[Cite as *State ex rel. Swanson v. Hague*, 2010-Ohio-4200.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE ex rel. VANDA LEAH SWANSON,	:	**PER CURIAM OPINION**
	:	**CASE NO. 2009-A-0053**
Relator,	:	
- vs -	:	
CHARLES G. HAGUE, JUDGE, JUVENILE DIVISION, ASHTABULA COUNTY COURT OF COMMON PLEAS,	:	
Respondent.	:	

Original Action for Writ of Prohibition.

Judgment: Writ granted.

Kenneth J. Cahill, Dworken & Bernstein, 60 South Park Place, Painesville, OH 44077 (For Relator).

Thomas L. Sartini, Ashtabula County Prosecutor, and *Rebecca K. Divoky*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Respondent).

PER CURIAM.

{¶1} This action in prohibition is presently before this court for final disposition of the parties' competing motions for summary judgment. Upon considering each side's respective evidentiary materials and legal arguments, we conclude that relator, Vanda

Leah Swanson, has established that she can satisfy the elements for the writ in regard to the judicial acts which respondent, Judge Charles G. Hague of the Ashtabula County Court of Common Pleas, has taken in an underlying juvenile proceeding. Specifically, relator has demonstrated that respondent lacked the authority to render any decision as to the custody of the subject child because his jurisdiction was never properly invoked at the outset of the proceeding.

{¶2} Our review of the submitted evidentiary materials readily indicates that the basic facts of the instant matter are not in dispute. Beginning in November 1993, relator was married to Donald G. Swanson for approximately twelve years. During the course of their union, the couple had one child, John L. Swanson. Even though the Swansons remained married throughout the majority of their son's young life, the child did not live with his parents. Instead, the child resided primarily with his paternal grandmother, Alyce Swanson, at her home in Austinburg, Ohio.

{¶3} In March 2005, relator instituted a divorce action in the Ashtabula County Court of Common Pleas. Since Ashtabula County does not have a separate domestic relations judge, the divorce action was heard by Judge Alfred W. Mackey of the general division of the common pleas court. In the final divorce decree, Judge Mackey ordered that relator would be the residential parent and legal custodian of the subject child. In addition, the decree provided that Donald Swanson would be obligated to pay monthly child support in the sum of $303.94.

{¶4} Despite the fact that legal custody of the child had been granted to relator, he continued to reside solely with his paternal grandmother. At some points during the ensuing three years, relator would also live at the grandmother's residence. However,

relator also maintained a separate residence in Fairlawn, Ohio, where she would live by herself.

{¶5} In November 2008, while living at the grandmother's home, relator had a serious verbal altercation with the child, who was then fifteen years old. After the child's father and grandmother had taken steps to end this initial confrontation, relator became embroiled in a new altercation with the grandmother, during which relator made certain threatening remarks. The latter altercation ended when the grandmother told relator to leave the residence.

{¶6} Only two weeks after the foregoing incident, the grandmother submitted a verified motion for the re-allocation of parental rights concerning the subject child. Even though the prior custody order had been issued in the divorce action, the grandmother did not file her motion before Judge Mackey. Rather, the grandmother basically initiated a new proceeding before respondent, the sitting juvenile judge for Ashtabula County.

{¶7} In her motion and accompanying affidavit, the grandmother described the manner in which the child had resided with her since his birth and his strong ties to the community in which she lived. The grandmother also described the events which had occurred during the November 2008 altercations. Furthermore, she averred that it was her belief that the subject minor met the definition of "dependent child" under the Ohio Revised Code. Based upon this, the grandmother requested that legal custody over the child be transferred to her.

{¶8} After conducting an oral hearing on the matter, a juvenile court magistrate rendered a written decision which set forth factual findings that were consistent with the assertions in the grandmother's motion and affidavit. Specifically, the magistrate found

that: (1) the subject child had always lived with the grandmother; (2) relator had never been the primary care giver for the child; (3) as a result of the November 2008 incident, the child was leery that relator might attempt to physically take him from the residence at night; and (4) the child's father, Donald Swanson, had agreed that a change of legal custody was warranted. In light of these findings, the magistrate recommended that the motion to re-allocate be granted, that legal custody of the subject child be transferred to the grandmother, and that the father's monthly child support obligation be paid directly to the grandmother. However, in delineating her analysis, the magistrate did not make any finding concerning whether the subject minor was a dependent child.

