REL: February 19, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200091

Ex parte L.B.S.

PETITION FOR WRIT OF MANDAMUS

(In re: L.B.S.

v.

M.W.S.)

(Blount Circuit Court, DR-16-900146.02)

FRIDY, Judge.

L.B.S. ("the mother") petitions this court for a writ of mandamus directing the Blount Circuit Court to vacate its September 15, 2020, order allowing the Blount County Department of Human Resources ("DHR") to intervene in a child-custody dispute between the mother and M.W.S. ("the father"). For the reasons set forth below, we deny the mother's petition.

The materials submitted to this court indicate the following. On September 26, 2016, the Blount Circuit Court entered a judgment divorcing the mother and the father; insofar as it presided over the parties' divorce action or any subsequent action involving the modification of the custody award in the parties' divorce judgment, the Blount Circuit Court is hereinafter referred to as "the divorce court." In the divorce judgment, the mother was awarded sole custody of the parties' only child ("the child"), subject to the father's visitation. The child was almost four years old at the time of the divorce. The parties subsequently agreed to a custody modification, which the divorce court approved, awarding the mother and the father joint legal custody; the mother retained sole physical custody, and the father was awarded standard visitation.

On September 5, 2018 -- nearly two years after the mother and the father divorced -- DHR filed a petition in the Blount Juvenile Court ("the juvenile court") asserting that the child was dependent. On September 12, 2018, the juvenile court entered a temporary order awarding the father sole physical custody of the child pending a further order of that court. On June 20, 2019, the father filed a verified petition in the divorce court seeking to modify the custody award established in the divorce action. In the petition, the father asserted that, because the juvenile court had awarded him "temporary sole physical custody" of the child in the dependency action, there had been a material change of circumstances warranting a modification of the child's custody.

On June 24, 2019, the day before the trial was scheduled in the dependency action, the father filed motions either to consolidate the dependency action and the modification action or to transfer the modification action to the juvenile court. The juvenile court entered an order granting the motion to consolidate, to which the mother did not object. After a two-day trial, a single judgment was entered in both the dependency action and the modification action awarding the father sole

physical custody of the child. DHR was ordered to maintain an open case regarding the child pending further order of the court. The judgment included a future trial date "solely on the issues of child support and child support arrearage," thus indicating that the judgment was not final as to the modification action.

The juvenile court's judgment, insofar as it addressed the dependency action, was appealed to this court, which entered an order transferring the case to the Blount Circuit Court for a trial de novo. All the Blount Circuit Court judges recused themselves from the matter, and our supreme court appointed a circuit judge from Marshall County to hear the dependency action; insofar as it is presiding over the trial de novo in the dependency action, the Blount Circuit Court is hereinafter referred to as "the circuit court." The dependency action remains pending in the circuit court.

On September 15, 2020, DHR filed in the divorce court a motion to intervene in the modification action. In its motion, DHR asserted that the mother had appealed from the juvenile court's judgment insofar as it pertained to the dependency action, but not insofar as it pertained to the

modification action, which, DHR said, remained pending. DHR also noted that the two cases were no longer consolidated because the dependency action had to be tried before a different judge than the judge who had previously presided over the trial of the dependency and modification actions. In the motion to intervene, DHR asserted that it was a "vital and interested party" in the modification action, stating that it had "very real concerns that unless it is a party to the modification action, the previous findings of [the juvenile court], i.e., that custody should be awarded to the father, and the mother allowed supervised visitation, may be changed/modified by the parties prior to a final order being entered."

The divorce court granted DHR's motion to intervene in the modification action on September 15, 2020. On October 27, 2020, the mother timely filed the petition for a writ of mandamus asking this court to direct the divorce court to vacate the September 15, 2020, order.

A writ of mandamus "is an extraordinary and drastic writ" that we will issue "only when (1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4)

this Court's jurisdiction is properly invoked." Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000). "Because mandamus is an extraordinary remedy, the standard by which this Court reviews a petition for the writ of mandamus is to determine whether the trial court has clearly abused its discretion." Id.

