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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

2130890

Ex parte W.L.K.

PETITION FOR WRIT OF MANDAMUS

(In re: The Adoption Petition of T.C.M. and C.N.M.)

(Jefferson Probate Court, 2013-217610)

On Application for Rehearing

PER CURIAM.

The opinion of November 7, 2014, is withdrawn, and the following is substituted therefor.

W.L.K. ("the father") and S.F. ("the mother") were involved in a relationship between April and July 2012; they lived together in the father's house in Middleburg, Florida, during that period. The mother became pregnant early in the relationship, and she and the father had begun preparing for the baby by purchasing baby items. However, the mother left the father in July 2012, and, after she broke into the father's house and stole several items, the father swore out a warrant against her. The mother was arrested, and, after that, the father lost contact with her. In December 2012, the father, who is in the United States Navy, contacted an attorney in the Judge Advocate General about his situation; that attorney referred the father to a nonmilitary attorney, who assisted the father by instituting a paternity and custody action in a Florida court in January 2013. The father registered with the putative father registry in Florida. The father attempted to locate the mother at nearby hospitals on January 18, 2013, the expected date of delivery. However, the father was unable to locate the mother.

On January 9, 2013, the mother gave birth to M.M. ("the child") in Montgomery, Alabama. The mother had consented to

an adoption of the child by T.C.M. and C.N.M. ("the prospective adoptive parents"), who were present at the birth and who took the child home from the hospital. On January 29, 2013, the prospective adoptive parents filed a petition to adopt the child in the Jefferson Probate Court.

The father first learned of the birth of the child in Alabama on March 1, 2013. After he was served with an amended petition to adopt the child on March 25, 2013, and upon the advice of his Florida counsel, the father sought legal counsel in Alabama. He filed a contest to the adoption petition and a motion to dismiss the adoption petition on April 11, 2013.

As required by Ala. Code 1975, § 26-10A-24(a), the probate court held a contested hearing on the father's contest to the adoption petition on September 26, 2013. At issue was whether the father had impliedly consented to the child's adoption pursuant to the theory of "prebirth abandonment," under which consent to an adoption may be implied based on abandonment if a father fails, "with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to the birth." Ala. Code 1975, § 26-10A-9(a)(1). After hearing the testimony of the father

and T.C.M., the probate court entered an order on March 19, 2014, concluding that the father had not impliedly consented to the adoption and specifically rejecting the contention that the father's conduct had amounted to an abandonment of the mother during her pregnancy. The order set a hearing for June 12, 2014, "to determine the best interest of [the] child."

On April 1, 2014, the prospective adoptive parents filed a motion, purportedly pursuant to Rule 59, Ala. R. Civ. P., seeking to have the probate court amend its judgment. The father filed a motion seeking to have the probate court dismiss the adoption proceeding as required by § 26-10A-24(d). The probate court purported to deny both motions on July 22, 2014. Also on July 22, 2014, the probate court entered an order stating that, on its own motion, it was transferring the adoption proceeding to the Jefferson Juvenile Court pursuant to § 26-10A-24(e).

The father filed this petition for the writ of mandamus with this court on August 4, 2014, seeking an order prohibiting the transfer of the adoption proceeding to the juvenile court, an order requiring the probate court to dismiss the adoption proceeding, as required by § 26-10A-

24(d), and an order requiring the probate court to vacate its interlocutory order awarding temporary custody of the child to the prospective adoptive parents.

> "'"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 (4) properly invoked jurisdiction of the court."'"

Ex parte A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008) (quoting Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003), quoting in turn Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

To determine whether the father's mandamus petition is the proper vehicle by which to invoke this court's review, we must first consider whether the probate court's March 19, 2014, order was a final judgment or an interlocutory order. Ex parte A.M.P., 997 So. 2d at 1014 ("A petition for a writ of mandamus is an appropriate remedy for challenging an interlocutory order."). The parties indicate in their respective filings that the March 19, 2014, order was an interlocutory order because it did not dismiss the adoption petition, determine who should have custody of the child, or

enter a judgment of adoption. "A final judgment is one that completely adjudicates all matters in controversy between all the parties." Eubanks v. McCollum, 828 So. 2d 935, 937 (Ala. Civ. App. 2002). The March 19, 2014, order decided the father's contest to the adoption, but it did not resolve the entire adoption proceeding. In addition, this court has explained that an order denying a petition to set aside consent to an adoption is not a final judgment capable of supporting an appeal. Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1990). Thus, we agree that the March 19, 2014, order was, in fact, an interlocutory order.

