REL: October 4, 2019

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180831

Ex parte Yaditxza Vega-Lopez

PETITION FOR WRIT OF MANDAMUS

(In re: Terry Potts

v.

Yaditxza Vega-Lopez)

(DeKalb Circuit Court, CV-19-900182)

DONALDSON, Judge.

Yaditxza Vega-Lopez ("the mother") petitions this court for a writ of mandamus directing the DeKalb Circuit Court

("the trial court") to dismiss the underlying action initiated by Terry Potts for lack of personal jurisdiction, subject-matter jurisdiction, and temporary emergency jurisdiction. Because the materials presented establish that the trial court lacks personal jurisdiction and temporary emergency jurisdiction, we grant the petition and issue the writ.

The materials submitted by the parties indicate the following. On June 10, 2019, Potts filed a verified complaint in the trial court against the mother seeking temporary and permanent custody of R.I.P. ("the child"). In the complaint, Potts alleged, in relevant part:

> "1. [Potts] is over 19 years of age and a resident of DeKalb County, Alabama, having been a bona fide resident of DeKalb County, Alabama for more than six months preceding the filing of this petition.
>
> "2. [The mother] is over 19 years of age and a resident of the state of Georgia, having been a bona fide resident of the state of Georgia for more than six months preceding the filing of this petition.
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> "3. [Potts] is the natural father of [the child]. [The child] resides [sic] in DeKalb County, Alabama since February, 2019. [The child] has resided in Alabama for more than 4 months of the last 6 months and Alabama is considered her 'home state' for custody determination.
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> "4. [The mother] is the natural mother of [the child].

> "5. The parties were never married and no previous court orders have been entered.
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> "6. [Potts] is a fit and proper person to have the full care, custody, and control of the minor child. [Potts] is ready, willing, and able to take custody of the minor child and provide for the daily financial and emotional needs of the minor child.
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> "The mother was fired from 4 out of the last 5 jobs she undertook and quit 2; her boyfriend is a felon who abuses drugs and alcohol daily; was part of an international federal drug case in Brooklyn involving many of her family; her residence is unknown but, in any event, does not have a working washer and dryer; sought pain pills and smokes marijuana; neglects [her] children and especially the child of this action; she skips and forgets to give the children their prescribed medications; has caused [another one of her children] to have a very high number of unexcused absences and tardiness; punches [another one of her children] in the face and chest causing [that child] to cry; and is otherwise unfit to have the care, custody and control of [the child].
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> "8. [Potts] fears for the safety of [the child if] he is not awarded temporary custody."

On June 12, 2019, the trial court entered an order granting "temporary custody" of the child to Potts. On June 24, 2019, an attorney for the mother entered a limited appearance for the sole purpose of contesting the trial court's jurisdiction in the action. On that date, the mother filed a motion to dismiss, arguing that the trial court lacked personal jurisdiction over her because the only contact she

had with Alabama was that the child occasionally visited with Potts in the state. The mother also argued that the trial court lacked subject-matter jurisdiction and temporary emergency jurisdiction. In the motion, the mother asserted, among other things, that she was a resident of Georgia, that she had never resided in Alabama, that the child was born in Georgia, that the child attended day care in Georgia, and that the child had never had any contacts with Alabama until Potts had moved to the state approximately six months earlier. The mother did not contest that Potts was the natural father of the child but noted that the child's paternity had not been previously adjudicated. The mother denied any allegations that she is unfit to exercise custody of the child, that she has a boyfriend, that she was involved in a criminal case in New York, that her residence is unknown to Potts, that she sought pain pills or smoked marijuana, that she neglected or abused her children, including the child in this case, or that the child faced any danger while in her custody. The mother asserted that there was no emergency basis that would permit the trial court to exercise temporary emergency jurisdiction. The mother also asserted that a custody action had been

initiated in Georgia regarding the child. On June 26, 2019, the mother filed an amendment to the motion to dismiss by adding her sworn verification of the factual assertions.

On June 26, 2019, the trial court conducted a hearing on the mother's motion to dismiss. At the hearing, the mother's attorney argued that the trial court lacked personal jurisdiction over the mother, subject-matter jurisdiction over the action, and temporary emergency jurisdiction. Specifically, the mother's attorney argued that the allegations in the father's complaint were insufficient to establish that an emergency situation had invoked the trial court's temporary emergency jurisdiction. She also informed the trial court that a custody proceeding had been instituted in Georgia and that, if the court was assuming temporary emergency jurisdiction, the court was required to communicate with the Georgia court and set a duration for the order granting Potts "temporary" custody.

