

Rel: December 13, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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D.K.

v.

S.M.S., S.L., and A.L.

Appeals from Houston Juvenile Court
(JU-17-494.01 and JU-17-495.01)

THOMPSON, Presiding Judge.

On October 13, 2017, D.K. ("the maternal grandfather") filed in the Houston Juvenile Court ("the juvenile court") petitions seeking to terminate the parental rights of S.M.S. ("the father") to the father's two surviving minor children

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("the children"). In those petitions, the maternal grandfather alleged that the father had murdered the children's mother, K.A.S., and the children's sibling, Z.L.S., in February 2013. The maternal grandfather alleged in his October 13, 2017, petitions that he wanted to adopt the children.

In amended petitions filed in December 2017, the maternal grandfather alleged that he shared joint legal custody of the children with S.L. and A.L., who are the children's paternal aunt and uncle, that he has physical custody of the children, and that the paternal aunt and uncle had been awarded rights of visitation with the children. The record contains a November 3, 2016, judgment corroborating the maternal grandfather's allegations regarding the custody arrangement. The maternal grandfather did not name the paternal aunt and uncle as defendants in his termination-of-parental-rights actions, but, in amended petitions, he stated that the paternal aunt and uncle were "parties." The father was served with process of the maternal grandfather's actions in October 2017.

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Also in October 2017, an attorney filed on behalf of the paternal aunt a notice of appearance in the termination-of-parental-rights actions. On December 22, 2017, the juvenile court entered orders finding that the paternal aunt did not have standing to be a party to the termination actions, and it directed the juvenile-court clerk to remove the paternal aunt's attorney from receiving further notices from the court in the two termination actions. On that same date, the juvenile court entered two other orders in which it set aside the first orders entered earlier on December 22, 2017. Later, the paternal aunt's attorney also filed a notice of appearance on behalf of the paternal uncle.

The termination-of-parental-rights actions were stayed pending the resolution of criminal charges against the father. In February 2019, the father was convicted on two counts of capital murder pertaining to his killing of the children's mother and the children's sibling. The father was sentenced to incarceration for life without the possibility of parole. In the juvenile court, the stays in the termination-of-parental-rights actions were lifted, and the juvenile court

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scheduled a hearing on the merits of those actions for April 4, 2019.

The juvenile court granted a motion to continue the hearing, and it rescheduled the ore tenus hearing on the maternal grandfather's petitions for May 2, 2019. On the second scheduled date for the termination-of-parental-rights hearing, May 2, 2019, the paternal aunt and uncle filed in the juvenile court "answers" in opposition to the maternal grandfather's petitions seeking to terminate the father's parental rights. In those filings, the paternal aunt and uncle stated, among other things, that, as joint legal custodians of the children, they "objected" to the termination-of-parental-rights actions and "den[ied] the material allegations of the [petitions, as amended,] and demand[ed] strict proof thereof."

The paternal aunt and uncle and the maternal grandfather attended the ore tenus hearing that same date. The father was incarcerated and not present at the hearing, but he was represented by an attorney. At the termination hearing, the paternal aunt and uncle objected to the termination actions, arguing, among other things, that the termination of the

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father's parental rights might impact their rights as joint legal custodians of the children. The maternal grandfather argued that his petitions sought only to terminate the parental rights of the father and did not impact the joint-legal-custody rights of the paternal aunt and uncle.

On May 2, 2019, the juvenile court entered orders noting that, during the hearing, the paternal aunt and uncle had orally moved to dismiss the termination-of-parental-rights actions. In its May 2, 2019, orders, the juvenile court specified that the paternal aunt and uncle, the maternal grandfather, and the father should submit briefs on their positions on the motion to dismiss filed by the paternal aunt and uncle, and they all did so.¹

On July 2, 2019, the juvenile court entered judgments granting the paternal aunt and uncle's motion to dismiss the maternal grandfather's termination-of-parental-rights actions. The maternal grandfather timely appealed from both judgments, and his appeals were consolidated in this court.

¹The father filed a brief opposing the termination of his parental rights two days after the juvenile court entered its July 2, 2019, judgments granting the paternal aunt and uncle's motion to dismiss.

