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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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R.J. and D.J.

v.

J.N.M.W. and R.T.W.

**Appeal from Walker Circuit Court
(DR-19-96)**

MOORE, Judge.

R.J. and D.J. ("the great-grandparents") appeal from a judgment of the Walker Circuit Court ("the circuit court") purporting to deny their

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claim for custody of their great-grandchild, L.W. ("the child"). We determine that the judgment is void and dismiss the appeal.

Procedural Background

The background pertinent to the disposition of this appeal is as follows. In October 2019, the great-grandparents filed in the circuit court a complaint against J.N.M.W. ("the mother") and R.T.W. ("the father"), seeking to obtain custody of the child; they alleged, among other things:

"2. The ... child has lived with the [great-grandparents] off and on since she was six weeks old.

"3. The Mother suffers from mental illness. She has been diagnosed with Borderline Personality Disorder, Depression and possible Schizophrenia. She was hospitalized at Walker Baptist Behavioral Medicine Unit September 3, 2019 through September 9, 2019 due [to] her threatening to hurt herself. The Mother will not take her medication as prescribed. ...

"4. The Mother leaves the ... child for long periods of time with the [great-grandparents]. The Mother will go weeks at a time without seeing the ... child. When the Mother does visit with the ... child it is for approximately one hour at a time.

"5. The Mother does not have consistent employment. She has been employed with at least fifteen different places since the ... child was born. The [great-grandparents] believe she is currently working ... as a stripper three nights a week.

"6. The Mother does not have a home of her own. She lives with relatives and friends. The relatives she stays with have criminal records which include domestic violence charges. The Mother just recently told the [great-grandparents] she is moving to Birmingham to live with her aunt. She has further indicated she wants to move herself and the ... child to Florida with her boyfriend[, whom] she has known for approximately three (3) weeks.

"7. The Father ... is an alcoholic. He suffers from mental illness and has anger problems. He does not have a home of his own. He comes to the [great-grandparents'] home to shower and sleeps at his mother's home or in his car. He is employed part time at Burger King and at a tattoo shop in Cullman

"8. In April 2019, the ... child was sexually abused by one of her father's friends while in the father's care. The [great-grandparents] made the police report, talked to the Walker County Department of Human Resources and [attended] appointments with the Walker County Children's Advocacy Center. The Mother scheduled approximately two of the [Children's Advocacy Center] interviews but cancelled each of those appointments. Neither parent participated or assisted in what was required during the investigation of the charges.

"9. The ... child is fearful while in the care of the Mother. She acts out verbally and physically when she thinks she will have to be in her Mother's care.

"10. The Father and the Mother have failed to provide financial support for the minor child.

"11. The [great-grandparents] are the fit and proper people to have custody of the child. Both [great-grandparents] are willing and able to physically, mentally and financially

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support the ... child. They have been caring for the ... child's physical, mental and financial well-being since she was born.

"12. The [great-grandparents] believe that immediate and irreparable harm is likely to occur to the ... child[] in [the] absence of an temporary order granting them custody."

The circuit court awarded the great-grandparents pendente lite custody of the child. The mother and the father filed an answer to the complaint. On June 8, 2020, the circuit court tried the case. On June 10, 2020, the circuit court entered a judgment determining that the great-grandparents had not met their burden of proving that the custody of the child should be transferred to them. The circuit court ordered the child to be returned to the custody of the mother and the father, and it dismissed the great-grandparents' complaint. The great-grandparents filed a postjudgment motion to alter, amend, or vacate the judgment, which the circuit court denied on June 15, 2020. The great-grandparents filed their notice of appeal on June 26, 2020.

Discussion

On appeal, the great-grandparents assert that the circuit court erred in denying their claim for custody of the child, arguing that the evidence

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proved that the mother and the father had voluntarily forfeited custody of the child, that the mother and the father were unfit to exercise custody of the child, and that the best interests of the child would be served by awarding the great-grandparents custody of the child. See Ex parte Terry, 494 So. 2d 628 (Ala. 1986). We do not consider the merits of their argument, however, because we conclude that the judgment is void based on the circuit court's lack of subject-matter jurisdiction.

Although neither party has raised before this court the issue whether the circuit court had subject-matter jurisdiction to adjudicate the great-grandparents' complaint, the absence of subject-matter jurisdiction cannot be waived, and it is the duty of an appellate court to notice the absence of subject-matter jurisdiction. See Burns v. Ashley, 274 So. 3d 970, 972 (Ala. 2018). If the circuit court lacked subject-matter jurisdiction to consider the great-grandparents' complaint, then the judgment entered on June 10, 2020, is void and will not support this appeal. Id. "A judgment entered by a court lacking subject-matter jurisdiction is absolutely void and will not support an appeal; an appellate court must

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dismiss an attempted appeal from such a void judgment." Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008).

