[Cite as *Williams v. O'Malley*, 2010-Ohio-3897.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94862

IESHA WILLIAMS & C.C.D.C.F.S.

PETITIONERS

vs.

HONORABLE THOMAS O'MALLEY

RESPONDENT

JUDGMENT:
PETITION DISMISSED

Writ of Habeas Corpus
Motion No. 433146
Order No. 436360

RELEASE DATE: August 16, 2010

ATTORNEYS FOR PETITIONERS

Cullen Sweeney
Paul Kuzmins
Assistant Public Defender
310 Lakeside Avenue
Suite 400
Cleveland, Ohio 44113

William D. Mason
Cuyahoga County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Gregory S. Millas
Assisstant Prosecuting Attorney
C.C.D.C.F.S.
3955 Euclid Avenue
Cleveland, Ohio 44115

Gina S. Lowe
Assisstant County Prosecutor
C.C.D.C.F.S.
4261 Fulton Parkway
Cleveland, Oh 44144

Beth Judge
17 South Main Street
Suite 201
Akron, Oh 44308

ATTORNEYS FOR RESPONDENT

Kevin M. Spellacy
McGinty, Hilow & Spellacy Co., L.P..A.
614 West Superior Avenue
Rockefeller Bldg.
Suite 1300
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} On March 10, 2010, the petitioners, Iesha Williams, her five children, and the Cuyahoga County Department of Children and Family Services (hereinafter "the County"), commenced this habeas corpus action against the respondent, Judge Thomas O'Malley, to order the judge to vacate his emergency custody order and return the Williams children to their mother. On April 20, 2010, the respondent judge moved to dismiss the petition. On May 4, 2010, the petitioners filed their briefs in opposition to the motion to dismiss. For the following reasons, this court grants the respondent's motion to dismiss.

{¶ 2} Iesha Williams is the mother of five children, ages four to eight. In May 2008, the County filed a complaint in Juvenile Court that the children were neglected. The County alleged that Iesha did not have proper utilities in her home and that she left the four younger children unattended while she took her oldest child to school. In July 2008, the Juvenile Court adjudicated the children dependent and awarded protective supervision to the County.

{¶ 3} The petitioners allege that over the next two years Iesha Williams fully complied with her case plan. On January 5, 2010, the County moved to terminate protective supervision. At a hearing on January 20, 2010, the Guardian Ad Litem expressed his reservations on the stability of housing, because Iesha gave him different addresses and the home visit he made was in the subsidized home of a

friend. The Guardian Ad Litem noted that in his experience a tenant's allowing other people to live in the tenant's subsidized housing was usually a lease violation. He also stated he was concerned over Iesha's ability to provide the basics for her children; he saw very little food and children's clothing in the home, and she did not have a steady source of income. The Guardian Ad Litem further stated that Iesha had not always co-operated with visitations. The magistrate admonished Iesha to co-operate with the Guardian Ad Litem on his surprise visits under penalty of contempt and set the next hearing for March 3, 2010.

{¶ 4} Over the next six weeks the Guardian Ad Litem made four attempts for a surprise visit and was never successful. He also said that a woman identifying herself as the children's grandmother had called and threatened him that her boyfriend, a deputy sheriff, would convince him that he had a vendetta against Iesha.

{¶ 5} At the March 3, 2010 hearing the following were present: the Guardian Ad Litem, the social worker, the attorney for the County, Iesha Williams, her attorney, Johnathan Johnson who is the father of some of the children, and Johnson's attorney.[1] The Guardian Ad Litem related his experiences, but was not under oath and was not cross-examined. Iesha denied that the Guardian Ad Litem was telling the truth, but she was not allowed to explain her position. The magistrate also investigated irregularities regarding daycare for the children. The County had

[1] The petitioners allege that the fathers had not received appropriate notice.

provided Iesha with vouchers for secure daycare, but nonetheless there were periods during which an unknown daycare provider cared for the children.

{¶ 6} In reviewing the matter, the magistrate noted that in the past Iesha had committed acts of deception and had alternately co-operated and not co-operated with the Guardian Ad Litem. She noted that as late as January there were concerns over housing, food, and clothing. Since then Iesha had not co-operated at all with the Guardian Ad Litem and thus could not relieve those fears. Indeed, it appeared that she was trying to hide the condition of her children. Moreover, there were irregularities regarding daycare, and a threat made against the Guardian Ad Litem. From this the magistrate concluded that the children were in immediate risk of harm and ordered them placed in emergency custody with the County. The petitioners's lawyers objected to these proceedings and requested a full emergency hearing, but the magistrate denied those requests.

