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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Ex parte Michael Allen Butts

PETITIONS FOR WRIT OF MANDAMUS

(In re: Michael Allen Butts

v.

Tammie J. Butts)

**(Jefferson Circuit Court, DR-11-900059.03, DR-11-900059.04,
DR-11-900059.05, DR-11-900059.06, DR-11-900059.07,
DR-11-900059.08, DR-11-900059.09, DR-11-900059.10,
DR-11-900059.11, and DR-11-900059.12)**

EDWARDS, Judge.

Michael Allen Butts ("the father") and Tammie J. Butts ("the mother") were divorced by a May 2012 judgment entered by the Jefferson

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Circuit Court ("the trial court"), which incorporated an agreement of the parties concerning, among other things, custody of the parties' only child.

The May 2012 judgment awarded the parties joint custody of the child and set out the father's custodial periods, which included the first, third, and fifth weekends of each month from Thursday afternoon until Monday morning, certain holiday and school-break visitations, and two weeklong periods each summer. In 2014, the trial court entered a judgment modifying the father's weekend custodial periods to the first, third, and every other fifth weekend from Friday afternoon to Sunday evening. In that 2014 modification judgment, the trial court recounted issues regarding the child's unwillingness to participate in the father's custodial periods.

The child's unwillingness to see the father apparently continued after 2014. On June 5, 2019, the father filed a verified complaint seeking to hold the mother in contempt for failing to ensure that the child participated in his custodial period over Memorial Day weekend in 2019 and his custodial weekend of May 31, 2019; that action was assigned case

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number DR-11-900059.03 ("the .03 action"). In his complaint, the father averred that the child had told the mother that she did not intend to "visit," that the mother had told the father that "she wanted to 'stay out of this,'" and that the mother had not transported the child to the designated exchange location on either occasion. The father apparently continued to file successive, separate complaints seeking to hold the mother in contempt for failing to require the child to participate in the father's custodial periods over the next several months, each of which was assigned a separate case-number point designation; those complaints, however, are not appended to the father's petition for the writ of mandamus or to the mother's answer.

In March 2021, the father filed a motion in the .03 action in which he sought to require the mother to participate in "Soberlink" testing because, he alleged, she could be driving the child, who, by that time, was 16 years of age and was attending a boarding school in Chattanooga, Tennessee.¹ The father asserted that the mother had been arrested for

¹It appears that "Soberlink" testing is a program under which a participant can be screened regularly for the use of alcohol.

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suspicion of driving under the influence of alcohol in Chattanooga in September 2020 while she was driving to pick up the child from school. The trial court denied the father's motion on May 28, 2021, but prohibited the mother from driving with the child pending further orders of the court.

In response to the father's motion, the mother filed in the trial court on March 11, 2021, a motion seeking to stay the contempt actions pending the resolution of the criminal charge in Tennessee. Her motion cited Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988), and asserted that she was entitled to the stay because she had "an absolute right under the 5th Amendment of the U.S. Constitution not to risk self-incrimination in a civil trial while a criminal matter is pending."² However, the mother's

²The mother's right to a stay is not absolute.

"[T]he Fifth Amendment does not mandate a stay of civil proceedings pending the outcome of criminal proceedings; whether to grant a stay, based on a balancing of the interests of the parties -- i.e., contrasting the interest of a party in postponing the civil proceedings with the possible prejudice to the party who wishes the litigation to go forward -- is within the trial court's discretion." Ex parte Pegram, 646 So. 2d 644, 645-46 (Ala. 1994).