Section 12-15-114(a), Ala. Code 1975, a part of the Alabama Juvenile Justice Act ("the AJJA"), § 12-15-101 et seq., Ala. Code 1975, provides, in pertinent part: "A juvenile court shall exercise exclusive original jurisdiction of juvenile court proceedings in which a child is alleged to have committed a delinquent act, to be dependent, or to be in need of supervision." Because § 12-15-114(a) vests exclusive jurisdiction over dependency proceedings in the juvenile courts, a circuit court has no subject-matter jurisdiction over proceedings in which a child is alleged to be dependent. See C.D.S. v. K.S.S., 963 So. 2d 125, 130 n.1 (Ala. Civ. App. 2007) (applying former § 12-15-30(a), Ala. Code 1975, which contained substantively identical language). "It is well settled that a circuit court lacks original subject-matter jurisdiction to adjudicate the custody of a child in a proceeding in which the child has been alleged to be dependent." Ex parte L.B.S., [Ms. 2200091, Feb. 19, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021); see also A.G. v. Ka.G., 114 So. 3d 24, 27 (Ala. 2012) (holding

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that a circuit court has no jurisdiction over a complaint asserting facts that, if proven to be true, would indicate the dependency of a child).

Under § 12-15-121(c)(1), Ala. Code 1975, and Rule 12(A), Ala. R. Juv. P., a party alleges the dependency of a child when the party sets forth facts in a complaint or a petition that indicate that the child is in need of care or supervision based on the existence of one or more of the circumstances set forth in § 12-15-102(8), Ala. Code 1975.¹ In Ex parte

¹Section 12-15-102(8) defines "dependent child" and provides:

"Dependent Child. a. A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:

"1. Whose parent, legal guardian, legal custodian, or other custodian subjects the child or any other child in the household to abuse, as defined in Section 12-15-301[, Ala. Code 1975,] or neglect as defined in Section 12-15-301, or allows the child to be so subjected.

"2. Who is without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child.

"3. Whose parent, legal guardian, legal custodian, or other custodian neglects or refuses, when able to do so or when the service is offered

L.E.O., 61 So. 3d 1042 (Ala. 2010), our supreme court determined that an allegation that a child is "in need of care or supervision" is implied in a

without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child.

"4. Whose parent, legal guardian, legal custodian, or other custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the compulsory school attendance laws of this state.

"5. Whose parent, legal guardian, legal custodian, or other custodian has abandoned the child, as defined in subdivision (1) of Section 12-15-301.

"6. Whose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.

"7. Who has been placed for care or adoption in violation of the law.

"8. Who, for any other cause, is in need of the care and protection of the state.

"b. The commission of one or more status offenses as defined in subdivision (4) of Section 12-15-201[, Ala. Code 1975,] is not a sufficient basis for an adjudication of dependency."

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complaint or a petition that asserts facts suggesting the dependency of a child. 61 So. 3d at 1047 n.4 (citing J.W. v. N.K.M., 999 So. 2d 526 (Ala. Civ. App. 2008)). This court has consistently held that a complaint or a petition alleges the dependency of a child, so as to fall within the exclusive jurisdiction of the juvenile courts, when it avers facts that, if proven to be true, would establish the dependency of the child under § 12-15-102(8), regardless of the particular language pleaded. See, e.g., C.E. v. M.G., 169 So. 3d 1061, 1064 (Ala. Civ. App. 2015); T.K. v. M.G., 82 So. 3d 1, 3 (Ala. Civ. App. 2011); P.S.R. v. C.L.P., 67 So. 3d 917, 921 (Ala. Civ. App. 2011); B.R.G. v. G.L.M., 57 So. 3d 137 (Ala. Civ. App. 2010); M.B. v. R.P., 3 So. 3d 237 (Ala. Civ. App. 2008); W.T.H. v. M.M.M., 915 So. 2d 64 (Ala. Civ. App. 2005); and L.L.M. v. S.F., 919 So. 2d 307 (Ala. Civ. App. 2005). This court recently summarized the law on this point as follows: "In deciding whether a pleading alleges the dependency of a child, so as to invoke the exclusive jurisdiction of a juvenile court, the court shall look to the substance of the pleading and not to the nomenclature employed by the pleader." A.M. v. A.K., [Ms. 2190617, Sept. 18, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020).

