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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200379

Ex parte Brandon J. Taylor

PETITION FOR WRIT OF MANDAMUS

(In re: Brandon J. Taylor

v.

Carina C. Zeigler)

(Montgomery Circuit Court, DR-15-900877.01)

MOORE, Judge.

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Brandon J. Taylor ("the father") petitions this court for a writ of mandamus directing Montgomery Circuit Court Judge Anita L. Kelly to enter an order on the father's pending motion for pendente lite relief and to set the matter for a final hearing.

The father's petition reveals the following pertinent procedural history. On October 8, 2019, the father filed a petition to modify a judgment divorcing him from Carina C. Zeigler ("the mother"). The father asserted, among other things, that the divorce judgment incorporated an agreement between the father and the mother, pursuant to which the parties would share joint legal and physical custody of the parties' two children, and that the mother had since indicated to the father that she planned to move to California with the children. The father requested, among other relief, that the circuit court award him sole physical custody of the parties' two children and child support. On the same date that he filed his modification petition, the father filed a request for immediate pendente lite relief, seeking temporary physical custody of the parties' minor children.

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On October 11, 2019, Judge Kelly entered an order setting the father's motion for pendente lite relief for an evidentiary hearing, which was conducted by Judge Kelly on October 17, 2019. On February 3, 2020, the father filed a motion requesting the entry of an order on his motion for pendente lite relief. After Judge Kelly did not respond to that motion, the father filed two more motions, one on August 5, 2020, and one on October 16, 2020, requesting that Judge Kelly rule on his request for pendente lite custody of the children. On November 17, 2020, the father filed a motion requesting that the case be set for a final hearing and noting that an order on his request for pendente lite custody had still not been entered at that time. After again receiving no response from Judge Kelly, the father finally filed a motion on January 26, 2021, requesting, for the fifth time, the entry of an order on his motion for pendente lite relief.

The father filed his mandamus petition with this court on February 22, 2021, requesting that this court issue the writ of mandamus to Judge Kelly ordering her to rule on his motion for pendente lite custody of the children and his motion to set the case for final hearing. This court entered an order on February 23, 2021, directing Judge Kelly to file, on or

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before noon on Friday, February 26, 2021, an answer to the father's petition and directing her to "explain why she has failed to rule on the pendente lite matters pending before her and the request for a final hearing filed by [the father]." This court also directed the mother to file an answer to the petition if she desired.

On February 26, 2021, Judge Kelly's judicial assistant e-mailed to the clerk of this court, at 11:49 a.m., two orders that had been entered by Judge Kelly earlier that morning. The first order, which was entered by Judge Kelly at 9:02 a.m., was a pendente lite order that, among other things, awarded the father physical custody of the parties' children, awarded the mother certain specified visitation in addition to visitation "at any and all times upon which the [p]arties mutually agree," enjoined the mother from removing the children from Montgomery, and suspended the father's child-support obligation. The second order, which was entered by Judge Kelly at 9:03 a.m., was a scheduling order that, among other things, set the father's modification petition for a final hearing on April 9, 2021. Notably, in neither of Judge Kelly's February 26, 2021, orders did she comply with this court's directive to explain why she had failed to rule

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on the pendente lite matters, which had been pending a ruling by Judge Kelly since October 17, 2019, when the hearing was held on the father's motion for pendente lite custody, or to set the father's modification petition for a final hearing, which request had been pending since November 17, 2020.

Following the receipt of Judge Kelly's February 26, 2021, orders, this court directed the father to notify this court whether his mandamus petition had been rendered moot in light of the entry of those orders. The father responded that he had not been made whole by the issuance of the February 26, 2021, orders, noting that he had waited 16 months for the entry of the pendente lite order, that he had been prejudiced by having to wait 16 months for the entry of the pendente lite order, and that he had incurred \$1,138.26 in attorney's fees and court costs associated with the filing of his mandamus petition; he requested reimbursement for the attorney's fees and court costs he had incurred.

In his mandamus petition, the father requested that this court order Judge Kelly to enter an order on his motion for pendente lite custody of the children and to enter an order on his motion to set the case for a final

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hearing. In the February 26, 2021, orders, Judge Kelly granted the father's motions. Those orders effectively granted all the relief sought by the father in his mandamus petition. The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction unless the action is stayed, and, if the trial court grants the relief that is sought in the mandamus petition, the petition may be mooted. Ex parte McDaniel, 291 So. 3d 847, 851 n.2 (Ala. 2019). A petition for the writ of mandamus is moot when there is no real controversy and it seeks to determine an abstract question that does not rest on existing facts. State ex rel. Eagerton v. Corwin, 359 So. 2d 767, 769 (Ala. 1977). To the extent that the petition seeks relief requiring Judge Kelly to grant the father's motions, the petition for the writ of mandamus is moot because it no longer presents a justiciable controversy. See Ex parte St. John, 805 So. 2d 84, 686 (Ala. 2001).

