

IN THE SUPREME COURT OF THE STATE OF NEVADA

H. M. S.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
WILLIAM O. VOY, DISTRICT JUDGE,
FAMILY COURT DIVISION,
Respondents,
and
CLARK COUNTY DEPARTMENT OF
FAMILY SERVICES,
Real Party in Interest.

No. 52558

FILED

NOV 21 2008
TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER GRANTING PETITION FOR
WRIT OF MANDAMUS

This original petition for a writ of mandamus or prohibition challenges a September 19, 2008, ex parte district court order staying a hearing master's recommendations concerning petitioner's release to her adult sibling.

Facts

This matter arises from proceedings that took place in the juvenile court after a decree of adoption pertaining to petitioner, a 16-year-old minor child, was orally vacated on September 11, 2008. The court's written order vacating the adoption decree, which was not entered until September 19, 2008, suggested that the court might not have jurisdiction regarding petitioner's permanent placement and that

petitioner had a legal guardian in California.¹ The order further directed real party in interest, the Clark County Department of Family Services (DFS), to determine whether petitioner's adult sibling's Las Vegas, Nevada home was suitable for petitioner's release to that sibling. If the sibling's home was found suitable, the order directed that petitioner "shall be" placed there "immediately." Although no written order had been entered at the time, a protective custody hearing was scheduled for the day following the oral ruling, September 12, 2008.

The matter apparently was heard on September 12 by a juvenile court hearing master, who determined that additional inquiry was warranted, in part with respect to the sibling's 1993 criminal conviction for sexual battery involving coercion of a minor. According to the hearing master's later-filed written findings of fact and recommendations, the matter was next heard on the morning of September 19, 2008. As a result of that hearing, the hearing master recommended that the court adopt findings that the California guardian was no longer able to care for petitioner and that it was in petitioner's best interest to be immediately placed with her adult sibling. Petitioner asserts that at the September 19 hearing, the hearing master recommended that the release to her adult sibling occur by 5 p.m. that same day.

¹A notice of appeal, which appears to pertain to the court's September 19 order vacating the adoption decree, has been filed. See In re: Petition of M., Docket No. 52485 (Certified Copy of Amended Notice of Appeal, September 26, 2008).

The juvenile court did not accept or reject the hearing master's recommendations on September 19, however. Nevertheless, that same day, the Clark County District Attorney's Office filed an objection to the hearing master's recommendations, combined with an emergency ex parte motion to "stay" the hearing master's recommendation that petitioner be released to her sibling at that time. Shortly thereafter, on September 19, the respondent family court judge, who was not presiding over the matter below, granted the ex parte motion and stayed the hearing master's recommendation "pending review by the District Court." According to petitioner, her counsel was first notified of the stay order on September 23, 2008.

Thereafter, on September 24, 2008, the presiding juvenile court judge entered an order on the hearing master's recommendations, noting that the legal guardianship over petitioner had not been set aside and that the California court had scheduled a hearing on the matter for November 21, 2008. The juvenile court, without indicating whether it had reviewed the objection filed on September 19 or mentioning the ex parte stay, nonetheless noted that, despite "the State's" opposition to the placement based on the sibling's criminal conviction, the placement was in petitioner's best interest. Accordingly, the court then ordered that petitioner be released to her sibling "no later than 5 p.m. today."

Petitioner then submitted the instant writ petition, challenging the ex parte order staying her release to her sibling. According to petitioner, the stay was intended to last until "the next hearing, over one month later," ostensibly referring to the October 20,

2008, date set for hearing the filed objection.² It appears from the documents before us that, due to the ex parte stay, petitioner was not released to her sibling as set forth in the juvenile court's September 24 order and is instead currently placed at Boys and Girls Town in Las Vegas.