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In this case, the great-grandparents alleged that the mother and the father, because of mental illness, alcoholism, homelessness, and/or instability, could not provide adequate financial support and care for the child, that the father had subjected the child to sexual abuse through improper supervision of the child, and that the mother and the father had relinquished their parental responsibilities to the great-grandparents for long periods. In their complaint, the great-grandparents asserted facts that, if proven to be true, would establish the dependency of the child so as to invoke the exclusive jurisdiction of the juvenile court. See § 12-15-102(8)a.1., 2., 5., and 6.; and Ex parte L.E.O., supra.

In P.S.R. v. C.L.P., 67 So. 3d 917, 922 (Ala. Civ. App. 2011), P.S.R. filed a complaint in the Franklin Circuit Court requesting custody of her two grandchildren. She alleged, among other things, that the mother of the children had abandoned the children and that the father had died, leaving the children without a parent to care for them. The Franklin Circuit Court dismissed the complaint, instructing P.S.R. to file a dependency petition in the appropriate juvenile court. This court, acting unanimously, agreed with that course of action, stating:

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"In this case, the circuit court construed the original petition filed by the grandmother in case number DR-04-189.02 as a dependency petition. Although that petition did not expressly allege the dependency of the children, it did assert that the natural parents of the children had been awarded legal custody of the children, that the father had died, that the mother had abandoned the children, that the mother was addicted to drugs, that the mother had criminal charges pending against her, and that the custody of the children should be placed with the grandmother. Those allegations are sufficient to imply an allegation that the children were dependent. See Ex parte L.E.O., 61 So. 3d 1042, 1047 (Ala. 2010) (holding that a child is 'in need of care or supervision' within the meaning of Ala. Code 1975, § 12-15-102(8)a., when the child is not 'receiving adequate care and supervision from those persons legally obligated to care for and/or to supervise the child'). The circuit court thus properly recognized that it did not have jurisdiction over the dependency petition filed by the grandmother and properly dismissed that petition with instructions that the grandmother file her petition in the juvenile court."

67 So. 3d at 921-22.

In A.M. v. A.K., supra, this court held that,

"[i]f a complaint filed in circuit court asserts facts indicating or implying that a child is a dependent child, within the meaning of Ala. Code 1975, § 12-15-102(8), the complaint shall be treated as a dependency petition over which the circuit court has no subject-matter jurisdiction and the juvenile court has exclusive jurisdiction."

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___ So. 3d at ___. In that case, A.K., the maternal aunt of the child at issue, filed a complaint in the Jefferson Circuit Court, asserting that the child's mother, who had been granted sole legal and physical custody of the child in a divorce judgment, had died and that the father was not fit to care for the child because of his felony conviction for domestic abuse, his lack of a relationship with the child, and his failure to support the child.

This court said:

"In substance, the maternal aunt asserted that the death of the mother, who was the custodial parent of the child, had rendered the child without a parent willing and able to properly raise the child, which is a ground for dependency. See § 12-15-102(8)a.2. and § 12-15-102(8)a.6. (respectively defining 'dependent child' as a child in need of care or supervision and '[w]ho is without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child' or '[w]hose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child').

"....

"In this case, like in P.S.R.[v. C.L.P., 67 So. 3d 917 (Ala. Civ. App. 2011)], a relative of the child, the maternal aunt, filed a complaint in the circuit court in order to obtain custody of the child following the death of the child's mother, who was the custodial parent, alleging that the surviving parent, the father, was unable or unwilling to properly care for the child. Following P.S.R., we determine that the complaint filed by the

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maternal aunt is, in substance, a dependency petition over which the circuit court had no subject-matter jurisdiction. Under § 12-15-114(a), [Ala. Code 1975,] the complaint could be adjudicated only as a dependency petition by a juvenile court."

___ So. 3d at ___. This court determined that the judgment of the Jefferson Circuit Court purporting to award custody of the child to the maternal aunt was void, that the void judgment would not support an appeal, and that the appeal was due to be dismissed with instructions to the Jefferson Circuit Court to vacate its void judgment.

