

REL: October 8, 2021

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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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C.D.

v.

J.B.O. and J.H.O.

Appeal from Shelby Probate Court  
(No. PR-19-942)

EDWARDS, Judge.

In November 2019, J.B.O. and J.H.O. ("the prospective adoptive parents") filed in the Shelby Probate Court ("the probate court") a petition

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seeking to adopt K.C.C. ("the child"). After she was served with the petition, C.D. ("the mother") filed an answer contesting the adoption and stating that she did not consent to the adoption. The probate court set a hearing on the mother's contest for May 21, 2020, but continued that hearing until June 4, 2020. After the hearing, the probate court entered an order on June 12, 2020, concluding that the mother had impliedly consented to the adoption under Ala. Code 1975, § 26-10A-9(a)(3). That order also set the matter for a final dispositional hearing to be held on June 23, 2020.

On June 17, 2020, the mother filed a motion requesting that the probate court reconsider its June 12, 2020, order concluding that the mother had impliedly consented to the adoption ("the implied consent order"). The probate court set a hearing on the mother's motion for the same date and time as the dispositional hearing. However, on the motion of the mother, the June 23, 2020, hearing was reset to July 8, 2020.

On June 26, 2020, the mother filed in the probate court a notice of appeal to the Shelby Circuit Court; that notice of appeal indicated that she was seeking review of the implied-consent order. The Shelby Circuit

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Court transferred the mother's appeal to this court on June 29, 2020; this court docketed the appeal as case number 2190755. This court dismissed that appeal on September 29, 2020, after concluding that the implied-consent order was not a final judgment capable of supporting an appeal. C.D. v. J.B.O. (No. 2190755, Sept. 29, 2020), \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2020) (table). Our certificate of judgment in appeal number 2190755 issued on October 20, 2020.

Before the issuance of this court's certificate of judgment in appeal number 2190755, the probate court entered an order on September 30, 2020, denying the mother's motion to reconsider the implied-consent order and stating that a final dispositional hearing would be set by separate order within seven days. The following day, on October 1, 2020, the probate court entered an order setting the final hearing for 2:00 p.m. on October 1, 2020.<sup>1</sup> Later on October 1, 2020, the probate court purported to enter a final judgment of adoption.

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<sup>1</sup>We note that the October 1, 2020, order setting the hearing for that same date indicates that it was copied solely to the attorney for the prospective adoptive parents.

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On November 17, 2020, the mother filed a motion seeking reconsideration of the October 1, 2020, judgment of adoption. The probate court denied the mother's motion on November 18, 2020. The mother filed a notice of appeal to this court on November 30, 2020; that appeal was assigned case number 2200195.

On January 28, 2021, this court dismissed the mother's appeal from the judgment of adoption. C.D. v. J.B.O. (No. 2200195, Jan. 28, 2021), \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2021) (table). In our order dismissing the appeal, we specifically determined that the judgment of adoption was void, and we cited Raybon v. Hall, 17 So. 3d 673, 675 (Ala. Civ. App. 2009), to provide guidance on the basis for our conclusion. As explained in Raybon, a court lacks jurisdiction to take any action in a case that is the subject of an appeal until this court issues its certificate of judgment. 17 So. 3d at 675; see also Portis v. Alabama State Tenure Comm'n, 863 So. 2d 1125, 1126 (Ala. Civ. App. 2003) (holding that a trial court is without jurisdiction to enter a judgment in a case in which an appeal has been filed until the appellate court issues the certificate of judgment in that case). In fact, in a case that has been the subject of an appeal, a judgment

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or order entered by a lower court before the issuance of an appellate court's certificate of judgment is void. Id.; see also Ex parte Citizens Bank, 879 So. 2d 535, 538 (Ala. 2003). Thus, our dismissal of the mother's appeal was based on the fact that the October 1, 2020, judgment of adoption was void because of the probate court's lack of jurisdiction over the matter until our certificate of judgment issued on October 20, 2020. Our dismissal of the mother's appeal in case number 2200195 was not based in any manner on the subject-matter jurisdiction of the probate court over the adoption action before the mother filed her notice of appeal or after the issuance of our certificate of judgment; that is, our dismissal was grounded solely on the fact that the probate court lacked jurisdiction to issue a judgment of adoption on October 1, 2020, because our certificate of judgment in appeal number 2190755 had not issued. Our dismissal did not declare void any other order of the probate court.

After our certificate of judgment in case number 2200195 issued on February 16, 2021, the mother filed in the probate court a motion to dismiss or, in the alternative, to transfer the adoption action. In her motion, the mother contended that, based on this court's determination

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that the judgment of adoption was void, the implied-consent order was also void. Thus, she argued that the probate court should either dismiss the adoption action or transfer the matter to the Shelby Juvenile Court for it to conduct a termination-of-parental-rights trial. See Ala. Code 1975, § 26-10A-3 ("If any party whose consent is required fails to consent or is unable to consent, the proceeding will be transferred to the court having jurisdiction over juvenile matters for the limited purpose of termination of parental rights.").