{¶9} No objections were filed in regard to the magistrate's decision. Therefore, twenty days after the release of the decision, respondent issued a separate judgment in which he concluded that there were no errors of law or other defects on the face of the magistrate's work. Based upon this, respondent adopted the recommendations as the final determination of the juvenile court, and expressly ordered the change of custody to the grandmother. Moreover, like the magistrate's decision, respondent's judgment did not contain any statement addressing the "dependent child" issue.

{¶10} Once the new "custody" order had been in effect for approximately seven months, respondent rendered a second judgment pertaining to the payment of support for the Swansons' child. In relation to relator, respondent again adopted the decision of the magistrate and ordered her to pay a monthly amount of $329.20 to the grandmother. The second judgment also modified the father's monthly support obligation.

{¶11} Immediately following the issuance of respondent's "support" order, relator initiated the instant action in prohibition before this court. In contesting the jurisdiction of

respondent to render the new custody and support orders, relator's petition stated two basic contentions. First, she maintained that respondent lacked the requisite authority to consider the issue of custody because the grandmother never took the required steps to institute a proper dependency proceeding. Second, she argued that, even if a new action had been filed properly, respondent had exceeded the scope of his jurisdiction by ordering a change of custody without first finding that the subject child was dependent or that she was an unfit parent. For her final relief under the petition, relator sought an order that would prohibit any further proceedings before respondent and require him to vacate the two orders pertaining to the custody and support of the subject child.

{¶12} In support of her sole claim, relator attached copies of the following items to her petition: (1) her own affidavit; (2) Judge Mackey's final decree in the divorce case, dated November 16, 2005; (3) the grandmother's new motion to re-allocate the parental rights to the child; (4) the magistrate's decision as to the disposition of the motion to re-allocate, dated March 30, 2009; (5) respondent's April 20, 2009 judgment adopting the magistrate's recommendations on the "custody" issue; and (6) respondent's November 5, 2009 judgment regarding relator's obligation to pay monthly child support.

{¶13} After respondent had submitted an answer to the prohibition petition, the parties agreed during a telephonic conference that the action should go forward on their competing motions for summary judgment. In support of her motion under Civ.R. 56(C), relator attached copies of the identical six documents that had had been filed with her petition. Respondent did not submit any separate evidentiary materials with his motion, but instead cited solely to the six documents attached to the petition. Neither party filed a brief in response to the opposing dispositive motion.

{¶14} As the primary basis for her summary judgment motion, relator has simply restated the first contention that formed the grounds of her sole claim. Essentially, she submits that the grandmother motion to re-allocate was legally insufficient to constitute a viable juvenile complaint for dependency under Juv.R. 10(A). Based upon this, relator further submits that the grandmother failed to properly invoke respondent's jurisdiction to proceed with a dependency action over the subject child. According to relator, since an actual dependency proceeding was never instituted, respondent never had the basic authority to issue a new "custody" order which trumped the prior order of Judge Mackey in the divorce case.

{¶15} Respondent's competing motion for final relief under Civ.R. 56(C) likewise focuses upon the question of the juvenile court's jurisdiction over the Swansons' child. Respondent has taken the position that, even though the grandmother's first pleading may have been captioned as a motion to re-allocate, the substance of her document did suffice to satisfy the requirements for a juvenile complaint. In this regard, he notes that the grandmother's submission set forth the express allegation that the subject child was dependent. Respondent also maintains that the grandmother's assertions regarding the November 2006 altercations were adequate to state a feasible dependency claim under the controlling statute. In light of this, he ultimately argues that, since a proper action in dependency was brought, the existence of the prior divorce case had no effect upon his authority to go forward.