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motion did not address the factors that a trial court must consider when ruling on a motion to stay proceedings that is based upon the assertion of the Fifth Amendment right against self-incrimination.³ The father objected to the motion for a stay, pointing out that the mother had not informed the trial court when the Tennessee criminal case was set for trial and complaining that staying the contempt actions would cause a delay in vindicating his right to exercise his custodial periods with the child. The trial court granted the mother's motion on April 23, 2021, and ultimately entered orders staying all 10 contempt actions.⁴

³The mother's motion was arguably insufficient to support her request for a stay. See Ex parte McDaniel, 291 So. 3d 847, 854 (Ala. 2019) (quoting Ex parte Ebbers, 871 So. 2d 776, 788 (Ala. 2003), quoting in turn Ex parte Hill, 674 So. 2d 530, 533 (Ala. 1996)) (explaining that a motion seeking a stay based on the right against self-incrimination must "clearly demonstrate" that the movant "is the subject of an ongoing and overlapping criminal investigation" and that a stay is "'not properly granted upon speculative or conclusory grounds'"). However, as discussed *infra*, we are not concerned with the propriety of the trial court's orders initially staying the contempt actions because those orders are not the subject of the father's petition for the writ of mandamus.

⁴Based on the materials appended to the petition, the April 23, 2021, order was entered in the actions numbered DR-11-900059 and ending in the following case-number point designations: .03, .04, .05, .06, .07, and .08. In June 2021, the mother filed a motion to stay in the actions

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In a July 2021 order, the trial court instructed the mother to file a status report "regarding the posture of the criminal charge" on July 23, 2021. The mother filed a status report indicating that the mother's criminal case had been continued to August 18, 2021, because of "discovery issues." The status report did not inform the trial court whether the continuance was of a trial or of another proceeding.

On July 28, 2021, the father filed a motion to lift the stay of the contempt actions. In that motion, he complained that the mother's status report contained insufficient information regarding why the criminal action had been continued and lacked information indicating "the next steps" toward a resolution of the mother's criminal charge. He alleged that the mother could repeatedly continue the criminal case, thus preventing him from having a trial on his contempt actions and precluding him from exercising his custodial periods, which, he further alleged,

numbered DR-11-900059 and ending in the following case-number point designations: .09,.10 and .11. A subsequent order entered on July 1, 2021, indicated that the motion to stay had been granted "in all points."

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violated his right to due process. The trial court entered an order denying the father's motion to lift the stay on August 18, 2021.

On August 19, 2021, the father filed a motion seeking reconsideration of the trial court's orders denying his motion to lift the stay. In that motion, the father informed the trial court that the mother's August 18, 2021, appearance in a Tennessee court had resulted in her waiver of a preliminary hearing and the submission of the mother's criminal case to a Tennessee grand jury. The father appended to his motion a certified copy of an August 18, 2021, "judgment" of the Tennessee court indicating that the criminal case had been set for a preliminary hearing on January 7, 2021, March 18, 2021, July 22, 2021, and August 18, 2021; that the mother had, on August 18, 2021, waived a preliminary hearing; and that the case had been bound over to the grand jury. In his motion to lift the stay, the father argued that the fact that the criminal case had been bound over to the grand jury in Tennessee would result in a significant delay in the resolution of the criminal charge against the mother and that, during that delay, the father's right to custodial periods

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with the child would continue to be violated. He alleged that he had exercised only a portion of one custodial period with the child since the mother had incurred the criminal charge; he stated that the abbreviated custodial period, which the father asserted had occurred in November 2020, had been accomplished only because the trial court had ordered it. He complained that he had lost all summer and holiday custodial periods in 2020 and 2021. The trial court denied the father's motion to reconsider the order denying his motion to lift the stay on August 31, 2021, and the father filed a petition for the writ of mandamus on September 24, 2021, within 42 days of the denial of his motion to lift the stay on August 18, 2021.⁵

Before we consider the merits of the father's petition, we must first consider the mother's argument that the father's petition is untimely because it was filed 154 days after the entry of the April 23, 2021, order granting the mother's motion to stay the contempt actions. See Rule

⁵Although the father filed a single petition, this court assigned 10 separate appellate case numbers to correspond to the 10 contempt actions in the trial court.

