**[Cite as *Howell v. Rintala*, 2012-Ohio-1464.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**TRUMBULL COUNTY, OHIO**

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|---|---|---|
| DIANNA HOWELL | : | **PER CURIAM OPINION** |
| Relator, | : | **CASE NO. 2011-T-0102** |
| - vs - | : | |
| JUDGE PAMELA A. RINTALA, et al., | : | |
| Respondents. | : | |

Original Action for Writs of Prohibition and Mandamus.

Judgment: Petition dismissed.

*David L. Engler*, 100 DeBartolo Place, Suite 315, Boardman, OH 44512 (For Relator).

*Dennis Watkins*, Trumbull County Prosecutor, and *James T. Saker*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondents).

PER CURIAM.

**{¶1}** This mandamus and prohibition action is before this court for consideration of the Motion to Dismiss of Respondents, Judge Pamela A. Rintala and Magistrate Alex Savakis of the Trumbull County Family Court. Respondents assert that the application for writs of mandamus and prohibition of Relator, Dianna Howell, fails to state a viable claim for the writs because her own allegations support the conclusion that she has an adequate remedy at law. Relator's petition must be dismissed because it is procedurally defective. Even if we were to consider the merits of the petition, the

dismissal of this mandamus and prohibition action is warranted because Relator has failed to state a viable claim for relief.

**Procedural History**

**{¶2}** The underlying custody case relating to Relator's minor child has been on-going in the juvenile court since 2006. A review of the instant petition shows that her claim is predicated on an agreed adjudicatory decision issued by the magistrate on January 4, 2011, which was adopted by the trial court on January 20, 2011.

**{¶3}** A review of the January 4, 2011 agreed adjudicatory decision issued by the magistrate indicates a hearing was held on the adjudication of Relator's minor child, at which Relator was represented by counsel. The magistrate found the child to be dependent and, furthermore, prohibited Relator's boyfriend, Scott Wheeland, from being in Relator's residence, listed as 3468 Cadwallader-Sonk Road, or "within 100 feet of this residence, nor [] within 100 feet of [the child]."

**{¶4}** That address was apparently Relator's old address. When the Trumbull County Children Services Board discovered the error, the agency corrected the address from Cadwallader-Sonk Road to reflect Relator's actual, current address at 807 Greenlawn Avenue, S.W., Warren. When the agency submitted its prepared judgment entry to the trial court for it approval and signature, the Greenlawn address was listed as Relator's address. On January 20, 2011, the trial court issued a judgment affirming the magistrate's decision, but with the corrected address. This order was sent to the parties, the guardian ad litem, and counsel on January 21, 2011.

**{¶5}** On January 27, 2011, the minor child was removed by the agency from Relator, when Mr. Wheeland was discovered to be in Relator's residence in Greenlawn Avenue.

**{¶6}** On February 22, 2011, Relator filed a motion to vacate the January 20, 2011 order on the ground that the order changed the prohibited residence from the Cadwallader-Sonk address to the Greenlawn address. She alleged the agency's counsel submitted the prepared entry containing the new address for the court's approval without first delivering it to the opposing counsel for review pursuant to the local rules.

**{¶7}** On the same day, February 22, 2011, the magistrate issued a decision as to the "interpretation of the January 4, 2011 protective supervision order (PSO) approved by the Judge on January 20, 2011." The magistrate explained that the January 4, 2011 decision contained a typographical error, which was corrected in the entry approved by the trial judge. The trial court subsequently approved this February 22, 2011 magistrate's decision.

**{¶8}** On March 4, 2011, Relator, represented by counsel, appeared in court and signed an agreed dispositional order giving temporary custody to the child's biological father. Four days later, Relator's attorney withdrew as counsel.

**{¶9}** On July 21, 2011, the court scheduled the matter for a four-day trial beginning on October 6, 2011. On the day of trial, Relator filed a motion to dismiss and a motion to renew the February 22, 2011 motion to vacate. This was shortly followed by the filing of the instant application, captioned "Statement of Writs Requested in Prohibition and Mandamus," which sought, inter alia, a stay of further proceedings and

an order compelling Respondents to rule on Relator's February 22, 2011 motion to vacate. We issued alternative writs.

**{¶10}** Relator then filed a motion to stay the instant original action, advising us that the trial court appeared to have granted the relief she sought in this action in part, but after receiving Respondents' Motion to Dismiss filed in response to the alternative writs, Relator filed a brief in response to Respondents' Motion to Dismiss followed by a "Request for Leave to File Response to Respondent's Motion to Dismiss, Instanter," through which she informed this court that the trial court had not granted any of the relief sought in the instant action. She also requested leave to amend the caption of the instant action as "Petition for Writ of Mandamus and Prohibition."

