

REL: 09/25/2015

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) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2015

2140874

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)

THOMAS, Judge.

In Ex parte W.L.K., [Ms. 2130890, February 27, 2015] ____

So. 3d ____ (Ala. Civ. App. 2015), W.L.K. ("the father") sought a writ of mandamus prohibiting the transfer of an adoption proceeding regarding M.M. ("the child") instituted in the

Jefferson Probate Court by T.C.M. and C.N.M. ("the prospective adoptive parents") to the Jefferson Juvenile Court; requiring the probate court to dismiss the adoption proceeding, as mandated by Ala. Code 1975, § 26-10A-24(d); and requiring the probate court to vacate its interlocutory order awarding temporary custody of the child to the prospective adoptive parents. Our February 27, 2015, opinion on rehearing in Ex parte W.L.K. ordered the probate court to rescind its order transferring the adoption proceeding to the juvenile court and to enter an order complying with Ala. Code 1975, § 26-10A-24(d) and § 26-10A-24(h). Ex parte W.L.K., ___ So. 3d at ___. The probate court has not complied with this court's directives, and the father now seeks a writ of mandamus directing the probate court to enter a judgment dismissing the adoption proceeding. We grant the petition and issue the writ.

"A writ of mandamus is an extraordinary remedy, and it will be 'issued only when 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 United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993). A writ of mandamus will issue only in situations where other relief is unavailable or is

inadequate, and it cannot be used as a substitute for appeal. Ex parte Drill Parts & Serv. Co., 590 So. 2d 252 (Ala. 1991)."

Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998). Our supreme court has explained that a petition for the writ of mandamus is the appropriate vehicle for seeking a trial court's compliance with an appellate-court mandate or directive:

"On remand, trial courts are required to follow the mandates of this Court or of any other appellate court. Kinney v. White, 215 Ala. 247, 110 So. 394 (1926). The question of whether a trial court after remand has correctly interpreted and applied an appellate court's decision is properly reviewable by a petition for a writ of mandamus. Ex parte Bradley, 540 So. 2d 711, 712 (Ala. 1989). If a trial court fails to comply with an appellate court's mandate, mandamus will lie to compel compliance. Id.; Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983)."

Ex parte United States Fid. & Guar. Co., 585 So. 2d 922, 924 (Ala. 1991).

We have explained that a trial court must comply with a directive issued by this court in an opinion granting a previous petition for the writ of mandamus. Ex parte Buckner, 73 So. 3d 686, 691 (Ala. Civ. App. 2010).

"In Ex parte Alabama Power Company, 431 So. 2d 151, 155 (Ala. 1983), the supreme court, quoting 5 Am. Jur. 2d Appeal and Error § 991 (1962), stated:

"'It is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court. No judgment other than that directed or permitted by the reviewing court may be entered.... The appellate court's decision is final as to all matters before it, becomes the law of the case, and must be executed according to the mandate, without granting a new trial or taking additional evidence....'''

Ex parte Buckner, 73 So. 3d at 691. If a directive or mandate is unclear, a trial court should consult the opinion of the appellate court. Walker v. Carolina Mills Lumber Co., 441 So. 2d 980, 982 (Ala. Civ. App. 1983) (citing Cherokee Nation v. Oklahoma, 461 F.2d 674 (10th Cir. 1972)).

In Ex parte W.L.K., we noted that the probate court had determined the father's adoption contest in his favor. Ex parte W.L.K., ___ So. 3d at ___. Based on that determination and our construction of the adoption code, we ordered the probate court to enter a judgment concluding the adoption proceeding in compliance with § 26-10A-24(d), which reads as follows:

"(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."

(Emphasis added.)

The probate court's interlocutory order placing custody of the child with the prospective adoptive parents was maintained pending the entry of the judgment in compliance with our directive. See Ex parte W.L.K., ___ So. 3d at ___. However, the probate court failed to comply with our directive to complete the ministerial task of entering a judgment dismissing the adoption proceeding as required by § 26-10A-24(d) because the adoption contest had been decided in favor of the father. Id. We also instructed the probate court to comply with § 26-10A-24(h), which requires a probate court to order reimbursement of "all medical and living expenses incidental to the care and well-being of the minor child for the time the child resided with the petitioner or petitioners for adoption," which the probate court has also failed to do.

To be certain, we did not clearly state at the conclusion of the opinion in Ex parte W.L.K. that the probate court was required to enter a judgment dismissing the adoption proceeding. However, a reading of our opinion, together with the special writings, would have made clear that this court was unanimous in its belief that the resolution of the adoption contest in favor of the father required the probate court to enter a judgment dismissing the adoption proceeding as mandated by § 26-10A-24(d). Although we agree with the probate court that it maintained jurisdiction over the adoption proceeding because the order under review in Ex parte W.L.K. was interlocutory, this court did intend to imply that the probate court should reconsider the matter it had already decided, and which it had already declined to reconsider on motions of both parties. Furthermore, the probate court was not instructed to take further evidence or to consider the best interest of the child, which, based on the transcript of the July 15, 2015, hearing before the probate court provided to this court by the father, the probate court felt it was authorized to do. Although a probate court is to consider the best interest of the child in a contested hearing, see Ala.

2140874

Code 1975, § 26-10A-24(a)(1), the resolution of the adoption contest in favor of the father terminated the adoption proceeding based on the lack of his required consent, see § 26-10A-24(d), and, thus, the probate court had no further need to consider the best interest of the child.

The probate court's resolution of the adoption contest in favor of the father requires it to enter a judgment dismissing the adoption proceeding. § 26-10A-24(d). The probate court must also, in that same judgment, order reimbursement to the prospective adoptive parents of the child's living and medical expenses as required by § 26-10A-24(h).

PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ., concur.