In Ex parte L.E.O., the supreme court held that a child is a "dependent child" "in need of care or supervision" if the child is not receiving adequate care from his or her legal custodians, even if that child is receiving proper care from other persons. In P.S.R. and A.M., this court held that a circuit court cannot adjudicate a complaint filed by third parties seeking custody of a child when that complaint is based on an assertion that the parent or parents of the child at issue are not providing adequate care to the subject child because that claim is, under Ex parte L.E.O., a dependency allegation that can be adjudicated only by a juvenile

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court.² In this case, the great-grandparents, in asserting that the mother and the father were not adequately caring for the child, alleged, in substance, that the child was a dependent child "in need of care or supervision" as that phrase is defined in Ex parte L.E.O. The circuit court did not have subject-matter jurisdiction to adjudicate that complaint, which, under § 12-15-114(a), falls within the exclusive jurisdiction of the juvenile court.

We recognize the point of the dissent that the circuit courts of this state have historically exercised jurisdiction over child-custody disputes between parents and third parties. However, as Justice Murdock explained in his dissent in Ex parte L.E.O., 61 So. 3d at 1055-56, by

²Although Ex parte L.E.O. was decided under the former version of the AJJA, see former § 12-15-1 et seq., Ala. Code 1975, the current version of the AJJA maintains that a "dependent child" is a child who is "in need of care or supervision," the exact language construed in Ex parte L.E.O. Until our supreme court decides otherwise, the words "dependent child" and "in need of care or supervision" have the same meaning as they did under the former AJJA, with the same jurisdictional implications. See A.E. v. M.C., 100 So. 3d 587, 601 (Ala. Civ. App. 2012) (Moore, J., concurring specially).

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defining "dependent child" more expansively than under previous Alabama law, our supreme court

"now blur[s], indeed largely remove[s], the line between true dependency cases, which fall within the limited, exclusive jurisdiction of the juvenile court and which are governed by the statutory dependency scheme, see Ala. Code 1975, § 12-15-114 (formerly § 12-15-30), and mere third-party custody cases, which are governed by the standard announced in Ex parte Terry, 494 So. 2d 628 (Ala.1986), and which fall within the jurisdiction of the juvenile court only if some other basis for juvenile-court jurisdiction exists.

"....

"Under the new rule announced today in the main opinion, it now will be impossible to distinguish a Terry case from a dependency case. Thus, a grandparent who has been caring for a child for several years because a parent or the parents have placed the child with the grandparent to raise, will now have to file a dependency proceeding in the juvenile court, rather than a custody proceeding in the circuit court, in order to obtain a custody award to be able to enroll the child in school. ..."

(Emphasis added.)

The main opinion in Ex parte L.E.O. did not address the implication of its holding on the jurisdiction of the circuit courts, and the supreme court has not since considered the issue, leaving only Justice Murdock's unrefuted observations to guide this court. We agree with Justice

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Murdock that the supreme court's decision in Ex parte L.E.O. does indeed unsettle the traditional equity jurisdiction of the circuit court. Under Ex parte L.E.O., when a third party alleges facts in a complaint or a petition that, if proven to be true, would establish the dependency of the child or children at issue, that complaint or petition now falls within the exclusive jurisdiction of the juvenile courts unless and until the supreme court holds otherwise.

Because the circuit court was without jurisdiction, the only proper action was for it to dismiss the great-grandparents' complaint for a lack of subject-matter jurisdiction. See, e.g., A.M., ___ So. 3d at ___. The circuit court ultimately dismissed the great-grandparents' complaint on the merits; however, it should not have adjudicated the case at all because it lacked subject-matter jurisdiction, and, thus, its judgment is actually void. See id.

A void judgment will not support an appeal. Tidwell v. State Ethics Comm'n, 599 So. 2d 12, 12 (Ala. 1992). This court has no jurisdiction over this appeal, which is taken from a void judgment, and, therefore, the appeal must be dismissed, albeit with instructions to the circuit court to

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vacate its void judgment. See, e.g., Weith v. Weith, 263 So. 3d 715, 720 (Ala. Civ. App. 2018).

APPEAL DISMISSED WITH INSTRUCTIONS.

Thompson, P.J., and Edwards, J., concur.

Hanson, J., dissents, with writing, which Fridy, J., joins.

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HANSON, Judge, dissenting.

The Walker Circuit Court's judgment in this case, entered after an ore tenus proceeding, made the following custody determination:

"A natural parent has [a] prima facie right to the custody of his or her child. For the parental right presumption to be overcome, the third party is to provide the Court with competent evidence that the natural parent has either abandoned the child or that the natural parent is guilty of such misconduct or neglect as to be deemed an unfit and improper person to be entrusted with the care and upbringing of the child in question.

