

REL: May 31, 2023

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is published in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

CL-2023-0368

Ex parte C.C.

PETITION FOR A WRIT OF MANDAMUS

(In re: H.C.

v.

C.C.)

(Madison Circuit Court, DR-23-3229)

EDWARDS, Judge.

C.C. ("the husband") has filed a petition for the writ of mandamus with this court seeking to compel the Madison Circuit Court ("the trial court") to grant his motion to restore to the docket a hearing on the ex parte protection-from-abuse ("PFA") order awarded to H.C. ("the wife"),

CL-2023-0368

which order, among other things, prohibits the husband from having any contact with the wife or the parties' children. The mandamus petition and the materials attached to the petition indicate that the wife filed a petition initiating the PFA action on May 16, 2023; the husband was served on May 17, 2023, and the PFA action was docketed as case number DR-23-3229 and was assigned to Judge Chris Comer. The materials also demonstrate the following procedural history. Judge Comer entered an ex parte PFA order on May 16, 2023, and set a hearing on the PFA petition for May 30, 2023. The wife then initiated a divorce action in the trial court on May 24, 2023; that action was docketed as case number DR-23-900459 and was assigned to Judge D. Alan Mann. The wife requested that the PFA action and the divorce action be consolidated. On May 25, 2023, Judge Comer entered an order consolidating the PFA action with the divorce action and ordered that the PFA action be reassigned to Judge Mann. In that same order, Judge Comer canceled the May 30, 2023, hearing on the PFA petition. That same day, the husband filed a motion seeking reconsideration of that part of the May 25, 2023, order canceling the hearing on the PFA petition, arguing that, pursuant to Ala. Code

CL-2023-0368

1975, § 30-5-6(a), he was entitled to a hearing within 10 days of service of process of the PFA petition. No action was taken on the husband's motion, and he filed his petition for the writ of mandamus on May 26, 2023.

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and properly invoked jurisdiction of the court."

Ex parte Norlander, 90 So. 3d 183, 185 (Ala. Civ. App. 2012) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

As the husband correctly points out, § 30-5-6(a) requires that a final hearing be held on a PFA petition within 10 days of service of process of the petition on the defendant. See generally Rule 6(a), Ala. R. Civ. P. (providing that, in computing any period that is less than 11 days, intermediate weekend days and holidays are not included in the computation). Section 30-5-6 provides, in its entirety:

"(a) The court shall hold a hearing after the filing of a petition under [the Protection from Abuse Act, § 30-5-1 et seq., Ala. Code 1975,] upon the request of the defendant or within 10 days of the perfection of service. A final hearing shall be set at which the standard of proof shall be a preponderance of

the evidence. If the defendant has not been served, a final hearing may be continued to allow for service to be perfected.

"(b) The court may enter such temporary ex parte protection orders as it deems necessary to protect the plaintiff or children from abuse, or the immediate and present danger of abuse to the plaintiff or children, upon good cause shown. The court shall grant or deny a petition for a temporary ex parte protection order filed under [the Protection from Abuse Act] within three business days of the filing of the petition. Any granted temporary ex parte protection order shall be effective until the final hearing date.

"(c) If a final hearing under subsection (a) is continued, the court may make or extend temporary ex parte protection orders under subsection (b) as it deems reasonably necessary."

At first glance, it might appear that § 30-5-6(c) permits a trial court to continue a final hearing on a PFA petition indefinitely and to continue in effect an ex parte PFA order until a final hearing is held. However, we do not believe that the statute grants such discretion to a trial court. Instead, we read § 30-5-6(c) to permit a trial court to extend the effectiveness of an ex parte PFA order only when the final hearing on the PFA petition is continued for the only reason stated in § 30-5-6(a), which is for failure of service on the defendant. Clearly, § 30-5-6(a) was designed to protect the due-process rights of defendants in PFA actions. To allow an ex parte PFA order, which is entered solely on the sworn

CL-2023-0368

allegations of the plaintiff, to remain in place indefinitely, without holding a hearing at which the defendant may refute the allegations of the petition, would violate the due-process rights of the defendant.