That being determined, we note that the father did not seek mandamus relief within 14 days of the entry of the March 19, 2014, order. According to Rule 21(a)(3), Ala. R. App. P., "[t]he presumptively reasonable time for filing a petition seeking review of an order of a trial court ... shall be the same as the time for taking an appeal." A judgment of adoption must be appealed within 14 days. Ala. Code 1975, § 26-10A-26(a). Instead of filing a petition for the writ of mandamus, the father filed a motion seeking to have the probate court enter an order dismissing the adoption

proceeding in April, and he waited until the probate court entered an order purporting to deny that motion in July.[1] To the extent that the father's motion was an attempt to have the probate court reconsider its March 19, 2014, order, we note that, "'unlike a postjudgment motion following a final judgment, a motion to reconsider an interlocutory order does not toll the presumptively reasonable time period that a party has to petition an appellate court for a writ of mandamus.'" Ex parte C.J.A., 12 So. 3d 1214, 1216 (Ala. Civ. App. 2009) (quoting Ex parte Onyx Waste Servs. of Florida, 979 So. 2d 833, 834 (Ala. Civ. App. 2007)). Although the father's petition was not timely filed in connection with the March 19, 2014, order, the father's petition was timely filed in connection with the probate court's July 22, 2014, order transferring the adoption proceeding to the juvenile court.

[1]We note that our supreme court has indicated that a postjudgment motion directed to a judgment of adoption is timely when filed within 14 days of the entry of the judgment and that such a postjudgment motion is denied by operation of law if not ruled upon within 14 days. See Ex parte A.M.P., 997 So. 2d at 1013 n.3 and accompanying text (explaining that the adoption judgment was entered on November 8, 2005, that the postjudgment motion was "timely filed" on November 22, 2005, that the postjudgment motion was denied by operation of law, and that the appeal, which was filed on December 16, 2005, had been timely filed).

Thus, we will consider the petition to have timely invoked this court's jurisdiction.

The father contends that, pursuant to § 26-10A-24(d), the probate court was required to dismiss the adoption proceeding once it resolved the adoption contest in the father's favor and that it lacked jurisdiction to transfer the proceeding to the juvenile court. Indeed, the language of the statute supports that conclusion:

> "(d) After hearing evidence at a contested hearing, the court shall dismiss the adoption proceeding if the court finds:
>
> "(1) That the adoption is not in the best interests of the adoptee.
>
> "(2) That a petitioner is not capable of adopting the adoptee.
>
> "(3) That a necessary consent cannot be obtained or is invalid.
>
> "(4) That a necessary consent may be withdrawn. Otherwise the court shall deny the motion of the contesting party."

§ 26-10A-24(d) (emphasis added).

The probate court relied on § 26-10A-24(e) for its transfer order. That provision provides that, "[o]n motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile

matters." § 26-10A-24(e). The probate court, however, had already held the contested hearing when it entered its July 22, 2014, order, and transfer was therefore not proper under § 26-10A-24(e).

However, as the prospective adoptive parents point out, another statute provides a potential basis for the probate court's July 22, 2014, order transferring the adoption proceeding to the juvenile court. Section 26-10A-3, Ala. Code 1975, grants the probate court original jurisdiction over adoption proceedings, but it further states that, "[i]f any party whose consent is required fails to consent or is unable to consent, the proceeding will be transferred to the court having jurisdiction over juvenile matters for the limited purpose of termination of parental rights." Thus, the prospective adoptive parents contend, under § 26-10A-3 the probate court properly transferred the adoption proceeding to the juvenile court for that court to consider the termination of parental rights.

At first blush, it appears that § 26-10A-24(d) and § 26-10A-3 conflict. One statute, § 26-10A-24(d), directs the probate court to dismiss the adoption proceeding if, after a

contested hearing, it concludes that, among other things, "consent cannot be obtained or is invalid." The other statute, § 26-10A-3, indicates that, when a parent "fails to consent or is unable to consent," the proceeding should be transferred to the juvenile court for the limited purpose of considering termination of parental rights.