{¶ 7} On March 8, 2010, Iesha Williams objected to the magistrate's report. On March 12, 2010, Judge O'Malley overruled the objections: "Upon review of the court file, the Magistrate's Order and the Objections, the Court finds the Objections are not well-taken. The Court affirms, approves and adopts said Decision and overrules said Objections. It is therefore ordered that the within Order of the Magistrate be and hereby is the Order of the Court. (New paragraph) The Motion to Set Order Aside and the Motion for Rehearing Instanter are also overruled."

(Capitalization in the original.) The County and the father also filed objections and motions to set aside the order of emergency custody, and Judge O'Malley overruled those objections and motions in nearly identical language. The petitioners then commenced this habeas action.

{¶ 8} The petitioners argue that the respondent judge has unlawfully deprived Iesha Williams of her fundamental right to parent her children and has unlawfully removed the five children from their home. In addition, they claim the Juvenile Court failed to provide the fathers with notice of the March 3, 2010 hearing and had not appointed a lawyer for the children. Moreover, the March 3, 2010 hearing was flawed because the magistrate did not take sworn testimony, did not allow cross-examination of the Guardian Ad Litem, did not allow the petitioners to present testimony, and had not warned Iesha that the failure to co-operate with the Guardian Ad Litem could result in the removal of her children. Finally, the petitioners argue that the hearing did not reveal such authentic exigent circumstances to permit removal; rather it seemed that the magistrate was punishing Iesha for not co-operating with the Guardian Ad Litem.

{¶ 9} The Supreme Court of Ohio in *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 637 N.E.2d 840, stated the principles for habeas corpus actions in juvenile cases. First, pursuant to R.C. 2725.05 habeas corpus will not issue if the court or magistrate had jurisdiction to issue the order

restraining a person's liberty. Nevertheless, "in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty, habeas corpus will lie notwithstanding the fact that only nonjurisdictional issues are involved, so long as there is no adequate legal remedy, *e.g.*, appeal or postconviction relief." 70 Ohio St.3d at 144. Furthermore, habeas relief will not lie, if the petitioner had an adequate remedy at law. *Thomas v. Huffman* (1998), 84 Ohio St.3d 266, 703 N.E.2d 315 and *In re Coleman*, 95 Ohio St.3d 284, 2002-Ohio-1804, 767 N.E.2d 677. Finally, the Supreme Court of Ohio reiterated that "[t]here may be certain extreme circumstances in which habeas corpus would lie where either one or a series of improperly entered emergency temporary custody orders is used solely to deprive natural parents of their paramount constitutional right to the care, custody, and management of their children * * * without any findings as to parental suitability and the best interest of the children * * *." 70 Ohio St.3d at 146 (citations omitted).

{¶ 10} In the present case the Juvenile Court had the jurisdiction to place the children into emergency temporary custody. R.C. 2151.23(A)(1), 2151.31(A), and 2151.35.3(A)(2). The petitioners concede this.

{¶ 11} More importantly, the extreme exigent circumstances are not present in this case to issue habeas relief. This court finds that the Juvenile Court acted to ensure the well being of the children. In the prior hearing the Guardian Ad Litem related serious concerns: unstable housing, unstable employment, and a lack of food

and clothing. Despite the magistrate's explicit warning to Iesha to co-operate with the Guardian Ad Litem, his four attempts at a surprise visit were thwarted. Moreover, somebody threatened him. The magistrate concluded that there was an unacceptable risk to the children because of their previously reported marginal condition, the mother's prior deception or evasion regarding housing, the irregularities surrounding daycare, and the apparent hiding of their condition. Given these circumstances, the Juvenile Court properly exercised its power to place the children into emergency temporary custody. Although removing children from their home is one of the most intrusive powers a government can exercise, the Juvenile Court must be able to exercise its independent judgment to protect Ohio's children and families and not merely rubber-stamp a department of children and family services's recommendation.