The only oral testimony presented to the trial court was from Potts. According to his testimony, Potts began residing in Alabama with the child within the first week of December 2018; he moved from Georgia to Alabama when he began dating

his fiancée; the child has primarily stayed with him since the move to Alabama; and he filed the complaint at least six months after the move. Potts testified that, after he filed the complaint, he allowed the child to stay with the mother in Georgia on June 12 and 13, 2019, "[b]ecause [the mother] has threatened me before with kidnapping." Potts later testified that he had allowed the child to stay with the mother during that time on the advice of his attorney and that the advice was given because no order had been entered yet and the mother had threatened him with an allegation of kidnapping. Potts further testified that the mother lives in Georgia, that he works in a restaurant in Georgia, and that their exchanges of the child occurred in Georgia. Potts presented no testimony tending to show that the child had been abandoned or that the child was subject to being abused or neglected.

On July 3, 2019, the trial court entered an order denying the mother's motion to dismiss. In the order, the trial court found that the father and the child had resided in Alabama for six consecutive months before the filing of the complaint and that, "[a]ccordingly, [the trial court] has jurisdiction over

this custody proceeding pursuant to Ala. Code [1975,] § 30-3B-201."

On July 22, 2019, the mother filed the present petition for a writ of mandamus. This court has jurisdiction to review the mother's mandamus petition pursuant to § 12-3-10, Ala. Code 1975, and § 12-3-11, Ala. Code 1975. In her petition, the mother contends that the trial court lacked personal jurisdiction over her and subject-matter jurisdiction or temporary emergency jurisdiction in the action. Potts filed a response that addresses only the issue of the trial court' subject-matter jurisdiction to make an initial custody determination.

A petition for a writ of mandamus is an appropriate means to review the denial of the mother's motion to dismiss. See Ex Parte AutoSource Motors, LLC, 156 So. 3d 397, 402 (Ala. 2014) (mandamus review of denial of motion to dismiss for lack of personal jurisdiction); Ex parte Builders & Contractors Ass'n of Mississippi Self-Insurer's Fund, 980 So. 2d 1003, 1006 (Ala. Civ. App. 2007) (mandamus review of denial of motion to dismiss for lack of subject-matter jurisdiction). We apply the following standard of review to the mother's petition:

> "'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner 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) properly invoked jurisdiction of the court.'"

Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

The mother first argues that neither the pleadings nor the evidence presented at the hearing established the trial court's personal jurisdiction over her. Alabama's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified at § 30-3B-101 et seq., Ala. Code 1975, governs child-custody disputes involving more than one jurisdiction. Although a trial court must have subject-matter jurisdiction pursuant to § 30-3B-201, Ala. Code 1975, in order to make an initial child-custody determination, Alabama also requires that the trial court have personal jurisdiction over the affected parties. See, e.g., Ex parte Dean, 447 So. 2d 733, 735 (Ala. 1984); Lovell v. Costigan, 185 So. 3d 1130, 1134 (Ala. Civ. App. 2015) (holding judgment void for lack of personal jurisdiction). In Ex parte Diefenbach, 64 So. 3d 1091

(Ala. Civ. App. 2010), we observed that, although the Official Comment to § 30-3B-201 states that "[p]ersonal jurisdiction over ... a parent ... is neither necessary nor required," Alabama did not adopt the language from the Model Uniform Child Custody Jurisdiction and Enforcement Act ("the Model Act") that supports that commentary of the Model Act. We stated:

> "Subsection (c) of § 201 of the Model Act provides that '[p]hysical presence of, <u>or personal jurisdiction over, a party or</u> a child is not necessary or sufficient to make a child-custody determination.' (Emphasis added.) In enacting the UCCJEA, the Alabama Legislature modified subsection (c) of § 201 of the Model Act; the Alabama version of that subsection provides that '[p]hysical presence of a child is not necessary or sufficient to make a child custody determination.' § 30-3B-201(c). Thus, Alabama's version of the UCCJEA omits the reference to personal jurisdiction contained in § 201(c) of the Model Act."

<u>Id.</u> at 1096. This court explained that, even if a trial court has subject-matter jurisdiction pursuant to § 30-3B-201, "our legislature intended that Alabama require in personam jurisdiction over the parties to an action filed pursuant to Alabama's version of the UCCJEA." <u>Id.</u> The legislature has not amended § 30-3B-201 since we made that observation. Therefore, we must address the mother's contention that her motion to

dismiss should have been granted based on a lack of personal jurisdiction over her.

