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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Ex parte Lester E. Heath III

PETITION FOR WRIT OF MANDAMUS

(In re: Lester E. Heath III

v.

Natalie S. Wood)

(Houston Juvenile Court, CS-14-900222.02)

MOORE, Judge.

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Lester E. Heath III ("the father") petitions this court for a writ of mandamus directing the Houston Juvenile Court ("the juvenile court") to vacate its judgment finding, among other things, that Alabama has continuing, exclusive jurisdiction over a custody action between the father and Natalie S. Wood ("the mother") with regard to their child, pursuant to Alabama's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975. We deny the petition with instructions.

Procedural History

On October 1, 2014, the juvenile court entered a judgment adopting an agreement of the parties and directing, among other things, that the parties would have joint legal custody of the child, with the mother having sole physical custody, subject to the father's specified visitation. On April 12, 2018, the father filed in the juvenile court a verified petition seeking a modification of the child's custody; he asserted, among other things, that the child had been present during an incident that had led to the mother's arrest for domestic violence, that the mother had used illegal drugs, that the child was afraid of the mother's husband, and that the mother and her

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husband had exhibited unstable behavior. The father sought an award of sole physical custody of the child. The juvenile court entered a judgment on April 19, 2018, that incorporated an agreement of the parties and ordered, among other things, that the parties retain joint legal custody of the child, that the father have sole physical custody of the child, subject to the mother's specified visitation, and that child support would not be paid by either party.

On January 16, 2019, the father sought to register the juvenile court's judgments in the District Court of Williamson County, Texas ("the Texas court"). He filed in the Texas court, on May 9, 2019, a petition for an ex parte emergency temporary restraining order and for an injunction against the mother to prevent the mother from removing the child from Williamson County or Travis County, Texas, asserting therein that the Texas court could exercise temporary emergency jurisdiction pursuant to § 152.204 of Texas's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("the Texas UCCJEA"), § 152.001 et seq., Tex. Fam. Code Ann., or pursuant to §§ 152.201 or 152.203 of the Texas UCCJEA because, he asserted, Texas is the child's home state. He further noted,

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among other things, that, because the mother had failed to contest the validity of the registration of the juvenile court's judgments, those judgments had been registered and confirmed by operation of law pursuant to § 152.305 of the Texas UCCJEA. The Texas court entered on that same date an ex parte temporary restraining order prohibiting the mother from, among other things, removing the child from Williamson County or Travis County, Texas, without the prior, written agreement of the father or an order of the Texas court, from disturbing the peace of the child, from allowing the child to have contact with the mother's husband, or from using or consuming illegal narcotics or prescription medications except in the manner prescribed. The Texas court set a hearing for May 23, 2019, to determine whether the ex parte temporary restraining order should be extended to a temporary injunction pending a final hearing or whether the mother should be permanently enjoined from, among other things, removing the child beyond a geographic area identified by the Texas court, from allowing the child to have contact with the mother's husband, or from using or consuming illegal narcotics.

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The mother filed an answer in the Texas court on May 14, 2019, generally denying the allegations of the father's petition, demanding strict proof thereof, and praying that the petition be dismissed. On May 21, 2019, the father filed in the Texas court a motion to extend the temporary restraining order to a date no later than June 6, 2019, asserting therein that he and the mother had agreed to such an extension. On June 11, 2019, the Texas court entered an order incorporating an agreement of the parties, pursuant to which the ex parte temporary restraining order that was entered on May 9, 2019, and apparently extended on May 23, 2019, would become a temporary injunction that would remain in full force and effect until July 20, 2019, and thereafter until a hearing could be held if the parties failed to reach an agreement by that date. An agreement of the parties was submitted to the Texas court on September 5, 2019, in which they had agreed, among other things, that, notwithstanding the terms of the temporary injunction, the child could travel to Alabama to visit the mother from August 30, 2019, to September 2, 2019, subject to certain specified conditions.

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On November 8, 2019, the father filed in the Texas court a petition to modify the juvenile court's April 19, 2018, custody judgment, requesting that the Texas court appoint the father as the child's conservator, require that the mother's visitation with the child be supervised or terminated, and award child support to the father. The father asserted, among other things, that the Texas court had jurisdiction pursuant to the Texas UCCJEA based on that court's temporary emergency jurisdiction, based on the mother's submission to the Texas court's jurisdiction, and because, he asserted, Texas is the child's home state. The mother filed in the Texas court a special appearance, asserting that the Texas court lacked jurisdiction over the mother and lacked subject-matter jurisdiction over the action; she moved to dismiss the father's modification petition in the Texas court and asserted further that Texas was an inconvenient forum.

