

Rel: March 22, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Ex parte Kelsey A. Dunbar

PETITION FOR WRIT OF MANDAMUS

(In re: Robert Wood

v.

Kelsey A. Dunbar)

(Elmore Circuit Court, DR-18-900280)

PER CURIAM.

A child was born in 2011 of the relationship between Kelsey A. Dunbar ("the mother") and Robert Wood ("the

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father"); the parties never married.¹ The materials before this court do not indicate that any order or judgment has awarded either party custody of the child. The parties agree that the child lived with the mother in Florida until the summer of 2017, when the child visited the father in Alabama. The child remained with the father in Alabama from approximately June 2017 through late November 2018. In late November 2018, the mother traveled from her home in Florida to Alabama, picked up the child from school without notifying the father, and did not return the child to the father.

Thereafter, on November 26, 2018, the father filed in the Elmore Circuit Court ("the trial court") a petition seeking to establish the paternity of the child, seeking an award of custody of the child, and seeking an award of child support. The father also sought an ex parte order awarding him custody of the child pending the resolution of his custody action. On November 27, 2018, the trial court entered an ex parte order ordering the mother to "immediately return the child to the father," and to return the child to Alabama if the child had

¹The father's paternity is not disputed.

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been removed from this state, and scheduling a pendente lite custody hearing for December 12, 2018.

On December 4, 2018, an attorney filed a general notice of appearance on behalf of the mother. Also on December 4, 2018, the mother filed a motion to vacate the ex parte custody order. In that motion, the mother argued that a child-support action concerning the child had been filed previously in Florida. The mother also stated in a footnote in her motion that she had not been served with process and was appearing for the sole purpose of "challenging the ex parte order."

On December 12, 2018, the mother's attorney filed an amended notice of appearance in which he stated that his representation of the mother was limited "at the present time to challenging" the November 27, 2018, ex parte order.

On December 13, 2018, the trial court entered an order finding that the father's attorney had been present for a hearing on that date and that an attorney had filed a notice of appearance on behalf of the mother.² The trial court determined that, although the mother had not been personally

²The parties agree that the hearing actually occurred on December 12, 2018, as scheduled in the November 27, 2018, order.

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served, the mother's attorney had filed a general notice of appearance in the trial court, and, therefore, that the mother had waived service of process. The trial court denied the mother's motion to vacate its November 27, 2018, ex parte custody order and directed that the father was to receive a pickup order for obtaining custody of the child.

The mother has filed a petition for a writ of mandamus in this court challenging the December 13, 2018, order. The mother, in part, relies on Rule 65, Ala. R. Civ. P., and characterizes that part of the December 13, 2018, order that continued the award of pendente lite custody in the father as an injunction. We agree. We construe that part of the December 13, 2018, order as granting the father interlocutory injunctive relief, i.e., a continuation of pendente lite custody and an order allowing him to regain custody of the child.

An appeal is the appropriate method for reviewing the grant or denial of injunctive relief. Rule 4(a)(1), Ala. R. App. P.; B.C. v. Cullman Cty. Dep't of Human Res., 169 So. 3d 1059, 1060 (Ala. Civ. App. 2015). "Rule 4(a)(1) requires appeals from an interlocutory order granting an injunction to

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be filed within 14 days of the date of the entry of the order or judgment being appealed." Peterson v. Lucas, 69 So. 3d 878, 879 (Ala. Civ. App. 2011).

Instead of filing a notice of appeal, the mother filed her petition for a writ of mandamus on December 26, 2018, within the 14 days allowed for taking an appeal from the December 13, 2018, order. A petition for a writ of mandamus is not a proper method for seeking review of the December 13, 2018, order. Rule 4(a)(1); B.C. v. Cullman Cty. Dep't of Human Res., supra. This court may construe the mother's petition for a writ of mandamus as an appeal. B.C. v. Cullman Cty. Dep't of Human Res., 169 So. 3d at 1060. However, given the posture of this case, we elect not to convert the mother's petition to an appeal. Accordingly, we conclude that the mother has failed to properly seek appellate relief from that part of the December 13, 2018, order pertaining to pendente lite custody of the child, and, thus, we dismiss the petition as to that issue.

The mother also argues that the trial court erred in determining in its December 13, 2018, order that she had waived service of process when her attorney filed his general

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notice of appearance. We conclude that that portion of the trial court's December 13, 2018, order is properly reviewable by way of the mother's petition for a writ of mandamus. Ex parte A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008); Green v. Estate of Nance, 971 So. 2d 38, 41 (Ala. Civ. App. 2007).

The mother cites Kingvision Pay-Per-View, Ltd. v. Ayers, 886 So. 2d 45 (Ala. 2003), in support of her argument that a notice of appearance filed by her attorney is not a pleading that would constitute a general appearance in an action. See Rule 7(a), Ala. R. Civ. P. (defining pleadings). In Kingvision, supra, our supreme court stated, among other things, that "[a] general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court." 886 So. 2d at 53. Thus, a party may be deemed to have waived the right to service of process by filing a general notice of appearance or a pleading that constitutes a general appearance.