{¶16} As a judge of the juvenile division of a common pleas court, the scope of respondent's jurisdiction is governed entirely by sections of the Ohio Revised Code. In relation to a dependency proceeding, R.C. 2151.23(A)(1) provides that a juvenile court

has exclusive original jurisdiction over any child who has been cited in a properly-filed complaint as someone who can satisfy the statutory definition of a dependent child. As respondent aptly states in his dispositive motion, the controlling statutory provisions also provide that, once the cited child has been adjudicated as being dependent, the juvenile court has the authority to make an award of legal custody of the child to any person who has requested that type of an award. See R.C. 2151.353(A)(3). As a separate basis for a juvenile court's jurisdiction, R.C. 2151.23(A)(2) further indicates that the court has exclusive original authority "to determine the custody of any child not a ward of another court of this state, ***."

{¶17} Given the unambiguous language of the latter provision, it is apparent that an Ohio juvenile court has the general ability to render a determination as to the custody of a minor child when no other court in this state has previously issued such a decision. However, under the undisputed facts of the instant case, respondent's authority to grant custody of the subject child to the grandmother could not have been predicated on the general provision in R.C. 2151.23(A)(2). That is, the general "custody" provision had no application in this instance because the Swansons' child was still subject to the prior custody order of Judge Mackey in the final divorce decree. As a result, the parties have implicitly agreed in their motions that, if respondent did have the authority to proceed in regard to the grandmother's "custody" request, his jurisdiction had to be based upon the filing of a proper juvenile complaint under R.C. 2151.23(A)(1).

{¶18} As was noted above, the grandmother in the underlying proceeding chose to label her initial pleading as a motion to re-allocate parental rights. In and of itself, the caption of the grandmother's pleading would appear to support the inference that it was

her intent to obtain a change-of custody order under the general jurisdictional provision of R.C 2151.23(A)(2). Nevertheless, the text of her initial pleading contained a specific allegation that her grandson, i.e., relator's son, was a dependent child for purposes of R.C. Chapter 2151. Thus, since the text of the pleading would certainly be controlling over the caption in determining the proper characterization on the document, our legal analysis must focus upon the substance of the factual assertions which were referenced in the pleading to support the basic "dependency" allegation.

{¶19} Pursuant to Juv.R. 10(B), a complaint concerning an alleged dependent, neglected or abused child must comply with the following requirements: (1) set forth the essential facts of the case; (2) state the statutory sections that may have been violated; (3) state the names and addresses of the parents; and (4) be made under oath. See *In re Dukes* (1991), 81 Ohio App.3d 145, 149. As to the necessary substance for a viable claim in dependency, this particular point is governed by the provisions of R.C. 2151.04, which delineates four definitions of a dependent child. Under the first three sections of the statute, a "dependent child" is defined as a minor:

{¶20} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶21} "(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶22} "(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship; ***."

{¶23} A general review of the foregoing provisions readily shows that, unlike the situations in which the subject child is alleged to be abused or neglected, the focus in a

dependency action is not upon the exact nature of the behavior of the parents or legal custodian. This point was noted by the Fifth Appellate District as part of its analysis in *In re Z.P.*, 5th Dist. No. 20008CA00209, 2009-Ohio-378:

{¶24} "A finding of dependency under R.C. 2151.04 focuses on whether the child is receiving proper care and support. *In re Walling*, 1st Dist. No. C-050646, 2006-Ohio-810, ¶16, citing *In re Bibb* (1980), 70 Ohio App.2d 117, 120, ***. Therefore, the determination must be based on the condition or environment of the child, not the fault of the parents. *In re Bishop* (1987), 36 Ohio App.3d 123, 124, ***; *In re Burchfield* (1988), 51 Ohio App.3d 148, 156, ***. That being said, a court may consider a parent's conduct insofar as it forms part of the child's environment. See *In re Burrell* (1979), 58 Ohio St.2d 37, 39, ***." Id. at ¶17.

{¶25} Given that the present environment of the minor child is the critical factor in determining whether he is dependent, a review of the factual assertions contained in the grandmother's initial pleading before respondent readily indicates that they were not sufficient to satisfy any of the three statutory definitions. That is, the factual assertions in her motion to re-allocate never contended that the general living environment of the Swansons' sole child posed a threat to his well-being. Specifically, the pleading never alleged that the subject child was homeless or destitute, as is required under section (A) of R.C. 2151.04. Similarly, there was simply no assertion that the child lacked adequate parental care, as is required under sections (A) and (B); in fact, the grandmother's own assertions supported the inference that she was providing the necessary care. Finally, in regard to section (C) of the governing statute, there was no assertion that the nature of the child's environment was such that the intervention of the state was justified.