We are aware that this court and our supreme court have indicated that the transfer language contained in § 26-10A-3 mandates transfer to the juvenile court of adoption proceedings lacking implied or express consent from a parent. Ex parte A.M.P., 997 So. 2d at 1018 ("It is only when there is no express or implied consent or relinquishment from a parent of the adoptee that the mandatory transfer portion of § 26-10A-3 applies .... When applicable, this transfer provision is mandatory ...."); R.L. v. J.E.R., 69 So. 3d 898, 901 (Ala. Civ. App. 2011) ("The mother refused to consent to the adoption; therefore, pursuant to § 26-10A-3, the probate court was required to transfer the matter to the court having jurisdiction to determine whether the mother's parental rights were due to be terminated."). In Ex parte A.M.P., our supreme court further opined that, "[w]hen § 26-10A-3 is read in para

materia with § 26-10A-9, it is clear that if the probate court finds that the evidence does not prove implied consent ..., then the probate court must transfer the case to juvenile court for a determination of whether to terminate parental rights." Ex parte A.M.P., 997 So. 2d at 1019. However, our supreme court did not consider the language of § 26-10A-24(d) in its analysis in Ex parte A.M.P., and neither Ex parte A.M.P. nor R.L. involved the resolution of an adoption contest in favor of the objecting parent under § 26-10A-24(d). Thus, we are presented with a question that cannot be answered by reliance on those cases.

To resolve this conflict, we turn to the rules of statutory construction.

> "This court must consider statutory provisions in the context of the entire statutory scheme, rather than in isolation. Siegelman v. Alabama Ass'n of School Bds., 819 So. 2d 568, 582 (Ala. 2001). In ascertaining legislative intent, we must look to the entire act instead of isolated phrases or clauses. Lambert v. Wilcox County Comm'n, 623 So. 2d 727, 729 (Ala. 1993). Moreover, it is 'the duty of the Court to harmonize and reconcile all parts of a statute so that effect may be given to each and every part: conflicting intentions in the same statute are never to be supposed or so regarded unless forced on the Court by unambiguous language.' Leath v. Wilson, 238 Ala. 577, 579, 192 So. 417, 419 (1939). When construing the language of a statute, this court must presume '"'that every word, sentence, or

> provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.'"' Ex parte Uniroyal Tire Co., 779 So. 2d 227, 236 (Ala. 2000) (quoting Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997))."

Hays v. Hays, 946 So. 2d 867, 877 (Ala. Civ. App. 2006); see also Dollar v. City of Ashford, 677 So. 2d 769, 770 (Ala. Civ. App. 1995) (quoting Ex parte Jones Mfg. Co., 589 So. 2d 208, 211 (Ala. 1991)) (stating that "'[s]tatutes should be construed together so as to harmonize the provisions as far as practical'"). "Furthermore, we must give the words in a statute their plain, ordinary, and commonly understood meaning, and where plain language is used we must interpret it to mean exactly what it says." Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) (citing Ex parte Shelby Cnty. Health Care Auth., 850 So. 2d 332 (Ala. 2002)).

Our consideration of the entire Alabama Adoption Code, Ala. Code 1975, § 26-10A-1 et seq., given the principles of statutory construction, convinces us that § 26-10A-3 and § 26-10A-24(d) each have specific fields of operation. In a situation in which a probate court has resolved a contest in

favor of the parent objecting to the adoption, the plain language of § 26-10A-24(d) must control.[2] That statute addresses a specific form of hearing held in an adoption proceeding, at which a contest to an adoption -- including a contest based on an argument that an express or an allegedly implied consent is invalid -- is determined. See § 26-10A-24(a)(3) (stating that one issue a probate court may determine at a contested hearing is "[w]hether an actual or implied consent or relinquishment to the adoption is valid"). Moreover, although, according to the prospective adoptive parents, § 26-10A-3 appears to require the transfer of an adoption proceeding in every situation where a parent has failed to give his or her consent, enforcing the transfer provision contained in § 26-10A-3 after a parent has successfully contested the adoption would leave no field of operation for the requirement in § 26-10A-24(d) that the adoption proceeding be dismissed after a successful contest. Enforcing § 26-10A-24(d) and requiring dismissal of an

[2]We note that a probate court may transfer a pending contest to the juvenile court for determination under § 26-10A-24(e), which states: "On motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile matters."

adoption proceeding after a successful contest, however, leaves room for the operation of § 26-10A-3 in those adoption proceedings in which a parent does not mount a contest to the adoption but fails to consent or is unable to do so. Such a construction of the two provisions is supported by the language used in the statutes, and it also meets our duty "'to harmonize and reconcile all parts of a statute so that effect may be given to each and every part.'" Hays, 946 So. 2d at 877 (quoting Leath v. Wilson, 238 Ala. 577, 579, 192 So. 417, 419 (1939)).