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21(a)(3), Ala. R. App. P. (Providing that the presumptively reasonable time for filing a petition for the writ of mandamus is the time for taking an appeal of a final judgment); Rule 4(a)(1), Ala. R. App. P., (providing that, generally, the time for taking an appeal from a final judgment is within 42 days of the entry of the judgment). If the father was seeking review of the original order issuing the stay, we would agree that the mandamus petition was untimely filed. However, after the mother's Tennessee criminal case failed to be resolved in July 2021, the father sought to have the stay lifted because of the prejudice that he contended would result from the additional delay of the trial of his contempt actions. Our supreme court has clearly indicated that a trial court may entertain a motion seeking to lift a stay based on changes in the circumstances that impact the propriety of the stay. See, e.g., Ex parte Rawls, 953 So. 2d 374 (Ala. 2006); see also Ex parte Decatur City Bd. of Educ., 265 So. 3d 1254 (Ala. 2018) (reviewing on petition for the writ of mandamus a circuit court's denial of a request to dissolve an injunction of the circuit court that had stayed an employment-termination proceeding before the Decatur

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City Board of Education based on the employee's Fifth Amendment right against self-incrimination). The father might have decided not to seek review of the initial orders staying the contempt actions for a myriad of reasons, but the failure to resolve the mother's pending criminal case is a change in the circumstances of the parties that might impact the propriety of the stay going forward. Accordingly, we reject the mother's contention that the father's petition for the writ of mandamus is untimely.

"A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is "appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001).'

"Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005). 'Mandamus will be granted only where an abuse of discretion is shown.' Ex parte McMahan, 507 So. 2d 492, 493 (Ala. 1987)."

Ex parte Rawls, 953 So. 2d at 377.

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In his petition, the father argues that the stay of the contempt actions should be lifted. He first contends that the criminal case is not parallel to the contempt actions. He further posits that the prejudice to him resulting from the delay caused by the stay outweighs any possible prejudice to the mother that might result from requiring the contempt actions to proceed.

Although we are not concerned with the propriety of the initial orders staying the contempt actions, see note 3, supra, we utilize the same framework for reviewing the denial of the father's motion to lift the stay as we would if we were reviewing the propriety of the initial stay orders. Ex parte Decatur City Bd. of Educ., 265 So. 3d at 1258. Our supreme court has outlined the following factors that a trial court must consider when ruling on a motion to stay civil proceedings based on an invocation of a party's constitutional right against self-incrimination:

" (1) whether the civil proceeding and the criminal proceeding are parallel, see Ex parte Weems, 711 So. 2d 1011, 1013 (Ala. 1998); (2) whether the moving party's Fifth Amendment protection against self-incrimination will be threatened if the civil proceeding is not stayed, see Ex parte

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Windom, 763 So. 2d 946, 950 (Ala. 2000); and (3) whether the requirements of the balancing test set out in Ex parte Baugh, 530 So. 2d [238,] 244 [(Ala. 1988)], and Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), are met.'

"Ex parte Rawls, 953 So. 2d 374, 378 (Ala. 2006). 'A court has the discretion to stay civil proceedings, to postpone civil discovery, or to impose protective orders and conditions in the face of parallel criminal proceedings against one of the parties when the interests of justice seem to require.' Ex parte Ebbers, 871 So. 2d at 787-88 (thoroughly discussing the right against self-incrimination in civil cases); see also G. Ray Kolb, Jr., and William L. Pfeifer, Jr., Assertion of the Fifth Amendment Privilege Against Self-Incrimination in Civil Proceedings, 67 Ala. Law. 40 (2006) (summarizing Alabama caselaw)."

Ex parte Butts, 183 So. 3d 931, 934 (Ala. 2015).