> "'An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction.' Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002). However, 'an appellate court must give deferential consideration to any findings of fact made by a trial court based on evidence received ore tenus in connection with a determination as to the nature and extent of a foreign defendant's contacts with the forum state.' Ex parte American Timber & Steel Co., 102 So. 3d 347, 353 n. 7 (Ala. 2011)."

Ex Parte AutoSource Motors, LLC, 156 So. 3d 397, 402-03 (Ala. 2014). Regarding a motion to dismiss on the basis of a lack of personal jurisdiction, our supreme court has stated that

> "'"[t]he plaintiff bears the burden of proving the court's personal jurisdiction over the defendant." Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002).'
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> "Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003).
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> > "'"In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996), and Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829 (11th Cir. 1990), and 'where the plaintiff's complaint and the defendant's

> affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff.' Robinson, 74 F.3d at 255 (quoting Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990))."'

> "Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, 'the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.' Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002)(citing Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000)). See also Hansen v. Neumueller GmbH, 163 F.R.D. 471, 474-75 (D. Del. 1995)('When a defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.') (citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984))."

Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004)(footnote omitted). Moreover, "'"when the complaint fails to allege any jurisdictional basis, 'there is nothing in the complaint ... that the court must consider as true and that therefore places [any] burden on [the defendant] to controvert by affidavit.'"'" Ex parte J.B., 223 So. 3d 251, 259 (Ala. Civ. App. 2016) (quoting Ex parte W.C.R., 98 So. 3d

1144, 1148 (Ala. Civ. App. 2012), quoting in turn Ex parte McNeese Title, LLC, 82 So. 3d 670, 674 (Ala. 2011), quoting in turn Ex parte Excelsior Fin., Inc., 42 So. 3d 96, 104 (Ala. 2010)).

> "The extent of an Alabama court's personal jurisdiction over a person or corporation is governed by Rule 4.2, Ala. R. Civ. P., Alabama's 'long-arm rule,' bounded by the limits of due process under the federal and state constitutions. Sieber v. Campbell, 810 So. 2d 641 (Ala. 2001). Rule 4.2(b), as amended in 2004, states:
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> > "'(b) Basis for Out-of-State Service. An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States ....'
>
> "In accordance with the plain language of Rule 4.2, both before and after the 2004 amendment, Alabama's long-arm rule consistently has been interpreted by this Court to extend the jurisdiction of Alabama courts to the permissible limits of due process. Duke v. Young, 496 So. 2d 37 (Ala. 1986); DeSotacho, Inc. v. Valnit Indus., Inc., 350 So. 2d 447 (Ala. 1977). ...
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> "This Court discussed the extent of the personal jurisdiction of Alabama courts in Elliott v. Van Kleef, 830 So. 2d 726, 730 (Ala. 2002):
>
> > "'...

> "'The Due Process Clause of the Fourteenth Amendment permits a forum state to subject a nonresident defendant to its courts only when that defendant has sufficient "minimum contacts" with the forum state. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The critical question with regard to the nonresident defendant's contacts is whether the contacts are such that the nonresident defendant "'should reasonably anticipate being haled into court'" in the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).'"

Ex parte DBI, Inc., 23 So. 3d 635, 643-44 (Ala. 2009).[1]

In Coleman v. Coleman, 864 So. 2d 371, 374-75 (Ala. Civ. App. 2003), we stated:

> "It is well settled that the wife's unilateral activity in moving to Alabama cannot satisfy the requirement that the husband have 'minimum contacts' with Alabama sufficient to subject him to a lawsuit in this state. Sena v. Sena, 709 So. 2d 48, 50 (quoting Lightell v. Lightell, 394 So. 2d 41 (Ala. Civ. App. 1981)). It is essential in each case that there be some act by which the nonresident

[1]We note that § 30-3D-201, Ala. Code 1975, provides the basis for personal jurisdiction over a nonresident defendant in an action seeking a parentage determination or child support. Potts, however, did not request an adjudication of paternity or child support and sought only custody of the child in his complaint. For the purposes of this mandamus petition, we do not consider Potts's complaint as having initiated paternity proceedings subject to § 30-3D-201.

> 'purposely avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). In the instant case, the record contains no evidence of any contacts the husband has with Alabama that would make it 'reasonable and fair' to require him to defend the wife's claims in this State.
>
> "... The husband's purposeful contacts, and not where his children reside, should determine jurisdiction. Sena v. Sena, supra."