Because we have concluded that the juvenile court's July 22, 2014, order transferring the adoption proceeding to the juvenile court is not proper under either § 26-10A-24(e) or § 26-10A-3, we grant the petition for the writ of mandamus and order the probate court to rescind its July 22, 2014, order transferring the adoption proceeding to the juvenile court and to comply with § 26-10A-24(d) and § 26-10A-24(h).[3]

The father also requests that this court order the probate court to vacate its interlocutory order awarding

[3]In deciding whether the probate court properly transferred the adoption proceeding, we have not considered whether the probate court correctly decided the father's contest, because that issue is not before us in this petition.

temporary custody of the child to the prospective adoptive parents. The father maintains that, because he never consented to the adoption of the child, the probate court never acquired jurisdiction to enter the interlocutory custody order, thus rendering that order void. Although a probate court "never obtains jurisdiction to grant [an] adoption" if the required consents are not given or implied, see J.L.F. v. B.E.F., 571 So. 2d 1135, 1136 (Ala. Civ. App. 1990), this court has likened an adoption proceeding to an in rem proceeding, and, as such, its jurisdiction is first invoked by allegations in the petition that the required consents have been given or are implied. See Davis v. Turner, 337 So. 2d 355, 361 (Ala. Civ. App. 1976).

> "One line of cases holds that consent must continue up until the rendition of the decree or the trial court loses jurisdiction, In re Adoption of Schult, 14 N.J. Super. 587, 82 A.2d 491 [(1951)]; In re Adoption of Susko, 363 Pa. 78, 69 A.2d 132 [(1949)]; In re Adoption of McKinzie, 275 S.W.2d 365, Mo. App. [(1955)] The other line of decisions holds that jurisdiction attaches with the initial manifestation of consent and remains in spite of attempted repudiation of consent, Walter v. August, 186 Cal. App. 2d 395, 8 Cal. Rptr. 778 (1960). This latter line of cases likens adoption to an in rem proceeding, analogous to divorce. The natural parent's initial consent followed by placement of the child with the adoptive parents creates a res, a preadoptive relationship, over which the trial

> court maintains jurisdiction until adoption is finally decreed or denied. Since it is this res, not the consent agreement per se, which furnishes jurisdiction, repudiation of consent does not withdraw jurisdiction. By keeping jurisdiction, the trial court is fully able to inquire into the best interests of the child.
>
> "In light of the unique features of Alabama's adoption statute, the in rem approach to jurisdiction is more appropriate. Jurisdiction attaches with the initial acknowledgement of consent by the natural parent, and, once the child is placed, remains despite attempts at revocation, so long as the child's welfare is thereby furthered."

Davis, 337 So. 2d at 361.

Thus, when the issue of consent is challenged, such as when a parent attempts to withdraw consent or when a parent contests an implied consent, the probate court does not automatically lose jurisdiction over the proceeding. Instead, it is called upon to determine that issue, because the preadoptive relationship has created a res to which jurisdiction has attached. Id. Furthermore, the Adoption Code provides that the probate court "may enter further orders concerning the custody of the adoptee pending appeal," Ala. Code 1975, § 26-10A-26(b), indicating that the probate court's jurisdiction over an adoptee's custody is not terminated by the entry of a final order in that court.

At present, the probate court has not concluded its proceedings in this matter. Once it complies with this court's directive and enters a final judgment in this case, the prospective adoptive parents will likely appeal, as they have attempted an appeal from the interlocutory order under review. The probate court may, pursuant to § 26-10A-26(b), enter an order respecting the custody of the child at that time. Accordingly, we deny the father's petition insofar as he requests that the probate court be ordered to set aside the interlocutory custody order.

APPLICATION GRANTED; OPINION OF NOVEMBER 7, 2014, WITHDRAWN; PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Pittman and Thomas, JJ., concur.

Moore, J., concurs in the result, with writing.

Thompson, P.J., concurs in the result in part and dissents in part, with writing, which Donaldson, J., joins.

MOORE, Judge, concurring in the result.

In this case, the probate court determined that W.L.K. ("the father") had not impliedly consented to the adoption of M.M., his child. At that point, the probate court did not dismiss the action in accordance with Ala. Code 1975, § 26-10A-24(d)(3); instead, the probate court purported to transfer the proceeding to the juvenile court "in accordance with [Ala. Code 1975, § 26-10A-24(e)]." Section 26-10A-24(e) provides that, "[o]n motion of either party or of the court, a contested adoption hearing may be transferred to the court having jurisdiction over juvenile matters." By its plain language, § 26-10A-24(e) authorizes a probate court to transfer a pending adoption contest to a juvenile court for hearing and resolution; however, the probate court had already adjudicated the adoption contest at the time of its purported transfer, so § 26-10A-24(e) no longer applied. Thus, the probate court could not have transferred the adoption proceeding pursuant to § 26-10A-24(e).