Because it appeared that petitioner had set forth issues of arguable merit and had no plain, speedy, and adequate remedy in the ordinary course of the law, this court directed DFS, on behalf of respondents, to file and serve an answer to the writ petition. We indicated that DFS should address the issues concerning the alleged improprieties surrounding the ex parte order's issuance; the validity and alleged continuing nature of that order, given the juvenile court's September 24 order on the hearing master's recommendations; and this matter's status in the Nevada court, given the California guardianship proceeding. The Clark County District Attorney's Office timely filed an answer, and petitioner timely replied to the answer, as permitted.³

²According to the answer, the juvenile court hearing on the filed objection, originally scheduled for October 20, 2008, was continued until December 3, 2008, due to this writ proceeding. Nothing in our order directing an answer stayed the district court proceedings pending our consideration of this writ petition, however.

³In her reply, petitioner asserts that the Clark County District Attorney's Office does not represent DFS and thus lacks standing to respond to this matter, that she was not timely served with the answer, and that the answer's Exhibit B contains impermissible ex parte communication, in that the exhibit was not provided to her.

As it was the Clark County District Attorney's Office that filed the objection and ex parte motion for stay below, we conclude that it properly
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Discussion

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion.⁴ The writ of mandamus's counterpart, the writ of prohibition, is available to arrest a district court's extrajudicial exercise of judicial functions.⁵ Both mandamus and prohibition are extraordinary remedies, and whether a petition will be considered is within our discretion.⁶ Petitioner bears the burden to demonstrate that our intervention by way of extraordinary relief is warranted.⁷ Having considered this petition, the answer, the reply, and the supporting documentation, we are persuaded that our extraordinary intervention is warranted.

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filed an answer to this writ petition, see NRS 432B.510(2); petitioner is free to raise any concerns with regard to the District Attorney's Office's standing below. Further, we note that, although the certificate of service of the answer is dated October 18, 2008, that date appears incorrect, as the answer itself was dated October 27, 2008. Regardless, although petitioner conscientiously filed her reply within five days of her asserted October 28, 2008, receipt of the answer, any hardship incurred in doing so does not warrant sanctions. See NRAP 26(a) (providing that, when a prescribed time period is less than seven days, weekends and non-judicial days are not included in the computation). Finally, no ex parte communication with respect to Exhibit B occurred, as no such exhibit was filed with the answer.

⁴See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁵NRS 34.320.

⁶See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

⁷Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Preliminarily, as it appears that petitioner was and currently is located in Clark County, Nevada, and may be a child in need of protection, the juvenile court appropriately has exercised jurisdiction to the extent of deciding petitioner's temporary placement.⁸ Nonetheless, if the court has not done so already, it must without delay determine its jurisdiction to make future custody determinations, including by conferring with the California court presiding over the guardianship matter.⁹

Next, regarding the respondent judge's ex parte order "staying" the hearing master's release recommendation, it appears that the September 24 order directing petitioner's release superseded that stay. In particular, the stay was clearly intended to last only until the juvenile court had the opportunity to review and rule on the hearing master's recommendations, which the court did on September 24, directing petitioner's release to her sibling.¹⁰

Moreover, in Monroe, Ltd. v. Central Telephone Co., this court reaffirmed that "any "special" motion involving judicial discretion that affects the rights of another, as contrasted to motions "of course," must be made on notice even where no rule expressly requires notice to obtain the

⁸NRS 125A.335(1); NRS 432B.410.

⁹See NRS 125A.275; NRS 125A.305; NRS 125A.325; NRS 125A.335(4).

¹⁰In its answer, the District Attorney's Office asserts that the September 24 order is invalid and could be set aside because it was entered before a ten-day objection period had expired and because its caption is incorrect. But merely because the order may be later set aside does not render it void and unenforceable.

particular order sought,” except in extraordinary circumstances like those arising under NRCP 65(b).¹¹ Without the required notice, the order is void.¹²

Here, because any ex parte stay that remained effective beyond when the juvenile court ruled on the hearing master’s recommendations would affect petitioner’s rights, that stay would be void. To explain, only the district court judge has power to make child custody determinations, and that power cannot be delegated to a master.¹³ In child protection matters, the hearing master has authority to hold hearings and make recommendations as to temporary and permanent placements; within five days after the hearing, the hearing master must prepare and submit his or her recommendations to the district court judge.¹⁴ Pursuant to court rule, after the parties are served with the recommendations, they must be allowed to file objections and seek the district court judge’s review.¹⁵ The master’s recommendations are not effective unless expressly approved by the district court judge.¹⁶

¹¹91 Nev. 450, 453, 538 P.2d 152, 154 (1975) (quoting Maheu v. District Court, 88 Nev. 26, 34, 493 P.2d 709, 714 (1972)).

