

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

STATE OF OHIO ex rel.	:	PER CURIAM OPINION
JENNIFER KANAGA,	:	
	:	
Petitioner,	:	CASE NO. 2009-L-106
	:	
- 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).

Charles E. Coulson, Lake County Prosecutor, and *Michael L. DeLeone*, Assistant Prosecutor, Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent).

Joshua Lemr, pro se, 9726 Martinique Street, Mentor, Oh 44060 (Respondent).

PER CURIAM.

{¶1} This habeas corpus action is presently before this court for consideration of the motion to dismiss of respondent, Judge Karen Lawson of the Lake County Court of Common Pleas, Juvenile Division. As the chief reason for her motion, Judge Lawson contends that the factual allegations of petitioner, Jennifer Kanaga, are not sufficient to state a viable claim for the writ because the allegations support the conclusion that the

juvenile court has not issued a void judgment in regard to the custody of a minor child. For the following reasons, we hold that the dismissal of the instant action is justified.

{¶2} Our review of the habeas corpus petition indicates that petitioner's claim for relief is predicated upon the following allegations. Petitioner is the natural mother of J. L., who was born on August 11, 1995. For the first thirteen years of her life, the minor child resided solely with petitioner.

{¶3} Respondent, Joshua Lemr, is the natural father of the subject child. Even though Lemr has maintained some form of relationship with the child over the years, he and petitioner were never married. As a result, jurisdiction over any parenting question regarding the subject child has lied solely with the juvenile court of Lake County.

{¶4} In August 2008, Lemr filed a separate action to establish shared parenting rights and responsibilities as to the subject child. As the basis for his complaint, Lemr asserted that, although he had originally enjoined significant visitation with his daughter, petitioner was now taking steps to limit their time together. Lemr further asserted that petitioner's present behavior had begun after her recent marriage.

{¶5} After Lemr's complaint had been pending before Judge Lawson's court for approximately ten months, the case was assigned to a court magistrate for the purpose of holding a trial on the final merits of the matter. Upon taking evidence from the parties for one complete day in June 2009, the magistrate issued an order that was expressly labeled as interim in nature. As part of this entry, the magistrate ordered that the minor child was to reside with Lemr until a further determination had been made. In addition, the magistrate indicated that petitioner was to have parenting time in accordance with a local court rule, and that Lemr's child support obligation would be suspended. Finally,

the magistrate's order stated that the "merits" trial would continue on August 24, 2009.

{¶6} In the days after the issuance of the magistrate's order, neither side in the underlying action filed objections to the new custody arrangement. Therefore, Judge Lawson did not take any immediate steps to either approve or reject the magistrate's new custody order.

{¶7} At some point during the interim period, petitioner hired a new attorney to represent her in the "parental rights" action before Judge Lawson. Approximately fifty-five days after the issuance of the magistrate's order, her new attorney filed a motion to vacate the "custody" order. As the basis for this motion, petitioner first argued that the order should be declared void because the magistrate lacked the inherent authority to render this type of decision. She further challenged the substance of the magistrate's order, contending that no evidence had been presented during the first day of trial which warranted a change in custody.

{¶8} Upon conducting an oral hearing on the matter, Judge Lawson released a judgment entry in which she denied petitioner's motion to vacate. At the outset of her analysis, Judge Lawson concluded that the magistrate's order had not been intended to be an award of temporary custody; instead, the magistrate had meant to issue an order of placement. Second, Judge Lawson held that the magistrate had acted within the scope of his authority because the order in question had been necessary to "regulate" the proceedings in the pending action. Finally, Judge Lawson found that the guardian ad litem had indicated during the hearing that, in his opinion, the magistrate's order had been in the best interest of the minor child.

{¶9} Once the ruling on her motion to vacate had been rendered, petitioner

initiated the instant action in habeas corpus. In her sole claim for relief, she asserted the identical argument that had formed the basis of her motion before Judge Lawson; i.e., she contended that the “custody” order was unenforceable as void because Judge Lawson had allowed the court magistrate to make a final determination on Lemr’s claim for parenting rights. Based upon this, petitioner further asserted that Judge Lawson and Lemr were unlawfully depriving her of both the custody and companionship of the minor child.

{¶10} In now moving for the dismissal the habeas corpus petition under Civ.R. 12(B)(6), Judge Lawson has essentially challenged the basic legal premise upon which petitioner predicated her claim for relief. That is, Judge Lawson submits that, in issuing the subject order, the court magistrate did not exceed the scope of his powers because his act was taken in compliance with Juv.R. 40(D)(2). In response, petitioner maintains that the juvenile rule was violated because the “custody” order constituted a final disposition which was never adopted by Judge Lawson.

{¶11} 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, our review of the materials accompanying the habeas corpus petition shows that Lemr did not bring the underlying action to establish paternity under R.C. Chapter 3111. Instead, as was noted above, the purpose of Lemr’s complaint was to establish a “shared parenting plan” in regard to the child. Thus, since the underlying case before Judge Lawson involved a custody proceeding under R.C. 2151.23(A)(2),

the propriety of the disputed order would be governed by Juv.R. 40.

{¶12} 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, ***."

{¶13} 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."

{¶14} 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 an interim custody order in a 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).

{¶15} 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.

{¶16} 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.

{¶17} 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 concerning 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.

{¶18} 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.

{¶19} In the instant matter, petitioner has argued that the "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 the basic claim in Lemr's complaint, 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 habeas corpus petition. Our review of that document readily shows that: (1) the order was expressly labeled as "interim" in nature; (2) in delineating the new custody arrangement, the magistrate stated that the minor child would live with Lemr "until further order" of the juvenile court; and (3) the order set a specific date for the continuation of the trial on Lemr's complaint. Given these three characteristics, it is quite evident that the magistrate's order was only intended to remain in effect until the trial could be completed and a final decision on the complaint could be made. Accordingly, since the order did not set forth a final ruling on the custody issue, it was not dispositive of a pending claim or defense.

{¶20} Without providing any type of explanation, petitioner has further made the conclusory statement that the "custody" order was not needed to regulate the pending proceedings in the underlying case. Yet, in ordering a change of custody in the midst of the trial, the magistrate was clearly attempting in some fashion to protect the interests of the subject child until Judge Lawson could issue the final judgment in the matter. To this extent, the "custody" order was analogous to both the stay order in *A.S.* and the temporary civil protection order in *Davis*. Therefore, 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.

{¶21} 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 interim “custody” order of June 11, 2009.

{¶22} 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, in light of the fact 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 “custody” order.

{¶23} 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.

{¶24} 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 “custody” order. Accordingly, since the magistrate’s order was a valid entry, Joshua Lemr’s present custody of the subject child is lawful, and Judge Lawson is not unlawfully depriving petitioner of the custody and companionship of the child. In turn, this means that petitioner does not have a superior legal right to custody.

{¶25} 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. Thus, 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.

{¶26} For the same reasons, this court sua sponte dismisses the entire habeas

corpus petition as to Joshua Lemr, respondent.

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