

Rel: February 21, 2020

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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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**Ex parte Caroline Capps Cate**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Darin Eugene Cate**

**v.**

**Caroline Capps Cate)**

**(Cullman Circuit Court, DR-19-900325)**

THOMPSON, Presiding Judge.

On September 26, 2019, Darin Eugene Cate ("the father") initiated in the Cullman Circuit Court ("the trial court") an

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action seeking a divorce from Caroline Capps Cate ("the mother"). That action was assigned case number DR-19-900297. The father later amended his verified complaint. The allegations in the father's verified complaint, as amended, indicate that the parties married in South Carolina in 2009 and that they lived together thereafter. The parties' two minor children were born in South Carolina in 2010 and 2013. The father moved to Alabama on approximately March 29, 2019 (a little less than six months before he initiated the action), for new employment, and the mother and the children moved to Alabama in August 2019, when the parties purchased a house in Cullman; the parties enrolled the children in school in Alabama. The father alleged that the parties and the children had lived together in Alabama until September 25, 2019. In his divorce complaint, the father sought an award of joint custody of the parties' children and a division of the parties' marital property.

On September 27, 2019, an attorney filed a limited appearance on behalf of the mother and indicated the mother's intention to contest the jurisdiction of the trial court over the father's action. The mother filed a September 27, 2019,

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motion to dismiss case number DR-19-900297 for want of subject-matter jurisdiction. In that motion, the mother's attorney alleged, among other things, that the mother and the children had moved to Tennessee on September 25, 2019. The mother argued only that the trial court lacked jurisdiction under § 30-2-5, Ala. Code 1975, which governs jurisdiction over divorce actions.

On October 3, 2019, the trial court entered an order in case number DR-19-900297 requiring the mother to return with the children to Alabama and specifying that the parties would share joint pendente lite custody of the children. In that order, the trial court also scheduled the mother's motion to dismiss for a hearing on October 16, 2019.

On October 9, 2019, the mother filed a "motion to alter, amend, or vacate" the October 3, 2019, pendente lite custody order. We note that a valid postjudgment motion filed pursuant to Rule 59(e), Ala. R. Civ. P., may be filed only in reference to a final judgment. Momar, Inc. v. Schneider, 823 So. 2d 701, 704 (Ala. Civ. App. 2001). Regardless, in that motion, the mother argued that the trial court had erred in entering its October 3, 2019, order because, she said, in

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failing to allow her to present evidence on the issue whether "the wife has established residency in Tennessee," the trial court had violated her due-process rights.

The trial court conducted an ore tenus hearing on the pending motions in case number DR-19-900297 on October 16, 2019. At that hearing, the mother testified that the parties had lived together in South Carolina until March 29, 2019, when the father moved to Alabama to accept new employment. The mother testified that, before the father obtained employment in Alabama, the parties had had no contacts with or connections to Alabama other than to travel through Alabama on the way to a beach.

The mother testified that she had intended that Alabama be her place of residence and that of the children and that she had obtained a nursing license in Alabama on August 20, 2019. The mother also stated that, after she and the children moved to Alabama, the parties' marriage deteriorated and the parties decided to divorce. The mother testified that she relocated with the children on September 25, 2019, to be close to her extended family living in Tennessee; she also stated that the father had extended family nearby in Tennessee.

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During the ore tenus hearing, the father and the trial court concluded that any jurisdictional defect in case number DR-19-900297 could be cured by the filing of a new divorce action. At the close of the October 16, 2019, ore tenus hearing in case number DR-19-900297, the trial court orally ordered the mother to return to Alabama with the children and to enroll the children in school here.

Thereafter, on October 16, 2019, the father filed a verified complaint that initiated a new divorce action that was assigned case number DR-19-900325.<sup>1</sup> The complaint in case number DR-19-900325 is substantially similar to the complaint, as amended, in case number DR-19-900297. Also on October 16, 2019, the father filed in case number DR-19-900325 a verified motion for temporary relief. In that verified motion, the father stated, among other things, that the mother had moved with the children to Tennessee on or about September 25, 2019.