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Initially, although none of the parties has addressed this issue, we note that the maternal grandfather, the juvenile court, and the paternal aunt and uncle clearly considered the paternal aunt and uncle to have intervened in the termination actions. In Sidwell v. Wooten, 473 So. 3d 1036 (Ala. 1985), our supreme court interpreted a third-party complaint filed by nonparties as a motion to intervene in the action before the trial court in that case. Our supreme court explained its decision, stating:

"We find that in order to do 'substantial justice' in compliance with Rule 8(f), Ala. R. Civ. P., the 'third-party complaint' should be interpreted as a motion to intervene granted by the circuit court. We believe this is the just result, especially in view of the fact that [the defendant/appellant] did not object to the filing of the 'third-party complaint' and did not otherwise raise the issue in the trial court or on appeal."

473 So. 2d at 1037-38.

In the two actions from which these appeals arise, the maternal grandfather alleged claims only against the father. A "termination of parental rights" means "[a] severance of all rights of a parent to a child." § 12-15-301(17), Ala. Code 1975 (emphasis added). The maternal grandfather's actions assert claims against the father, i.e., seeking to terminate

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his parental rights. In these actions, the maternal grandfather has not asserted any claims pertaining to the paternal aunt and uncle's custody rights.

Regardless, the paternal aunt and uncle filed notices of appearance and "answers," and they later moved to dismiss the maternal grandfather's termination actions. It is clear that, in addressing the paternal aunt and uncle's filings and motion to dismiss, both the juvenile court and the maternal grandfather treated the paternal aunt and uncle as having intervened as parties in the termination-of-parental-rights actions. See, e.g., F.W. v. T.M., 140 So. 3d 950, 958 (Ala. Civ. App. 2013) ("This court has routinely recognized that relative caregivers and foster parents may seek and be granted intervention in a dependency action."). The maternal grandfather has not objected to the treatment of the paternal aunt and uncle as intervenors, either before the juvenile court or before this court. Accordingly, for the purposes of these appeals, we treat the paternal aunt and uncle as intervenors below, and, therefore, as parties to the termination actions. Sidwell v. Wooten, *supra*. See also Davis v. Blackstock, 159 So. 3d 708, 719-20 (Ala. Civ. App. 2013)

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("It is clear from the rulings of the trial court that it considered the 'notice of limited appearance' filed by [the State Department of Human Resources ('DHR')] to be a motion to intervene and that the court implicitly granted that motion on February 9, 2011, by overruling the father's January 28, 2011, objection to DHR's participation in the action.").

As the juvenile court noted in its May 2, 2019, orders requiring the parties to submit letter briefs in support of their positions on the motion to dismiss, the parties had submitted to it, during a hearing that day, certain documentary evidence, including the settlement agreement pertaining to custody, the November 3, 2016, judgment incorporating that settlement agreement, and documents evidencing the father's conviction and sentencing. In addition, the paternal aunt and uncle submitted in conjunction with their brief filed in support of their motion to dismiss a copy of the children's mother's will. When a trial court considers matters outside the pleadings on a motion to dismiss, the motion is converted to a motion for a summary judgment. T.S. v. E.J., 976 So. 2d 497, 500 (Ala. Civ. App. 2007); Rines v. Freightliner Trucks of Dothan, Inc., 702 So.

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2d 163, 164 (Ala. Civ. App. 1997); and H.R. v. State Dep't of Human Res., 609 So. 2d 448, 448 (Ala. Civ. App. 1992). We conclude that, given the language in the May 2, 2019, orders, it is clear that the juvenile court considered the evidence submitted by the parties, i.e., matters outside the pleadings; therefore, the motion to dismiss was converted to a motion for a summary judgment and the July 2, 2018, judgments are summary judgments. Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017); Reese v. Bolling, [Ms. 2180265, May 10, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019).

A summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56, Ala. R. Civ. P.; Bussey v. John Deere Co., 531 So. 2d 860 (Ala. 1988). The moving party bears the initial burden of demonstrating that he or she is entitled to a summary judgment. T.S. v. E.J., 976 So. 2d at 500. "When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present 'substantial evidence' creating a genuine issue of material fact." Ex parte Alfa Mut. Gen. Ins. Co., 742 So. 2d 182, 184 (Ala. 1999).

