

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO ex rel.	:	PER CURIAM OPINION
KIMBERLY REA STANLEY,	:	
	:	
Petitioner,	:	CASE NO. 2009-L-100
	:	
- vs -	:	
	:	
JUDGE KAREN LAWSON, JUDGE OF LAKE COUNTY COURT OF COMMON PLEAS, JUVENILE DIVISION, et al.,	:	
	:	
Respondents.		

Original Action for Writ of Habeas Corpus.

Judgment: Petition dismissed.

Neil R. Wilson, Neil R. Wilson Co., L.P.A., First Merit Bank Building, 56 Liberty Street, #205, Painesville, OH 44077 (For Petitioner).

Michael C. Lucas, Wiles and Richards, 35000 Kaiser Court, #306, Willoughby, OH 44904 (For Respondent, Judge Karen Lawson).

John P. O'Donnell, John P. O'Donnell, L.L.C., 38109 Euclid Avenue, Willoughby, OH 44094 (For Respondent, Terry L. King).

PER CURIAM.

{¶1} This habeas corpus action is presently before this court for consideration of the dual motions to dismiss of the two respondents, Terry L. King and Judge Karen Lawson of the Lake County Court of Common Pleas, Juvenile Division. Even though the motions in question were filed separately, they have essentially asserted the same argument for review. That is, both Mr. King and Judge Lawson contend that the factual

allegations of petitioner, Kimberly Rae Stanley, are not sufficient to state a viable claim for the writ because the allegations support the conclusion that the juvenile court has not rendered a void judgment regarding the custody of a minor child. For the following reasons, we hold that the dismissal of the instant action is justified.

{¶2} The ensuing statement of facts is predicated upon the factual allegations contained in the habeas corpus petition. Petitioner and Mr. King are the natural parents of the subject child, M. K., who was born on August 9, 2000. Since petitioner and Mr. King have never been married, jurisdiction over any dispute regarding a parenting issue has lied solely with the Juvenile Division of the Lake County Court of Common Pleas.

{¶3} In 2001, Mr. King brought an action to establish his parental rights against petitioner in the juvenile court. After approximately two years of litigation, the juvenile court adopted a shared parenting plan that had been negotiated by the two parties. The provisions of this plan remained in effect and were followed by Mr. King and petitioner over the next five years.

{¶4} However, on April 3, 2009, Mr. King submitted the following three motions in the “parenting” proceeding before Judge Lawson’s court: (1) a motion to terminate the shared parenting plan; (2) a motion to modify his child support obligation; and (3) an ex parte emergency motion for temporary custody of the subject child. As the basis for the third motion, King asserted that his daughter had been sexually abused while residing with petitioner.

{¶5} Mr. King’s ex parte motion was assigned for review to a magistrate of Judge Lawson’s court. Initially, the court magistrate issued an order in which Mr. King’s request for temporary custody of the subject child was overruled. Within two days of the

release of that initial order, though, Mr. King filed a new ex parte emergency motion for temporary custody and a separate ex parte emergency motion for a restraining order against petitioner. In support of the two new submissions, Mr. King not only reasserted his allegation of sexual abuse, but also stated that petitioner was presently planning to take the child from the state of Ohio and move to North Carolina.

{¶6} On April 8, 2009, the same date that the two new ex parte motions were filed, the court magistrate rendered a second order granting both motions. As part of this particular order, the court magistrate expressly decreed that Mr. King was entitled to take immediate temporary custody of the child. In addition, the magistrate decreed that when petitioner had possession of the child, she could not remove the child from Lake County or any contiguous county.

{¶7} In the days after the release of the court magistrate's "temporary custody" order, neither side in the underlying case submitted any form of objections to the ruling. Furthermore, during that same time frame, Judge Lawson did not take any steps to approve or reject the April 8, 2009 order.

{¶8} On May 14, 2009, the court magistrate conducted a pretrial conference in relation to the pending motions to terminate the shared parenting plan and to modify Mr. King's child support obligation. During this proceeding, Mr. King and petitioner were able to reach an agreement pertaining to their respective parenting time until the final disposition of the pending motions. This interim agreement was set forth in a separate order of the court magistrate.

