

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

S.S.

Court of Appeals No. E-10-021

Petitioner

v.

Hon. Judge Robert DeLamatre

DECISION AND JUDGMENT

Respondent

Decided: May 26, 2010

* * * * *

Loretta A. Riddle, for petitioner.

* * * * *

OSOWIK, P.J.

{¶ 1} Petitioner, S.S, has filed a petition for a writ of prohibition against respondent, the Honorable Judge Robert Delamatre, Erie County Court of Common Pleas, Juvenile Division. In the petition, petitioner requests that this court issue a writ prohibiting respondent from releasing "confidential" records and making rulings that may affect issues in two separate custody-related appeals that are currently before this court.

{¶ 2} The following is taken from both the record and the allegations made in petitioner's complaint. On September 11, 2008, the Erie County Department of Job and Family Services ("ECDJFS") filed a complaint and motion for temporary custody of petitioner's minor son, C.D. On May 21, 2009, petitioner filed a motion to change custody and to modify child support. C.D.'s father, K.D., then asked ECDJFS for documents which he alleged are relevant to the matter. Petitioner opposed K.D.'s requests. On October 29, 2009, respondent granted K.D.'s records requests. Petitioner filed a timely notice of appeal from that order on November 24, 2009 ("case No. E-09-066"). K.D. later filed a motion to modify or terminate the parties' shared-parenting arrangement.

{¶ 3} On January 8, 2010, petitioner filed a "Motion for Stay" in this court, in which she alleged that respondent continues to schedule pre-trial conferences and hearings, and rule on motions that relate to the issues presented on appeal in case No. E-09-066. On February 22, 2010, this court issued a decision in which we stated that, since petitioner did not file a motion to stay the underlying judgment, her motion to stay the trial court's actions after the issuance of that judgment was denied.

{¶ 4} On March 29, 2010, the trial court denied petitioner's motion for change of custody and to modify child support. Petitioner filed a notice of appeal from that judgment on April 28, 2010 ("case No. E-10-019"). Both appeals are pending in this court.

{¶ 5} On May 7, 2010, petitioner filed the complaint herein, in which she asks this court to prohibit respondent "and any Magistrates acting on his behalf from further acting in this matter except to take action in aid of the appeals until further order of the Court of Appeals." Specifically, petitioner asks us to: (1) order respondent not to make any more "confidential" records available to K.D. pending the outcome of case No. E-09-066; and (2) prohibit respondent from ruling on a motion to modify/terminate a shared parenting plan filed by K.D., pending this court's resolution of her appeal in case No. E-10-019.

{¶ 6} On May 10, 2010, K.D. voluntarily dismissed his motion to modify the shared parenting plan in the trial court pursuant to Civ.R. 41. Accordingly, it is not necessary for this court to determine whether we should prohibit respondent from ruling on that issue, since it has become moot. As to any remaining issues, it is well-established that, to be entitled to a writ of prohibition, a petitioner must show: (1) respondent is about to exercise judicial power; (2) the exercise of that power is unauthorized by law; and (3) "[denial] of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law." *State ex rel. Eshleman v. Fornshell*, 125 Ohio St.3d 1, 2010-Ohio-1175, ¶ 11, citing *State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections*, 122 Ohio St.3d 462, 2009-Ohio-3657, ¶ 14.

{¶ 7} Generally, notices of appeal that have been filed by a petitioner provide an adequate remedy at law by which to challenge respondent's jurisdiction to issue those

judgments. *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Franklin Cty. Court of Common Pleas* (1996), 76 Ohio St.3d 287, 289.

{¶ 8} However, the Supreme Court of Ohio has held that, even where an appeal is filed, "the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment * * *." *Atlantic Mortgage & Investment Corp. v. Sayers*, 11th Dist. No. 2000-A-0081, 2002-Ohio-844, citing *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44. "Moreover, once an appeal has been filed, unless a stay of execution has been obtained, 'the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same.'" *Id.*, quoting *State ex rel. Klein v. Chorpening* (1983), 6 Ohio St.3d 3, 4.

{¶ 9} In this case, by seeking a writ of prohibition, petitioner is attempting to prohibit respondent, and any magistrate working on his behalf, from releasing records, holding hearings, and otherwise executing those judgments while her appeals are pending in this court. It is undisputed that petitioner has not filed a motion to stay execution of the judgments issued by respondent.

{¶ 10} Upon consideration, we find that petitioner has an adequate remedy at law by way of filing a motion to stay execution of the judgments issued by respondent¹

¹App.R. 7, which governs stays pending appeal, states that the request for a stay of execution of a civil judgment "must ordinarily be made in the first instance in the trial court." *Id.* When made to the appellate court, in addition to stating the reasons for relief and setting out the facts relied upon, a motion for stay pending appeal must either "show that application to the trial court for the relief sought is not practicable, or that the trial

pending her appeals in cases E-09-066 and E-10-019. Accordingly, petitioner has not demonstrated that all the requirements for a writ of prohibition have been satisfied and her complaint is therefore dismissed, sua sponte. See *State ex rel. Jones v. Garfield Heights Municipal Court*, 77 Ohio St.3d 447, 448, 1997-Ohio-256 (The sua sponte dismissal of a complaint, though uncommon, "is warranted if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." *Id.*, citing *State ex rel. Cossett v. State Governors Federalism Summit* (1995), 74 Ohio St.3d 1416.)

{¶ 11} Writ denied. Costs are assessed to petitioner. The clerk is directed to serve upon all parties, within three days, a copy of this decision in a matter prescribed by Civ.R. 5(B).

WRIT DENIED.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

court has, by journal entry, denied an application or failed to afford the relief which the applicant requested. * * * " *Id.*