Supreme Court of Ohio Clerk of Court - Filed December 15, 2014 - Case No. 2014-1914

IN THE SUPREME COURT OF OHIO

MARIAN LESTER	)	CASE NO. 2014-1914
	)	
Relator,	)	Original Action in Prohibition
	)	and Mandamus arising from
vs.	)	Cuyahoga County Probate Court
	)	Case Number 2014-GRD-199316
JUDGE LAURA J. GALLAGHER	)	
	)	
Respondent.	)	

RELATOR'S MEMORANDUM IN RESPONSE TO THE
RESPONDENT'S MOTION TO DISMISS

Now comes the Relator, Marian Lester, by and through her duly authorized counsel, L. Bryan Carr, and pursuant to S.Ct.Prac.R. 12.04(b)(2) submits her Memorandum in Response to the Respondent, Judge Laura J. Gallagher's, Motion to Dismiss. As the Relator's Complaint sets forth a valid and substantial claim for relief in Prohibition and Mandamus, the Respondent's Motion to Dismiss must be denied.

A memorandum in support of this Response is attached hereto and incorporated herein.

Respectfully Submitted,

/s/ L. Bryan Carr
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COUNSEL FOR THE RELATOR,
MARIAN LESTER

RESPONSE TO "STATEMENT OF FACTS AND PROCEEDINGS"

Respondent begins her Motion by stating that the Relator's Juvenile Court Complaint "did not reveal anything about the fact that the custody of the child was already being litigated in the Probate Division." First, that is irrelevant and does not change the fact that the child is being claimed to be dependent and neglected. Second, "custody," neglect and dependency are not being litigated in the Probate Court; and cannot be litigated in the Probate Court. In fact, these issues may only be litigated in Juvenile Courts. Third, the Juvenile Court was made aware of the Probate Court proceedings the very day the Emergency Complaint was filed and walked-through (on September 30, 2014). In fact, the Juvenile Court noted the Probate Court proceedings in its October 28, 2014 Magistrate's Order. Thus, this is a non-issue. Further, while the Respondent criticizes the fact that Relator filed with the Juvenile Court after the Probate Hearing, that was the earliest point in time to file with the Juvenile Court, as the facts concerning the child's living situation (and Field's criminal and financial background, etc.) could not be learned earlier.

The Respondent goes on to argue that, in essence, the Courts below have "determined their own jurisdiction to proceed." Thus, according to the Respondent, "no harm-no foul." Unfortunately for the Respondent, what occurred between the lower courts is in violation of the Ohio Revised Code, well established precedent and the rights of a twelve year old girl. Lower courts cannot simply agree to act contrary to law. Respondent's newly invented legal theory "first-filed and first-litigated" is frivolous, without merit and in direct violation of the plain language of the Ohio Revised Code and established precedent. Moreover, the "first-filed and first-litigated" concept was verbally rejected by the Juvenile Court Magistrate on October 28, 2014, when he articulated at a Pre-Trial that the Probate Court has no jurisdiction in Neglect and Dependency Cases (or in custody cases). Further, had the Juvenile Court believed in "first filed

and first-litigated," it would not have confirmed custody to the Relator on October 28, 2014, in which the Magistrate's order clearly acknowledged the Probate Court proceedings. (***Exhibit 1***)

Respondent also states (Motion, Page 3) "...Fields was not named as a defendant to the Juvenile Court case." That is a red herring. Field's has no legal standing, is not an interested party and has no legal relationship to the child. Fields is not the child's father or step-father. Fields is nothing to the child. At the time of her mother's death, Fields was not even involved with the child's mother, but was living upstairs from the child with his current girlfriend. Thus, Fields did not need to be named as a defendant in the Juvenile Court case. Again, Respondent argues that the Juvenile filings made no mention of the Probate Court case. Without re-arguing, it must also be noted that at the time the Juvenile Court case was filed, the child had no parent, custodian or guardian. There was no legal relationship between the child and any adult. Thus, the Relator was well within her right to file in the Juvenile Court for her granddaughter.

Respondent states (Motion, Page 3) that after the Juvenile Court's October 6, 2014 Order was issued, "the Juvenile Court hearing was scheduled to occur on December 1, 2014." That is incorrect. Respondent's timeline is significantly off. Respondent fails to realize that a Pre-Trial was held at the Juvenile Court on October 28, 2014. During that Pre-Trial the status of the case ***and the Probate Court proceedings*** were discussed with the Magistrate. (See ***Exhibit 1***) As stated above, the Juvenile Court Magistrate reviewed the Probate Court's October 16, 2014 Judgment Entry (denying the Motion to Certify Jurisdiction) and was incredulous the Probate Court was taking such a position. The Magistrate was adamant that his Juvenile Court had exclusive and original jurisdiction over the child as the case was a Neglect and Dependency case (as well as a private custody case).