In her answer to the father's petition, the mother alleges that the father has obtained and filed copies of documents from the Tennessee criminal case, that the father has propounded discovery requests seeking information about the facts and circumstances surrounding the criminal charge, and that he has hired an attorney to monitor the status of the criminal case.⁶ The mother has also asserted, without contradiction by the

⁶We note that the mother failed to append any supporting materials to her answer to the father's petition. However, although we permitted the

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father, that the father has amended his the complaints in contempt actions to include claims seeking a modification of custody.⁷ She contends that those actions, and the father's refusal to "leave any evidence or questioning about the criminal case out of this case" despite being requested to do so by the trial court on two occasions, render the contempt actions and the Tennessee criminal case parallel.

father to file a reply to the mother's answer, he did not dispute the mother's factual allegation that he has propounded discovery aimed at discovering the facts and circumstances relating to the mother's criminal charge. Because we are required to accept as true factual statements in an answer to a petition for the writ of mandamus to the extent that the petitioner has not controverted those factual assertions, we accept as fact that the father has propounded such discovery upon the mother. Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1227 (Ala. 2009) (quoting King v. Smith, 288 Ala. 215, 219, 259 So. 2d 244, 248 (1972), quoting in turn Ex parte Adams, 216 Ala. 353, 355, 113 So. 513, 515 (1927))(" "In passing upon the petition for mandamus, the return or answer of respondent, unless controverted, is to be taken as true." ")).

⁷Neither party has provided any pleading indicating that the father is seeking to modify custody based on the mother's Tennessee criminal charge. However, as we indicated in note 6, supra, we permitted the father to file a reply to the mother's answer, and he has not denied her allegations. We therefore accept as true her factual assertion that the father has amended the complaints in his contempt actions to seek a modification of custody. Ex parte Guaranty Pest Control, 21 So. 3d at 1227.

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Insofar as the father seeks to have the mother held in contempt for her failure to ensure that the child participated in the father's custodial periods, we agree with the father; that is, we are unable to determine how the mother's criminal charge has any connection to her allegedly contemptuous conduct, some of which clearly predated the September 2020 criminal charge, or how any facts relating to the criminal charge would have any bearing on the resolution of the contempt claims before the trial court, see Ex parte Weems, 711 So. 2d 1011 (Ala. 1998). The allegations relating to the mother's failure to secure the child's participation in the father's custodial periods "can be proven without a determination of whether" the mother is guilty of the criminal charge. Ex parte T.K., 255 So. 3d 783, 789 (Ala. Civ. App. 2017). The facts and circumstances relating to the contempt claims and the facts and circumstances giving rise to the criminal charge simply do not overlap. See Ex parte T.K., 255 So. 3d at 790.

Having determined that the criminal case and the contempt actions, insofar as they involve the father's claims that the mother is in contempt,

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are not parallel, the second of the issues for consideration set out in Ex parte Rawls, 953 So. 2d at 378 -- whether the mother's "protection against self-incrimination will be threatened" if the contempt actions proceed -- is, as our supreme court has explained, "essentially answered by our answer to the parallel-proceeding question." Ex parte Butts, 183 So. 3d at 936. The fact that the relevant inquiries involved in the contempt claims and the criminal case differ results in a conclusion that the mother's right against self-incrimination will not be threatened by the continuation of the contempt actions with respect to resolving the contempt claims. Furthermore, our decision on the first two issues set out in Ex parte Rawls "obviates the need to discuss" the father's second argument relating to the balancing of the factors to determine whether continuing the stay would prejudice the father and whether that prejudice would outweigh any prejudice to the mother's Fifth Amendment rights if the stay was lifted as to the contempt claims. Id.

Thus, at least insofar as the father's contempt actions concern the issue whether the mother has contemptuously denied him his right to his

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custodial periods, the trial court should have lifted the stay. The father's contempt actions should proceed, but the trial court should permit inquiry into solely whether the mother is in contempt. As our supreme court observed in Ex parte Rawls, in certain circumstances a stay of only a portion of an action may be necessary to protect the right against self-incrimination. 953 So. 2d at 386-87 (explaining that, although the husband was entitled to a stay of the property-division portion of divorce proceedings because of parallel criminal proceedings arising from his alleged stalking of the wife, the trial court could hear testimony regarding the ground for divorce, which was asserted in the complaint to be incompatibility, and could divorce the parties, while reserving judgment on other issues pending resolution of the criminal proceedings). In light of the father's right to exercise his custodial periods with the child, we consider this case to be one of those situations.