The trial court entered an October 16, 2019, pendente lite custody order in case number DR-19-900325, which reads:

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<sup>1</sup>The father filed an October 21, 2019, motion to dismiss case number DR-19-900297. The materials before this court do not indicate that the trial court has ruled on that motion or on the mother's September 27, 2019, motion to dismiss case number DR-19-900297.

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"This matter is before the Court on Motion For Pendente Lite Relief filed herein on behalf of [the father].

"After review and the receipt of testimony this date, the Court does GRANT such Motion.

"The children shall be returned to the State of Alabama and be re-enrolled in East Elementary School in Cullman, Alabama. The parties shall share joint legal and physical custody of the parties' children pendente lite on a week-to-week basis.

"All other aspects and directives of the Court's Standing Order For Domestic Relations Cases, entered herein, shall be in effect and the parties shall abide thereby."

In referring in its October 16, 2019, order entered in case number DR-19-900325 to other orders entered "herein," the trial court was apparently referring to orders it had entered in case number DR-19-900297.

On October 18, 2019, the mother filed a motion to strike the father's complaint that initiated case number DR-19-900325.<sup>2</sup> The mother also filed an October 18, 2019, purported "motion to alter, amend, or vacate" in reference to the trial court's October 16, 2019, pendente lite custody order entered

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<sup>2</sup>That motion to strike is designated as having been filed in case number DR-19-900297 in response to what the mother characterized as the father's "amended complaint" in that action. It is clear from the materials submitted to this court that the father's October 16, 2019, complaint initiated case number DR-19-900325.

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in case number DR-19-900325. In her motion to strike, the mother argued only that the father's October 16, 2019, complaint in case number DR-19-900325 did not cure any purported jurisdictional defects from case number DR-19-900297. In the October 18, 2019, purported postjudgment motion, the mother stated only that she was reasserting the arguments she had made in her September 27, 2019, motion to dismiss and her October 9, 2019, purported postjudgment motion filed in case number DR-19-900297 and her arguments in her October 18, 2019, motion to strike filed in case number DR-19-900325. The trial court entered an October 22, 2019, order denying the mother's October 18, 2019, "motion to alter, amend, or vacate."

The mother filed an October 23, 2019, motion to dismiss case number DR-19-900325 for want of jurisdiction. In that motion to dismiss, the mother argued that she had moved to Tennessee and had established a residence there, and, therefore, she asserted, the trial court did not have jurisdiction over her. She also asserted, for the first time, that the trial court did not have jurisdiction over custody

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issues pertaining to the children under § 30-3B-201, Ala. Code 1975.

On October 24, 2019, the trial court entered an order denying the mother's motion to dismiss case number DR-19-900325. The mother filed this petition for a writ of mandamus on November 11, 2019, challenging the October 24, 2019, denial of her motion to dismiss case number DR-19-900325 and the October 16, 2019, pendente lite order entered in case number DR-19-900325.

"This Court has consistently held that the writ of mandamus is an extraordinary and drastic writ and that a party seeking such a writ must meet certain criteria. We will issue the 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 Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997). Because mandamus is an extraordinary remedy, the standard by which this Court reviews a petition for the writ of mandamus is to determine whether the trial court has clearly abused its discretion. See Ex parte Rudolph, 515 So. 2d 704, 706 (Ala. 1987)."

Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000).

In her petition for a writ of mandamus, the mother argues that the father's commencement of case number DR-19-900325 did not operate to cure any jurisdictional defects in case number



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DR-19-900297. The mother has not directly challenged the jurisdiction of the trial court in case number DR-19-900297, presumably because the trial court has not ruled on either party's pending motion to dismiss that action. See note 1, supra. We do not address the jurisdiction of the trial court with regard to case number DR-19-900297. Rather, assuming, without deciding, that the trial court lacked subject-matter jurisdiction over case number DR-19-900297, we address the mother's contention that the father's filing of a new action, i.e., case number DR-19-900325, did not cure any jurisdictional defects present in the original divorce action, case number DR-19-900297.