Respondent is correct in that Relator filed a Motion to Certify Jurisdiction. However, the Motion to Certify Jurisdiction contained a detailed explanation of the relevant Ohio Revised Code and precedent that cloaked the Juvenile Court with exclusive and original jurisdiction.

Respondent relies on the Juvenile Court Order adopting the Probate Court's Decision. Relator is incredulous how the Juvenile Court decided (and dismissed) a case it has exclusive jurisdiction over (without any hearing) based solely on a Magistrate's Decision from a Probate Court that had no jurisdiction. Moreover, the Juvenile Court case is still pending, as the Juvenile Court retained jurisdiction to hear Relator's Objections to the Magistrate's Decision. Given the manner in which the Courts below have trampled on jurisdiction in this matter, Realtor is entitled to Writs of Mandamus and Prohibition.

Respondent repeatedly states that the Courts below "determined their own jurisdiction." Jurisdiction, however, is not for trial courts to "decide." Jurisdiction is determined by Ohio law. In this case the law is clear. While the Respondent argues that the lower courts resolved this issue, what actually occurred in the lower courts is that, while aware that this matter was pending in this Court, instead of addressing same, the following hastily occurred: (1) the Respondent's Magistrate prepared and finalized a Magistrate's Decision; (2) the Respondent immediately reviewed and adopted the Decision; (3) the Probate Court communicated with the Juvenile Court and forwarded the Magistrate's Decision/Judgment Entry to the Juvenile Court *along with legal research/case law discussing jurisdiction*; (4) the Juvenile Court dismissed Relator's Neglect and Custody matter. This is not "determining jurisdiction" this is violating Relator's rights. Clearly, the Relator has no adequate remedy at law to address what occurred in the lower courts. To illustrate: on December 3, 2014 (due to Respondent's November 19, 2014 Entry) the Juvenile Court issued an Order, terminating the temporary custody granted to Relator. At 3:30 p.m.,

armed with this Judgment Entry, the Guardian *Ad Litem* appointed by the Juvenile Court appeared at Relator's home (as the child arrived home from school) with the Cleveland Heights Police Department. The Guardian *Ad Litem* ***had the Officers physically remove the child from Relator's home, and delivered her to Fields. Significantly, Fields currently has a warrant out for his arrest. (Exhibit 2)*** Incredibly, the "adequate remedy" from the Respondent's perspective is the Relator being forced to file ***two (2) appeals***: one appealing the Probate Court's decision on Guardianship, and one appealing the Juvenile Court's dismissal of the case. This "remedy" is unreasonable, inequitable and, significantly, inadequate.

RESPONSE TO "LAW AND ARGUMENT"

In relying upon State ex rel. Corn v. Russo, 90 Ohio St. 3d 551 (2001), the Respondent seems to acknowledge that an action in prohibition tests the jurisdiction of the lower court. The Respondent (Motion, Pages 7-8) sets forth a litany of cases that refer to probate courts "patently lacking jurisdiction." Quite simply, the Relator has provided statute and precedent that clearly demonstrate Respondent "patently and unambiguously" lacks jurisdiction. Similarly, the Relator has argued that the Respondent is under a legal duty to Certify Jurisdiction to the Juvenile Court.

Quite simply, the child has been alleged to be Neglected and Dependent as defined in O.R.C. 2151.03 and 2151.04. As such, pursuant to O.R.C 2151.23, the Juvenile Court has exclusive and original jurisdiction. At issue is the jurisdiction over a person, not merely a dispute. According to O.R.C. 2151.23(A), Juvenile Courts have **exclusive** original jurisdiction:

> (1) Concerning any child who on or about the date specified in the complaint...is alleged to...be a juvenile traffic offender or a delinquent, unruly, abused, ***neglected, or dependent child...***
>
> (2) Subject to divisions (G), (K), and (V) of section 2301.03 of the Revised Code, ***to determine the custody of any child not a ward of another court of this state.***

Respondent simply cannot get beyond the Ohio Revised Code, which forms the basis of Prohibition and Mandamus. The Respondent does not attempt to address the Ohio Revised Code, yet chooses instead to attempt to explain away the very clear holding that Juvenile Courts have exclusive jurisdiction over children "once complaints which allege that they are dependent, neglected and abused children are filed." See, In re Doe Children, 93 Ohio App.3d 134 (1994) Having exclusive jurisdiction is precisely what this case is about. Also, Respondent fails to address, in any manner, this Court's recent mandate that exclusive original jurisdiction of juvenile courts (to determine the custody of any child not a ward of another court of the state) ***includes*** custodial claims brought by the persons considered non-parents at law. Rowell v. Smith, 133 Ohio St.3d 288 (2012)

Further, the Respondent's attempt to distinguish In the Matter of the Guardianship of NP, 2011 Ohio 3846 and In the Matter of the Guardianship of Brinegar, 160 N.E.2d 589 (1959) is ineffective. These cases state that as soon as a common pleas court makes an order affecting custody of a child, that order is continuing and that court retains jurisdiction. There is no language limiting that to "permanent" custody. The Juvenile Court was the first to act in any manner with regard to the child. The Probate Court did absolutely nothing for the child except establish a hearing date. That is not sufficient.