{¶ 12} Moreover, the petitioners have or had adequate remedies at law which preclude the issuance of the writ of habeas corpus. Filing objections to the magistrate's report pursuant to Juv.R. 40(E) and a motion for rehearing pursuant to Juv.R. 7(G) are adequate remedies at law. *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, 780 N.E.2d 278 and *In Re: C.R. v. McCafferty* (Sept. 19, 2002), Cuyahoga App. No. 81427. In *Luchene v. Wagner* (1984), 12 Ohio St.3d 37, 465 N.E.2d 395, the Supreme Court of Ohio noted pursuit of an adequate remedy at law, even if initially unsuccessful, still precludes the writ.

{¶ 13} Additionally, appeal is still an adequate remedy at law. The Supreme Court of Ohio has held: "An adjudication by a juvenile court that a child is 'neglected' or 'dependent' as defined by R.C. Chapter 2151 followed by a disposition awarding temporary custody to a public children services agency pursuant to R.C. 2151.353(A)(2) constitutes a 'final order' within the meaning of R.C. 2505.02 and is appealable to the court of appeals pursuant to R.C. 2501.02." *In re Murray* (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169, syllabus; *In re H.F.,* 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, ¶8; *In Re: A.S. and T.S.*, Cuyahoga App. Nos. 94098 and 94104, 2010-Ohio-1441; and *In re: A.B.,* Washington App. No. 09CA17, 2009-Ohio-5733. The Ninth District Court of Appeals further ruled that "a later modification or continuation of a temporary custody order is also a final, appealable order." *In the Matter of A.S.* (May 12, 1999), Lorain App. No. 98CA007172. *In re: P.C.,* (Feb. 4, 1992), Athens App. No. CA-1494, is particularly instructive. In that case the juvenile court adjudicated the children to be dependent and awarded temporary custody to the county children services department. Several months later the juvenile court changed its disposition by terminating temporary custody, returning the children to their home, but placing the children in protective custody. The county children services department appealed. The court of appeals held that "the entry terminating temporary custody and placing the children in protective custody,

which followed an adjudication of dependency, is final, appealable order." (Slip op. Pg. 2.)

{¶ 14} In the present case the Juvenile Court had adjudicated the five children as dependent and awarded the County protective supervision in the disposition. The Juvenile Court then changed its disposition, after an adjudication, to emergency temporary custody. Under the above-listed precedents, such a disposition, if properly entered by the Juvenile Court, would constitute a final, appealable order. Thus, appeal presents a further adequate remedy at law precluding habeas corpus.[2]

{¶ 15} Finally, this court notes that Judge O'Malley is not the proper respondent in this habeas corpus action. R.C. 2725.04(B). The failure to name the proper respondent is cause to dismiss the petition. *State ex rel. Sherrills v. State*, 91 Ohio St.3d 133, 2001-Ohio-299, 742 N.E.2d 651; *Boyd v. McGinty*, Cuyahoga App. No. 84476, 2004-Ohio-2704; and *Rockwell v. Geauga Cty. Court of Common Pleas*, Geauga App. No. 2005-G-2661, 2005-Ohio-5762. In these cases the petitioners

[2] This court notes that in its journal entries the Juvenile Court merely adopted and incorporated the findings and recommendations of the magistrate. It did not explicitly state the relief to be afforded, e.g., the children are placed in the temporary custody of the Cuyahoga County Department of Children and Family Services. Such an entry does not constitute a final, appealable order. *In re Zinni*, Cuyahoga App. No. 89599, 2008-Ohio-581; *Burns v. Morgan*, 165 Ohio App.3d 694, 847 N.E.2d 1288, 2006-Ohio-1213; *In Re Dortch* (1999), 135 Ohio App.3d 430, 734 N.E.2d 434; and *In re Zakov* (1995), 107 Ohio App.3d 716, 669 N.E.2d 344. When the Juvenile Court issues an order explicitly stating the relief granted, the matter would become appealable.

sought habeas relief against a judge or court, and their petitions were dismissed, inter alia, for commencing a habeas corpus case against a wrong respondent.[3]

{¶ 16} Accordingly, this court grants the respondent's motion to dismiss and dismisses this writ action. Petitioners to pay costs. The court instructs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

SEAN C, GALLAGHER, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
JAMES J. SWEENEY, J., CONCUR

[3] This court notes, however, that the petitioners by commencing this habeas corpus action against the respondent judge sought to present an actual case and controversy.