"Having heard the testimony and received the evidence, the Court finds that [the great-grandfather] failed to meet the burden for gaining custody of [the mother]'s and [the father]'s child. ... Even though [the mother and the father] display a certain amount of immaturity when it comes to relationships, jobs and living arrangements, this immaturity does not rise to the level of misconduct or neglect to have their child taken away from them. [The great-grandparents] want what they believe is best for [the child], but [the mother and the father] have a presumptive right to their child.

"Therefore, the Court ORDERS the child ... returned to her parents. ..."

(Capitalization in original.)

I acknowledge the validity of the main opinion's premise that the absence of a trial court's subject-matter jurisdiction is a matter that is

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fatal to appellate review of the merits of that judgment. I further agree that, when a petition is filed in a juvenile court alleging a child's dependency, that court has subject-matter jurisdiction in the first instance to adjudicate that claim. However, I part ways with the main opinion to the extent that it recasts the allegations of the complaint filed by R. J. and D.J. ("the great-grandparents") in the circuit court so as to equate those allegations with a dependency claim and, in effect, forces the parties to start over in the juvenile court.

Notwithstanding the settled and historic jurisdiction of circuit courts to decide custody disputes between parents and nonparents,³ the main

³See, e.g., Lassiter v. Wilson, 207 Ala. 669, 670, 93 So. 598, 598 (1922) ("[T]he judicial power of our courts of equity to consider and to determine the custody of infants is inherent, not dependent upon statutory authorization."); McDaniel v. Youngblood, 201 Ala. 260, 261, 77 So. 674, 675 (1918) (holding that an act creating a juvenile court "ha[d] no application to [a] contest between the rival claimants to the custody of [a] child"); Whitfield v. Saulsberry, 247 Ala. 690, 693, 26 So. 2d 93, 95 (1946) (holding that circuit court sitting in equity was not completely and constitutionally supplanted by juvenile court's dependency jurisdiction and had concurrent jurisdiction to decide parent/nonparent dispute regarding custody); Ex parte Graham, 266 Ala. 1, 8, 95 So. 2d 390, 396-97 (1957) ("[A]lthough the child is dependent, neglected or delinquent, the circuit court, in equity, has inherent jurisdiction in respect to its custody when that jurisdiction is invoked before that of the juvenile court is

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opinion reaches its judgment by drawing inferences from our supreme court's opinion in Ex parte L.E.O., 61 So. 3d 1042 (Ala. 2010). The main opinion also relies upon two subsequent opinions of this court, P.S.R. v. C.L.P., 67 So. 3d 917 (Ala. Civ. App. 2011), and A.M. v. A.K., [Ms. 2190617, Sept. 18. 2020] ___ So. 3d ___ (Ala. Civ. App. 2020).

Our supreme court's opinion in Ex parte L.E.O. indicates that, in that case, L.E.O. and P.O., two persons with whom J.I.P., Jr., a minor child, had been living for several years (with the consent of the child's mother), "filed a petition in [a juvenile court] seeking the custody of" the child "and alleging that the child [was] a dependent child." 61 So. 3d at 1043 (emphasis added). Although the juvenile court dismissed the petition based upon a determination that the child was not dependent and that that court lacked jurisdiction -- a judgment affirmed by this court

sought."); Ex parte Lipscomb, 660 So. 2d 986, 989 (Ala. 1994) (noting concurrent jurisdiction of juvenile and circuit courts); Hornbuckle v. Hornbuckle, 223 So. 3d 225, 229 (Ala. Civ. App. 2016) ("'[T]he circuit court also has jurisdiction to decide custody matters where nonparents are involved.'" (quoting Ex parte Lipscomb, 660 S. 2d at 959); see also B.B. v. L.W., 163 So. 3d 1042 (Ala. Civ. App. 2014) (in which a majority of this court voted to reach the merits of a circuit court's custody judgment).

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over a dissent from then-Judge (now Justice) Bryan -- our supreme court, on certiorari review, reversed this court's judgment of affirmance, concluding that the juvenile court had subject-matter jurisdiction. Crucial to the supreme court's reasoning was its conclusion that "[a] child is dependent if, at the time a petition is filed in the juvenile court alleging dependency, the child meets the statutory definition of a dependent child." Id. at 1046 (emphasis added). Although that definition has been the subject of stylistic revisions since the dependency petition at issue in Ex parte L.E.O. was filed, our supreme court held in that case that [a] child who falls into one of the identified categories described "in the statute defining "dependent child," "including a child who has been abandoned" and, "in that ... condition, is 'in need of care or supervision' meets the statutory definition of a dependent child." Id. at 1047. In a footnote, our supreme court acknowledged that the dependency petition that had been filed by L.E.O. and P.O. "' did not specifically allege that the child was 'in need of care or supervision,'" but concluded that, taken together, the petitioners' statements that the child was within the identified categories, that the child was dependent, and that the child's best interests would be

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served by awarding custody to L.E.O. and P.O. were "sufficient to invoke the jurisdiction of the juvenile court" on the basis that the "in need of care or supervision" element was "implicit in the petition." Id. at 1047 n.4.