While the Respondent may quote R.C. 2151.23, she then goes on to cite to (and rely upon) non-binding, inapplicable appellate court opinions that contradicts R.C. 2151.23. The Respondent is relying upon cases involving "jurisdictional priority" in a matter that is dictated unequivocally by R.C. 2151.23. Further, the cases cited to by the Respondent (Motion, Pages 9-10) are not on-point with the issues or facts in the case *sub judice*. Further, for Respondent to rely upon In the Guardianship of Pierce, 2003 Ohio 3997, an 11 year old, 4th Appellate District

case, is specious. Moreover, contrary to In the Guardianship of Pierce, Respondent never issued any temporary guardianship of the child, nor did the Respondent act in any fashion with regard to possession of the child. However, the Juvenile Court did so act. Further, and as argued, as Fields has absolutely no relation to the child, Fields was not a necessary party to be served – nor did he ever seek to intervene in the Juvenile Court matter. Contrary to Respondent's belief, (Motion, Page 11,) Fields has absolutely no "legal interest" or "legal relationship" to this child. That said, In re Guardianship of Pierce is directly at odds with R.C. 2151.23. Minimally, this Court must step in to address the inconsistency and confusion that this has caused.

Further, Respondent states (Motion, Pages10-11) that "the Juvenile Court's temporary emergency custody order was "necessarily temporary pursuant to R.C. 2151.33 until such time as the matter could be heard fully." The issues of Neglect, Dependency and legal custody were to scheduled to be heard on December 1, 2014. However, the Respondent and her Magistrate produced a Magistrate's Decision and Judgment Entry and forwarded same to the Juvenile Court. The Juvenile Court then immediately dismissed the case and canceled the Trial. This, in no way, is the manner in which a case involving a 12 year old girl is to be handled.

Probate Courts have jurisdiction over "garden variety" guardianships. Unfortunately, this is clearly not the situation in the case *sub judice* –and it took a Hearing to discover that this was a matter for the Juvenile Court. In fact, Probate Courts are not designed to deal with situations like the one involving the child at issue. That is precisely the reasons R.C. 2151.23 exists, to allow the appropriate Court (Juvenile) to deal with children at risk.

CONCLUSION

The Relator concluded her Complaint for Writ of Mandamus, Prohibition and for Alternative Writ by stating: "Should the Probate Court and Juvenile Court continue to act concurrently (and inconsistently) chaos will result." Indeed, that situation has occurred.

WHEREFORE, Relator requests that the Respondent's Motion to Dismiss be denied.

Respectfully submitted,

/s/ L. Bryan Carr

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Counsel for the Relator

CERTIFICATE OF SERVICE

A copy of the foregoing was delivered via electronic Mail this 15th day of December, 2014 to: Charles Hannan, The Justice Center, Courts Tower, 8th Floor, Cleveland, Ohio 44113.

/s/ L. Bryan Carr

L. BRYAN CARR (0066649)
Counsel for the Relator

COURT OF COMMON PLEAS, JUVENILE DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: IMANI L. BRUCE

CASE NO: AD14912510
JUDGE: DENISE N. RINI

MAGISTRATE'S ORDER
ABUSE NEGLECT DEPENDENCY

This matter came on for hearing this 28th day of October, 2014, before Magistrate Richard T. Graham, upon the Complaint for Legal Custody as to the child herein alleged to be Neglected and Dependent filed by Bryan Carr.

The following persons were present: Maternal Grandmother, Marian R. Lester with Attorney Bryan Carr; and Guardian ad litem for child, Amy Nash.

The Court finds that this matter is before Probate Court awaiting a Decision.

This matter is continued to December 1, 2014 at 9:00 a.m. for Trial.

Magistrate Richard T. Graham
October 28, 2014
Received for filing, October 28, 2014, Kristin W. Sweeney, ex-officio Clerk,
Court of Common Pleas, Juvenile Division

Notice to Parties and Counsel: Pursuant to Juv. R. 40(D)(2)(b) and Civ. R. 53(D)(2)(b), the parties were informed of their right to file with the Court, a Motion to Set Aside the Magistrate's Order not later than ten (10) days after the Magistrate's Order is filed.

Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office, Volume 99, Page 8284, October 29, 2014, cjsmw

THE OHIO LEGAL BLANK CO., INC.
EXHIBIT
1
CLEVELAND, OHIO 44102-1799

CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

Case Number: 2014 TRD 042411
STATE OF OHIO / CITY OF CLEVELAND
VS.
FIELDS, MICHAEL
AKA:

DOB: 02/24/1979
SSN: XXX-XX-0296
SCR Status: OPEN
Arresting Agency:
DISTRICT 4

Event Date: 11/20/2014 8:30 am
Event: TRAFFIC ARRAIGNMENT (MORNING)
Event Location: 3RD FLOOR COURTROOM C
Event Judge: CRIMINAL, JUDGE/MAGISTRATE

Charge	Short Description	Decision Date /	PNG	NGW	NC	PG	Prosecutor Amends Charge	FG	FNG	NOL	DWP	Fine	Days	Suspended Fine	Suspended Days
1 M1 - 435.07	DRIVING UNDER SUSP/REVOC		☐	☐	☐	☐		☐	☐	☐	☐				
			☐	☐	☐	☐		☐	☐	☐	☐				
			☐	☐	☐	☐		☐	☐	☐	☐				
			☐	☐	☐	☐		☐	☐	☐	☐				
			☐	☐	☐	☐		☐	☐	☐	☐				

☐ Public Defender Fee
☐ Time to Pay Until: _____
☐ Indigency Hearing Had:
☐ Found ☐ Not Found
☐ CWS in lieu of F & C
_____ Hrs _____ Date

☐ Bond Set $ _____ ☐ No Contact ☐ Personal Bond
☐ Capias / BFC / Warrant to Issue ☐ Capias Recalled
☐ Bond Forfeiture Vacated ☐ Original Bond Reinstated
☐ Warrant Block Release ☐ Warrant Fee Waived
☐ Defendant Advised of Rights

3D Exam: ☐ W /BO ☐ I /A ☐ Demanded ☐ Days Held _____

Cont. to: _____ at _____ am / pm ☐ Drug Court

At: ☐ COPR ☐ CODR ☐ COCR ☐ Final ☐ SPW

For: ☐ Pretrial ☐ Trial ☐ Jury Trial ☐ PFS ☐ PVH

☐ Trial Had ☐ Trial in Progress ☐ Jury Sworn ☐ Motion Hearing _____

☐ Interpreter Requested Language _____ ☐ Jury Waived

☐ Atty: _____ _____ ☐ Public Defender

Driver's License Suspended from Date of Arrest _____ or
From _____ to _____ DUI # Within 6 Yrs _____

Immobilization _____ Days ☐ Vehicle Forfeited ☐ TIP

INS: ☐ Shown ☐ Not Shown ☐ N/A ☐ LDPG ☐ ALS Appeal ☐ ALS Term

Motion To / For: _____

☐ Granted ☐ Denied ☐ OSJ

JUDGE / MAGISTRATE _____

Revised 10/29/2014

☐ Found Indigent Costs Suspended ☐ Sentence Satisfied
☐ Cost Satisfied ☐ Cost Partially Suspended $ _____
☐ Credit for _____ Days Served $ _____ ☐ Sentence Suspended
☐ Sentence Ordered Executed _____ Fine _____ Days
☐ Sentence Stayed Until (Date / Time) _____ Mandatory Days _____

Refer to Probation: ☐ PSI ☐ SIP: [S] [P] [C] ☐ CWS _____ Hrs _____ Date

☐ DV: [A] [C] ☐ MHD: [S] [P] ☐ Veteran's Docket: [S] [P] [C] ☐ DJP: [S] [P] [C]

☐ CAP ☐ DIET ☐ COP ☐ Get On Track ☐ Project HOPE

☐ Anger Mgmt ☐ Parenting ☐ ROCK: [P] [C] [H] ☐ Drug Court: [S] [P] [C]

Probation Duration: _____ MO _____ YRS ☐ Active ☐ Inactive ☐ Form 95

Probation Conditions: _____

☐ ATJ ☐ MADD # _____ ☐ SAT ☐ SA[A][C] ☐ AA _____ x per wk.

Probation Violation Hearing: ☐ Had ☐ Waived ☐ Found ☐ Not Found ☐ SRS

Probation Continued Until: _____ ☐ Probation / SIP Terminated

Notes: _____

JUDGMENT ENTRY RECEIVED FOR JOURNALIZATION
NOV 20 2014
EARLE B. TURNER, CLERK

THE OHIO LEGAL BLANK CO., INC.
EXHIBIT
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CLEVELAND, OHIO 44102-1799