In his mandamus petition, the husband relies on the principles espoused in Ex parte Couey, 110 So. 3d 378, 381 (Ala. Civ. App. 2012), in which this court determined that a parent who has lost custody of his or her child by virtue of an ex parte order in a domestic-relations action "should be given notice and an opportunity to be heard as expeditiously as possible," preferably within 72 hours of the entry of the ex parte order. As we explained in Ex parte C.T., 154 So. 3d 149, 153 (Ala. Civ. App. 2014) (quoting Ex parte White, 245 Ala. 212, 215, 16 So. 2d 500, 503 (1944), quoting in turn 39 Am. Jur. 604, § 17)), "the right to transfer custody in a 'summary proceeding' is limited by the requirement that 'an adequate remedy [be] available by which the parent may afterward have his [or her] rights presented to a proper tribunal.'" We further explained that "[o]ne hallmark of an adequate remedy is its timely availability." Id.

The wife first asserts that this court should deem the husband's mandamus petition to have been improperly filed because, she says, the husband seeks relief from an order entered by Judge Comer when the PFA action is now pending before Judge Mann, who has yet to enter any order in the PFA action. The husband is seeking review of Judge Comer's May 25, 2023, order. We find no reason to consider the husband's challenge to that order mooted by that portion of the order consolidating the PFA action with the divorce action and reassigning the PFA action to Judge Mann. If the cancellation of the May 30, 2023, final hearing on the PFA petition is an error that may be remedied, it must be remedied by seeking review of the order canceling the hearing, not by awaiting the entry of an order from a subsequent judge.

The wife also challenges the husband's request for expedited mandamus relief under Rule 27(e), Ala. R. App. P., because, she contends, the husband has not alleged that an emergency exists that would warrant expedited relief. She also argues that he has failed to demonstrate the existence of a situation under which he would be subjected to irreparable harm. However, the failure to timely hold a final

CL-2023-0368

hearing at which the husband may challenge the wife's allegations in her PFA petition is significant enough to entitle the husband to expedited relief.

The wife next contends that Judge Mann may still enter an order in compliance with § 30-5-6(a) because, she says, he can hold a hearing "upon the request of the [husband]." In making that argument, the wife completely ignores that portion of § 30-5-6(a) that compels a trial court to hold a final hearing on a PFA petition "within 10 days of the perfection of service." That is, she apparently believes that the statute permits the trial court to elect to hold a final hearing either within 10 days of service of process or at some later time, after a hearing is requested by the defendant. Thus, the wife appears to ignore the imperative nature of the term "shall" in the statute. See Oliver v. Shealey, 67 So. 3d 73, 76 (Ala. 2011) (indicating that "[t]he word 'shall' can be permissive in a situation where it would frustrate legislative intent to hold otherwise, but if no such circumstance exists, it is mandatory"). A more logical reading of the statute is that a trial court may hold a final hearing on a PFA petition at any time before the expiration of the 10-day period if a request is made

CL-2023-0368

by the defendant and circumstances permit. To read the statute as the wife suggests would severely hamper the due-process protections it is clearly designed to protect.

Based on § 30-5-6(a) and the due-process principles set out in Ex parte Couey and Ex parte C.T., we agree with the husband that he has a clear, legal right to a final hearing on the PFA petition within 10 days of the perfection of service, i.e., on or before June 1, 2023. See Rule 6(a), Ala. R. Civ. P. Because the hearing that was scheduled for May 30, 2023, has been canceled and the materials before us indicate that no hearing has been rescheduled within the 10-day period required by § 30-5-6(a), we conclude that the husband is entitled to a writ directing the trial court to set a final hearing on the wife's PFA petition on or before Thursday, June 1, 2023, so that the husband may challenge the evidentiary basis for the ex parte PFA order, which, in part, curtails his ability to have contact with his children.

PETITION GRANTED; WRIT ISSUED.

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