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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Ex parte Ja.T. and Jo.T.

PETITION FOR WRIT OF MANDAMUS

(In re: N.T.

v.

Ja.T. and Jo.T.)

(Autauga Juvenile Court, JU-13-169.08)

MOORE, Judge.

Ja.T. and Jo.T. ("the paternal grandparents"), the paternal grandparents of Ju.T. ("the child"), have petitioned this court for a writ of

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mandamus directing the Autauga Juvenile Court ("the juvenile court") to grant their motion to transfer the custody-modification and contempt action commenced by N.T. ("the mother"), the child's mother, to the Chilton Juvenile Court. We grant the petition and issue the writ.

Procedural History

These parties have previously been before the court. See Ja.T. v. N.T., [Ms. 2200422, Nov. 12, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021). In Ja.T., this court set forth the relevant procedural history as follows:

"In a December 17, 2013, judgment entered in case number JU-13-169.01, [the juvenile court] found [the child] dependent and awarded [the paternal grandparents] 'primary physical custody' of the child. In that judgment, the juvenile court specified that the paternal grandparents and [the mother] share joint legal custody of the child, awarded the mother a schedule of visitation, and restricted the mother from allowing S.M., her boyfriend at that time, from being present at her visitations with the child. The juvenile court amended that judgment on December 30, 2013, to place further restrictions as to the locations of the mother's visitations and to reiterate that the child was not to be in S.M.'s presence.

"Over the next few years, four additional judgments, each in a new action involving the custody of the child, were entered. Those judgments left physical custody of the child with the paternal grandparents, and several reiterated the

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requirement that the mother not allow S.M. to have any contact with the child. ...

"On June 26, 2020, the mother filed in the juvenile court a petition seeking to modify custody of the child; that action was designated as case number JU-13-169.07. The paternal grandparents answered and counterclaimed

"....

"... [T]he juvenile court [eventually] entered a judgment on February 1, 2021, in which it found[, in pertinent part,] that the mother had failed to meet the required standard of proof for a custody modification. However, the juvenile court also found that the mother was 'due' additional visitation and awarded the mother alternating weeks of 'visitation' with the child, in addition to certain holiday visitation. In other words, the juvenile court ordered that the child spend one week with the mother and the next week with the paternal grandparents."

___ So. 3d at ___ (footnote omitted).

The paternal grandparents appealed, and this court, among other things, reversed the juvenile court's judgment to the extent that it had awarded the mother "alternating weekly periods with the child." ___ So. 3d at ___. We concluded that that award was "an improper modification of the earlier custody judgments in favor of the paternal grandparents."

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___ So. 3d at ___. This court's certificate of judgment in Ja.T. was issued on December 1, 2021.

On December 10, 2021, the mother filed in the juvenile court a petition to modify the custody of the child, which was designated as case number JU-13-169.08. At the time she filed her petition, she also filed an affidavit indicating that the child resided with her and with the paternal grandparents. She listed her city of residence as Montgomery and the paternal grandparents' city of residence as Verbena.

On December 20, 2021, the paternal grandparents filed a motion to transfer the mother's current custody-modification action to the Chilton Juvenile Court. They asserted that they and the child reside in Chilton County, that the mother resides in Montgomery County, and that the child's father resides in Mobile County. That same day, the mother filed an amended petition seeking to hold the paternal grandparents in contempt of court. She also filed a response to the paternal grandparents' motion to transfer the action, asserting that, because she had amended her petition to add a claim for contempt, venue was proper in the juvenile court. The paternal grandparents filed a reply to the mother's response,

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asserting that venue should be determined at the commencement of the action. On December 22, 2021, the juvenile court denied the paternal grandparents' motion to transfer the action. The paternal grandparents filed their petition for a writ of mandamus with this court on January 5, 2022.

Standard of Review

"The writ of mandamus is an extraordinary remedy; it will not be issued unless the petitioner shows " '(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 Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000) (quoting Ex parte Gates, 675 So. 2d 371, 374 (Ala. 1996)); Ex parte Pfizer, Inc., 746 So. 2d 960, 962 (Ala. 1999)."