{¶9} Nearly four months following the issuance of the magistrate's "temporary custody" order, petitioner moved Judge Lawson to vacate that specific entry. In seeking

the reinstatement of the custody arrangement which had been in effect under the prior shared parenting plan, petitioner primarily attacked the allegations upon which King's motion for temporary custody had been based. For example, she maintained that Lake County Job and Family Services had previously investigated Mr. King's allegation of sexual abuse and had expressly concluded that the allegation was unfounded. As a distinct basis for her motion to vacate, petitioner further argued that the court magistrate had exceeded the scope of his authority in attempting to issue any type of order as to the custody of the subject child.

{¶10} Within ten days of the submission of the motion to vacate before Judge Lawson, petitioner initiated the instant action in habeas corpus before this court. In her sole claim for relief, petitioner asserted that she was entitled to immediate custody of the minor child because the "temporary custody" entry of the court magistrate did not constitute a valid court order. Specifically, she contended that the "temporary custody" order was unenforceable because, by rendering such an order without Judge Lawson's approval, the magistrate had made a final decision on Mr. King's motion to terminate the shared parenting plan. She further argued that, since the magistrate's order set forth a final disposition of the pending matter, it did not comply with the requirements of Juv.R. 40(D)(2)(a)(i). Based on this, petitioner asserted that Mr. King and Judge Lawson were unlawfully depriving her of the custody and companionship of the minor child.

{¶11} In now moving for the dismissal the habeas corpus petition under Civ.R. 12(B)(6), both Mr. King and Judge Lawson has basically challenged the underlying legal premise of petitioner's claim for relief. That is, they submit that, in issuing the disputed order, the court magistrate did not act beyond the scope of his authority under Juv.R.

40(D)(2)(a)(i) because the change in custody was only intended to remain in effect until a final ruling on the motion to terminate could be made.

{¶12} At the outset of our analysis, this court would indicate that, contrary to the assertion of petitioner, the Ohio Rules of Juvenile Procedure were applicable to the specific proceedings before Judge Lawson and the court magistrate. Although Juv.R. 1(C)(4) expressly states that the juvenile rules do not govern a proceeding to determine parent-child relationships, as the court magistrate correctly in his ultimate decision in the underlying matter, the proceeding in question did not involve a “Revised Code §3111 paternity” action, but was “commenced pursuant to Revised Code §2151.23(A)(2).” As a result, the propriety of the “temporary custody” order would be governed by Juv.R. 40.

{¶13} In delineating the procedure for the employment of a court magistrate in civil cases, Juv.R. 40 contains specific provisions regarding the extent of a magistrate’s powers. For example, section (C)(1) of the rule sets forth a list of judicial acts which a magistrate is allowed to perform, including the resolution of any motion and presiding over the trial of any matter which will not be tried to a jury. In addition, section (C)(2) of the rule provides that, in completing the various judicial acts cited under section (C)(1), a court magistrate has the authority to “regulate all proceedings as if by the court and to do everything necessary for the efficient performance of [his] responsibilities, ***.”

{¶14} In relation to the types of entries which a magistrate may release, Juv.R. 40 refers to both magistrate’s orders and magistrate’s decisions. As to the first type of permissible entry, section (D)(2)(a)(i) of the rule states the general circumstances under which a magistrate may render an interim “order” in a pending matter: “Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval

if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.”

{¶15} In addition to the foregoing general statement of a magistrate’s authority, Juv.R. 40(D)(2)(a)(iii) delineates a specific list of issues or topics that can be the subject of a valid magistrate’s order. This court’s review of this particular list demonstrates that it does not contain any reference to a temporary order in a custody proceeding under R.C. 2151.23(A)(2). Therefore, in order for the disputed magistrate’s order in the instant matter to have been valid, it must have been rendered in compliance with the general provision of Juv.R. 40(D)(2)(a)(i).

{¶16} As the wording of Juv.R. 40(D)(2)(a)(i) readily indicates, it is not necessary for the trial court to approve a magistrate’s order before it can become effective. To this extent, a magistrate’s order is treated somewhat differently than a magistrate’s decision. Cf., Juv.R. 40(D)(4)(a), which provides that a magistrate’s decision does not take effect until the trial court has adopted it. Yet, although judicial review of a magistrate’s order may not be mandated, a party to the action is not precluded from obtaining immediate relief from the order. Juv.R. 40(D)(2)(b) allows for the submission of a motion before the trial court to set aside a magistrate’s order.