The father maintains, however, that the entry of the February 26, 2021, orders does not eliminate the prejudice he suffered as a result of Judge Kelly's lengthy delay in entering those orders. The father does not elaborate on the "prejudice" he suffered, and he does not explain how this

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court can remedy that prejudice by a specific judicial determination granting his petition for the writ of mandamus. It appears that this court cannot grant the father any practical relief to remedy the prejudice to his rights caused by the delay in the ruling on his motions. See Alabama Dep't of Env't Mgmt. v. Association of Reg'l Councils, 968 So. 2d 534 (Ala. Civ. App. 2006) (indicating that a case does not present a justiciable controversy when the court cannot provide any practical relief through a judicial determination). The father requests attorney's fees and costs for filing this mandamus petition, but this court cannot order Judge Kelly, who, according to the materials before this court is the sole person responsible for the delay in entering the orders on the father's motions,¹ to pay those fees and costs. See Ex parte Town of Lowndesboro, 950 So. 2d 1203 (Ala. 2006) (concluding that an award of attorney fees and

¹The father has not suggested, and this court cannot conclude from the materials before the court, that the mother bears any responsibility for Judge Kelly's failure to enter in a timely manner an order on either the father's motion for pendente lite relief or his motion to set the modification petition for a final hearing. Thus, we do not interpret the father's request as seeking reimbursement of costs and attorney's fees from the mother.

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expenses against an officer of the State is precluded by the doctrine of sovereign immunity set out in Art. 1, § 14, Ala. Const. 1901 (Off. Recomp.)).

This court is more concerned, however, with the harm that the delay might have caused to the children. In his modification petition and his motion for pendente lite custody, the father alleged, among other things, that the parties had agreed to share physical custody of the children when the parties divorced in 2016, that the mother had since sold her home, had become unemployed, was living with her sister, was not using child support to provide for the needs of the children, and was planning on moving with the children to California to follow a "prophet" despite having no family-support system in that state. The father alleged that it was not in the best interests of the children to relocate to California and to disturb their relationship with the father.

Judge Kelly conducted an evidentiary hearing on the father's motion for pendente lite relief on October 17, 2019, at which, according to the February 26, 2021, order granting the father pendente lite custody, the testimony indicated that the mother had separated from her employment

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in anticipation of moving to California, that the mother had developed health problems that had impeded her planned move, that the sole source of the mother's income was the \$550 per month she received in child support, that the mother was unable to financially provide for the children and had requested additional money from the father in order to care for the children, and that the mother was residing with her sister in Montgomery. The testimony further indicated that the father was in a stable relationship, was living in a stable home, and could provide for the needs of the children.

According to the February 26, 2021, order granting the father's motion for pendente lite custody of the children, Judge Kelly determined from the evidence presented at the October 17, 2019, hearing that, although the mother was otherwise a good mother, because of the mother's financial problems it would be in the best interests of the children that they be placed in the physical custody of the father pending resolution of his custody-modification petition. Nevertheless, Judge Kelly did not enter an order granting the father's motion for pendente lite

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custody until February 26, 2021, 498 days later, and, then, only when prompted to act by this court. This court can only assume that, in the meantime, the children continued to reside with the mother under the circumstances existing at the time of the October 17, 2019, hearing on the father's motion for pendente lite custody when they could have been residing with the father in a more stable environment the entire time.

A judge is expected to "dispose promptly of the business of the court, being ever mindful of matters taken under submission," Canon 3.A.(5), Ala. Canons of Jud. Ethics, and to "diligently discharge his [or her] administrative responsibilities," Canon 3.B.(1), Ala. Canons of Jud. Ethics. We note that Judge Kelly's consistent dereliction of duty in promptly disposing of the cases before her led to Judge Kelly's being disciplined by the Court of the Judiciary in 2018. Based partly on her past history, this court ordered Judge Kelly to explain why she had not ruled on the father's motion for pendente lite custody, but Judge Kelly did not respond to that order or otherwise file an answer to the mandamus petition when her judicial assistant filed the February 26, 2021, orders, presumably relying

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on that action to moot the mandamus petition. See Montgomery Cnty. Dep't of Hum. Res. v. A.S.N., 215 So. 3d 582 (Ala. Civ. App. 2016) (recounting Judge Kelly's pattern and practice of entering orders only after petitions for the writ of mandamus had been filed requesting that she be required to adjudicate actions over which she was presiding and this court had entered orders requiring her to file answers to those petitions). Because this court does not have jurisdiction to do anything other than dismiss a moot case, see K.L.R. v. K.S., 201 So. 3d 1200 (Ala. Civ. App. 2016), it appears that this gambit has relieved Judge Kelly of any responsibility to this court for explaining her inaction. However, we once again admonish Judge Kelly that the public places great confidence in judges to act with integrity in discharging their judicial duties. See, generally, Ex parte Hall, [Ms. 1180976, Nov. 6, 2020] ___ So. 3d ___ (Ala. 2020). In particular, in cases involving the delicate matter of the custody of children, any delay in disposing of such cases is contrary to the children's best interests, see Durham v. Sisk, 628 So. 2d 873, 875 (Ala. Civ. App. 1993) ("The consequences of delaying the opportunity for

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correction of child custody problems could include preventable damage to a child's well-being, physically, emotionally, or otherwise."), and should be steadfastly avoided in future cases.

PETITION DISMISSED AS MOOT.

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