Our caselaw holds that a notice of appearance filed by an attorney on behalf of his or her client constitutes "a waiver of service of process." Simmons v. Simmons, 99 So. 3d 316, 320 (Ala. Civ. App. 2011). See also Ex parte McCrory &

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Williams, Inc., 155 So. 3d 1018, 1021 (Ala. Civ. App. 2014) (citing Simmons v. Simmons, supra, with approval); and C.M. v. Madison Cty. Dep't of Human Res., 133 So. 3d 890 (Ala. Civ. App. 2013) (recognized as having been superseded by statute on other grounds in J.B. v. Cullman Cty. Dep't of Human Res., 225 So. 3d 66, 72 n. 3 (Ala. Civ. App. 2016)) (same).

The facts of C.M. v. Madison County Department of Human Resources, supra, are similar to those of this case with regard to the issue of service. In that case, with regard to the issue, the mother's attorney filed a notice of appearance on behalf of the mother in an action seeking to terminate the mother's parental rights. One week later, the mother's attorney amended his notice of appearance to state that that notice of appearance was not a waiver of the mother's right to dispute service of process. At the hearing on the merits, the mother's attorney objected to the service by publication of the mother; he argued that the affidavit in support of the service by publication on the mother was insufficient to establish that the mother had avoided service of process. The juvenile court overruled that objection. On appeal, this court held that the notice of appearance filed by the mother's

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attorney constituted a waiver of service of process by the mother and that the mother's attorney's attempt to amend the notice of appearance approximately a week after the initial notice had been filed was ineffective. C.M., 133 So. 3d at 893 (citing Simmons v. Simmons, supra). This court explained:

"[T]he mother's counsel attempted to 'amend' the notice of appearance to disavow any waiver of service of process, but a notice of appearance is not a 'pleading,' see Rule 7(a), Ala. R. Civ. P., to which the exception to waiver of the defense of insufficiency of service of process outlined in Rule 12(h)(1), Ala. R. Civ. P., for 'amended pleadings' is applicable."

C.M. v. Madison Cty. Dep't of Human Res., 133 So. 3d at 893.

In this case, after filing his initial general notice of appearance, the mother's attorney later purported to amend that notice of appearance to state that he was appearing for the limited purpose of opposing the ex parte order. In that purported amended notice of appearance, the mother's attorney did not dispute service of process on the mother. This court has stated:

""[I]f a defendant intends to rely on want of jurisdiction over his [or her] person, he [or she] must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court. An appearance for any other purpose is usually considered general." R.M. v. Elmore Cty. Dep't of Human Res., 75 So. 3d 1195, 1200 (Ala. Civ. App.

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2011) (quoting Persons v. Summers, 274 Ala. 673, 681, 151 So. 2d 210, 215 (1963)). A general appearance acts as a waiver of any defense of lack of personal jurisdiction, including any defense of improper service."

Sims v. Sims, 229 So. 3d 769, 771 (Ala. Civ. App. 2016).

Even if this court interpreted the mother's attorney's "amended" notice of appearance as arguing that the mother had not been properly served, based on the above caselaw, we cannot agree with the mother that such a purported amendment could alter the general notice of appearance initially filed by her attorney. C.M. v. Madison Cty. Dep't of Human Res., supra; Simmons v. Simmons, supra. Given the facts and the foregoing authority, we cannot say that the mother has met her burden of demonstrating that she is entitled to a writ of mandamus on this issue. Therefore, we deny the petition as to this issue.

The mother filed a motion to strike portions of the father's response to her petition for a writ of mandamus. We grant the mother's motion to strike insofar as it pertains to exhibit four in the response to the petition for a writ of mandamus; the motion to strike is otherwise denied.

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PETITION DISMISSED IN PART AND DENIED IN PART.

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

Edwards, J., concurs in the result, without writing.

Thompson, P.J., concurs in part and dissents in part,
with writing.

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THOMPSON, Presiding Judge, concurring in part and dissenting in part.

I concur in that part of the main opinion that concludes that Kelsey A. Dunbar ("the mother") failed to demonstrate that she is entitled to relief with regard to the trial court's determination that she had waived service of process by virtue of her attorney's filing a general notice of appearance on her behalf. I dissent, however, as to the dismissal, in part, of the mother's mandamus petition because I believe that this court should exercise its discretion to address the issue the mother raises pertaining to the ex parte order.

I note that the materials submitted to this court indicate that orders exist from Florida concerning child support. At this early point in the action, it is unclear to me whether the trial court has considered the issue of its own subject-matter jurisdiction over the custody claim under the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975. Arguably, the allegations in the petition filed in the trial court by Robert Wood, the father, would vest jurisdiction in the trial court

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pursuant to the UCCJEA, assuming that there is not another action in Florida pursuant to which the Florida courts might retain jurisdiction. I would direct the trial court to inquire into its jurisdiction under the UCCJEA.