{¶17} To be permissible under Juv.R. 40(D)(2)(a)(i), a magistrate’s order must: (1) be necessary for the proper regulation of the proceedings; and (2) not be dispositive of a claim or defense. The inclusion of this general standard in the juvenile magistrate rule is a fairly recent development; thus, our research on this issue has failed to disclose any specific case law in which the foregoing two requirements have been construed in regard to an interim order. Nevertheless, this court would note that Civ.R. 53(D)(2)(a)(i)

states the same requirements for determining the propriety of a magistrate's order. In fact, the wording of Civ.R. 53(D)(2)(a)(i) and Juv.R. 40(D)(2)(a)(i) is identical. Similarly, like Juv.R. 40(C)(2), Civ.R. 53(C)(2) provides that a court magistrate has the authority to regulate the proceedings before him in the same manner as the trial court. Accordingly, logic dictates that the provisions in Juv.R. 40 concerning magistrate's orders should be interpreted in the identical manner as the corresponding provisions in Civ.R. 53.

{¶18} In applying the two requirements of Civ.R. 53(D)(2)(a)(i), the courts of this state have held that the rule gives a magistrate the ability to make temporary decisions pertaining to the rights of the subject parties. For example, in *In re: A.S.*, 12th Dist. Nos. CA2009-03-071, CA2009-03-083, & CA2009-03-088, 2009-Ohio-3932, the appealing party asserted an assignment of error regarding the propriety of an order, in which the magistrate granted a stay of the trial court's prior judgment concerning the placement of a child in foster care. In holding that the magistrate had acted within the scope of his authority under Civ.R. 53(D)(2)(a)(i), the Twelfth Appellate District began its analysis by concluding that the temporary stay order had not been dispositive of any pending claim or defense in the case. The court further concluded that the second requirement under Civ.R. 53(D)(2)(a)(i) had been satisfied, in that the issuance of the stay order had been needed to properly regulate the proceedings. As to the latter point, the appellate court emphasized that the issuance of a stay order was proper because, pursuant to Civ.R. 53(C)(2), a magistrate can act in the same way as a trial court in regulating a case.

{¶19} A similar holding was reached in *City of Cincinnati v. Davis*, 1st Dist. Nos. C-070838 & C-070845, 2008-Ohio-5281. In *Davis*, the question on appeal involved whether a court magistrate had the authority to render a temporary civil protection order

under R.C. 2903.214. Upon initially concluding that the Ohio Rules of Civil Procedure were applicable to a “civil protection” proceeding, the appellate court expressly cited the two requirements of Civ.R. 53(D)(2)(a)(i), and then held that a magistrate could render a temporary civil protection order without judicial approval. Furthermore, the *Davis* court indicated that the magistrate’s temporary order had remained effective throughout the case even though it had never been adopted by the trial court.

{¶20} In the instant matter, petitioner asserted in her habeas corpus petition that the “temporary custody” order of the juvenile court magistrate did not comply with either of the two requirements under Juv.R. 40(D)(2)(a)(i); i.e., according to her, not only was the magistrate’s order dispositive of Mr. King’s pending motion to terminate the shared parenting plan, but also was not necessary to properly regulate the pending proceeding. However, as to the “non-dispositive” requirement, this court would note that petitioner attached a copy of the disputed order to her petition. Our review of that entry readily shows that the magistrate did not render any type of decision in regard to the merits of the motion to terminate. Instead, the magistrate only ruled upon the ex parte motion for temporary custody, and only granted Mr. King “temporary” custody of the child. In light of the use of the term “temporary” in the disputed order, it is evident that the magistrate only intended for the order to remain in effect until the merits of the motion to terminate could be heard and a final determination on the entire custody issue could be made. Thus, because the order did not set forth a final ruling on the custody issue, it was not dispositive of the motion to terminate or any “defense” which petitioner might have to that motion.