The mother has not cited any authority to support her argument that a new action cannot be used to correct any possible jurisdictional defects in a previously filed action. Rather, she appears to refer to precedent establishing that an amendment to a complaint relates back to the time of the filing of the complaint and that, for that reason, an amended complaint does not rectify any possible jurisdictional defects in a complaint. Alsaikhan v. Alakel, 173 So. 3d 925, 931 (Ala. Civ. App. 2015) ("[W]hen a complaint fails to invoke a

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trial court's subject-matter jurisdiction, any amendment to the complaint does not cure the initial defect, and the trial court does not obtain jurisdiction by virtue of the amended complaint."); see also Off Campus Coll. Bookstore, Inc. v. University of Alabama in Huntsville, 25 So. 3d 423, 426 (Ala. 2009) (holding that an "amendment of the original complaint did not cure the jurisdictional defect that existed at the time the original complaint was filed").

The father's complaint in case number DR-19-900325 is not an amendment to the complaint he filed in case number DR-19-900297. Rather, that complaint initiated a new action, and it did not relate back to the original complaint filed by the father in a separate action that the mother contended had possible jurisdictional defects.

The mother does not properly argue that, assuming case number DR-19-900325 was properly initiated, the trial court did not obtain jurisdiction over that part of the father's complaint seeking a divorce. She mentions, in one sentence that is not supported by citations to authority, that the trial court does not have jurisdiction because she is "domiciled" in Tennessee. Given the lack of an argument on

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that issue and the high burden required to demonstrate a right to a writ of mandamus, we decline to analyze the issue of whether the mother was domiciled in or was a resident of Alabama.

Regardless, and out of an abundance of caution because this case involves a possible jurisdictional issue, we note that § 30-2-5, Ala. Code 1975, a part of Alabama's statutory law governing divorces, provides that, in a divorce action, "[w]hen the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint, which must be alleged in the complaint and proved." A trial court may obtain subject-matter jurisdiction over the marital res under § 30-2-5. Chafin v. Chafin, 101 So. 3d 234, 236 (Ala. Civ. App. 2012); see also Coleman v. Coleman, 864 So. 2d 371, 374 (Ala. Civ. App. 2003) ("The wife alleged and proved her residence in the State of Alabama pursuant to § 30-2-5. This was sufficient to allow jurisdiction over the wife and the marital res."); and Sena v. Sena, 709 So. 2d 48, 50 (Ala. Civ. App. 1998) (same).

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Thus, even assuming that the mother, as the defendant in case number DR-19-900325, had demonstrated that she is not an Alabama resident, the trial court would have jurisdiction over the divorce action if the father had been an Alabama resident for the six months preceding the filing of the complaint in case number DR-19-900325. The mother has not disputed that the father, i.e., the plaintiff in case number DR-19-900325, is a resident of Alabama. The materials provided to this court support the trial court's determination that, because of the father's residency in Alabama for more than six months before the October 16, 2019, commencement of case number DR-19-900325, it had jurisdiction over the portion of the father's complaint pertaining to the claim seeking a divorce. Chafin v. Chafin, 101 So. 3d at 237 (holding that, under the facts of that case, a trial court had jurisdiction to divorce the parties but not over issues pertaining to child custody). Accordingly, for the reasons discussed above, we conclude that the mother has not demonstrated a clear legal right to a writ of mandamus requiring the trial court to dismiss that part of the father's action in case number DR-19-900325 pertaining to the divorce between the parties.