**{¶11}** The matter is now before this court for consideration of Respondents' Motion to Dismiss.

**{¶12}** Relator alleges two grounds for her entitlement to the writs. First, she claims she was not afforded a hearing "in any sense of the word" by the magistrate "when she was caused to sign an adjudicatory order" on January 4, 2011. She alleges that it was not until early October 2011 that her second counsel discovered "the Magistrate failed to hold a hearing at the Adjudicatory Hearing Level and that the Order of the Court was procured by fraud upon the Court * * *." She claims no testimony was taken, the magistrate failed to determine the agreed order was voluntary, and she was simply told to sign the agreed judgment by her counsel.

**{¶13}** Second, she alleges she did not have an opportunity to review the prepared order submitted to the trial court, which changed her address from

Cadwallader-Sonk Road to Greenlawn Avenue, before the court issued the order on January 20, 2011, containing the latter address.

**{¶14}** Based on these allegations, Relator requests that this court issue the writs of prohibition and mandamus to stay further proceedings at the trial court and to compel the trial court to rule on her motion to set aside the January 20, 2011 judgment.

**{¶15}** However, Relator's petition is improperly captioned. First, she captioned the action as "Statement of Writs Requested in Prohibition and Mandamus." Second, she captioned this case as "Dianna Howell, Relator v. Judge Pamela A. Rintala, Magistrate Alex Savakis, Respondents." That is, she improperly filed the petition in her individual capacity instead of bringing it in the name of the state on the relation of Howell. *See* R.C. 2731.04 ("[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying.)

**{¶16}** Although Relator subsequently filed a motion for leave to change the caption of the writ from "Statement of Writs Requested in Prohibition and Mandamus" to read "Petition for Writ of Mandamus and Prohibition," she never amended the caption to include the proper R.C. 2731.04 language. This court has held that "the requirement that the writ of mandamus be brought in the name of the state on the relation of the person applying for the writ is mandatory." *Ezzone v. Bruening*, 11th Dist. No. 96-L-105, 1996 Ohio App. LEXIS 5941, *9 (Dec. 31, 1996) (citations omitted). The failure to bring an action for a writ in the name of the state on the relation of the person applying for the writ constitutes sufficient grounds to dismiss the petition. *Hill v. Kelly*, 11th Dist. No. 2011-T-0094, 2011-Ohio-6341, ¶7, citing Barry *v. Galvin*, 8th Dist. No. 85990, 2005-Ohio-2324, and *Ezzone*. Here, Relator has failed to amend the caption of her petition,

and therefore has failed to bring this action in the name of the state. The deficiency mandates a dismissal. *Ezzone* at *9-11; *Hill* at ¶7.

**{¶17}** In any event, even if Relator's petition was not procedurally deficient, it would still lack merit, for the following reasons.

**Predicates for Mandamus and Prohibition**

**{¶18}** "A mandamus is a civil proceeding, extraordinary in nature since it can only be maintained when there is no other adequate remedy to enforce clear legal rights." *State ex rel. Widmer v. Mohney*, 11th Dist. No. 2007-G-2776, 2008-Ohio-1028, citing *State ex rel. Brammer v. Hayes*, 164 Ohio St. 373 (1955). Mandamus is a writ issued to a public officer to perform an act that the law enjoins as a duty resulting from his or her office. R.C. 2731.01. For a writ of mandamus to issue, (1) the relator must establish a clear legal right to the relief prayed for; (2) the respondent must have a clear legal duty to perform the act; and (3) the relator must have no plain and adequate remedy in the ordinary course of the law. *Widmer* at ¶31.

**{¶19}** As to a writ of prohibition, it will 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, ¶9.

**The Motion to Dismiss is Well-Taken as There is an Adequate Remedy at Law**

**{¶20}** A motion to dismiss for failure to state a claim upon which relief can be granted is procedural in nature and tests the sufficiency of the complaint. *Huffman v.*

*Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, ¶16, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs*., 65 Ohio St.3d 545, 548 (1992). "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber*, 57 Ohio St.3d 56, 60 (1991). "In order for a court to grant a motion to dismiss for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Huffman*, *supra*, at ¶18, quoting *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975).