{¶21} Without providing any type of explanation, the instant petition contained

the conclusory statement that the “temporary custody” order was not needed to regulate the pending proceedings in the underlying case. Yet, in granting temporary custody of the child to Mr. King while his motion to terminate remained pending, the magistrate was attempting to protect the interests of the child until Judge Lawson could issue a final judgment on the motion to terminate and the entire custody matter. To this extent, the “temporary custody” order was analogous to both the stay order in *A.S.* and the temporary civil protection order in *Davis*. Hence, since the relevant provisions of Juv.R. 40 are identical to those in Civ.R. 53, the holding of the two opinions should be followed in this instance.

{¶22} Consistent with the analysis in the *A.S.* opinion, this court would reiterate that, under Juv.R. 40(C)(2), a court magistrate has been granted the ability to regulate a civil proceeding in the same manner as a trial judge. Given that a judge of a juvenile court would have the authority to “regulate” an action through the issuance of an interim custody order, it follows that a magistrate of a juvenile court could also render such an order pursuant to Juv.R. 40(D)(2)(a)(i). As a result, this court ultimately concludes that the magistrate in the underlying proceeding did not exceed the scope of his authority in issuing the “temporary custody” order of April 8, 2009.

{¶23} In claiming that the disputed order should be declared void, petitioner has emphasized the fact that the order was never adopted or approved by Judge Lawson. However, given that a magistrate’s order under Juv.R. 40(D)(2)(a)(i) is only intended to be interim in nature, judicial approval of the order is not necessary. *Davis*, 2008-Ohio-5281, at the syllabus. In conjunction with this point, this court would again note that if a party disagrees with a magistrate’s order, she has the ability to move the trial court to

set aside the order under Juv. R. 40(D)(2)(b). For whatever reason, petitioner failed to invoke this remedy by submitting a motion to set aside within ten days of the date of the issuance of the disputed order. Thus, to some extent, petitioner has tried to use the instant action as a separate means of contesting the magistrate's "temporary custody" order.

{¶24} As a general proposition, in order to be entitled to the issuance of a writ of habeas corpus, the petitioner in such an action must be able to demonstrate an unlawful restraint of a person's liberty and the lack of any adequate remedy in the ordinary course of the law. *Pegan v. Crawmer* (1996), 76 Ohio St.3d 97, 99. In the context of a habeas corpus action involving the custody of a child, the Supreme Court of Ohio has modified the elements of the claim in the following manner; i.e., the writ will lie when the child is being unlawfully detained and the petitioner in the case has a superior legal right to custody. *State ex rel. Bruggeman v. Ct. of Common Pleas of Auglaize Cty.* (1999), 87 Ohio St.3d 257. Furthermore, the Supreme Court has consistently indicated that, in relation to child custody matters, the issuance of the writ should be "the exception rather than the general rule ***." *Barnebey v. Zschach* (1995), 71 Ohio St.3d 588.

{¶25} Pursuant to the foregoing legal analysis, this court holds that, even when petitioner's factual allegations are construed in a manner most favorable to her, they are not legally sufficient to satisfy the first element for a writ of habeas corpus. That is, the materials in the habeas corpus petition can only be interpreted to support the conclusion that the court magistrate in the underlying action acted in compliance with Juv.R. 40(D) in issuing the disputed "temporary custody" order. Accordingly, since the magistrate's order was a valid entry, Mr. King's present custody of the subject child is lawful, and

Judge Lawson is not unlawfully depriving petitioner of the custody or companionship of the child. In turn, this means that petitioner does not have a superior legal right to custody.

{¶26} As petitioner will not be able to prove a set of facts under which she would be entitled to a writ of habeas corpus, the dismissal of this action under Civ.R. 12(B)(6) is warranted. Therefore, the motion to dismiss of respondent, Judge Karen Lawson, is granted. It is the order of this court that the entire habeas corpus petition is dismissed as to Judge Lawson.

{¶27} For the same reasons, the motion to dismiss of respondent, Terry L. King, is likewise granted. It is further ordered that the entire habeas corpus petition is hereby dismissed as to respondent King.

MARY JANE TRAPP, P.J., CYNTHIA WESTCOTT RICE, J., COLLEEN MARY O'TOOLE, J., concur.