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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200685

Ex parte Jesus Esteban

PETITION FOR WRIT OF MANDAMUS

(In re: Jesus Esteban

v.

Jessica Esteban)

(Shelby Circuit Court, DR-19-900066.01)

2200686

Ex parte Jesus Esteban

PETITION FOR WRIT OF MANDAMUS

(In re: Jessica Esteban

v.

Jesus Esteban)

(Shelby Circuit Court, DR-19-900066.02)

EDWARDS, Judge.

On April 1, 2021, Jesus Esteban ("the father") filed in the Shelby Circuit Court ("the trial court") a complaint seeking to modify the custody and child-support provisions of the 2019 judgment divorcing him from Jessica Esteban ("the mother"); that action was assigned case number DR-19-900066.01 ("the father's modification action"). The mother filed an answer to the father's complaint on April 8, 2021. On April 7, 2021, the mother filed a verified petition, seeking a determination that the father was in contempt for failing to comply with a requirement in the parties'

divorce judgment that he sign a quitclaim deed; that action was assigned case number DR-19-900066.02 ("the mother's contempt action"). The father's modification action and the mother's contempt action were consolidated by an order entered by the trial court. The trial court entered an order scheduling a trial for June 14, 2021.

On May 4, 2021, the mother filed a subpoena duces tecum directed to the Shelby County Department of Human Resources ("DHR"), requesting that DHR produce at the June 14, 2021, trial "all records, documents, reports, audio recordings, video recordings, etc. relating to" the father. On May 5, 2021, the father filed a motion to quash the subpoena duces tecum and requesting that sanctions be imposed on the mother. In that motion, the father argued that the subpoena duces tecum should be quashed on the basis that the mother had failed to comply with the requirement of Rule 45, Ala. R. Civ. P., because, he asserted, she had failed to file a notice of intent to file a subpoena on a nonparty or to seek leave of the court to file a subpoena less than 45 days after service of the complaint. The father also challenged the subpoena duces tecum on the ground that it sought "immaterial, irrelevant, and confidential"

information. The trial court granted the father's motion to quash on May 6, 2021, but did not impose sanctions on the mother.

On May 11, 2021, DHR filed a motion to quash the mother's subpoena duces tecum or, in the alternative, for a protective order. That same day, the mother filed a motion seeking reconsideration of the May 6, 2021, order quashing the subpoena duces tecum. On May 12, 2021, the trial court entered an order denying DHR's motion to quash but granting its motion for a protective order. In that order, the trial court directed DHR to submit the subpoenaed documents or other materials to the trial court for inspection. Although the documents and other materials do not appear to have been produced to the trial court at that time, the trial court stated in its order that "certain" of the subpoenaed documents and other materials were "relevant and material to the issues in this cause" and that the documents and other materials were "not otherwise reasonably available to the parties."

The trial court issued another order on May 12, 2021, in which it warned the parties that, if the matter (presumably the mother's motion for reconsideration of the May 6, 2021, order granting the father's motion

to quash) proceeded to a virtual hearing and if it concluded that the position taken by either party was "legally without merit," it would award costs to the other party. On May 15, 2021, apparently after holding a virtual hearing on the matter, the trial court granted the mother's motion seeking reconsideration of the May 6, 2021, order quashing the subpoena duces tecum, determined that the father's position on the issue was "legally without merit," and ordered the father to pay $520 to the mother's counsel within 14 days.

The father filed these petitions for the writ of mandamus in this court on June 1, 2021, and this court consolidated the petitions. On the father's motion, we stayed the June 14, 2021, trial scheduled in this matter. The mother filed an answer to the petitions.

"[A] mandamus petition may be used to review rulings on motions to quash subpoenas from parties and nonparties." Ex parte Summit Med. Ctr. of Montgomery, Inc., 854 So. 2d 614, 616 (Ala. Crim. App. 2002).