T.C.M. and C.N.M. ("the prospective adoptive parents") argue that the probate court could have transferred the adoption proceeding to the juvenile court under Ala. Code

1975, § 26-10A-3. However, I find nothing in the materials submitted to this court to indicate that the probate court intended to transfer the case to the juvenile court under that Code section. The probate court did not refer to § 26-10A-3 in its order, and the prospective adoptive parents do not cite any document purporting to be a motion to transfer the proceeding to the juvenile court under § 26-10A-3 or for the purpose of terminating the father's parental rights. Hence, I cannot agree that the transfer order should be considered valid for that reason, and I find no need to discuss the interplay between § 26-10A-3 and § 26-10A-24(d).

Because the probate court did not transfer the case to the juvenile court under § 26-10A-3, and because it could not have transferred the case to the juvenile court under § 26-10A-24(e), its only remaining option was to dismiss the adoption proceeding. Hence, I concur with the main opinion that the petition for a writ of mandamus should be granted, that the transfer order should be vacated, and that the probate court should dismiss the case in compliance with § 26-10A-24(d) after complying with the costs provisions set out in Ala. Code 1975, § 26-10A-24(h).

In his petition, the father argues that the probate court is required to rescind its interlocutory custody order and to enter an order awarding him custody of the child. As a general rule, interlocutory orders become unenforceable upon a final judgment of dismissal. See Maddox v. Maddox, 276 Ala. 197, 199, 160 So. 2d 481, 483 (1964) (discussing Duss v. Duss, 92 Fla. 1081, 111 So. 2d 283 (1927)). Like other interlocutory orders, an interlocutory custody order entered by a probate court in an adoption proceeding merges into the final judgment of adoption. See Ex parte A.M.P., 997 So. 2d 1008, 1015 (Ala. 2008) ("Once the final order of adoption is entered, the interlocutory order becomes moot."). It would follow that an order dismissing an adoption petition due to the lack of consent by the natural father would automatically render an interlocutory custody order entered in the adoption proceeding ineffective. However, the father does not cite any caselaw or other authority to support that particular position. See Rule 28(a)(10), Ala. R. App. P. Because the burden rests on the petitioner seeking the writ of mandamus to prove a clear legal right to the relief sought, see generally Ex parte S.T., 149 So. 3d 1089 (Ala. Civ. App. 2014), and

because this court has no burden to perform legal research for a petitioner, Galloway v. Ozark Striping, Inc., 26 So. 3d 413 (Ala. Civ. App. 2009), I concur that the petition should be denied insofar as it seeks a writ of mandamus requiring the probate court to vacate its interlocutory custody order.

Likewise, the father has not provided this court any legal authority requiring the probate court to enter a judgment awarding him custody. To the contrary, the father argues repeatedly that the probate court does not have the jurisdiction to enter any order other than one dismissing the case. The main opinion cites § 26-10A-26(b), Ala. Code 1975, which provides, in pertinent part: "The [probate] court may enter further orders concerning the custody of the adoptee pending appeal." However, that provision does not apply at this juncture because no final judgment has been entered that would support an appeal. I believe that the father has a presumptive right to custody of the child, see Ex parte Terry, 494 So. 2d 628 (Ala. 1986), but, in the absence of citation to relevant and binding legal authority on the subject, I find no basis for granting the petition for a writ of mandamus

directing the probate court to award the father custody of the child.

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

Because I disagree with that portion of the main opinion that declines to direct the Jefferson Probate Court ("the probate court") to set aside its interlocutory order awarding temporary custody of the child to T.C.M. and C.N.M. ("the prospective adoptive parents"), I must respectfully dissent in part to the main opinion.

Pursuant to the Alabama Adoption Code ("the AAC"), § 26-10A-1 et seq., Ala. Code 1975, the probate court had jurisdiction to consider whether W.L.K. ("the father") had consented to the adoption. Section 26-10A-3, Ala. Code 1975, vests the probate court with original jurisdiction of proceedings, like the case at bar, brought under the AAC. Ex parte A.M.P., 997 So. 2d 1008, 1016 (Ala. 2008); see also § 26-10A-24(a)(3) (whether an actual or implied consent to the adoption is valid shall be determined at a contested hearing before the probate court); and § 26-10A-25(b)(2), Ala. Code 1975 (at the dispositional hearing, the probate court is required to find that all necessary consents, relinquishments,

terminations, or waivers have been obtained before it can enter a final judgment of adoption).