In seeking the writ, the mother challenges the divorce court's jurisdiction over the modification action in which DHR's motion to intervene was granted. She asserts that, because a trial de novo must be held in the separate dependency action, the intervention of DHR in the modification action will result in the divorce court's hearing the same claims by the same parties as will be heard by the circuit court in the trial de novo in the dependency action. The mother maintains that such parallel proceedings are impermissible. However, this court rejected an argument similar to the mother's argument in Winford v. Winford, 139 So. 3d 179 (Ala. Civ. App. 2013), a case with a similar procedural history.

In Winford, the mother and the father were divorced, and the mother had sole physical custody of their children. Several years after the parties' divorce, the mother's parents filed petitions in a juvenile court

alleging that the children were dependent and seeking custody of the children. While the dependency petitions were pending, the father filed a petition for a modification of custody in a circuit court, alleging a material change of circumstances because, he said, the mother had abdicated her parenting responsibilities to the maternal grandparents. Id. at 180.

As in this case, the mother in Winford argued that the circuit court did not have jurisdiction to consider the custody-modification action while the dependency petitions were pending in the juvenile court. This court held that, although the juvenile court had original and exclusive jurisdiction over the dependency petitions, it "shared concurrent jurisdiction over child custody with the [circuit] court, which had continuing subject-matter jurisdiction of the child-custody dispute between the parents based on its resolution of custody issues in the parents' divorce judgment." Id. at 183. This court wrote that, "in the absence of a conflicting judgment from the juvenile court entered on the basis of a dependency finding, the [circuit] court was not deprived of its continuing jurisdiction to enter orders pertaining to the custody dispute between the parents." Id.

The same holds true in this case. The juvenile court (and now the circuit court by appeal de novo) has exclusive jurisdiction over the dependency action; however, the juvenile court (and the circuit court by appeal) has concurrent jurisdiction with the divorce court, which has continuing subject-matter jurisdiction over the parties' custody dispute by virtue of having determined custody issues in the judgment divorcing the mother and the father. Thus, the divorce court retains its authority to enter an order regarding the father's action to modify custody.

The mother contends that DHR's intervention in the modification action converts that action into a "de facto" dependency action over which the divorce court has no jurisdiction. In support of her contention, the mother relies on A.M. v. A.K., [Ms. 2190617, Sept. 18, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020), which discussed an exception to a circuit court's continuing jurisdiction over custody matters decided pursuant to a divorce -- namely, that, " 'in the event a genuine dispute between a parent and a third party arises as to the dependency of the child, the juvenile court assumes exclusive jurisdiction to adjudicate that dispute.' " ___ So. 3d at ___ (quoting P.S.R. v. C.L.P., 67 So. 3d 917, 922 (Ala. Civ. App. 2011)).

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. P.S.R., 67 So. 3d at 922 . In A.M., this court held that courts must look to the substance of a pleading to determine whether it alleges the dependency of a child so as to invoke the exclusive jurisdiction of a juvenile court. In A.M., the mother had been awarded sole physical custody of her child when she and the father divorced. The mother died, and a maternal aunt sought custody of the child in the circuit court, alleging that the child's father was unfit to parent the child because he had been incarcerated after being convicted of a felony assault on the mother in the presence of the child, that he had failed to financially support the child, and that his relationship with the child had become strained. This court determined that the maternal aunt's petition was, in fact, a dependency petition and that, therefore, the circuit court lacked subject-matter jurisdiction to consider her request for custody.

The mother in this case argues that DHR's motion to intervene essentially asserted a "de facto" claim alleging dependency that, once

granted, deprived the divorce court of jurisdiction. However, in reviewing the motion to intervene, it is clear that DHR did not seek a determination of dependency or seek custody of the child. Instead, DHR sought to intervene in the modification action to protect its interest in ensuring the safety of the child. In other words, DHR's motion to intervene cannot be construed as a mislabeled dependency petition that would invoke the exclusive jurisdiction of the juvenile court.