> " ' "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 Brown, 963 So. 2d 604, 606-07 (Ala. 2007) (quoting Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

The father contends first that the mother did not follow the proper procedure for issuing a subpoena duces tecum to DHR under Rule 45(a), Ala. R. Civ. P., which reads, in pertinent part:

> "Form; Issuance.
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> > "(1) Every subpoena shall
> >
> > > "(A) state the name of the court from which it is issued; and
> >
> > > "(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
> >
> > > "(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things

> in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
>
> "(D) set forth the text of subdivisions (c) and (d) of this rule.

"A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

"(2) A subpoena commanding attendance at a trial or hearing and a subpoena commanding attendance at a deposition shall issue from the court in which the action is pending.

"(3) The clerk shall issue a subpoena to a party requesting it, except that a subpoena for production, inspection, copying, testing, or sampling separate from a subpoena commanding the attendance of a person shall issue from the court in which the action is pending pursuant to the additional requirements set forth below:

> "(A) Notice of Intent to Serve Subpoena for Production or Inspection. The party seeking issuance of a subpoena for production, inspection, copying, testing, or sampling shall serve a notice to every other party of the intent to serve such subpoena upon the expiration of fifteen (15) days from the service of the notice, and the proposed subpoena shall be attached to the notice. The court may allow a shorter or longer time. Such notice may be served without leave of court upon the

> expiration of forty-five (45) days after service of the summons and complaint or other mode of service under Rule 4-Rule 4.4 upon any defendant, except that leave is not required within the forty-five-(45-) day period if a defendant has previously sought discovery.
>
> "(B) Objection to Issuance of Subpoena for Production or Inspection. Any person or party may serve an objection to the issuance of a subpoena for production, inspection, copying, testing, or sampling within ten (10) days of the service of said notice and in such event the subpoena shall not issue. The party serving the notice may move for an order under Rule 37(a)[, Ala. R. Civ. P.,] with respect to such objection. If no objection is timely served, the clerk shall cause the subpoena to be issued upon the expiration of fifteen (15) days from the service of the notice or upon the expiration of such other time as may have been allowed by the court."

According to the father, because the mother sought the production of documents and other materials by use of a subpoena duces tecum, she was required under Rule 45(a)(3)(A) to first serve upon him notice of her intent to file the subpoena. He also contends that the mother was required to have sought leave of the court to serve the subpoena because less than 45 days had elapsed since she was served with the summons and complaint. The mother, however, argues that, because the subpoena

duces tecum required, in addition to producing the requested documents or materials, that the custodian of records for DHR appear in person at the trial, she was not required by Rule 45(a)(3)(A) to serve notice of intent to issue the subpoena.

We agree with the mother that, under the plain language of the rule, because the subpoena duces tecum did not request only the production of documents or other materials and instead compelled both the production of documents or other materials and the attendance of the custodian of records for DHR at the trial, she was not required to file a notice of intent to serve the subpoena. This conclusion is bolstered by the following statements contained in the Committee Comments to the October 1, 1995, Amendment to Rule 45:

> "[The amendment] authorizes the use of a subpoena to compel production of evidence independent of a deposition. Former Ala. R. Civ. P. 34 covered this subject. It preserves former Rule 34 for a forty-five- (45-) day ban on discovery through subpoenas seeking evidence from a person not a party separate from a deposition. It carries forward the procedure of former

> Ala. R. Civ. P. 34 for filing and service of a notice of intent to issue subpoena ...."[1]

Thus, the father has not established a clear legal right to the writ of mandamus based on this argument.