In Ex parte A.M.P., 997 So. 2d at 1018, our supreme court held that, "in the absence of a transfer of the contest[ed adoption proceeding], it is the probate court that hears and determines whether all necessary consents or relinquishments, either express or implied, are present." Section 26-10A-24(d)(3) expressly provides that the probate court "shall dismiss the adoption proceeding" if it finds that the necessary consent to the adoption has not been given. Therefore, as Judge Moore states in his special writing, once the probate court determined in this case that the father had not consented to the adoption, the adoption contest had been adjudicated and § 26-10A-24(e), allowing a contested adoption proceeding to be transferred to the juvenile court, was no longer applicable. ___ So. 3d at ___.

I also agree with Judge Moore that the prospective adoptive parents did not provide the probate court with any grounds that would lead to consideration of the termination of the father's parental rights. Thus, there was no basis for the probate court to transfer the adoption proceeding to the

juvenile court for the limited purpose of termination of parental rights pursuant to § 26-10A-3. Accordingly, I believe that the main opinion reached the correct conclusion in directing the probate court to rescind its order transferring the adoption proceeding to the Jefferson Juvenile Court.

I disagree, however, with the main opinion's statement that the March 19, 2014, order finding that the father had not impliedly consented to the adoption and had not abandoned the mother during her pregnancy did not resolve the entire adoption proceeding. ___ So. 3d at ___. To the contrary, because § 26-10A-24(d) mandates dismissal of an adoption proceeding in a case such as this one, in which it is established that the father did not consent to the adoption, and because the prospective adoptive parents have provided no basis calling for a consideration of whether the father's parental rights should be terminated, I believe that any action the probate court took after denying the parties' "postjudgment" motions is void for lack of subject-matter jurisdiction.

I have found no authority that allows the probate court to consider matters of child custody once it has been determined that an adoption proceeding is due to be dismissed. The main opinion, relying on Davis v. Turner, 337 So. 2d 355 (Ala. Civ. App. 1976), states that the probate court retained jurisdiction in this matter even after determining that the father had not consented to the adoption. I do not believe that Davis supports that position. In Davis, the biological mother of the child at issue in that case appealed from a final judgment of adoption. One of the issues on appeal was whether the mother's initial consent to the adoption could be revoked for legal cause before the entry of a final adoption judgment. 337 So. 2d at 360-61. In considering the issue, this court wrote:

> "Under the Alabama [adoption] statute it is the state's sovereign power, manifested by court decree, which brings the adoption to pass. The consent of the natural parent is not the instrument of adoption: rather, the giving of consent at some point is one of the prerequisites to the probate court's consideration of the subject matter.
>
> "Where this jurisdictional prerequisite has been satisfied at the time of the decree, the decree consummates the adoption and a later withdrawal of consent has no effect. Where a required consent has never been given, the trial court never obtains jurisdiction to proceed to the paramount question of

> the child's welfare. In the case before us now, the natural mother gave consent at one point in time but attempted to repudiate this consent, relying on the disability of nonage, prior to the rendition of the final decree."

337 So. 2d at 361 (emphasis added).

In this case, the probate court determined that the father had never given his consent to the adoption; therefore, the probate court "never obtain[ed] jurisdiction to proceed to the paramount question" of determining the child's best interest or to leave in place the interlocutory order awarding temporary custody of the child to the prospective adoptive parents. In other words, once the probate court found that the father did not consent to the adoption, it lost jurisdiction to make a custody determination regarding the child. At that point, the adoption proceeding should have been dismissed pursuant to § 26-10A-24(d).

Furthermore, under the facts of this case--which, according to the materials before this court include a DNA test indicating the father's paternity and the father's written claim of paternity of the child in accordance with Florida's Putative Father Registry--there is no legal basis for denying the father immediate custody of the child. See,

e.g., Stanley v. Illinois, 405 U.S. 645, 650-58 (1972)(holding that unwed fathers are entitled to a hearing on their fitness before their children are removed from their custody).

For the reasons set forth above, I would grant the father's petition in full and direct the probate court to vacate the temporary custody order, to place the child in the father's custody, and to enter a judgment dismissing the adoption proceeding. If the prospective adoptive parents believe they have valid grounds to seek custody of the child, the matter should be initiated in the appropriate court.

Donaldson, J., concurs.