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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte S.H.

PETITION FOR WRIT OF MANDAMUS

(In re: K.G.

v.

S.H.)

(Jefferson Circuit Court, CV-17-900409)

EDWARDS, Judge.

In May 2016, the Jefferson Juvenile Court ("the juvenile court") determined that L.G. ("the child") was a dependent

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child and awarded custody of the child to S.H. ("the maternal grandmother"). At that time, according to the 2016 judgment, both of the child's parents were deceased. In February 2017, K.G. ("the paternal grandmother") instituted in the Jefferson Circuit Court ("the circuit court") an action against the maternal grandmother in which the paternal grandmother sought to establish grandparent visitation pursuant to the Grandparent Visitation Act ("the GVA"), Ala. Code 1975, § 30-3-4.2. The maternal grandmother filed a motion to dismiss the paternal grandmother's action in March 2017, which motion she renewed in July 2017 and in March 2019.¹ On July 2, 2019, the circuit court entered an order denying the maternal grandmother's motion to dismiss; in that same order, the circuit court awarded the paternal grandmother pendente lite grandparent visitation pending a trial to be held in January 2020. The maternal grandmother filed in this court a petition for the writ of mandamus on August 5, 2019. Although we

¹During the pendency of the action, the parties reached a pendente lite agreement regarding visitation with the aid of the child's guardian ad litem. An August 2018 order incorporating the terms of the pendente lite agreement indicated that neither the pendente lite agreement nor the order would be used to prejudice either party regarding the merits of the action. The parties, however, had ceased abiding by the agreement incorporated into the order.

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called for answers to the maternal grandmother's petition, none were filed.

""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 Gentry, 228 So. 3d 1016, 1022 (Ala. Civ. App. 2017) (quoting Ex parte Brown, 963 So. 2d 604, 606-07 (Ala. 2007), quoting in turn Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)). A petition for the writ of mandamus is a proper vehicle for reviewing an order awarding pendente lite grandparent visitation. Ex parte Gentry, 238 So. 3d 66, 72 (Ala. Civ. App. 2017); Ex parte McElrath, 258 So. 3d 364, 367 (Ala. Civ. App. 2018).

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In her petition, the maternal grandmother first argues that the circuit court lacks jurisdiction over the paternal grandmother's action. She asserts that the juvenile court acquired jurisdiction over the child pursuant to its exercise of dependency jurisdiction and that, because it has not terminated its jurisdiction over the child, the circuit court could not attain jurisdiction over a matter involving the child. Secondly, the maternal grandmother argues that, because custody of the child is not vested in a parent, the GVA does not operate in this instance to permit the paternal grandmother to seek visitation. Finally, the maternal grandmother asserts that, if the GVA does apply, the circuit court failed to properly apply the GVA to award the paternal grandmother pendente lite visitation because the circuit court failed to hold an evidentiary hearing and lacked evidence supporting the requirements for an award of pendente lite grandparent visitation.

We find the maternal grandmother's second issue dispositive of her petition. In essence, the maternal grandmother contends that the GVA is worded in such a way as to apply solely to conflicts regarding visitation between

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grandparents and parents. Thus, she says, the paternal grandmother cannot utilize the GVA to seek visitation with the child because, although she is the child's legal custodian, the maternal grandmother is not a parent.

The GVA provides, in pertinent part:

"(b) A grandparent may file an original action in a circuit court where his or her grandchild resides or any other court exercising jurisdiction with respect to the grandchild or file a motion to intervene in any action when any court in this state has before it any issue concerning custody of the grandchild, including a domestic relations proceeding involving the parent or parents of the grandchild, for reasonable visitation rights with respect to the grandchild if any of the following circumstances exist:

"(1) An action for a divorce or legal separation of the parents has been filed, or the marital relationship between the parents of the child has been severed by death or divorce.

"(2) The child was born out of wedlock and the petitioner is a maternal grandparent of the child.