The father next argues that a subpoena duces tecum is not a "tool of discovery" and that the mother's use of the subpoena duces tecum in this case as a method of discovery is improper. The father relies mostly on criminal-law cases that prohibit the use of a subpoena duces tecum as a tool to enable a "fishing expedition" by the criminal defendant. See State v. Reynolds, 819 So. 2d 72 (Ala. Crim. App. 1999); Sale v. State, 570 So. 2d 862 (Ala. Crim. App. 1990). In addition, he relies on the holding of Ex parte Anniston Personal Loans, Inc., 266 Ala. 356, 359, 96 So. 2d 627, 630

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[1]Both Rule 34 and Rule 45, Ala. R. Civ. P., were amended effective October 1, 1995. The Committee Comments to the October 1, 1995, Amendment to Rule 34 explain:

> "Under ... former [R]ule [34], provision was made for obtaining production or inspection from persons not parties. At the time the former rule was drafted, there was no comparable procedure under federal practice. With the advent of revised F. R. Civ. P. 45, the functions have been transferred to Ala. R. Civ. P. 45 for the sake of uniformity. The revised Rule 34 deals only with the production and inspection from parties."

(1957), in which our supreme court construed Ala. Code 1940, Tit. 7, § 489, and indicated that a subpoena duces tecum "looks to the production of books and documents for use as evidence on the trial of a cause" and that it does not "embrace[] discovery as one of its purposes."

Insofar as the father contends that we should use the principles set out in Reynolds and similar criminal authorities to conclude that the mother's use of the subpoena duces tecum in this civil case is inappropriate and unwarranted, we disagree. The caselaw on which the father relies specifically states that it is applicable to the use of subpoenas duces tecum in criminal cases. Reynolds, 819 So. 2d at 75 (quoting United States v. Nixon, 418 U.S. 683, 698-700 (1974)) ("recogniz[ing] certain fundamental characteristics of the subpoena duces tecum in criminal cases" (emphasis added)). Rule 17.3, Ala. R. Crim. P., governs the use of subpoenas duces tecum in criminal cases, and the Committee Comments to that rule explicitly state that "[t]his rule is not intended to be a discovery device because Rule 16[, Ala. R. Crim. P.,] provides for discovery." The several Committee Comments to Rule 45, Ala. R. Civ. P., do not contain a similar statement.

Regarding the principles espoused in Ex parte Anniston Personal Loans, we conclude that they also do not support granting the father's mandamus petitions. As noted above, the mother did not seek to compel production of the documents or other materials in DHR's possession in order for her to inspect those documents or materials before the trial, as was the case in Ex parte Anniston Personal Loans. In that case, the attorney general had secured, by way of a "Petition for Summary Production of Documents," production of the books of a company from a nonparty who had possession of those books to the county register before trial so that the attorney general could inspect and copy them. 266 Ala. at 357-58, 96 So. 2d at 628-29. Our supreme court explained that nonparties were not subject to discovery under the relevant statutes and noted that the nonparty should have " 'be[en] called upon to produce such books and papers as evidence by a subpoena duces tecum, in the usual way,' " under former Title 7, § 489. 266 Ala. at 362, 96 So. 2d at 633 (quoting 17 Am. Jur., Discovery & Inspection § 36). Thus, contrary to the father's insistence otherwise, Ex parte Anniston Personal Loans does not

hold that a nonparty may not be compelled to produce documents by the use of a subpoena duces tecum.

Furthermore, as explained in the Committee Comments to the 1973 Adoption of Rule 30, Ala. R. Civ. P., Rule 30(b)(1) expressly allows, as part of discovery, the use of a subpoena duces tecum in conjunction with taking the deposition of a nonparty, which reflects "a departure in that present Alabama practice d[id] not permit the use of a subpoena duces tecum in conjunction with the deposition of a non-party under Title 7, § 474(1), Code of Ala. [1940.] See Ex parte Thackston, 275 Ala. 424, 155 So. 2d 526 (1963)." In Thackston, the supreme court noted that, as to a nonparty, "[t]he ... method for production of papers, documents, etc., is a subpoena duces tecum, which [was] provided for in Title 7, § 489, Code of Alabama 1940," and that § 489 was, "by its terms, limited to such writings or documents which might be used as testimony on the trial of a pending cause, and has been so interpreted by this court. Ex parte Anniston Personal Loans, supra ...." 275 Ala. at 427, 155 So. 2d at 529. Based on the changes in discovery practice under Rule 30, it is not clear that the rationale for Ex parte Anniston Personal Loans and Thackston relating to

the limited use of a subpoena duces tecum with regard to nonparties retains its force, particularly when reviewed in light of other pertinent developments in discovery practice as to nonparties. See Committee Comments to the October 1, 1995 Amendments to Rule 34 and Rule 45, Ala. R. Civ. P. Thus, the father's argument on this point also fails to support granting the father's petitions.