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The mother also argues that the trial court lacked subject-matter jurisdiction over that part of the father's complaint in case number DR-19-900325 pertaining to issues of child custody and visitation. The mother relies on only § 30-3B-201(a)(1), Ala. Code 1975, a part of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975, in asserting that argument. The UCCJEA governs whether a trial court has jurisdiction over the parties' claims for an initial child-custody determination, such as a custody determination in a divorce action. See 30-3B-102(4), Ala. Code 1975 (defining "child custody proceeding" as "[a] proceeding in a court in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce ... in which the issue [of custody] may appear."). The UCCJEA provides, in pertinent part:

"(a) Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975,] a court of this state has jurisdiction to make an initial child custody determination only if:

"(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the

child is absent from this state but a parent or person acting as a parent continues to live in this state;

"(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 30-3B-207 or 30-3B-208, [Ala. Code 1975,] and:

"a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

"b. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

"(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 30-3B-207 or 30-3B-208; or

"(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)."

§ 30-3B-201. The UCCJEA defines the term "home state," which is referenced in § 30-3B-201, as:

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"The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of the child or any of the mentioned persons is part of the period."

§ 30-3B-102(7).

In her brief filed in this court, the mother cites only § 30-3B-201(a)(1) of the UCCJEA in arguing that Alabama does not have jurisdiction over the issue of child custody. The only mention the mother makes in her brief submitted to this court of the term "home state" is in her quotation of § 30-3B-201(a)(1). In other words, in her brief submitted to this court, the mother makes no argument pertaining to which state might be the children's "home state" under the UCCJEA, and she fails to examine any facts or address any argument regarding the trial court's possible subject-matter jurisdiction under any other subsection of § 30-3B-201(a) or any other provision of the UCCJEA.

The parties presented evidence to the trial court pertaining to its jurisdiction under § 30-2-5, the statute governing jurisdiction over divorce actions, and it appears

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that much of that evidence pertains to the various bases under which a court may exercise jurisdiction over custody issues pursuant to § 30-3B-201. However, it is clear from the lack of argument by the parties concerning the UCCJEA that the trial court was not presented with the issue of its jurisdiction under the UCCJEA. The trial court's comments during the October 16, 2019, hearing indicate that it did not consider the various grounds under § 30-3B-201 in determining that it had jurisdiction over custody issues in case number CR-19-900325. Rather, those comments and the arguments of the parties indicate that the trial court relied solely on the father's apparent residence in Alabama for the six months preceding his commencement of case number DR-19-900325.

As already stated, in addition to addressing the parties' arguments concerning jurisdiction under § 30-2-5, the evidence presented at the October 16, 2019, hearing touches on some of the issues pertinent to a determination of whether the trial court has jurisdiction over custody issues under the UCCJEA. The trial court, and not this court, is the appropriate forum to make a factual determination regarding whether it could properly exercise jurisdiction over custody issues under § 30-



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3B-201 of the UCCJEA. Fuller v. Fuller, 51 So. 3d 1053, 1057 (Ala. Civ. App. 2010). The mother has not specifically argued that the trial court failed to make an appropriate determination of its jurisdiction under the UCCJEA. However, this court may consider the issue:

"'As our Supreme Court noted in Ex parte Progressive Specialty Insurance Co., 31 So. 3d 661, 663 (Ala. 2009), questions of a trial court's subject-matter jurisdiction are reviewable by means of a petition for a writ of mandamus. Further, our review of such questions is not limited to grounds specifically raised in a mandamus petition because a lack of subject-matter jurisdiction is not subject to waiver by the parties, and it is our duty to consider a lack of subject-matter jurisdiction ex mero motu.'

"Ex parte T.C., 63 So. 3d 627, 630 (Ala. Civ. App. 2010) (emphasis added), superseded on other grounds by statute, as recognized in Ex parte F.T.G., 199 So. 3d 82, 86 (Ala. Civ. App. 2015)."

Ex parte Thompson Tractor Co., 227 So. 3d 1234, 1239 (Ala. Civ. App. 2017).

The trial court has failed to comply with the UCCJEA in determining whether it has jurisdiction to address the custody issues raised in case number DR-19-900325. Therefore, we grant the mother's petition in part and direct the trial court to conduct whatever proceedings are necessary to determine

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whether it, or a court of another state, has jurisdiction over the child-custody claims under the UCCJEA. We express no opinion regarding whether the trial court might have jurisdiction over the custody-related issues under § 30-3B-201.