However, because the father's contempt actions also involve claims seeking the modification of custody, see note 7, supra, we cannot agree with the father that the criminal case and the contempt actions, insofar

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as they include claims seeking the modification of custody, are not parallel. The character and conduct of a parent is a consideration for a trial court that is contemplating a decision regarding child custody, and the father could, in fact, seek to impugn the mother's character based on the circumstances surrounding her arrest on the criminal charge. See Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981) (listing among the factors a trial court should consider in making a custody determination: "the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; [and] the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children"); Davis v. Davis, 317 So. 3d 47, 60 (Ala. Civ. App. 2020) (quoting Pratt v. Pratt, 56 So. 3d 638, 641 (Ala. Civ. App. 2010)) (stating that "the character of the parents and other moral considerations are relevant to decisions regarding custody and the welfare of the children at issue" and observing that a parent's custodial " 'rights may be restricted in order to protect children from conduct, conditions, or circumstances surrounding

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their noncustodial parent that endanger the children's health, safety, or well-being' "); and Filligim v. Filligim, 388 So. 2d 1010, 1011 (Ala. Civ. App. 1980) (indicating that each custody case "must stand upon its own peculiar facts and the personalities involved"). Thus, to the extent that the father is seeking a modification of custody, the criminal case and the contempt actions are sufficiently parallel to support the conclusion that a stay might be warranted. See, e.g., Ex parte Flynn, 991 So. 2d 1247, 1253-53 (Ala. 2008) (determining that a criminal charge arising out of an allegation that Shana M. Flynn had solicited the murder of Michael Patrick Flynn was parallel to a custody-modification proceeding between the Flynns in which the alleged change of circumstances included Shana's being charged with soliciting murder). The mother's right against self-incrimination could be threatened if she was questioned about her conduct and the circumstances surrounding her arrest on the criminal charge in an attempt to establish her character and the reasons she might be unsuited to have custody of the child. Thus, because the contempt actions also include the issue of custody modification, we must proceed to a

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balancing of the factors set out in Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), which were succinctly summarized in Ex parte Rawls.

The factors our supreme court has required trial courts to consider when balancing "[the movant's] interest in postponing the civil actions against the prejudice that might result to the [nonmovant] because of the delay," Ex parte White, 551 So. 2d 923, 925 (Ala. 1989), include:

" '1. The interest of the [nonmovant] in proceeding expeditiously with the civil litigation, or any particular aspect of it, and the potential prejudice to the [nonmovant] of a delay in the progress of that litigation.

" '2. The private interest of the [movant] and the burden that any particular aspect of the proceedings may impose on the [movant].

" '3. The extent to which the [movant's] Fifth Amendment rights are implicated/the extent to which the issues in the criminal case overlap those in the civil case.

" '4. The convenience of the court in the management of its cases, and the efficient use of judicial resources.

" '5. The interest of persons not parties to the civil litigation.

" '6. The interest of the public in the pending civil and criminal litigation.

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" '7. The status of the criminal case, including whether the party moving for the stay has been indicted

" '8. The timing of the motion to stay.' "

Ex parte Rawls, 953 So. 2d at 385 (quoting Ex parte Ebbers, 871 So. 2d at 789-90).

The father relies on the prejudice to his custodial rights resulting from the ever-lengthening delay in holding the trial to resolve his contempt claims. The mother contends that a six-month stay of the contempt actions is not significant in light of the fact that the initial contempt action, the .03 action, has been pending since June 2019. Her stated fear is that the father or his Alabama attorney will share information gleaned in discovery in the custody-modification aspect of the contempt actions with the criminal prosecutor in Tennessee.