The father's final argument is that the confidentiality of DHR's records prevents them from being subpoenaed. He cites to several statutes that provide, as he argues, that DHR records are confidential. Those citations include Ala. Code 1975, § 38-2-6(8) (requiring that "records, papers, files, and communications" concerning public-welfare programs be kept confidential except for use in administering such programs or in investigations relating to the administration of such programs); Ala. Code 1975, § 38-7-13 (requiring that "[r]ecords regarding children and facts learned about children and their relatives" obtained by child-care facilities be kept confidential by the facility and by the Department of Human Resources); Ala. Code 1975, § 38-9-6(e) (providing that "[a]ny record of [the Department of Human Resources] or other

agency pertaining to [an adult in need of protective services] shall not be open for public inspection" but "may be made available on application for cause to persons approved by the commissioner of [the Department of Human Resources] or by the court"); and Ala. Code 1975, § 12-15-133(a) (requiring the juvenile courts to maintain the confidentiality of information, including records of the Department of Human Resources, that they may acquire in the performance of their judicial duties). The father also relies on Ala. Code 1975, § 26-14-8(c), which makes the records and reports relating to allegations of child abuse and neglect, which are maintained in a statewide central registry, confidential.

In her answer, the mother contends that §12-15-133(a) is not applicable in this instance because she sought documents from DHR and not from the juvenile court. We agree. Section 12-15-133(a) requires the juvenile court to protect information concerning children that it obtains or generates in its duties. The subpoena duces tecum at issue does not seek any records of the juvenile court.

Regarding § 26-14-8, the mother points out that, although records maintained in the statewide central registry are confidential, § 26-14-

8(c)(4) expressly permits disclosure of the information contained in the reports and records maintained in the registry "[f]or use by a court where it finds that such information is necessary for the determination of an issue before the court." She asserts that § 26-14-8(c)(4) permits the trial court access to those otherwise confidential records in this particular case because, she says, the information is necessary to the determination of the issues before the court. She specifically contends that the issues of child custody and visitation require consideration of the best interest of the children involved and that a parent's conduct and character are at issue in cases involving custody and visitation. See Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981) (listing among the factors a trial court should consider in making a custody determination: "the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children"); Davis v. Davis, [Ms. 2190220, July 24, 2020] ___ So. 3d ___, ___ & ___ (Ala. Civ. App. 2020) (stating that "the character of the parents and other moral

considerations are relevant to decisions regarding custody and the welfare of the children at issue" and explaining that a parent's visitation "rights may be restricted in order to protect children from conduct, conditions, or circumstances surrounding their noncustodial parent that endanger the children's health, safety, or well-being"); and Fillingim v. Fillingim, 388 So. 2d 1010, 1011 (Ala. Civ. App. 1980) ("The trial court has much discretion in ascertaining visitation rights, and each case must stand upon its own peculiar facts and the personalities involved."). The mother therefore posits that the trial court's decision on the father's request to modify custody and/or visitation could be informed by material information that might be contained within the child-abuse/neglect reports maintained in the registry. We agree with the mother that information contained in the records maintained in the statewide central registry may well be material to the issues presented by the father's modification action.