Moreover, we note that DHR has been permitted to intervene in divorce actions. See, e.g., State Dep't of Hum. Res. v. Engle, 717 So. 2d 395, 397 (Ala. Civ. App. 1998)(reversing order of the circuit court denying DHR's motion to intervene in a divorce proceeding when the parties' child had previously been found dependent). Unlike the situation in A.M., in which the circuit court never obtained jurisdiction over the maternal aunt's petition seeking custody of the child, in this case we have already determined that the divorce court has jurisdiction over the father's custody-modification petition. Granting DHR's motion to intervene did not deprive the divorce court of its jurisdiction.

Regarding the mother's contention that the divorce court abused its discretion by granting the motion to intervene, our supreme court has emphasized the extraordinary nature of the writ of mandamus and that it is a remedy permitted only in "exceptional cases." See, e.g., Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003). In Ex parte U.S. Bank National Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014), our supreme court again stressed the limited scope of the availability of the writ and listed the categories under which mandamus review is permitted. The granting of a motion to intervene is not included within that list. In Ex parte U.S. Bank, the supreme court acknowledged that "this list may seem to contradict the nature of mandamus as an extraordinary writ," but wrote that

> "the use of mandamus review has essentially been limited to well recognized situations .... Those well recognized situations include making sure that an action is brought in the correct court (e.g., subject-matter jurisdiction and venue) and by the correct parties (e.g., personal jurisdiction and immunity), reviewing limited discovery rulings (e.g., patently irrelevant discovery), and reviewing erroneous decisions by a trial court where there is a compelling reason not to wait for an appeal (e.g., abatement)."

Id. at 1064-65.[1]

Our supreme court observed in Ex parte Spears, 621 So. 2d 1255, 1258 (Ala. 1993), that "[t]he tendency of this Court in the past has been to enlarge the scope of the extraordinary writ of mandamus by recognizing certain exceptions to the general rule that orders ultimately reviewable on appeal from a final judgment are not subject to mandamus review" and declared that the appellate courts "should not continue to decide cases in a piecemeal fashion."

In her petition seeking to have vacated the order permitting DHR to intervene in the modification action, the mother cites Ex parte Pelham Tank Lines, Inc., 898 So. 2d 733, 736 (Ala. 2004), and Covington Electric Cooperative v. Alabama Power Co., 277 Ala. 162, 167, 168, 5, 10 (1964), for the proposition that an order allowing intervention is a nonappealable interlocutory order. Therefore, she says, such orders are properly reviewable by a petition for a writ of mandamus. However, we note that

[1]See Ex parte U.S. Bank, 148 So. 3d at 1064, for a list of the specific situations that have been found to be within the scope of mandamus review.

in Pelham Tank Lines the petition for the writ of mandamus was dismissed as untimely and the issue of whether an order allowing permissive intervention was a proper subject for mandamus review was not addressed. In Covington Electric, our supreme court noted that an order allowing intervention was interlocutory and was not immediately appealable; however, like Pelham Tank Lines, that case did not address whether such an order is the proper subject for mandamus review. We note that an order denying a motion to intervene is sufficiently final to support an appeal. Jim Parker Bldg. Co. v. G & S Glass & Supply Co., 69 So. 3d 124, 130 (Ala. 2011); Jones v. Joines, 142 So. 3d 584, 587 (Ala. Civ. App. 2012).

On the other hand, there are numerous cases decided on appeal in which Alabama appellate courts have held that the granting or denying of a motion to intervene "is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." Magee v. Boyd, 175 So. 3d 79, 138 (Ala. 2015); See also Valley Forge Ins. Co. v. Alexander, 640 So. 2d 925, 927 (Ala. 1994); Millers Mut. Ins. Ass'n v. Young, 601 So. 2d 962 (Ala.1992); Dearmon v. Dearmon, 492 So. 2d

1004, 1006 (Ala. 1986); J.S.M. v. Cleburne Cnty. Dep't of Hum. Res., 140 So. 3d 484, 485 (Ala. Civ. App. 2013); D.S. v. Cullman Cnty. Dep't of Hum. Res., 42 So. 3d 1284, 1286 (Ala. Civ. App. 2010).