"(3) The child was born out of wedlock, the petitioner is a paternal grandparent of the child, and paternity has been legally established.

"(4) An action to terminate the parental rights of a parent or parents has been filed or the parental rights of a parent has been terminated by court order; provided, however, the right of the

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grandparent to seek visitation terminates if the court approves a petition for adoption by an adoptive parent, unless the visitation rights are allowed pursuant to [Ala. Code 1975, §] 26-10A-30."

§ 30-3-4.2(b).

The GVA does not define the term "parent." Generally, "[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning." Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)). The traditional dictionary definition of "parent" includes both "one that begets or brings forth offspring" and "a person who brings up and cares for another." Merriam-Webster's Collegiate Dictionary 900 (11th ed. 2003). Thus, the term "parent" could be read narrowly to refer to biological parents or expansively to include within its ambit persons who, like the maternal grandmother, rear children in the absence of their parents.

We are guided in our efforts to discern the intended meaning of the term "parent" as used in the GVA by the following principles.

"[T]he rule is well recognized that in the construction of a statute, the legislative

intent is to be determined from a consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately.'

"Blair v. Greene, 246 Ala. 28, 30, 18 So. 2d 688, 689 (1944).

"'It is well settled that when it is interpreting a statute this Court seeks to give effect to the intent of the Legislature, as determined primarily from the language of the statute itself. Beavers v. County of Walker, 645 So. 2d 1365, 1376 (Ala. 1994) (citing Ex parte McCall, 596 So. 2d 2 (Ala. Civ. App. 199[1])); Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301 (Ala. 1991). Also, our rules of statutory construction direct us to look at the statute as a whole to determine the meaning of certain language that is, when viewed in isolation, susceptible to multiple reasonable interpretations. McRae v. Security Pac. Hous. Servs., Inc., 628 So. 2d 429 (Ala. 1993).'

"Ex parte Alfa Fin. Corp., 762 So. 2d 850, 853 (Ala. 1999)."

State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 813 (Ala. 2005).

Furthermore,

"'[u]nder common law principles, grandparents lacked any legal right to visitation and communication with the grandchildren if such visitation was forbidden

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by the parents.' Ex parte Bronstein, 434 So. 2d 780, 782 (Ala. 1983). ... [T]he rights of grandparents to visitation with their grandchildren exist only as created by [statute]; they are purely statutory."

Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011) (discussing Ala. Code 1975, former § 30-3-4.1, the predecessor statute to the GVA). Because the GVA is in derogation of the common law, we are further guided by the principle that,

"[i]n Alabama, '[s]tatutes in derogation or modification of the common law are strictly construed. Cook v. Meyer, 73 Ala. 580 (1883). Such statutes are presumed not to alter the common law in any way not expressly declared. Pappas v. City of Eufaula, 282 Ala. 242, 210 So. 2d 802 (1968).' Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977)."

Baldwin v. Branch, 888 So. 2d 482, 484-85 (Ala. 2004).

A reading of the GVA itself in its entirety reveals that it contains provisions designed to recognize and protect the fundamental right of a parent to control the associations of his or her children. See Ex parte E.R.G., 73 So. 3d at 642 ("The right of parents to direct the upbringing of their children has long been recognized as fundamental by the United States Supreme Court"). Specifically, § 30-3-4.2(c)(1) provides "a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child." In addition, § 30-3-4.2(p)

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"recognizes ... the fundamental rights of parents" and indicates that "a fit parent's decision regarding whether to permit grandparent visitation is entitled to special weight." Moreover, the GVA defines "grandparent" as a "parent of a parent" and requires a biological or adoptive relationship between the parent and the grandparent. § 30-3-4.2(a)(1). Thus, a fair reading of the GVA and a consideration of the context of the uses of the term "parent" throughout it, indicate that the legislature intended the term "parent" to refer to a person who is a natural parent or an adoptive parent of the grandchild at issue.²