However, our analysis does not end there. Notably, § 26-14-8(c)(4) permits disclosure of a record in the statewide central registry to a court for its use in determining an issue before it. No exception listed in § 26-

14-8(c) permits disclosure to litigants in a custody case. But see § 26-14-8(c)(8) (permitting disclosure to "an attorney or guardian ad litem in representing or defending a child or its parents or guardians in a court proceeding related to abuse or neglect of the child"). In a civil case involving the application of § 26-14-8(c), our supreme court has indicated that a trial court should perform an in camera review of the records of the Department of Human Resources to determine if they are material to the issues before the court. Ex parte Riggs, 423 So. 2d 202, 203 (Ala. 1982) (indicating that "the trial judge should conduct an in camera inspection of the subject records and any other written evidence to determine if there is relevant evidence" within the records). Similarly, the Court of Criminal Appeals has discussed the right of a criminal defendant to seek information from confidential records of the Department of Human Resources that are protected by § 26-14-8. See, e.g., Marshall v. State, 89 So. 3d 195, 201-03 (Ala. Crim. App. 2011). That court explained that, even when it is likely that the statewide central registry may contain exculpatory evidence, a criminal defendant is not entitled to disclosure of the records contained in the statewide central registry or the right to

review them. Marshall, 89 So. 3d at 201. Instead, a trial court is required to review those records in camera and to disclose only that information that is material to the defense. Id. at 202-03.

Although it is not related to a consideration of the confidentiality of records under § 26-14-8, the decision in Ex parte State Farm Fire & Casualty Co., 529 So. 2d 975 (Ala. 1988), is instructive. The insurance company plaintiffs in Ex parte State Farm had sought juvenile-court and law-enforcement records pertaining to two juveniles who had been adjudicated delinquent for setting a fire. 529 So.2d at 975-76. The juvenile court that had adjudicated the juveniles as delinquent and the circuit court presiding over the insurers' action had both denied the insurers' requests for "access to and use of certain law enforcement records and testimony of certain investigating officers relating to" the fire, id. at 975, based on Ala. Code 1975, §§ 12-15-100, 12-15-101, and 12-15-72(b). Id. at 975-76. Our supreme court explained that, although the records that the insurers sought were confidential, the insurers also had a right to defend themselves against a claim resulting from the fire. 529 So. 2d at 976. According to our supreme court,

> "[c]learly, then, we are faced with two competing public policies: on the one hand, the need to protect the child from public disclosure of juvenile court records and proceedings; and, on the other hand, the right of a liability insurer of a child in a civil action to prosecute its defense of the child's claim through the use of those records and proceedings that are essential and material to its case. We hold, however, that when these two public interests are brought face to face, it is not imperative that either of them should totally succumb to the absolutism of the other.
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> "That the right of 'confidentiality' on behalf of the child is a 'qualified' and not an 'absolute' privilege was addressed by this Court in Ex parte Guerdon Industries, Inc., 373 So. 2d 322 (Ala.1979) (denying the writ where the petitioner was found not to have a legitimate interest, because the child there involved was not a litigant in the civil action). Here, the civil litigants' constitutionally protected rights to a full and fair trial can be preserved without totally eroding the child's concomitant right of privacy. A carefully tailored order of discovery can accommodate one to the other, so that each can yield, to the degree necessary, without unduly compromising the underlying reasons for each of these competing public interests. Indeed, this Court has already recognized exceptions to the application of §12-15-72(b)[, Ala. Code 1975,] in criminal cases where the defendant's constitutional rights under the Sixth Amendment otherwise would be unduly hampered. Ex parte Lynn, 477 So. 2d 1385 (Ala.1985); see, also, Alderson v. State, 370 So. 2d 1119 (Ala. Crim. App. 1979)."