The mother has not provided us with any authority in which our appellate courts have reviewed by a petition for the writ of mandamus an order granting a motion to intervene. Furthermore, the mother has not persuaded us that the circumstances warranting mandamus review should be expanded to include the granting of a motion to intervene.

Because it is well settled that the propriety of an order permitting a party to intervene is an issue to be determined on appeal, the mother has an adequate legal remedy available to her, thus precluding mandamus review. See Ex parte Alabama Dep't of Hum. Res., 227 So. 3d at 521. Accordingly the mother's mandamus petition is denied.

PETITION DENIED.

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

Moore, J., concurs in the result, with writing.

MOORE, Judge, concurring in the result.

I concur that the petition for the writ of mandamus filed by L.B.S. ("the mother") should be denied, but I do so for reasons different than those expressed in the main opinion.

The mother argues that the Blount Circuit Court ("the trial court") erred in granting a motion to intervene filed by the Blount County Department of Human Resources ("DHR"). The mother contends that DHR did not file a proper motion to intervene, that she was not provided notice and a meaningful opportunity to object to the motion before the trial court granted it, and that the trial court lacks subject-matter jurisdiction over the claim asserted by DHR.

As the main opinion points out, the mother has not directed this court to any caselaw from our supreme court or this court specifically providing for mandamus review of an order granting a motion to intervene. I have located one case in which this court at least impliedly recognized that a petition for the writ of mandamus is a proper vehicle for obtaining review of such an order. In State v. Colonial Refrigerated Transportation, Inc., 48 Ala. App. 46, 261 So. 2d 767 (1971), the Jefferson

Circuit Court granted motions allowing several different governmental entities to intervene in a civil action filed by the State of Alabama against Colonial Refrigerated Transportation, Inc. ("Colonial"), regarding the recovery of escape taxes allegedly owed by Colonial. Colonial filed a petition for the writ of mandamus in this court, requesting that this court issue a writ of mandamus compelling the Jefferson Circuit Court to vacate the order granting the motions to intervene. Without discussing the propriety of such review, this court addressed the merits of the petition, determined that the Jefferson Circuit Court had abused its discretion in granting the motions to intervene, and granted the petition for the writ of mandamus and issued a writ. The supreme court, without commenting on the use of mandamus proceedings to review an order granting a motion to intervene, affirmed this court's decision. See Ex parte Windham, 288 Ala. 433, 261 So. 2d 772 (1972).

This court's decision in Colonial Refrigerated Transportation is, at best, questionable authority for the proposition that an appellate court can invoke its mandamus jurisdiction to review an order granting a motion to intervene. No subsequent reported opinion has cited Colonial

Refrigerated Transportation as authority for permitting mandamus review of an order granting a motion to intervene, and, despite an exhaustive search, I have not located any other opinion that even follows the same procedure employed in that case. Nevertheless, based on Ex parte U.S. Bank National Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014), I believe our supreme court would allow mandamus review of an order granting a motion to intervene in an extraordinary situation in which the order implicates the subject-matter jurisdiction of the trial court or raises an issue of abatement under Ala. Code 1975, § 6-5-440, as the mother contends in this case.

That said, "[a] writ of mandamus will not issue to compel the respondent to act when the respondent has not refused to do so." Ex parte CUNA Mut. Ins. Soc'y, 822 So. 2d 379, 384 (Ala. 2001). In this case, the trial court has not refused to vacate the intervention order. The materials before this court indicate that the trial court has scheduled a hearing to consider vacating that order, but that hearing, currently scheduled for February 19, 2021, has not yet taken place. As a consequence, to this point, the trial court has not adjudicated the matter and has not refused

to vacate the order granting DHR's motion to intervene. Until it does, in my opinion, any petition requesting that this court issue a writ of mandamus requiring the trial court to vacate the intervention order would be premature.