The mother last argues that the trial court violated her due-process rights in entering its October 16, 2019, pendente lite custody order in case number DR-19-900325. "[A] parent having custody of a minor child cannot be deprived of that custody, even temporarily, without being given adequate notice under Rules 4 and 5, A[1a]. R. Civ. P., and an opportunity to be heard." Ex parte Williams, 474 So. 2d 707, 710 (Ala. 1985). This court has explained the requirement of affording notice to a parent of a threatened deprivation of his or her custody rights as follows:

"'Although the state has a compelling interest in determining the best interest and welfare of a child, the interest is not compelling enough to allow the determination to be made without notice to the child's parents. The purpose of requiring notice is to preserve the fairness of the hearing; and it is of vital importance to the child, as well as the parent, that the hearing be fair. A parent must have notice of the issues the court will decide in order to adduce evidence on

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those issues before the court, to give the court a basis from which a determination most beneficial to the child can be made. Otherwise, the child, rather than being helped, might even be harmed.'

"Thorne v. Thorne, 344 So. 2d 165, 170 (Ala. Civ. App. 1977)."

Ex parte Franks, 7 So. 3d 391, 394-95 (Ala. Civ. App. 2008).

In Ex parte Franks, 7 So. 3d at 395, this court noted that the only circumstance in which an award of pendente lite custody may be made without affording a parent notice is when ""the actual health and physical well-being of the child are in danger."" (Quoting Ex parte Williams, 474 So. 2d at 710, quoting in turn Thorne v. Thorne, 344 So. 2d 165, 171 (Ala. Civ. App. 1977).) In this case, the father made no allegations that the children might be in any danger while in the custody of the mother.

Before it entered its October 16, 2019, pendente lite custody order in case number DR-19-900325, the trial court did not afford the mother notice that it would consider the issue of pendente lite custody. In fact, the trial court entered its pendente lite custody order on the same date that the father commenced case number DR-17-900325. Further, even assuming that the trial court could have been said to have

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provided the mother with notice in case number DR-19-900297 that it would consider the issue of pendente lite custody at the October 16, 2019, ore tenus hearing conducted in that case, the trial court did not do so. At that October 16, 2019, ore tenus hearing in case number DR-19-900297, the trial court received evidence pertaining to the parties' arguments concerning its subject-matter jurisdiction. No evidence was presented concerning any facts pertinent to pendente lite custody.

We have granted, in part, the mother's petition for a writ of mandamus so that the trial court may determine the issue of its jurisdiction under the UCCJEA. We also grant the petition with regard to the mother's challenge to the October 16, 2019, pendente lite custody order. If the trial court determines that it has jurisdiction under the UCCJEA over custody-related issues involving the parties' children, it is directed to conduct a hearing, complete with appropriate notice and due process to the mother, on the issue of the pendente lite custody of the children. Ex parte Franks, supra; Thorne v. Thorne, supra. If, however, the trial court determines that it lacks subject-matter jurisdiction under the

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UCCJEA to resolve issues pertaining to custody of the parties' children, any issue pertaining to a lack of notice to the mother of pendente lite custody order would be moot and no further proceedings as to custody would be required.

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

Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., concurs in part and dissents in part, with writing.

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EDWARDS, Judge, concurring in part and dissenting in part.

I concur in the majority's decision to deny the petition for the writ of mandamus filed by Caroline Capps Cate ("the mother") insofar as it challenges the subject-matter jurisdiction of the Cullman Circuit Court ("the trial court") over the complaint for a divorce filed in the trial court by Darin Eugene Cate ("the father") on October 16, 2019 ("the October 2019 divorce complaint"). However, I cannot agree with the majority's decision to grant the mother's petition "in part" to require the trial court to hold a hearing on the mother's motion seeking to have the child-custody aspects of the October 2019 divorce complaint dismissed on the asserted basis that the trial court lacks jurisdiction to make a custody determination under Ala. Code 1975, § 30-3B-201, a part of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), Ala. Code 1975, § 30-3B-101 et seq. I would, however, grant the mother's petition insofar as she seeks relief from the October 16, 2019, pendente lite order entered by the trial court on the basis that she was deprived of due process.