The GVA creates a cause of action in which a grandparent may seek visitation rights from a parent of his or her

²See Ala. Code 1975, § 26-10A-25(c) ("The final decree [of adoption] shall further order that from the date of the decree, the adoptee shall be the child of the petitioners, and that the adoptee shall be accorded the status set forth in [Ala. Code 1975, §] 26-10A-29"), and Ala. Code 1975, § 26-10A-29(a) ("After adoption, the adoptee shall be treated as the natural child of the adopting parent or parents and shall have all rights and be subject to all of the duties arising from that relation"); see also McCaleb v. Brown, 344 So. 2d 485, 489 (Ala. 1977) (stating that "the overall policy of the adoption statute [is] to treat adopted children in all respects as natural children").

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grandchild, a right to which that grandparent was not entitled at common law. See Ex parte E.R.G., 73 So. 3d at 646. The creation of that cause of action was within the purview of the legislature, and this court is bound to strictly construe the statute so as to give effect to only those rights the legislature expressly created. Baldwin, 888 So. 2d at 484-85. The GVA does not create a cause of action in which a grandparent may seek visitation from a third-party custodian of his or her grandchild. Accordingly, we conclude that the maternal grandmother has demonstrated a clear, legal right to the relief that she has requested. We therefore grant the petition and instruct the circuit court to enter an order vacating its pendente lite grandparent-visitation order and dismissing the paternal grandmother's action.³

PETITION GRANTED; WRIT ISSUED.

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

Moore and Donaldson, JJ., dissent, with writings.

³Because the resolution of this issue is dispositive of the maternal grandmother's petition, we pretermitt discussion of the other arguments presented in that petition. L.R. v. C.G., 78 So. 3d 436, 443 (Ala. Civ. App. 2011) (citing Favorite Mkt. Store v. Waldrop, 924 So. 2d 719, 723 (Ala. Civ. App. 2005) (stating that this court would pretermitt discussion of further issues in light of dispositive nature of another issue)).

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MOORE, Judge, dissenting.

I respectfully dissent. In February 2017, K.G. ("the paternal grandmother") instituted an action in the Jefferson Circuit Court ("the trial court") seeking visitation with L.G. ("the child"). S.H. ("the maternal grandmother") moved the trial court to dismiss the action for lack of jurisdiction. On July 2, 2019, the trial court denied the motion to dismiss. The maternal grandmother filed in this court a petition for a writ of mandamus directing the trial court to vacate its order denying her motion to dismiss and to enter a final judgment granting her motion to dismiss.

The main opinion concludes that the Grandparent Visitation Act ("the GVA"), Ala. Code 1975, § 30-3-4.2, authorizes actions by a grandparent against only a parent of the child. I disagree.

The GVA provides, in pertinent part:

"(b) A grandparent may file an original action in a circuit court where his or her grandchild resides or any other court exercising jurisdiction with respect to the grandchild or file a motion to intervene in any action when any court in this state has before it any issue concerning custody of the grandchild, including a domestic relations proceeding involving the parent or parents of the grandchild, for reasonable visitation rights with

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respect to the grandchild if any of the following circumstances exist:

"(1) An action for a divorce or legal separation of the parents has been filed, or the marital relationship between the parents of the child has been severed by death or divorce.

"(2) The child was born out of wedlock and the petitioner is a maternal grandparent of the child.

"(3) The child was born out of wedlock, the petitioner is a paternal grandparent of the child, and paternity has been legally established.

"(4) An action to terminate the parental rights of a parent or parents has been filed or the parental rights of a parent has been terminated by court order; provided, however, the right of the grandparent to seek visitation terminates if the court approves a petition for adoption by an adoptive parent, unless the visitation rights are allowed pursuant to [Ala. Code 1975, §] 26-10A-30."

§ 30-3-4.2(b) (emphasis added).

