

REL: March 1, 2024

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0814

Ex parte Amanda Gentry Fanning

PETITION FOR WRIT OF MANDAMUS

(In re: George Lee Fanning

v.

Amanda Gentry Fanning)

(Chilton Circuit Court, DR-22-900110.01)

MOORE, Presiding Judge.

Amanda Gentry Fanning ("the mother") petitions this court for a writ of mandamus directing the Chilton Circuit Court ("the trial court") to vacate the pendente lite orders that it entered on October 5, 2023, and

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November 5, 2023, in response to a custody petition and a motion for child support filed by George Lee Fanning ("the father"). We grant the mother's petition in part and deny it in part.

Background

On October 5, 2022, the trial court entered a judgment divorcing the parties; that judgment did not adjudicate the custody of the parties' minor child, A.F. ("the child"). On September 27, 2023, the father filed a petition seeking sole custody of the child because, he alleged, the safety and well-being of the child was being endangered by the mother's new live-in boyfriend who had an extensive criminal history. The trial court entered an ex parte order on the same date the petition was filed awarding the father pendente lite custody of the child, but scheduling a hearing for October 5, 2023, to further consider the matter. Just before that hearing commenced, the mother filed a motion to vacate the ex parte pendente lite order on the ground that it was not supported by any evidence. The trial court heard that motion, received exhibits from both parties relating to the criminal history of the mother's boyfriend and his current attempts at rehabilitation, and heard oral arguments from counsel regarding the pendente lite custody of the child.

After the hearing concluded, the trial court entered an order denying the mother's motion to vacate the ex parte pendente lite order. Additionally, the trial court entered a separate order on that same date ("the pendente lite custody order"), which states, in its entirety:

"Case called this date on hearing for the September 27, 2023, ex parte pendente [lite] custody order. [The mother was] not served, but service is waived by counsel present this date. [The father was] present with his counsel.

"[The father] presenting the criminal record from the [Administrative Office of Courts'] system and counsel states that there are pending other charges in Georgia as stated to counsel by Clerk of Court in Georgia. [The mother] acknowledges knowing of old cases and knowledge of newer pending cases.

"[The mother] presenting letters indicating her boyfriend having a job at a rehab in Birmingham and states that he has been at her residence overnight.

"ORDER, Pendente Lite.

"Ex parte order remains in effect as to temporary custody of [A.F.].

"[The m]other to have visitation, alternate Saturdays, supervised through The Haven, at her expense.

"[The m]other is to [e]nsure that [the] child has no contact with [her boyfriend].

"[The m]other is to hold onto and protect the firearms given to [A.F.].

"[The m]other is to gather and make available, upon notice by the father to collect the child's clothing and personal effects of the[] child."

On November 1, 2023, the father filed a motion requesting an award of "pendente lite child support." He asserted that, to his "best knowledge," the mother was employed by Heart South Cardiovascular earning \$22.50 per hour, that he earns \$3,440 per month in gross income via his employment with the City of Rockford, that the mother could pay child support, and that, pursuant to Rule 32, Ala. R. Jud. Admin., the mother should be paying \$574 in monthly child support. The mother asserts in her mandamus petition that the father attached to his motion his Form CS-41 Child-Support-Obligation Income Statement/Affidavit but that he did not attach any other forms as required by Rule 32. See Ex parte Dozier, 170 So. 3d 673, 675 n.1 (Ala. Civ. App. 2014) (accepting as true factual assertions in a petition for a writ of mandamus when those assertions were not refuted in the answer to the petition). On November 5, 2023, the trial court entered an order granting the father's motion ("the pendente lite child-support order"), setting the mother's monthly pendente lite child-support obligation at "\$574.00 based on the

allegations in the motion for child support." The mother filed her petition for the writ of mandamus with this court on November 16, 2023.

Standard of Review

"Mandamus is an extraordinary remedy. An appellate court will grant a petition for a writ of mandamus 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) (citing Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997)). Review by mandamus is not appropriate where the petitioner has another adequate remedy, such as an appeal. Ex parte Jackson, 780 So. 2d 681 (Ala. 2000); Ex parte Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000); Ex parte Walters, 646 So. 2d 154 (Ala. Civ. App. 1994)."

Ex parte Amerigas, 855 So. 2d 544, 546-47 (Ala. Civ. App. 2003).

Analysis

When the safety and well-being of a child requires protection, a court may summarily remove a child from the custody of one parent and award the custody of the child to another parent so long as the court affords the adversely affected parent due process in adequate subsequent proceedings to assert his or her rights to the child. See Ex parte Williams, 474 So. 2d 707, 710 (Ala. 1985); Ex parte White, 245 Ala. 212, 215, 16 So. 2d 500, 503 (1944); Thorne v. Thorne, 344 So. 2d 165 (Ala.