On November 12, 2019, the father filed in the juvenile court a "petition to transfer jurisdiction under UCCJEA"; he asserted, among other things, that a material change in circumstances had arisen and that, based on those changed circumstances, he had filed a petition in the Texas court seeking relief. The father sought "an order from [the juvenile court]

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relinquishing jurisdiction in accordance with the UCCJEA" and requested that, if necessary, the juvenile court communicate with the Texas court to determine which court was the more appropriate forum. The juvenile court entered a "default judgment" on December 4, 2019, finding, among other things, that the child had lived with the father in the State of Texas for more than six months following the entry of the juvenile court's April 19, 2018, modification judgment and that, as a result, Texas is the home state of the child pursuant to § 30-3B-102(7), Ala. Code 1975. Thus, the juvenile court "transfer[red] jurisdiction immediately to the State of Texas." In response to a motion filed by the mother to set aside that default judgment, however, the juvenile court entered an order on December 10, 2019, granting that motion and directing the mother to file an answer within seven days. The mother filed an answer to the father's petition to transfer jurisdiction in the juvenile court on December 15, 2019, asserting, among other defenses, that the father's petition failed to state a claim upon which relief could be granted.

The mother filed a motion to set the case for a final hearing in the juvenile court. The father filed a response to the mother's motion to set

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the case for a hearing, as well as a motion to stay the proceedings so the juvenile court could confer with the Texas court to establish which court had jurisdiction. On February 18, 2020, the father filed in the juvenile court an "amended petition for modification of custody, child support, and to transfer jurisdiction." The father sought a modification of custody and visitation, specifically requesting that the mother's visitation with the child be supervised. Additionally, the father asserted that a modification of child support was warranted and that Texas was the proper forum for the action. Accordingly, he requested that the juvenile court relinquish jurisdiction of the case to the Texas court.

Both the mother and the father filed in the juvenile court extensive witness lists in support of their opposing positions related to whether Alabama or Texas would be the more appropriate forum. A hearing was conducted in the juvenile court on July 14, 2020, and both parties filed in the juvenile court additional witness lists and other documentation in support of their respective positions with regard to jurisdiction and venue. On August 12, 2020, the juvenile court entered an order finding, among other things, that Alabama has continuing, exclusive jurisdiction over the

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custody action; declining to conclude that Alabama is an inconvenient forum or that Texas is a more appropriate forum; and denying the father's request to decline jurisdiction or to relinquish jurisdiction to the Texas court. The father filed his petition for the writ of mandamus in this court on October 7, 2020.

On November 18, 2020, this court entered an order directing the parties to submit letter briefs regarding (1) whether the UCCJEA or any other law gives a juvenile court jurisdiction over a "petition to relinquish jurisdiction," (2) whether the father's petition in the juvenile court is, in substance, a declaratory-judgment action not within the jurisdiction of the juvenile court and whether the juvenile court could assume jurisdiction of the father's petition while his modification petition was pending in the Texas court, (3) whether, if the juvenile court could not assume jurisdiction of the father's petition, the father's February 18, 2020, amendment to his petition was a nullity, and (4) whether the August 12, 2020, order entered by the juvenile court is void due to lack of subject-matter jurisdiction. The parties complied with our request, and we now address the issue of jurisdiction.

Analysis

First, we consider the mother's assertion before this court that the father's mandamus petition is due to be dismissed because it was untimely filed. See Rule 21(a)(3), Ala. R. App. P. (providing that a petition for the writ of mandamus shall be filed within a reasonable time and that the presumptively reasonable time for filing a petition seeking review of an order of a trial court shall be the same as the time for taking an appeal); and Ex parte J.B., 223 So. 3d 251, 254 (Ala. Civ. App. 2016) (noting that the presumptively reasonable time for filing a petition for the writ of mandamus challenging an order in juvenile court is 14 days). We agree that, because the father's mandamus petition was filed 56 days after the entry of the juvenile court's August 12, 2020, order, it was not filed within the presumptively reasonable time as outlined in Rule 21(a)(3). The father is correct, however, that "a petition for the writ of mandamus that challenges the jurisdiction of the trial court to enter the order sought to be vacated need not be filed within the presumptively reasonable period prescribed by Rule 21[, Ala. R. App. P.]." Ex parte Madison Cnty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017). Accordingly, the

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father's petition is not due to be dismissed based on the untimeliness of its filing. We conclude, however, that the father's petition is due to be dismissed, albeit for reasons not raised by either party in their original briefs to this court. See *McMurphy v. East Bay Clothiers*, 892 So. 2d 395, 397 (Ala. Civ. App. 2004) ("Jurisdictional matters are of such importance that a court may take notice of them ex mero motu.").

In the present case, the father alleged in his November 12, 2019, petition to transfer jurisdiction that he had filed a petition in the Texas court seeking a modification of the child's custody. There was no custody-modification or enforcement action pending between the parties in the juvenile court at that time, and the father's petition did not request a modification of custody by the juvenile court. Thus, at that time, there was no action between the parties pending before the juvenile court at that time to be transferred. Rather, the father's petition appears to have sought declaratory relief. Section 6-6-221, Ala. Code 1975, provides, in pertinent part, that the purpose of the Declaratory Judgment Act, § 6-6-220 et seq., Ala. Code 1975, "is to settle and to afford relief from

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uncertainty and insecurity with respects to rights, status, and other legal relations."