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I begin by reiterating the standard under which this court examines a petition for the writ of mandamus:

""A writ of mandamus is an extraordinary remedy that requires a showing of: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on 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 Siderius, 144 So. 3d 319, 323 (Ala. 2013) (quoting Ex parte Punturo, 928 So. 2d 1030, 1033 (Ala. 2002), quoting in turn Ex parte Bruner, 749 So. 2d 437, 439 (Ala. 1999), quoting in turn Ex parte McNaughton, 728 So. 2d 592, 594 (Ala. 1998)). Furthermore,

""[t]he burden of establishing a clear legal right to the relief sought rests with the petitioner. [Ex parte] Cincinnati Insurance [Cos.], 806 So. 2d [376,] 379 [(Ala. 2001)]. It is not this Court's function to do independent research to determine whether a petitioner for a writ of mandamus has established a clear legal right.''

"Ex parte Metropolitan Prop. & Cas. Ins. Co., 974 So. 2d 967, 972 (Ala. 2007) (emphasis added). Arguments not made as a basis for mandamus relief are waived. Ex parte Navistar, Inc., 17 So. 3d 219, 221 n.1 (Ala. 2009)."

Ex parte Simpson, 36 So. 3d 15, 25 (Ala. 2009).

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The mother, in her petition, contends that she is entitled to a writ of mandamus directing the trial court to dismiss the October 2019 divorce complaint insofar as it seeks a child-custody determination because, she asserts, the trial court lacks jurisdiction to make a child-custody determination under the UCCJEA. In the trial court, the mother sought to have the October 2019 divorce complaint dismissed insofar as it related to custody issues, arguing that Alabama was not the children's home state under the UCCJEA. Although the mother requested a hearing before the trial court in her motion to dismiss, she specifically requested that the trial court "deny the motion so that [the mother] may properly perfect her Writ of Mandamus regarding the issue of residency; subject-matter jurisdiction and personal jurisdiction over her and the children; and any and all other issues." Had this issue involved something other than subject-matter jurisdiction, the mother would, in my opinion, have come close to inviting the error of which she now complains. See J.S. v. S.L., 244 So. 3d 120, 125 (Ala. Civ. App. 2017).



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As presented in her mandamus petition, the mother's argument before this court includes a quote from § 30-3B-201(a)(1), which provides:

"(a) Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975,] a court of this state has jurisdiction to make an initial child custody determination only if[, among other reasons discussed later in this writing]:

"(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state ...."

The mother then contends that, because she and the children relocated to Tennessee in September 2019, they were domiciled in that state. From that conclusion, the mother apparently, but by no means clearly, intends to assert that Alabama is not the home state of the children and, thus, that the trial court therefore could not make a child-custody determination regarding them.

I agree that Alabama is not the children's home state. However, the mother has not argued what state might be the home state, and she has completely ignored the remaining provisions of § 30-3B-201. From my understanding of the facts

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of this case, which appear in verified pleadings and are able to be gleaned from the mother's testimony before the trial court at the October 16, 2019, hearing,<sup>3</sup> the children have no home state under the UCCJEA. The children had lived in South Carolina until they moved to Alabama in August 2019 and then to Tennessee on or about September 25, 2019. No parent or person acting as a parent remained in South Carolina at the time of the filing of the October 2019 divorce complaint, and the children had not resided in either Alabama or Tennessee long enough at the time that divorce complaint was filed for either of those states to have become the children's home state. See Ala. Code 1975, 30-3B-102(7) (defining "home state," in pertinent part, as "[t]he state in which a child

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<sup>3</sup>The trial court was free to judicially notice what occurred at the October 16, 2019, hearing because the mother referred to the father's previous divorce proceeding in her motion to dismiss. See Slepian v. Slepian, 355 So. 2d 714, 716 (Ala. Civ. App. 1977) (indicating that a trial court is "authorized and required" to take judicial notice of proceedings pending in the same court when those proceedings are referred to in a motion to dismiss). I further note that the father's counsel mentioned the "homestead" of the children and made reference to the "uniform child-custody act" at the October 16, 2019, hearing. The trial court commented on the record that, once the father re-filed the action to cure the residency-requirement defect, it intended to exercise jurisdiction over the child-custody determination.