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"[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). In reviewing a summary judgment, this court must review the record in a light most favorable to the nonmoving party and must resolve all reasonable doubts concerning the existence of a genuine issue of material fact against the moving party. Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412 (Ala. 1990).

Section 12-15-319, Ala. Code 1975, of the Alabama Juvenile Justice Act ("the AJJA"), § 12-15-101 et seq., Ala. Code 1975, sets forth the grounds warranting a termination of a parent's parental rights and the factors a juvenile court may consider in deciding whether to terminate parental rights. Among other factors the juvenile court may consider is whether the parent has been convicted of a felony and whether the parent has murdered the other parent and caused significant injury to one of the child's siblings. See § 12-15-319(a)(4) and (5), Ala. Code 1975. Further, with regard to terminating parental rights, this court has stated:

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"In order to terminate parental rights upon a nonparent's petition, a court must make several findings: First, the court must determine that the child is dependent according to clear and convincing evidence. Second, the court must find that there exists no viable alternative to termination of the parental rights. Ex parte Beasley, 564 So. 2d 950 (Ala. 1990)."

A.N.S. v. K.C., 628 So. 2d 734, 735 (Ala. Civ. App. 1993); see also C.J. v. Marion Cty. Dep't of Human Res., 5 So. 3d 1259 (Ala. Civ. App. 2008) (same).

In their summary-judgment motion and the briefs submitted in support of that motion, the paternal aunt and uncle argued the merits of the termination actions; they contended that the children were not dependent and that there were viable alternatives to the termination of the father's parental rights. The maternal grandfather argued before the juvenile court that he was seeking the termination of the father's parental rights, not a modification of the November 13, 2016, judgment that provided the paternal aunt and uncle joint legal custody of the children; he stated that "[o]ne has nothing to do with the other."

As joint legal custodians, the paternal aunt and uncle have a legally protected custody interest in the children. Hoeck v. Hoeck, 545 So. 2d 786, 788 (Ala. Civ. App. 1989).

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However, the AJJA specifies that a "termination of parental rights" means "[a] severance of all rights of a parent to a child." § 12-15-301(17) (emphasis added). The only claims at issue in these actions are the claims seeking the termination of the father's parental rights. The paternal aunt and uncle have no "rights of a parent" in the children at issue. J.S. v. Etowah Cty. Dep't of Human Res., 72 So. 3d 1212, 1224 (Ala. Civ. App. 2011). See also W.N. v. Cullman Cty. Dep't of Human Res., [Ms. 2171166, March 15, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019) ("The grandmother, however, cannot challenge the judgment insofar as it terminated the parents' parental rights and cannot raise arguments in this appeal on behalf of the parents.").

In these cases, the sole claims are the maternal grandfather's claims seeking the termination of the father's parental rights. In moving for a summary judgment on the maternal grandfather's claims, the paternal aunt and uncle argued both that the children are not dependent and that there are viable alternatives to the termination of the father's parental rights. Those issues pertain only to the maternal grandfather's claims against the father, i.e., those claims

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pertain to "[a] severance of all rights of a parent to a child." § 12-15-301(17). However, the paternal aunt and uncle have "no legally protected parental rights in the children, and [they] cannot assert arguments on behalf of the children's parent[]." J.S. v. Etowah Cty. Dep't of Human Res., 72 So. 3d at 1224.

The paternal aunt and uncle argued before the juvenile court that their rights as legal custodians of the children might be impacted if the father's parental rights were terminated and if the maternal grandfather then sought to adopt the children. This court may not address, as a part of this opinion, the impact of any litigation that might occur in the future between the parties. See, generally, Alabama Nursing Home Ass'n v. Alabama State Health Planning Agency, 554 So. 2d 1032, 1033 (Ala. Civ. App. 1989) (noting that a trial court and this court may not issue advisory opinions).

The summary judgments entered in favor of the paternal aunt and uncle are reversed. On remand, the juvenile court must address the maternal grandfather's termination-of-parental-rights actions as they pertain to the father.

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2180828 -- REVERSED AND REMANDED.

2180829 -- REVERSED AND REMANDED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.