In Bedsole v. Goodloe, 912 So. 2d 508, 518 (Ala. 2005), our supreme court stated, in pertinent part:

"The Declaratory Judgment Act, §§ 6-6-220 through -232, Ala. Code 1975, 'does not " 'empower courts to ... give advisory opinions, however convenient it might be to have these questions decided for the government of future cases.' " ' Bruner v. Geneva County Forestry Dep't, 865 So. 2d 1167, 1175 (Ala. 2003) (quoting Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (quoting in turn Town of Warrior v. Blaylock, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963))) (emphasis added in Stamps). This Court has emphasized that declaratory-judgment actions must 'settle a "bona fide justiciable controversy." ' Baldwin County v. Bay Minette, 854 So. 2d 42, 45 (Ala. 2003) (quoting Gulf South Conference v. Boyd, 369 So. 2d 553, 557 (Ala. 1979)). The controversy must be "definite and concrete," ' must be "real and substantial," ' and must seek relief by asserting a claim opposed to the interest of another party ' "upon a state of facts which must have accrued." ' Baldwin County, 854 So. 2d at 45 (quoting Copeland v. Jefferson County, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)). "Declaratory judgment proceedings will not lie for an 'anticipated controversy.'" ' Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002) (quoting City of Dothan v. Eighty-Four West, Inc., 738 So. 2d 903, 908 (Ala. Civ. App. 1999)). Thus, if a declaratory judgment would not terminate any uncertainty or controversy, the court should not enter such a judgment. Bruner, 865 So. 2d at 1175.

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" "[J]usticiability is jurisdictional," Ex parte State ex rel. James, 711 So. 2d 952, 960 n. 2 (Ala. 1998); hence, if necessary, "this Court is duty bound to notice ex mero motu the absence of subject matter jurisdiction." ' Baldwin County, 854 So. 2d at 45 (quoting Stamps, 642 So. 2d at 945 n.2)."

In Ex parte Johnson, 993 So. 2d 875, 884 (Ala. 2008), our supreme court concluded, citing Bedsole, that, "any attempt to obtain a declaratory judgment as to a hypothetical future controversy is beyond the subject-matter jurisdiction of the [trial] courts."

In the present case, because no custody action was pending in the juvenile court at the time the father filed his petition to transfer jurisdiction, the relief sought was merely hypothetical. Although, on the face of his petition, the father alleged that a petition to modify custody had been filed in the Texas court, our supreme court has acknowledged that

" '[j]urisdiction of a declaratory judgment action will not be entertained if there is pending at the time of the declaratory judgment action another action or proceeding to which the same persons are parties, and in which are involved and may be adjudicated the same identical issues that are involved in the declaratory judgment action.' "

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Home Ins. Co. v. Hillview 78 West Fire Dist., 395 So. 2d 43, 44 (Ala. 1981)

(quoting Mathis v. Auto-Owners Ins. .Co., 387 So. 2d 166, 167 (Ala. 1980)).

Section 152.203 of the Texas UCCJEA provides:

"Except as otherwise provided in Section 152.204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 152.201(a)(1) or (2) and:

"(1) the court of the other state determines it no longer has exclusive continuing jurisdiction under Section 152.202 or that a court of this state would be a more convenient forum under Section 152.207; or

"(2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state."

Because a modification petition was pending between the father and the mother in the Texas court at the time the father filed his petition to transfer jurisdiction and the Texas UCCJEA requires the Texas court to address whether the juvenile court had exclusive continuing jurisdiction before proceeding to address the father's modification petition, the juvenile court was not permitted to entertain jurisdiction of the father's

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declaratory-judgment action. See Home Ins. Co., supra. Accordingly, we conclude that the father's attempt to obtain a judgment in the juvenile court purporting to "transfer" jurisdiction was beyond the juvenile court's subject-matter jurisdiction. See Johnson, supra.

The father purported to amend his petition in the juvenile court on February 18, 2020, to seek a modification of custody and visitation and an award of child support. In Ex parte Owens, 65 So. 3d 953, 956 (Ala. Civ. App. 2010), however, this court observed, quoting Cadle Co. v. Shabani, 4 So. 3d 460, 463 (Ala. 2008), that, because the original petition filed in that case "did not invoke the subject-matter jurisdiction of the trial court, we must conclude that the original petition was a nullity, that the purported amendment of that petition was also a nullity, and that the trial court did not have jurisdiction to do anything other than 'dismiss the action forthwith.' " Thus, the father's attempt to amend his petition in the juvenile court did not operate to create a bona fide justiciable controversy that could bestow subject-matter jurisdiction on the juvenile court. Id.

Conclusion

Because the juvenile court lacked jurisdiction to entertain the father's November 12, 2019, petition, the father's petition for the writ of mandamus is due to be denied, albeit with instructions to the juvenile court to vacate its orders stemming from the father's November 12, 2019, petition in accordance with this opinion. See S.B.U. v. D.G.B., 913 So. 2d 452, 455 (Ala. Civ. App. 2005) ("A judgment entered by a court that lacks subject-matter jurisdiction is void.").

PETITION DENIED WITH INSTRUCTIONS.

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