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Civ. App. 1977). In this case, the trial court summarily awarded the father pendente lite custody of the child on September 27, 2023, without notice to the mother and without otherwise giving her an opportunity to be heard. The trial court apparently scheduled the October 5, 2023, hearing to provide the mother an adequate proceeding to assert her rights to the child.

The mother does not assert that she was deprived of notice or an opportunity to be heard at the October 5, 2023, hearing. She maintains, however, that the trial court violated her due-process rights by failing to require the father to present evidence to support the pendente lite custody order. In Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005), this court held that, in a hearing following the entry of an ex parte pendente lite custody order, "due process require[s] that ... the [party petitioning for pendente lite custody] introduce evidence establishing that an award of pendente lite custody to him [or her] was in the best interest of the child." Under Ex parte Russell, the unsworn statements of the parties and arguments of counsel will not suffice to support a pendente lite custody award. See id.

According to the pendente lite custody order, during the October 5, 2023, hearing, the mother did not dispute the allegations in the father's custody petition indicating that her boyfriend had an extensive criminal history and that he had stayed overnight in the residence she shared with the child. The father submitted an exhibit detailing the nature of the multiple crimes for which the mother's boyfriend had been convicted. The mother was allowed to counter that evidence by submitting evidence tending to show that her boyfriend was rehabilitating himself after a period of incarceration. From that competing evidence, the trial court could have reasonably concluded that it was in the best interests of the child to award the father pendente lite custody until the evidence could be more fully developed at a final hearing on the father's custody petition. The father could have presented more evidence to support his claim for pendente lite custody of the child, but his failure to do so did not violate the due-process rights of the mother. Therefore, we deny the mother's mandamus petition insofar as it seeks an order from this court requiring the trial court to vacate the pendente lite custody order.

The mother also asserts that the pendente lite child-support order is due to be vacated because of a lack of supporting evidence. Rule 32,

Ala. R. Jud. Admin., controls the procedure for awarding child support, including pendente lite child support. See Rule 32(A). Rule 32(E) requires that Forms CS-41, CS-42 (or, in cases involving "shared 50% physical custody," CS-42-S), and CS-43 be filed in every child-support case to ascertain the monthly gross income of the parties through their sworn affidavits, to calculate the presumptive amount of child-support due, and to otherwise assure compliance with the Rule 32 child-support guidelines. If those forms are omitted from the record, the trial court must receive sufficient evidence to sustain its calculation of the child-support award. See generally Dismukes v. Dorsey, 686 So. 2d 298, 301 (Ala. Civ. App. 1996) (recognizing that, in the absence of the required forms, a child-support award may be affirmed when the record "clearly indicat[es] that the award comports with the evidence regarding the parties' incomes").

In this case, the trial court received a Form CS-41 from the father and setting forth his gross monthly income, but the father presented no other forms. The trial court did not receive any evidence regarding the mother's income; the unsworn statement in the father's motion that the mother earned \$22.50 per hour was not evidence, see Ex parte Russell,

supra, and that statement alone was insufficient to ascertain the mother's monthly gross income as required to complete a Form CS-41 and a Form CS-42. The trial court also did not receive any evidence regarding how the father calculated the presumptive amount of child support due, which would have been revealed by submission of a Form CS-42, and the trial court had no evidence before it to assure that the father had complied with the child-support guidelines in calculating the child-support award. Ultimately, the trial court relied exclusively on the information set forth in the father's motion to enter an order obligating the mother to pay him pendente lite child support.

The trial court had an imperative duty to ascertain the proper amount of child support to be paid based on evidence and not merely the assertions of a party or counsel in a motion. The trial court refused to perform its duty by entering an order awarding child support without the necessary supporting evidence. The mother has demonstrated that she is entitled to a writ of mandamus compelling the trial court to vacate the pendente lite child-support order.

In reaching our decision, we reject the father's contention that the petition for the writ of mandamus directed toward the pendente lite child-

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support order should be dismissed as moot. On January 15, 2024, the father filed a motion in the trial court requesting an evidentiary hearing on his motion for pendente lite child support. However, the materials before us do not indicate that that motion has been granted, and, in any event, the mere holding of an evidentiary hearing will not necessarily relieve the mother of her obligation under the pendente lite child-support order. We therefore conclude that the father's request for an evidentiary hearing does not resolve the controversy between the parties or alter the existing facts supporting the issuance of a writ of mandamus. See Ex parte Taylor, 335 So. 3d 1159, 1161 (Ala. Civ. App. 2021)("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.").

Conclusion

We deny the mother's petition for the writ of mandamus regarding the pendente lite custody order. We grant the petition for the writ of mandamus regarding the pendente lite child-support order. The trial court is directed to vacate that order and to take such other actions as

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are consistent with this opinion in awarding any pendente lite child support in the future in this case.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Edwards, Hanson, and Fridy, JJ., concur.