In this case, the mother argued in her verified motion to dismiss that the only contact she had with Alabama was that the child visited Potts who had moved to Alabama. Where a child resides, however, does not determine personal jurisdiction in custody proceedings. See Coleman, supra. Potts did not allege in his complaint or present any evidence in the hearing that the mother had any contacts with Alabama. As a result, Potts did not meet his burden of establishing that the mother had the sufficient minimum contacts with Alabama to confer the trial court with personal jurisdiction over her. Therefore, because the mother has demonstrated that the trial court lacked personal jurisdiction over her, the trial court lacked the authority to make an initial custody determination in this case.

In her petition to this court, the mother further argues that temporary emergency jurisdiction is the only other possible jurisdiction that the trial court could have exercised in the proceedings, but that the trial court lacked that type of jurisdiction as well. In his response to the mother's petition for the writ of mandamus, Potts did not address the mother's arguments on this issue and did not claim that the trial court had exercised temporary emergency jurisdiction. Section 30-3B-204, Ala. Code 1975, provides:

> "(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> "(b) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 30-3B-201 through 30-3B-203, [Ala. Code 1975,] a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 30-3B-201 through 30-3B-203. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 30-3B-201 through 30-3B-203, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

> "(c) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under Sections 30-3B-201 through 30-3B-203, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 30-3B-201 through 30-3B-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> "(d) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Sections 30-3B-201 through 30-3B-203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 30-3B-201 through 30-3B-203, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."

The materials before us indicate that the trial court did not intend to exercise temporary emergency jurisdiction under § 30-3B-204. The trial court had entered an ex parte order granting Potts "temporary" custody of the child. At the June

26, 2019, hearing, the mother argued that there was no emergency justifying temporary emergency jurisdiction but that, if grounds for such jurisdiction existed, the trial court was required to immediately communicate with the Georgia court in which custody proceedings had been initiated. There is no indication that the trial court has met or intended to meet the requirements of § 30-3B-204(d) that it immediately communicate with the Georgia court and determine a period of duration for its ex parte pendente lite custody order. See J.D. v. Lauderdale Cty. Dep't of Human Res., 121 So. 3d 381, 386 (Ala. Civ. App. 2013) (instructing juvenile court to include appropriate limitations on its orders pursuant to the requirements of § 30-3B-204 and to communicate with a Texas court "'to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order'"). We further note that, to invoke the temporary emergency jurisdiction of the trial court, § 30-3B-204(a) requires either an abandonment of the child or an emergency in which it is necessary "to protect the child because the child ... is subjected to or threatened with mistreatment or abuse." Potts did not allege in his complaint

that the child had been abandoned, and it is unclear from Potts's allegations what specific threat or danger to the child constituted an emergency. Nevertheless, in the event that any of the child's circumstances could amount to an emergency situation, we note that the mother argued at the hearing on her motion to dismiss that the trial court did not have temporary emergency jurisdiction. In response, Potts testified but presented no evidence to support any allegations that an emergency situation existed or had existed or that the child experienced or faced the threat of mistreatment or abuse. To the contrary, Potts testified at the hearing that he had allowed the child to stay with the mother two days after he had filed his complaint, and, according to his testimony, he voluntarily transported the child to the mother in Georgia during exchanges of custody. Therefore, there was no basis for the trial court to exercise temporary emergency jurisdiction pursuant to § 30-3B-204(a), and, accordingly, the trial court expressly decided only its subject-matter jurisdiction to make an initial custody determination under § 30-3B-201 and stated findings pertaining only to requirements for making such a determination.

For the reasons discussed, we conclude that the trial court lacks personal jurisdiction over the mother, and therefore lacks the authority to make an initial custody determination in this case, and lacks temporary emergency jurisdiction pursuant to § 30-3B-204(a). Because the issues of personal jurisdiction and temporary emergency jurisdiction are dispositive and we are granting the petition and issuing the writ of mandamus on that basis, we pretermit any discussion of whether the trial court lacked subject-matter jurisdiction under § 30-3B-201. See Ex parte Krukenberg, 252 So. 3d 676, 682 (Ala. Civ. App. 2017) (pretermitting discussion of trial court's subject-matter jurisdiction after determining that the court lacked personal jurisdiction over the defendant). Therefore, the mother has demonstrated a clear legal right to an order dismissing the action. Accordingly, we grant the mother's petition for a writ of mandamus, and we direct the trial court to vacate the order denying the mother's motion to dismiss and to grant the mother's motion.

PETITION GRANTED; WRIT ISSUED.

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

Moore and Edwards, JJ., concur in the result, without writings.