The GVA plainly expresses that the petitioner must be a "grandparent," as defined in Ala. Code 1975, § 30-3-4.2(a)(1), and this court has held that only a grandparent may invoke the GVA to seek visitation with a child. See Ex parte Gentry, 238 So. 3d 66 (Ala. Civ. App. 2017). On the other hand, the GVA does not expressly provide that the respondent must be a

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parent of the child, regardless of the meaning of that term. The GVA does refer to the "parent" or "parents" of the child repeatedly, and I agree with the main opinion that the legislature intended the common meaning of those terms, ___ So. 3d at ___, but nowhere in the GVA does it state that an action for grandparent visitation may be commenced only against a parent.

Section 30-3-4.2(b) broadly provides that a grandparent may file or intervene in a civil action in the appropriate court to obtain visitation with his or her grandchild when certain circumstances are met. Subdivision (b)(1) authorizes an action for grandparent visitation when "the marital relationship between the parents of the child has been severed by death or divorce." That subdivision recognizes that an action for grandparent visitation may lie when the marital relationship has terminated due to the death of one or both parents. As worded, subdivision (b)(1) contemplates proceedings for grandparent visitation following the death of a "parent" or "parents." Under Alabama law, an action against a deceased person is a nullity, see A.E. v. M.C., 100 So. 3d 587, 595 (Ala. Civ. App. 2012), so the respondent in such an

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action could not be the deceased parent or parents; rather, the respondent would have to be the living person or persons having legal custody of the child following the death of the parent or parents of the child.⁴

Subdivisions (b) (2) and (b) (3) of the GVA authorize an action for grandparent visitation when the child is born out of wedlock and other statutory criteria have been established. Those subdivisions do not require that the petition name the "parent" of the child as the respondent in such circumstances. Subdivision (b) (4) allows an action for grandparent visitation when, among other things, an action to terminate the parental rights of both parents has been filed and is proceeding, which

⁴I note that a predecessor to the GVA authorized an action for grandparent visitation when "[o]ne parent of the child is deceased and the surviving parent denies reasonable visitation rights." See Ala. Code 1975, former § 30-3-4(b) (as amended by Ala. Acts 1989, Act No. 89-864). That language would have applied only when the grandchild had one living parent who objected to visitation and who, presumably, would have been named as the respondent in the action. The current GVA does not use that limiting language. See W.B.B. v. H.M.S., 141 So. 3d 1062, 1064 (Ala. Civ. App. 2013) ("It is well settled that when the legislature makes a "material change in the language of [an] original act," it is "presumed to indicate a change in legal rights." 1A Norman J. Singer, Statutes and Statutory Construction § 22:30 (6th ed. 2002) (footnote omitted). In other words, the "amendment of an unambiguous statute indicates an intention to change the law." Id." (quoting Pinigis v. Regions Bank, 977 So. 2d 446, 452 (Ala. 2007))).

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ordinarily occurs after the parents have lost custody of the child to the state. Subdivision (b)(4) implicitly recognizes that the action would not proceed against the parents, but would proceed against the state as the legal custodian of the child.

I agree with the main opinion that the GVA "contains provisions designed to recognize and protect the fundamental right of a parent to control the associations of his or her children." ___ So. 3d at ___. Those provisions operate when one or more of the natural parents of the child objects to the imposition of court-ordered grandparent visitation. On the other hand, those provisions have no field of operation when the child at issue has no living natural parents with fundamental custodial rights to control the associations of the child. I also agree with the main opinion that the GVA "creates a cause of action in which a grandparent may seek visitation rights from a parent of his or her grandchild, a right to which that grandparent was not entitled at common law." ___ So. 3d at ___. However, I do not read the GVA as limiting its scope solely to that cause of action. The GVA also creates a cause of action in which a grandparent may seek

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visitation rights from a legal custodian of the child other than the parent of his or her grandchild when the specified statutory circumstances exist.

