adoption action. Relying on Ex parte D.B., 975 So. 2d 940 (Ala. 2007), the alleged biological father argues that Texas is the home state of the child under the PKPA and, therefore, that the adoption action must be dismissed under 28 U.S.C. § 1738A(g), which, he says, prohibits the exercise of jurisdiction by the Alabama court

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because the Texas court was already exercising its jurisdiction. The prospective adoptive parents disagree, contending that Texas is not the home state of the child.² Based upon our review of the language of the PKPA and Ex parte D.B., we conclude that Alabama could not properly assert jurisdiction over the adoption action after the initiation of the alleged biological father's paternity and custody action in Texas.

In pertinent part, the PKPA reads as follows:

"(b) As used in this section, the term --

"(1) 'child' means a person under the age of eighteen;

"(2) 'contestant' means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

"(3) 'custody determination' means a judgment, decree, or other order of a court providing for the custody of a child, and

²The prospective adoptive parents did not argue that Alabama was the child's home state or explain the basis for Alabama's exercise of jurisdiction over the adoption action. We presume that the prospective adoptive parents would contend that Alabama has "significant connection" jurisdiction under 28 U.S.C. § 1738A(c) (2) (B). However, as explained in Ex parte D.B., 975 So. 2d at 949, Alabama may not exercise significant-connection jurisdiction if another state is exercising home-state jurisdiction.

includes permanent and temporary orders, and initial orders and modifications;

"(4) 'home State' means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

". . . .

"(6) 'person acting as a parent' means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

"(7) 'physical custody' means actual possession and control of a child;

"(8) 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; . . .

". . . .

"(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if --

"(1) such court has jurisdiction under the law of such State; and

"(2) one of the following conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to

or threatened with mistreatment or abuse;

"(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

"(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

"(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

"(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

"....

"(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the

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pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination."

28 U.S.C. § 1738A.

The alleged biological father contends that Texas is the child's home state because the child was born there, lived there for several weeks, albeit not in the home of H.G., the biological mother, or the alleged biological father, and was then removed from Texas by the prospective adoptive parents, who qualify as "contestants" under the PKPA. The alleged biological father's argument finds support in Ex parte D.B., in which our supreme court explained that Nebraska was the home state of a child who was born in Nebraska and who lived in Nebraska with the biological mother for 11 days after birth, despite the fact that, after that 11-day period, the child was relocated to Alabama by a prospective adoptive couple. 975 So. 2d at 950. The evidence in the present case indicates that the child resided in Texas for approximately five weeks after his birth. Thus, the alleged biological father contends, the child's home state under the PKPA is Texas.

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The prospective adoptive parents contend that Texas is not the home state of the child because the child did not live in Texas "from birth" with his biological mother. However, although the prospective adoptive parents focus solely on the term "parent" in the definition of "home state," the PKPA considers the "home state" to be, "in the case of a child less than six months old, the State in which the child lived from birth with" either the child's parents, a parent, or a person acting as a parent. § 1738A(b) (4). A "person acting as a parent" is defined as "a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody." § 1738A(b) (6). The prospective adoptive parents, who, after the child was born had the child in their physical custody and control and who claimed a right to his custody by virtue of the biological mother's consent to his adoption by them, were, therefore, "persons acting as a parent." The evidence thus demonstrates that the child lived in Texas with persons acting as parents -- the adoptive parents -- for five weeks after his birth. Applying Ex parte D.B. to the facts of this case results in the conclusion that the child's home state at the

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time of the commencement of the alleged biological father's paternity and custody action was, in fact, Texas.

The fact that the alleged biological father commenced his paternity and custody action in Texas before the commencement of the adoption action is undisputed by the parties. The alleged biological father argues that, because he commenced a custody proceeding in Texas, the home state of the child, § 1738A(g) prohibited the Alabama court from exercising jurisdiction over the adoption action. The prospective adoptive parents complain that they were not served with the complaint in the Texas action when it was commenced and that, therefore, the Texas court was not "exercising jurisdiction consistently with the provisions of" the PKPA, as required by § 1738A(g). Therefore, they contend that the Alabama court need not recognize the various temporary orders entered by the Texas court and that the Alabama court was not required to "defer" to the jurisdiction of the Texas court.

The parties dispute whether the prospective adoptive parents were properly served with notice of the Texas action. However, we need not decide whether service was properly completed and, if so, when. If we were to assume that the

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initial attempts at service on the prospective adoptive parents were insufficient in some way, we agree with the prospective adoptive parents that that deficiency would render the Texas temporary orders unenforceable against them. See Ex parte D.B., 975 So. 2d at 953. Enforcement of the Texas orders, however, is not the issue presented to us. Instead, we are concerned with whether the Alabama court could properly exercise jurisdiction over the adoption action.

In addition to arguing that the Texas orders are unenforceable against them, the prospective adoptive parents, like the adoptive couple in Ex parte D.B., contend that, "as a result [of the failure of service,] the Alabama courts are not required to defer jurisdiction to the non-compliant Texas proceedings." The prospective adoptive parents are mistaken. Our supreme court rejected the same argument in Ex parte D.B.

"Our holding in Part II.A recognizes that the Nebraska custody determination cannot be enforced against the adoptive couple because they were not adequately notified of the Nebraska proceedings. However, the adoptive couple also insists that the lack of adequate notice means the Nebraska child custody proceeding itself is void. We disagree.

"As noted in Part I of this opinion, the PKPA recognizes Nebraska as having exclusive subject-matter jurisdiction for proceedings to be brought to determine the child's custody, because

Nebraska is the home state under § 1738A(c)(2)(A)(ii). Therefore, § 1738A(c)(2)(B) and § 1738A(g) prohibit Alabama from exercising significant-connection jurisdiction concurrently with the State of Nebraska over the subject matter of the child's custody.

"The prohibition in § 1738A(g) is a prohibition on concurrent proceedings. Accordingly, for § 1738A(g) to apply as a bar to concurrent proceedings, there does not have to exist a child-custody determination that satisfies the PKPA's notice requirement stated in § 1738A(e) -- that is, the prohibition stated in § 1738A(g) could apply when there has been no child-custody determination in the first state. Section 1738A(g) provides:

'(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.'

"(Emphasis added.)

"In this case, proceedings to determine the child's custody have been initiated in Nebraska and in Alabama. Because Nebraska is the home state under the PKPA, it has preferred jurisdiction under the PKPA, even though an enforceable custody determination has not yet emerged from those proceedings. Consequently, Alabama cannot exercise significant-connection jurisdiction."

Ex parte D.B., 975 So. 2d at 955-56.

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Under the PKPA, Texas was the child's home state at the commencement of the alleged biological father's paternity and custody action. Because § 1738A(g) prohibits the exercise of jurisdiction over a custody proceeding by one state when a custody proceeding is pending in another state acting in conformity with the provisions of the PKPA, we conclude that the Alabama court improperly denied the alleged biological father's motion to dismiss. The alleged biological father's petition is therefore granted, and the Alabama court is directed to dismiss the adoption action.

APPEAL DISMISSED; PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ.,
concur.