¹²Id.

¹³Cosner v. Cosner, 78 Nev. 242, 245-46, 371 P.2d 278, 279-80 (1962).

¹⁴NRS 432B.455.

¹⁵See, e.g., EDCR 1.46(d) (allowing a minor, parent, or guardian five days after service of the hearing master’s recommendations to apply to the court for a hearing); NRCP 53(e)(2) (providing that the parties may serve written objections to a master’s report and recommendations upon the other parties within ten days from the date of service); see also NRS

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Accordingly, the minutes submitted with the answer in this matter indicate that the hearing master “recommended” that petitioner be released to her adult sibling by 5 p.m. that same day, subject to the district court’s order on review and a five-day “stay” to allow the parties to file objections. The master’s written recommendations were served, apparently in accordance with the juvenile proceeding statute, NRS 62B.030(3),¹⁷ on September 23, 2008, and filed on October 1, 2008. The written recommendations specifically stated that the parties had five days to file and serve any written objections or to request a trial de novo and that the recommendations were not effective unless approved by a district court judge.

Even so, according to an affidavit from the respondent judge, when the Clark County District Attorney’s Office and DFS approached him with the emergency ex parte motion for a stay, they informed him that DFS “always followed” hearing master recommendations as if they were district court orders. Consequently, as the presiding judge was not available, the respondent judge granted the stay pending the presiding judge’s review of the hearing master’s recommendations.

Because the recommendations could not have been properly carried out until the district court judge expressly approved them, the

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62B.030(3)(c) and (d) (noting that parties have the right to object to juvenile court hearing master recommendations under the juvenile statutes and to request a trial de novo).

¹⁶Cosner, 78 Nev. at 245-46, 371 P.2d at 279-80; EDCR 1.46(f).

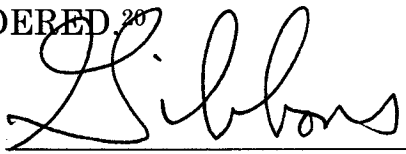
¹⁷Cf. NRS 432B.455.

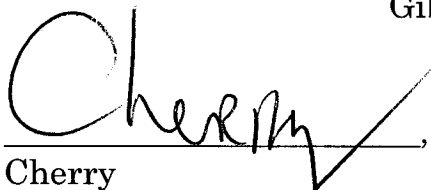
motion for stay did not clearly affect petitioner's rights. Thus, the motion for a stay was "of course," and the respondent judge appropriately granted the stay.¹⁸ At this point, however, the presiding judge has entered an order on the hearing master's recommendations. Accordingly, the stay is no longer in effect and should have been vacated.

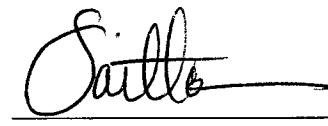
Conclusion

For the reasons explained above, we grant this petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate the September 19, 2008, stay. Any request for a stay pending the district court's consideration of the filed objection to the hearing master's recommendations or other future proceedings should be made below, with proper notice to petitioner.¹⁹

It is so ORDERED.²⁰


_____, C.J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

¹⁸We cannot condone, however, the lack of notice provided to petitioner's counsel in this instance, when, as a result of the proceedings before the hearing master earlier that day, the parties were aware of the matter and ready to respond to any emergency motion.

¹⁹See Monroe, Ltd. v. Central Telephone Co., 91 Nev. at 453, 538 P.2d at 154; NRCP 5(a).

²⁰Petitioner's alterative request for a writ of prohibition is denied as moot.

cc: Hon. William O. Voy, District Judge, Family Court Division
Hon. Steven E. Jones, District Judge, Family Court Division
Legal Aid Center of Southern Nevada
Clark County District Attorney David J. Roger/Juvenile Division
Eighth District Court Clerk