The prospective adoptive parents filed a response to the mother's motion. In that response, they contended that the probate court had jurisdiction over the adoption action and that no need for a termination-of-parental-rights trial existed because the probate court had previously determined that the mother had impliedly consented to the adoption. In addition, the prospective adoptive parents contended that the implied-consent order was still effective and that "the time [to] appeal ... the June 12, 2020, [implied-consent] order has passed."<sup>2</sup>

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<sup>2</sup>The prospective adoptive parents are incorrect. We dismissed the appeal in case number 2190755 because the implied-consent order was not

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On March 1, 2021, the probate court entered a lengthy order detailing the procedural history of the adoption action. The probate court correctly construed our January 28, 2021, dismissal order in 2200195 as having dismissed the mother's appeal from the October 1, 2020, judgment of adoption based on the probate court's lack of jurisdiction to enter that judgment because our certificate of judgment had not yet issued in appeal number 2190755. The probate court denied the mother's motion to dismiss or, in the alternative, to transfer. After referencing the fact that it had previously determined that the mother had impliedly consented to the adoption, the probate court stated: "[T]his court expressly directs entry of this judgment as a final judgment pursuant to Ala. R. Civ. P., Rule 54(b), as this court has determined that there is no just reason for delay in the entry of a final judgment."

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a final judgment. See Ex parte W.L.K., 175 So. 3d 652, 656 (Ala. Civ. App. 2015) (explaining that an order resolving an adoption contest but not resolving the entire adoption proceeding was an interlocutory order); see also Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990) (holding that the denial of a motion to set aside consent to an adoption was not a final judgment). Therefore, the mother may challenge the implied-consent order in an appeal from any valid adoption judgment that might be entered in this matter.

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On April 6, 2021, the mother filed in this court a petition for the writ of mandamus directed to the March 1, 2021, order. After review of the materials attached to the petition, this court determined that the petition should be converted to an appeal because the mother was appealing from an order expressly made final pursuant to Rule 54(b). See Ex parte W.H., 941 So. 2d 290, 298 (Ala. Civ. App. 2006) (treating a petition for the writ of mandamus directed to a final judgment as a notice of appeal). The record having been certified and the parties having filed briefs, the appeal is now ripe for consideration.

As the prospective adoptive parents argue, the mother's petition for the writ of mandamus was filed outside the 14-day period for appealing an interlocutory order in an adoption action. See Ex parte K.R., 210 So. 3d 1106, 1111 (Ala. 2016) (concluding "that the presumptively reasonable time for filing a mandamus petition challenging an order in an adoption proceeding is 14 days"); see also C.B.W.N. v. K.P.R., 266 So. 3d 47, 48 (Ala. Civ. App. 2018). The mother submitted a statement of good cause for the delay in filing the petition, which consisted of her allegation that the March 1, 2021, order had not been provided to her by the probate court



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until March 20, 2021. In addition, the mother challenged the probate court's subject-matter jurisdiction over the adoption action in her petition. Ex parte J.B., 223 So. 3d 251, 254 (Ala. Civ. App. 2016) (citing Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016)) ("[I]n situations in which a petition for the writ of mandamus challenges the subject-matter jurisdiction of the court in which the challenged interlocutory order was rendered, the petition need not timely invoke the jurisdiction of the appellate court."). Thus, this court could properly consider the mother's petition for the writ of mandamus.

However, because the probate court certified the March 1, 2021, order as a final judgment pursuant to Rule 54(b), we ordered that the mother's petition for the writ of mandamus be converted to an appeal. The mother was required to appeal the March 1, 2021, order, even if the Rule 54(b) certification was improvidently made. Wallace v. Belleview Props. Corp., 120 So. 3d 485, 494 (Ala. 2012) ("When the trial court enters a Rule 54(b) certification, there is a facially valid order from which the time for filing a notice of appeal starts to run."). Although we are permitted to consider an otherwise presumptively untimely petition for

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the writ of mandamus if we are provided a sufficient statement of good cause, see Rule 21(a)(3), Ala. R. App. P., the timely filing of a notice of appeal is jurisdictional. Wallace, 120 So. 3d at 494. The remedy for the mother's failure to receive notice of the entry of the March 1, 2021, order was to file a motion pursuant to Rule 77(d), Ala. R. Civ. P., to extend the time for taking her appeal. See J.D. v. M.B., 226 So. 3d 706, 709 (Ala. Civ. App. 2016) (discussing the application of Rule 77(d) in an adoption action); see also Mousseau v. Wigley, 227 So. 3d 73, 75-76 (Ala. Civ. App. 2017) (explaining that a party who does not receive notice of the entry of a judgment from the probate court should file a Rule 77(d) motion in that court). She failed to do so, and her appeal was therefore untimely.

We would be remiss, however, if we did not explain that the probate court's Rule 54(b) certification of the March 1, 2021, order is improper. Rule 54(b) may be used to certify as final a judgment against one of multiple parties or a judgment on one of multiple claims. See Scrushy v. Tucker, 955 So. 2d 988, 996 (Ala. 2006) (quoting Stearns v. Consolidated Mgmt., Inc., 747 F.2d 1105, 1108 (7th Cir.1984), citing in turn Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976)) (indicating that the first

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prerequisite for a Rule 54(b) certification is that " 'the action must involve separate claims' "). The mother's motion to dismiss or, in the alternative, to transfer did not assert a claim. In the event that the probate court intended its Rule 54(b) certification in the March 1, 2021, order to certify as final the implied-consent order, we would also conclude that the certification was invalid; the mother's contest to the adoption was also not a separate claim. The only claim at issue in this adoption action is the claim seeking to adopt the child. Until that claim is adjudicated fully, any order of the probate court is an interlocutory order incapable of being made a final judgment. The probate court's Rule 54(b) certification of the March 1, 2021, order denying the mother's motion to dismiss or, in the alternative, to transfer was improper and could not effectively render that order a final judgment.

Because we have treated the mother's petition as a notice of appeal, and because the mother filed the notice of appeal outside the 14-day period for taking an appeal from a judgment entered in an adoption action, we dismiss the appeal.

APPEAL DISMISSED.

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