{¶26} Equally as important as the foregoing, it must also be emphasized that, to the extent that the grandmother asserted that her grandson was experiencing problems at that time, she never maintained in her pleading that those problems were not caused by relator. Clearly, the opposite was true; i.e., it was the grandmother's contention that relator was at fault in precipitating the situation that led to the submission of the motion to re-allocate.

{¶27} When viewed as a whole, the grandmother's pleading before respondent raised the argument that she should be awarded legal custody of the child because: (1) since relator had not taken any substantive steps to act as a parent, she had been the child's primary care giver throughout his life; and (2) relator caused a serious altercation which had left the child fearful of her intentions. While these allegations may have been sufficient in the context of an alternative legal action to state a viable reason to change the child's legal custodian, they readily do not suffice to satisfy any of the substantive requirements for a finding of dependency under the first three sections of R.C. 2151.04. Accordingly, since the grandmother's factual assertions did not support her conclusory statement that the child was dependent, her motion to re-allocate could not logically be construed as a proper dependency complaint under Juv.R. 10(B).[1]

{¶28} In considering the legal effect of the failure to submit a proper complaint at the outset of a juvenile proceeding, the appellate courts of this state have stated that such an error deprives the juvenile court of the authority to base a change-of-custody judgment upon a finding of dependency. For example, in *Riley v. Liston*, 12th Dist. No.

1. As an aside, this court would note that a fourth definition of "dependent child" is set forth in section (D) of R.C. 2151.04. However, in order for section (D) to apply, the child in question must have a sibling who has already been adjudicated as a neglected, abused or dependent child. In the instant matter, there was no allegation that the Swansons' child had a sibling; thus, R.C. 2151.04(D) had no application.

CA2005-12-032, 2006-Ohio-5846, the boyfriend of the mother moved the juvenile court for custody of the minor child after the mother had been incarcerated. After holding an evidentiary hearing on the custody motion, the juvenile court specifically found that the subject minor was a dependent child, and that the minor's father was an unfit parent; as a result, the court awarded custody to the boyfriend. In appealing this final decision, the father argued that the juvenile court had lacked the general authority to make a finding of dependency when no dependency complaint was ever filed under R.C. 2151.27 and Juv.R. 10(B). In agreeing with the father, the Twelfth Appellate District held that, even though the boyfriend's custody motion had been sufficient to invoke the juvenile court's jurisdiction to issue original custody orders under R.C. 2151.23(A)(2), a true complaint in dependency had to be submitted before that court could exercise its distinct authority under R.C. 2151.23(A)(1) to make any finding of dependency. In light of this, the *Riley* court concluded that, due to the lack of proper jurisdiction, the dependency finding and the new custody order had been void ab initio. Id. at ¶14.

{¶29} In its statement of the underlying facts, the appellate court in *Riley* did not indicate whether the boyfriend had alleged in his motion that the minor in question was a dependent child. Nevertheless, even if that particular item was not consistent with the facts in the instant case, this court still finds the legal analysis in *Riley* to be dispositive. That is, given that the grandmother's initial pleading did not contain any allegations that supported her "dependency' assertion, logic dictates that the assertion was included in the document merely as a separate, additional reason to justify her request for custody. In turn, this means that, despite the "dependency" reference, it actually was the intent of the grandmother to invoke respondent's general jurisdiction under R.C.2151.23(A)(2) to

issue original custody orders, as compared to his "dependency" jurisdiction under R.C. 2151.23(A)(1). In other words, the caption of the grandmother's motion was consistent with the nature of her allegations.

{¶30} Under these circumstances, there can be no dispute that the grandmother never filed a viable juvenile complaint before respondent. Instead, her motion regarding the re-allocation of parental rights was only sufficient to invoke respondent's jurisdiction over general "child custody" matters. However, since a custody order pertaining to the subject child had previously been rendered in the prior divorce action, respondent could not proceed under R.C. 2151.23(A)(2). Therefore, respondent's order granting custody to the grandmother was void ab initio for lack of jurisdiction.