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lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding"). Thus, the children have no home state.

Section 30-3B-201(a) provides other bases for the exercise of jurisdiction of an initial child-custody determination when a child does not have a home state, such as when:

"(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [Ala. Code 1975, §§] 30-3B-207 or 30-3B-208, and:

"a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

"b. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

"(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more

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appropriate forum to determine the custody of the child under Section 30-3B-207 or 30-3B-208; or

"(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)."

Section 30-3B-201 further provides:

"(b) Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

"(c) Physical presence of a child is not necessary or sufficient to make a child custody determination."

In my opinion, the mother's petition does not contain sufficient argument for this court to conclude that the mother has demonstrated a clear, legal right to the relief that she seeks -- a determination that the trial court lacks jurisdiction over the child-custody determination sought by the father in the October 2019 divorce complaint under the UCCJEA and a writ directing the trial court to dismiss the child-custody aspects of the October 2019 divorce complaint on that basis. The mother makes no argument regarding any other basis for jurisdiction under the UCCJEA; instead, it appears that she based her argument regarding the lack of jurisdiction, at least in part, on the fact of the children's

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lack of physical presence in Alabama at the time the father filed the October 2019 divorce complaint, despite the fact that their physical presence is not required under the UCCJEA. See § 30-3B-201(c). The mother raised her UCCJEA argument to the trial court in her motion to dismiss the October 16, 2019, complaint, which the trial court denied. I presume that the trial court properly considered the mother's argument and rejected it, and, thus, I would deny that aspect of her petition.

I do, however, find the mother's petition to have merit insofar as she argues that the trial court's October 16, 2019, pendente lite order was improperly entered in violation of her due-process rights. The October 2019 divorce complaint was filed upon the direction of the trial court at a hearing held on October 16, 2019; the issue before the trial court at that hearing was whether the father's September 26, 2019, divorce complaint had been filed before the father had met the six-month residency requirement under Ala. Code 1975, § 30-2-5. In addition to the October 2019 divorce complaint, the father filed a verified motion for immediate temporary relief on October 16, 2019. That motion averred that the mother had

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taken the children to Tennessee on September 25, 2019, and that the mother had informed the father that she did not intend to return to Alabama. The father further averred that the mother's actions had "uprooted the children from their normal lives, taken them from their father, and disrupted their lives" and that, "absent an intervention on an emergency basis, the well being of the children will suffer due to the disruption in their lives caused by the [mother's] capricious acts."

The father's allegations, however, are not sufficient under our precedents to allow for the entry of an ex parte custody award. As we explained in Ex parte Franks, 7 So. 3d 391, 395 (Ala. Civ. App. 2008), "[i]n the absence of allegations indicating that the 'actual health and physical well-being of the minor child are in danger,' [a] trial court [is] without authority to enter an order removing custody from [a parent] without affording [that parent] notice and an opportunity to be heard." I recognize that the mother had appeared at a hearing before the trial court on October 16, 2019; however, that hearing was held on the mother's motion to dismiss the father's September 2019 divorce complaint based on

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his failure to meet the residency requirement. The testimony presented at the October 16, 2019, hearing did not pertain to the children's custody pending the resolution of the divorce action or address the well-being or best interest of the children in any manner. Thus, I conclude that the mother has established a clear legal right to have the October 16, 2019, pendente lite order set aside, and I would grant her petition insofar as it seeks that relief. I would further direct the trial court to hold a hearing on the issue of pendente lite custody, at which both parents can present evidence regarding the best interest of the children.