In this case, the maternal grandmother argues that the paternal grandmother has not stated a valid claim for grandparent visitation solely because the petition names the maternal grandmother as the respondent. The maternal grandmother argues that the GVA allows actions for grandparent visitation against only a parent. Even giving the GVA the strict construction required, see ___ So. 3d at ___, the GVA cannot be interpreted as foreclosing actions for grandparent visitation against a person, other than a parent, who is exercising custody of a child. The maternal grandmother does not argue that the paternal grandmother has failed to allege the existence of one or more of the circumstances required by the GVA in order to maintain her claim for visitation. Thus, the maternal grandmother has not shown a clear legal right to dismissal of the petition for grandparent visitation on this ground.

The maternal grandmother argues two other grounds to support her petition for a writ of mandamus. Having decided

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that the GVA does not allow for petitions for visitation against third-party custodians, ___ So. 3d at ___, the main opinion does not consider those alternative grounds for relief. I reject the proposition that the GVA authorizes actions for grandparent visitation against only the parents of a child, so I believe the appropriate course of action would be to address the remaining two arguments of the maternal grandmother to determine if either warrant extraordinary mandamus relief.

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DONALDSON, Judge, dissenting.

I agree with Judge Moore's analysis of the Grandparent Visitation Act, Ala. Code 1975, § 30-3-4.2, and join his dissent on that issue. I write specially to address the other two grounds for issuance of the writ of mandamus asserted by S.H. ("the maternal grandmother") in her petition.

One of those other grounds is her contention that the Jefferson Circuit Court ("the circuit court") could not exercise jurisdiction over a claim seeking grandparent visitation because, she says, the Jefferson Juvenile Court ("the juvenile court") had continuing and exclusive jurisdiction over L.G. ("the child") following its determination that the child was dependent. Although I think the juvenile court had continuing jurisdiction over the child pursuant to § 12-15-117(a), Ala. Code 1975, that jurisdiction was not exclusive with respect to proceedings brought pursuant to § 12-15-115, Ala. Code 1975. See Ex parte F.T.G., 199 So. 3d 82, 86-87 (Ala. Civ. App. 2015) (holding that a juvenile court's original jurisdiction over a civil proceeding brought pursuant to § 12-15-115(a)(6), Ala. Code 1975, was not exclusive). Moreover, a juvenile court's nonexclusive

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jurisdiction over grandparent-visitation claims conferred by § 12-15-115(a)(10), Ala. Code 1975, is limited to claims that are "filed as part of a juvenile court case involving the same child." The materials presented to us indicate that K.G.'s grandparent-visitation claim was not joined with any other claim over which the juvenile court would have had jurisdiction; rather, it was filed as the sole claim in K.G.'s petition in the circuit court. Therefore, the circuit court could properly exercise jurisdiction over K.G.'s claim because it was the circuit court located where the child resided. See § 30-3-3.4(b), Ala. Code 1975. Accordingly, I cannot conclude that the maternal grandmother has established that she has a clear legal right to a writ of mandamus based on her contention that the circuit court could not exercise jurisdiction over K.G.'s claim seeking grandparent visitation.

The maternal grandmother also contends that, if it has jurisdiction over the claim, the circuit court did not comply with the requirement of § 30-3-4.2(o), Ala. Code 1975, which states that "the court may, after a hearing, enter a pendente lite order granting temporary visitation rights to a grandparent." Based on the plain language of the statute, the

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maternal grandmother's request for a hearing should have been granted. The lack of an evidentiary hearing would be a valid basis for directing the circuit court to vacate its order granting K.G. pendente lite visitation and to hold an evidentiary hearing as required. It appears, however, that the only relief specifically requested in the petition for the writ of mandamus to this court is a writ directing the circuit court to dismiss the action. To be entitled to the writ of mandamus, the petitioner must have "a clear legal right to the relief sought." 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)). I cannot conclude that the failure to hold a hearing is a valid basis for directing the circuit court to dismiss the action. Therefore, I would deny the petition for the writ of mandamus and respectfully dissent.