529 So. 2d at 976 (footnote omitted).

After discussing cases from other jurisdictions regarding situations in which the confidential nature of juvenile records did not prevent some

limited release and use of the information contained therein, the supreme court concluded that the insurers were entitled to material information contained in the law-enforcement records. 529 So. 2d at 977. Thus, our supreme court instructed the circuit court to review the records at issue in camera. Id. In addition, our supreme court directed the circuit court to

> "determine whether the information contained therein is essential and not otherwise reasonably available in the petitioners' civil action. If it finds this information to be both essential and not otherwise reasonably available, the [circuit] court shall make it available for inspection and use for trial purposes, as may be appropriate under the rules of evidence. For example, data pertaining to the social background of the children, matters of a mere personal nature, any record of former offenses, and other data pertaining to rehabilitation and treatment shall not be subject to disclosure. After these determinations are made, the [circuit] court shall tailor an order allowing the investigating officers to testify in keeping with the scope of the materials ordered to be disclosed."

529 So. 2d at 977.

Under § 26-14-8(c)(4), a trial court is permitted access to the records in the statewide central registry. The protective order issued by the trial court in the present case requires that DHR produce the records to the trial court. The trial court may review those records in camera and

determine whether they contain any information that would be material to the issues before it. If such information is discovered by the trial court, it may, consistent with the practice followed by the trial court in Marshall and prescribed by our supreme court in Ex parte State Farm Fire & Casualty Co., release that information to the parties at trial, provided that the information would be admissible evidence at the trial on the father's modification action.

Of course, the mother did not specifically request in the subpoena duces tecum only those DHR records contained in the statewide central registry created under § 26-14-8; she requested production of all records of whatever kind maintained by DHR relating to the father. The mother indicates in her answer to the father's petitions that she does not believe that §§ 38-2-6, 38-7-13, and 38-9-6 are relevant because those statutes are not "applicable to the matter at hand" and "address records kept by child-care facilities and placements for adults in need of protective services, neither of which we have in the case at hand." However, based on the language of the subpoena duces tecum, any records kept relating to adult-protective services, child-care facilities, or public-welfare programs that

might relate to, or contain a reference to, the father would be subject to the subpoena and would be furnished to the trial court.

Unlike § 26-14-8, neither § 38-2-6, nor § 38-7-13, nor § 38-9-6 contain a specific provision permitting disclosure of the records compiled under those statutes to a court for its use in determining an issue before it. Section 38-9-6(3) allows records relating to an adult in need of protective services to be "made available on application for cause to persons approved by the commissioner of [the Department of Human Resources] or by the court"; however, nothing in the materials before us suggest that the trial court could have treated the mother's subpoena duces tecum as an application seeking disclosure of such records or that it could have determined that the mother had established good cause to have any such records made available. Section 38-2-6(8) states that information contained in records pertaining to applicants for, or recipients of, public assistance is confidential and that such information should not be disclosed except for "purposes ... directly connected with the administration of public assistance, or the investigation thereof by grand juries," neither of which is an issue before the trial court. See also Ex

parte Alabama Dep't of Hum. Res., 719 So. 2d 194, 200 (Ala. 1998) (quoting § 38-2-6(8) and noting the confidentiality of records pertaining to public-assistance programs, especially " 'information concerning children and their families and applicants for and recipients of public assistance, including, but not limited to, payments or services' " but allowing in camera inspection of such records by the trial court to determine whether any of the information contained in those records would be material to the defense of a class-action fraud claim by an insurer). The requirements in §§ 38-2-6, 38-7-13, and 38-9-6 respecting the confidentiality of those records protected by each statute, combined with the mother's apparent concession that any potential records kept pursuant to those statutes concerning the father are not material or relevant to the issues raised in the father's modification action, prevent us from concluding that confidential records maintained under those statutes may be properly disclosed pursuant to the subpoena duces tecum. Thus, insofar as the father argues that records maintained by DHR pursuant to §§ 38-2-6, 38-7-13, and 38-9-6 are confidential and not subject to the subpoena duces tecum, we agree. Accordingly, the father's petitions are granted insofar

as the subpoena duces tecum might be perceived as requiring DHR to relinquish records deemed confidential by §§ 38-2-6, 38-7-13, and 38-9-6, and the trial court is directed to modify the protective order to exclude the production of such records in compliance with this opinion.

2200685 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

2200686 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

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