

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERESA L. FERRELL, :
 :
 Plaintiff : Civil Action 2:09-cv-152
 :
 v. : Judge Marbley
 :
 THOMAS LOUDEN, *et al.*, : Magistrate Judge Abel
 :
 Defendant :

REPORT AND RECOMMENDATION

Plaintiff Theresa L. Ferrell brings this action against three state judicial officers to request a new trial in a child custody case. This matter is now before the Magistrate Judge for an initial screening of the complaint under 28 U.S.C. §1915A(e)(2) to identify cognizable claims, and to dismiss the complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *McGore v. Wrigglesworth*, 114 F.3d 601, 608-09 (6th Cir. 1997).

The complaint, brought against Judge Elizabeth Gill of the Franklin County, Ohio Court of Common Pleas, Domestic Relations Division ("the domestic relations court"), Juvenile Magistrate Douglas Shoemaker of the domestic relations court,

and Judge Thomas Louden¹, alleges that Plaintiff's children were wrongfully removed from her custody. Her complaint is styled a "Complaint for Writ of Habeas Corpus to Obtain Children Taken Under Fraud by State Actors", and states that it is being brought pursuant to O.R.C. §2725.04, the Ohio habeas corpus statute. However, the complaint also states that Plaintiff claims a deprivation of her constitutional right to due process, pursuant to 42 U.S.C. §1983. (Doc. 1-3 at 6.)

Plaintiff alleges that her children were wrongfully removed from her custody.² She claims that she was represented by counsel in proceedings before the domestic relations court until July 17, 2006, when her counsel resigned. The court appointed new counsel for Plaintiff, but her new attorney was not prepared by the time that a hearing went forward on July 31, 2006 before Magistrate Shoemaker. On March 30, 2006, Judge Gill removed Plaintiff's attorney. On January 24 and 29, 2008, Judge Louden held further proceedings, at which Plaintiff was apparently again represented by court-appointed counsel. However, this court-appointed counsel was unprepared and failed to conduct any discovery. On January 28, 2008, Plaintiff petitioned the state appellate court for a writ of prohibition, although this was not granted.

The relief which Plaintiff requests is to receive a new trial and effective

¹ Judge Louden, retired from the Delaware County, Ohio Court of Common Pleas, serves as a visiting judge in Franklin County.

² Plaintiff implies that her children are now in the custody of Franklin County Children Services, which has placed them in foster care. (Doc. 1-3 at 6-7.)

assistance of counsel. The gist of her argument is that her children are being held in state custody in violation of constitutional due process. Therefore, this action is, as Plaintiff styled it, a petition for writ of habeas corpus. A federal court can grant such writs under 28 U.S.C. §2254, the federal habeas corpus statute.

However, the United States Supreme Court, in *Leham v. Lycoming County Children's Services*, 458 U.S. 502 (1982), held that federal courts do not have subject-matter jurisdiction under 28 U.S.C. §2254 to review state court judgments involuntarily terminating parental rights. The *Leham* decision was based on a reading of the word "custody" as it appears in the habeas statute:

[A]lthough the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the same sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents.

458 U.S. at 510. *See also Jacobson v. Summit County Children Services Bd.*, 202 Fed. Appx. 88, 90 (6th Cir. Oct. 25, 2006).

Therefore, this Court does not have the power to grant a petition for writ of habeas corpus which seeks to overturn a child custody proceeding of the Franklin County, Ohio Court of Common Pleas, Domestic Relations Division. If a court determines at any time that it lacks subject-matter jurisdiction over an action, it must dismiss it. Fed. R. Civ. Pro. 12(h)(3). This Court does not have subject-matter jurisdiction over this matter, and consequently the Magistrate Judge **RECOMMENDS** that this case be **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff Theresa L. Ferrell's application to proceed without prepayment of fees be **GRANTED**.

If any party objects to this Report and Recommendation, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the party thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgement of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also, Small v. Secretary of Health and Human Services*, 892 F.3d 15, 16 (2d Cir. 1989).

s/Mark R. Abel
United States Magistrate Judge