It is one thing for a court to assess, as was done in Ex parte L.E.O., the adequacy of a petition brought by nonparents in a juvenile court in which those petitioners actually seek a determination of dependency⁴ and a resultant disposition of custody based purely upon the welfare and best interests of the child (see Ala. Code 1975, § 12-15-314(a)(4)). It is another

⁴At the time the petition at issue in Ex parte L.E.O. was filed, the governing law provided that "[t]he juvenile court shall exercise exclusive original jurisdiction of proceedings in which a child is alleged to be delinquent, dependent or in need of supervision." Ala. Code 1975, former § 12-15-30(a) (emphasis added). However, under the current Alabama Juvenile Justice Act, which is codified at Ala. Code 1975, § 12-15-101 et seq., "[a] juvenile court shall exercise exclusive original jurisdiction of juvenile court proceedings in which a child is alleged to have committed a delinquent act, to be dependent, or to be in need of supervision." Ala. Code 1975, § 12-15-114(a) (emphasis added). "'[A] statute should be construed, if possible, to give effect to every section thereof, and ... the legislature should not be deemed to have done a vain and useless thing.'" The Shoals Mill Dev., Ltd. v. Shelby Cnty. Bd. of Equalization, 238 So. 3d 1253, 1255 (Ala. Civ. App. 2017) (quoting State v. Amerada Hess Corp., 788 So.2d 179, 183-84 (Ala. Civ. App. 2000), quoting in turn State of Alabama Home Builders Licensure Bd. v. Sowell, 699 So. 2d 214, 218 (Ala. Civ. App. 1997)).

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matter, however, if a nonparent voluntarily elects not to pursue such a determination but, instead, freely chooses to seek custody of a child in a circuit court of this state, which is, under our constitution, a "trial court of general jurisdiction," Ala. Const. 1901 (Off. Recomp.), art. VI, § 139(a), and thereby chooses to instead assume the burden of adducing "clear and convincing evidence that [a parent] is unsuited or unfit to assume the place of a [parent] in providing a safe and comfortable home, proper environment, parental affection, care, training and education." Chandler v. Whatley, 238 Ala. 206, 209, 189 So. 751, 753-54 (1939). The great-grandparents in this case, unlike L.E.O. and P.O., made the latter election, and their reasons for having done so are not properly within this court's purview: "the plaintiff[] is the master of [the] complaint." Cadence Bank, N.A. v. Robertson, [Ms. 1190997, Apr. 2, 2021] ___ So. 3d ___, ___ (Ala. 2021).

Of course, the same evidence that would support a circuit court's finding of parental unfitness under Chandler and its progeny might also go far in demonstrating to a juvenile court that a child, for example, is a victim of parental abandonment, has not received necessary medical care,

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has not been sent to school, or has been placed for care or adoption in violation of applicable law and is in need of alternate care or supervision within the scope of the current statutory definition of a dependent child in Ala. Code 1975, § 12-15-102(8)a. However, in my view, an appellate court goes too far when it reviews particular factual allegations in a circuit-court pleading seeking a simple custody determination in favor of a nonparent on a basis of parental unfitness and proceeds to then recast the pleading in a manner that hooks in an unpleaded dependency claim so as to nullify the choice of the nonparent to seek a simple remedy for a simple dispute. To the extent that such a result would be permissible by this court's holding in A.M., supra, which was decided in the context of a direct challenge by the parent to the circuit court's jurisdiction made both in the trial court and in this court, I would recede from that holding rather than unnecessarily assuming the burden of determining, in this and future cases, if a nonparent custody petitioner should have alleged dependency of the child rather than simply seeking an award of custody.

Although I acknowledge that this court is bound by decisions of our supreme court such as Ex parte L.E.O., supra, see Ala. Code 1975, § 12-3-

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16, and while I concede that the scope and implications of that decision are matters for that court to fully and finally determine, I do not believe that faithfulness to that decision under § 12-3-16 mandates the procedure endorsed by the majority in this case. I therefore dissent from the main opinion.

Fridy, J., concurs.