Ex parte Children's Hosp. of Alabama, 931 So. 2d 1, 5-6 (Ala. 2005).

Discussion

In their mandamus petition, the paternal grandparents argue that the juvenile court erred in denying their motion to transfer the mother's action to the Chilton Juvenile Court. Section 12-15-302, Ala. Code 1975, provides, in pertinent part:

"(c) When a petition is filed seeking to modify an award of custody or visitation pursuant to an adjudication of dependency in which all parties to the original action, including the child, no longer reside in the county of original jurisdiction, the petition shall be filed in the county where the child resides at the time the petition is filed. The petition shall be accompanied by a certified copy of the most recent order to be modified.

"(d) For purposes of this section, county where the child resides means the county in which the child and legal custodian have established legal residence or have resided for six or more months of a calendar year. This term shall not include placements by a state department or agency."

Our supreme court has explained:

" "The question of proper venue for an action is determined at the commencement of the action.' " Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002) (quoting Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001)). If venue is improper at the outset, then upon motion of the defendant, the court must transfer the case to a court where venue is proper. Ex parte Pike Fabrication, 859 So. 2d at 1091.
...

"....

"As noted above, '[t]he question of proper venue for an action is determined at the commencement of the action.' Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001). It is also well established that

" '[l]ater amendments to the complaint to add parties or claims, with the exception of substituting

the true name of a fictitiously named party, are not considered in determining whether venue is improper at the commencement of the action. See Rule 15(c)(4)[, Ala. R. Civ. P.] ("relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h)[, Ala. R. Civ. P.]").'

"Ex parte Lugo de Vega, 65 So. 3d 886, 892 (Ala. 2010)."

Ex parte Hampton Ins. Agency, 85 So. 3d 347, 350-52 (Ala. 2011).

When the mother initiated the current custody-modification action, her sole request for relief was a modification of custody. Under § 12-15-302(c), when "all parties to the original action, including the child, no longer reside in the county of original jurisdiction, the petition shall be filed in the county where the child resides at the time the petition is filed." Although the paternal grandparents' motion to transfer the action to the Chilton Juvenile Court was not verified, considering the mother's own affidavit, it is clear that neither the mother, nor the paternal grandparents, nor the child lived in Autauga County. Moreover, the mother does not dispute the paternal grandparents' contention that the father does not live in Autauga County. See, e.g., Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1227 (Ala. 2009) (quoting King v. Smith, 288

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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." "). Therefore, we conclude that venue was not proper in Autauga County at the time the mother's current custody-modification action was initiated. Moreover, pursuant to Hampton, the mother's later amendment of her petition to add a claim for contempt will not be considered in determining whether venue was proper.¹

Our supreme court has held that "the prevailing parties on a motion to transfer the action for improper venue ... are entitled to select the appropriate county to which the action must be transferred when venue

¹The mother argues that the allegations in her initial custody-modification petition in case number JU-13-169.08 would support an action for contempt and, thus, that a contempt claim could be inferred from that petition. She cites McCormick v. Ethridge, 15 So. 3d 524 (Ala. Civ. App. 2008), in support of her argument. We note, however, that the opinion in McCormick was discussing whether an issue had been tried with the consent of the parties. In this case, the action had not yet proceeded to trial. Therefore, we conclude that the discussion in McCormick is inapplicable here.

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is proper in more than one county." Ex parte Guarantee Ins. Co., 133 So. 3d 862, 873 (Ala. 2013). Therefore, we need not determine whether venue would also be proper in the county in which the mother resides. The paternal grandparents, as the parties entitled to prevail on the motion to transfer the action, are entitled to select Chilton County as the transferee court. Guarantee Ins. Co., 133 So. 3d at 873.

Conclusion

Based on the foregoing, we grant the paternal grandparents' petition and issue a writ of mandamus directing the juvenile court to transfer the mother's custody-modification and contempt action to the Chilton Juvenile Court.

PETITION GRANTED; WRIT ISSUED.

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