The stated concern of the mother is quite similar to the issues specifically identified by our supreme court in Ex parte Ebbers:

"A civil party's Fifth Amendment right against self-incrimination cannot be adequately protected by requiring him simply to assert his right to remain silent when asked specific questions during a civil deposition; such an approach construes the Fifth Amendment too narrowly. The dangers in such an approach have been identified as including the possibility of a criminal investigator's being 'planted' at the

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deposition, the revealing by the deponent of his weak points by his selection of which questions he refuses to answer, and the opportunity presented to a prosecutor of deriving, by a point-by-point review of the civil case, a 'link in the chain of evidence' that would unconstitutionally contribute to the defendant's conviction in the criminal case."

871 So. 2d at 788.

The mother's right against self-incrimination will likely be impacted by discovery requests related to, and a trial on, the custody-modification issues presented in the contempt actions.⁸ The father does not specifically

⁸We note that the mother has alleged that, despite being requested to do so, the father has declined the trial court's invitation to limit his discovery requests and the presentation of evidence to avoid any issue regarding the mother's potential self-incrimination in the determination of the contempt actions. Had he done so, perhaps the trial court would have considered lifting the stay of the contempt actions, at least insofar as they relate to the mother's alleged contemptuous behavior. See Ex parte Oliver, 864 So. 2d 1064, 1067 (Ala. 2003) (denying a petition for the writ of mandamus seeking an order directing a trial court to stay civil proceedings pending the resolution of a criminal investigation because the respondents "had modified their discovery requests to protect [the petitioner's] privilege against self-incrimination"). In any event, the father's acquiescence is not necessary. The trial court has the authority, on motion of a party, to enter a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" and may order one or more of the following:

"(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions; ... (4) that

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argue that he would be unduly prejudiced by a delay of the decision on the custody-modification claims. We have already determined that the contempt claims presented in the father's contempt actions are not parallel to the mother's criminal case and that, therefore, the stay relating to those claims should be lifted. In situations in which the actions are parallel and a threat to a party's right against self-incrimination exists, "we must favor the constitutional privilege against self-incrimination over the interest in avoiding the delay of a civil proceeding." Ex parte Williams, 775 So. 2d 146, 148 (Ala. 2000) (quoting Ex parte Coastal Training Inst., 583 So. 2d 979, 981 (Ala. 1991)). We conclude that the father has not successfully demonstrated that the balancing of the factors set out in Ex parte Ebbers requires a conclusion that the prejudice to the father's interest in resolving the custody-modification claims outweighs

certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; [and] (6) that a deposition after being sealed be opened only by order of the court"

Rule 26(c), Ala. R. Civ. P.

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the potential prejudice to the mother's Fifth Amendment right against self-incrimination such that the stay, insofar as it pertains to the custody-modification claims, should be lifted.

Insofar as the father requests in his petition that we direct the trial court to order the mother "to cause the minor child to be with [the father] for his court-ordered custodial time while the case is pending or suffer the consequences," we decline to do so. The father's petition is directed to the denial of his motion to lift the stay of his contempt actions. The materials before us do not include any pendente lite requests for the exercise of the father's custodial periods or orders denying such requests. The writ of mandamus is intended to direct a trial court to exercise its discretion when it is required to do so and has refused; the writ of mandamus does not lie to compel the exercise of that discretion in a particular way. See Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001) (quoting State v. Cannon, 369 So. 2d 32, 33 (Ala. 1979)) (explaining that "'[m]andamus is an extraordinary remedy and will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner except where there is an abuse of discretion'").

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In conclusion, we grant the father's petition in part. The trial court is directed to lift the stay and to allow the father's contempt actions, insofar as they relate to his claims that the mother is in contempt of the 2012 divorce judgment, as amended by the 2014 modification judgment, to proceed. The trial court may permit discovery and testimony relevant to only the claims that the mother is in contempt and may not hear any evidence relating to the mother's criminal charge. See Ex parte Rawls, 953 So. 2d at 387. Insofar as the father is pursuing claims seeking a modification of custody, the stay is to remain in effect regarding those claims.

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2201034, 2201035, and 2201036 -- PETITION GRANTED IN PART AND
DENIED IN PART; WRIT ISSUED.

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

Fridy, J., recuses himself.