In her petition to this court, the mother recognizes that the trial court has not yet acted on her motion to vacate the intervention order, but she indicates that she filed her mandamus petition in order to comply with the deadline established in Rule 21(a)(3), Ala. R. App. P. That rule generally provides that a party to a civil action in circuit court must file a petition for the writ of mandamus within 42 days from the date of the entry of the order allegedly aggrieving the party. By caselaw, a "motion to reconsider" does not toll the time for filing a mandamus petition. See Ex parte Pelham Tank Lines, Inc., 898 So. 2d 733 (Ala. 2004). However, in this case, the trial court has not yet addressed the merits of the mother's objections to allowing DHR to intervene, and the motion to vacate is not in the nature of a motion to reconsider.

The materials before this court show that the trial court granted DHR's motion to intervene on September 15, 2020, only hours after it was

filed and before the mother was given any meaningful opportunity to raise an objection. The mother eventually filed her motion to vacate the intervention order on October 15, 2020, asserting for the first time her position that DHR should not be allowed to intervene and raising for the first time her various arguments supporting that position. The trial court has not yet conducted the hearing to consider those arguments and to make its own judicial determination as to their validity. In her motion to vacate, the mother is not asking the trial court to reconsider a ruling on her objections but, rather, is asking this court to rule on those objections in the first instance.

The facts of this case differ significantly from the facts of Ex parte Troutman Sanders, LLP, 866 So. 2d 547 (Ala. 2003), in which our supreme court established the rule that a motion to reconsider does not toll the time for filing a petition for the writ of mandamus. In that case, Troutman Sanders, LLP ("Troutman"), filed a motion to dismiss claims made by certain nonresident plaintiffs on the ground of forum non conveniens. The Shelby Circuit Court denied the motion, after which Troutman filed a motion to reconsider asserting the same argument,

which the trial court again denied. Under those facts, the supreme court determined that any petition for the writ of mandamus challenging the trial court's ruling on the forum non conveniens issue should have been filed within 42 days of the date of the initial order denying the motion to dismiss and that the subsequent motion to reconsider did not act in the manner of a Rule 59, Ala. R. Civ. P., motion to toll that deadline.

In Ex parte Troutman Sanders, when the Shelby Circuit Court refused to dismiss the case as requested by Troutman, that refusal triggered the period for filing a petition for the writ of mandamus. The subsequent ruling denying the motion to reconsider only affirmed the earlier decision and did not establish a new filing period. In this case, on the other hand, the trial court has not refused to grant the mother's requested relief; it simply has not made a decision on the matter one way or the other. In her motion to vacate, the mother is not asking the trial court to reconsider arguments it has already rejected but, instead, is asking the trial court to consider those arguments for the first time. Any order the trial court enters on the mother's motion would be the first and only adjudication of the mother's objections by the trial court. Therefore,

to be consistent with the holding in Ex parte Troutman Sanders, the mother may petition this court for mandamus relief only upon receiving an adverse ruling on her motion.

Because the mother has filed her petition for the writ of mandamus before the trial court has been given an opportunity to rule on her motion, the mother does not ask this court to compel the trial court to perform an act that it has refused to perform but, instead, asks this court to decide the merits of her objections to DHR's intervention in the first instance. That is not the office of a petition for the writ of mandamus, which can be filed only after a trial court has refused to provide the petitioner the relief requested. The trial court should first be given an opportunity to rule on the motion to vacate before this court undertakes any "review" of the matter and expresses any opinion on the merits of the mother's motion.

Because, in my opinion, the petition for the writ of mandamus filed by the mother is premature, the petition is due to be denied on that basis. See Ex parte Liberty Nat'l Life Ins. Co., 631 So. 2d 865, 868 (Ala. 1993). Therefore, I concur in the result.