**{¶21}** Here, as the record reflects, Relator was represented by counsel at the January 4, 2011 hearing, and the magistrate issued an agreed adjudicatory decision following the proceeding. It contained a no-contact order, prohibiting Mr. Wheeland from being at Relator's residence or within 100 feet of the minor child, although it inadvertently listed Relator's old address. This error was corrected when the trial judge affirmed the magistrate's order on January 20, 2011. The magistrate subsequently clarified the error in a decision on February 22, 2011, although it did not expressly refer to Relator's motion to vacate, which was approved by the court. The matter then proceeded to a dispositional hearing on March 4, 2011. Relator, again represented by counsel, agreed to an order granting temporary custody of the child to the biological father. On that day, the magistrate issued an agreed dispositional decision granting the temporary custody. Relator never objected to that decision.

**{¶22}** To be entitled to either writ of mandamus or prohibition, Relator must establish that she has no adequate remedy at law. However, her complaint regarding

any perceived impropriety of the January 20, 2011 adjudicatory order could be raised in the normal course of the law by way of appeal.[1]

**{¶23}** This court entertained a similar mandamus action in *State ex rel. Richards v. Rintala*, 11th Dist. No. 96-T-5535, 1997 Ohio App. LEXIS 345 (Jan. 31, 1997). There, the relator filed a petition for a writ of mandamus to compel the trial court to dismiss the temporary custody order, alleging defects in the proceedings, including the failure to hold a bifurcated hearing. We dismissed the petition, explaining as follows:

**{¶24}** "This court cannot issue a writ of mandamus compelling the juvenile court to dismiss its * * * temporary custody order or the dependency proceedings. A proper challenge to that order or those proceedings would be in the form of an appeal after the final custody decision is rendered. Even if relator is correct that a bifurcated hearing should have been held, he will be able to challenge that on appeal. * * * Therefore, because relator has an adequate remedy at law, a writ may not be issued." *Id*. at *5-6.

**{¶25}** Similarly here, Relator could challenge any perceived procedural defects regarding the January 20, 2011 adjudicatory order in the ordinary course of the law. On appeal, she could raise the issue regarding the lack of a "real" hearing on January 4, 2011, the change of address in the January 20, 2011 order, as well as Respondents' failure to set aside the January 20, 2011 adjudicatory order.

1. In their motion to dismiss, Respondents state Relator could appeal from the March 4, 2011 dispositional order. This is incorrect. This court has observed that temporary custody orders are interlocutory in nature and generally not final and appealable. *Keyerleber v. Keyerleber*, 11th Dist. No. 2004-A-0040, 2005-Ohio-60, ¶2. However, an adjudication by a juvenile court that a child is abused, neglected, or dependent followed by a dispositional order of temporary custody *to the agency* has been held to constitute a final appealable order. *In re H.F*., 120 Ohio St.3d 499, 2008-Ohio- 6810, ¶8; *In re Murray*, 52 Ohio St.3d 155 (1990), syllabus. Here, the dispositional order granted the temporary custody to the biological father instead of the agency and, therefore, does not qualify as a final appealable order pursuant to *In re H.F* and *In re Murray*.

**{¶26}** "Mandamus will not lie where there is an adequate remedy at law." *State ex rel. Strauss v. Court*, 11 Ohio St.3d 214, 215 (1984). To be entitled to either writ in this case, Relator must establish that she has no other adequate remedy at law she could seek to resolve the underlying dispute. This court has consistently held that "a direct appeal from a final appealable order constitutes an adequate legal remedy which forecloses the issuance of such a writ." *State ex rel. Die Co. v. Court of Common Pleas Lake Cty.*, 11th Dist. No. 2010-L-107, 2011-Ohio-5232. Mandamus will not substitute for an appeal. *State ex rel. Humr v. Pittman*, 11th Dist. No. 2010-P-0066, 2011-Ohio-403, ¶9.

**{¶27}** Relator has an adequate remedy in the ordinary course of the law available for her claim of procedural defects concerning the adjudicatory order issued by Respondents in this case. Her factual assertions conclusively show that she will not be able to prove a set of facts under which it could satisfy the "adequate legal remedy" element for the writ. The dismissal of the instant mandamus and prohibition petition is warranted under Civ.R. 12(B)(6) because Relator has failed to state a viable claim for relief.

**{¶28}** Relator's petition for writs of mandamus and prohibition is dismissed.

TIMOTHY P. CANNON, P.J., MARY JANE TRAPP, J., THOMAS R. WRIGHT, J., concur.