{¶31} In the context of prior prohibition proceedings, this court has described the nature of the elements for the writ in this manner:

{¶32} "Under Ohio law, a writ of prohibition will only lie when the relator can meet each of the following three elements: (1) the judicial officer or court is about to employ its judicial authority in a pending matter; (2) the intended use of the judicial power is not permitted under the law; and (3) the denial of the writ will cause an injury for which there is no adequate legal remedy. *State ex rel. Feathers v. Hayes*, 11th Dist. No. 2006-P-0092, 2007-Ohio-3852, at ¶9. Even though the lack of an adequate remedy is always referenced as a necessary element of the writ, this court has consistently indicated that there are instances in which the writ can issue despite the fact that a viable alternative remedy exists. In determining whether such an instance has arisen in a given case, our analysis must focus upon the nature of the alleged jurisdictional flaw:

{¶33} "'As to the second and third elements for the writ, this court has

emphasized that the absence of an adequate legal remedy is not necessary when the lack of judicial authority to act is patent and unambiguous; i.e., if the lack of jurisdiction is clear, the writ will lie upon proof of the first two elements only. *** However, if the lack of jurisdiction is not patent and unambiguous, the fact that a party can appeal a lower court's decision bars the issuance of the writ because, when a court has general jurisdiction over the subject matter of a case, it has the inherent authority to decide whether that jurisdiction has been properly invoked in a specific instance.' *State ex rel. Godale v. Geauga Cty. Court of Common Pleas*, 166 Ohio App.3d 851, 2006-Ohio-2500, at ¶6, ***. (Citations omitted.)" *McGhan v. Vettel*, 11th Dist. No. 2008-A-0036, 2008-Ohio-6063, at ¶49-50.

{¶34} In light of the foregoing analysis in this opinion, this court holds that relator has satisfied the second element for a writ of prohibition, in that the undisputed facts of this case demonstrate that respondent never acquired the requisite jurisdiction over the subject child to be able to render a new custody order. Furthermore, given that a prior custody order concerning the child had been issued in the separate divorce action and the grandmother's allegations were not sufficient to state a viable dependency claim, we further hold that respondent's lack of jurisdiction was patent and unambiguous. Hence, it will be unnecessary for relator to satisfy the third element in order to be entitled to the writ.

{¶35} In regard to the first element for the writ, respondent contends that relator cannot establish this element because he has already fully exercised his judicial power by ordering the change of custody and imposing the new child support obligation. As to this point, this court would note that the Supreme Court of Ohio has indicated that when

a trial judge's lack of jurisdiction is patent and unambiguous, a writ of prohibition can be issued to both stop future unauthorized judicial acts and correct prior unauthorized acts. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 98. Accordingly, since the undisputed facts of this action show that respondent performed his prior judicial acts in the underlying proceeding when he patently and unambiguous lacked the jurisdiction to proceed, relator has also satisfied the first element for the writ.

{¶36} In order to prevail in a summary judgment exercise, the moving party must demonstrate that: (1) no genuine questions of material fact remain to be litigated; (2) the moving party is entitled to judgment in the case as a matter of law; and (3) the nature of the evidentiary materials are such that a reasonable person could only reach a decision against the nonmoving party, even after interpreting the materials in a manner which is most favorable to that party. *State ex rel. Jurczenko v. Lake Cty. Ct. of Common Pleas*, 11th Dist. No. 2009-L-178, 2010-Ohio-3252, at ¶45. In the present matter, relator has been able to fulfill each prong of the foregoing standard as to both relevant elements of her prohibition claim. That is, even when the evidentiary materials are construed most favorably for respondent, they show that respondent has rendered two judgments in the underlying proceeding which were patently and unambiguously beyond the scope of his jurisdiction as a juvenile court. Thus, relator is entitled to the writ as a matter of law.

{¶37} Relator's motion for summary judgment is granted. It is the order of this court that final judgment is entered in favor of relator as to her entire prohibition petition. Accordingly, a writ of prohibition is hereby issued under which respondent is required to

vacate all judgments in the underlying proceeding and dismiss the motion to re-allocate of Alyce Swanson.

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