IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GAYLORD FORBES ADAM and MONTANA LEA MARINO, a minor,

Plaintiffs,

v.

ELLEN M. FRANTZ and THE HON. MICHAEL J. ROSBOROUGH, Judge of the Circuit Court of Vernon County, Wisconsin,

Defendants.

OPINION AND ORDER

02-C-0053-C

Plaintiff Gaylord Forbes Adam is a petitioner in an ongoing state court child custody case who is dissatisfied with the actions of the presiding judge and the court-appointed guardian ad litem for the minor child. Plaintiff Adam contends that the guardian ad litem's refusal to allow him to have unsupervised visits with his daughter, plaintiff Montana Marino, has deprived him and Montana of their rights under the Fourth, Ninth and Fourteenth Amendments of the United States Constitution. Plaintiff Adam has filed a complaint on behalf of himself and his daughter pursuant to 42 U.S.C. § 1983 in which he asks this court to issue an injunction allowing him to have immediate and unsupervised access to his daughter and restraining the guardian ad litem from denying him that access. He also seeks an order declaring that "the provisions of Wisconsin Statute 767 in failing to provide for an evidentiary hearing prior to the entry of an order restraining contact between a natural

parent and child is in derogation of the due process clause of the Fourteenth Amendment." In addition, he seeks appointment of counsel for the minor child, actual damages and costs and attorney fees.

Presently before the court are the motions of defendants Ellen Frantz and Judge Michael Rosborough to dismiss the complaint on the grounds that plaintiffs' action fails to state a claim against them or that this court lacks subject matter jurisdiction over plaintiffs' claims. Because I find that plaintiffs' claim against defendant Frantz falls within the domestic relations exception to federal jurisdiction, I am dismissing that claim for lack of subject matter jurisdiction. Furthermore, because plaintiffs have an adequate opportunity to raise their constitutional claims in the pending state court paternity action, abstention is warranted under the principles of Younger v. Harris, 401 U.S. 37 (1971). For this same reason, I decline to exercise jurisdiction over plaintiffs' claim against defendant Rosborough.

In deciding the motions to dismiss, I have considered whether plaintiff Adam is a suitable legal representative for his daughter, Montana, who lacks the legal capacity to sue on her own behalf. Generally, a parent who is a party to the lawsuit and who has the same interests as the child is a proper representative under Fed. R. Civ. P. 17(c). See generally T.W. by Enk v. Brophy, 124 F.3d 893, 895-97 (7th Cir. 1997); see also In re Chicago, Rock Island & Pac. R.R. Co., 788 F.2d 1280, 1282 (7th Cir. 1986) ("If there was some reason to think that [the infant's] mother would not represent [the infant's] interests adequately, the district court would, we may assume, be required (and certainly would be empowered)

to appoint a guardian ad litem to represent [the infant]"). But here, plaintiff Adam's interests are not necessarily one and the same as his daughter's; Montana may not want the same unlimited and unsupervised contact with her father that plaintiff Adam seeks in this lawsuit. In fact, this is the view of the guardian ad litem who was appointed to represent Montana's interest in the state court proceeding. (Of course, the guardian ad litem's status as a named defendant precludes her from representing Montana in *this* lawsuit.) By requesting that this court appoint a separate legal representative for Montana, even plaintiff Adam appears to concede that he and his daughter may have conflicting interests in this lawsuit.

In spite of that conflict, I conclude that it is unnecessary to appoint a guardian ad litem to represent Montana's interests in light of my conclusion that this court lacks subject matter over the claims presented in this lawsuit. Even assuming Montana wanted her claims heard in this forum, the most vigorous advocate could not convince me that this court could properly referee a state court custody dispute without violating the fundamental notions of comity that underlie the domestic relations and abstention exceptions to federal jurisdiction. As the Seventh Circuit has indicated, it makes no sense to delay the inevitable to await the finding of a proper next friend or guardian ad litem when the suit is "patently outside the jurisdiction of the district court." T.W. by Enk, 124 F.3d at 898.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint.

Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6), the court must accept as true all well-pleaded allegations of the complaint and draw all inferences in favor of the non-movant. Transit Express, Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir. 2001); Levenstein v. Salafasky, 164 F.3d 345, 347 (7th Cir. 1998). Plaintiffs have attached to the complaint various documents from the paternity proceedings in Vernon County circuit court and they refer to these documents in the complaint. Federal Rule of Civil Procedure 10(c) provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." When deciding a motion to dismiss, a district court may take into consideration documents incorporated by reference to the pleadings without converting the motion to one for summary judgment. Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993).

ALLEGATIONS OF FACT

Plaintiff Gaylord Forbes Adam lives in Reedstown, Wisconsin. His daughter, Montana Lea Marino, is a minor child living in Madison, Wisconsin. Her mother is Jill Marino. Plaintiff Adam and Jill Marino shared custody of their minor daughter pursuant to an informal agreement from December 1997 until July 2001. In July 2001, Jill Marino took Montana to live with her in Madison and refused to return her to plaintiff Adam.

In August 2001, plaintiff Adam filed a paternity action in the Circuit Court of Vernon County, Wisconsin. On September 4 and 14, 2001, Jill Marino filed a motion in the Vernon County circuit court for an order prohibiting plaintiff Adam from having contact with Montana. On September 21, 2001, after a hearing at which plaintiff Adam was present with his lawyer, defendant Judge Rosborough issued an order prohibiting him from having contact with Montana pending a determination of paternity. (In the complaint, plaintiffs allege that Judge Rosborough's September 21, 2001 order was entered *ex parte*. However, the copy of the order that plaintiffs have attached to the complaint indicates that it was not.)

On October 22, 2001, another hearing was held before Judge Rosborough. Plaintiff Adam appeared pro se. Jill Marino conceded that DNA tests had confirmed that plaintiff Adam was Montana's father. Judge Rosborough refused to vacate the order prohibiting plaintiff Adam from having contact with Montana and "did not hold a hearing as contemplated by the Wisconsin Statutes." On October 31, 2001, Judge Rosborough entered an order in which he adjudicated plaintiff Adam the father of Montana and awarded periods of primary physical placement to Jill Marino pending the appointment of a guardian ad litem and further order of the court.

Judge Rosborough appointed defendant Ellen Frantz as guardian ad litem for Montana pursuant to Wis. Stat. § 767.045. On or about November 9, 2001, pursuant to a stipulation signed by defendant Frantz, plaintiff Adam's new lawyer (Amy Smith), and Marino's lawyer, Judge Rosborough entered an order that amended the restraining order to

allow plaintiff Adam to have supervised placement of Montana "as recommended by the Guardian ad Litem and as the parties agree." On December 31, 2001, plaintiff Adam, by yet a different lawyer (Sam Adam), filed an emergency motion to vacate the September 21, 2001 restraining order and the November 9, 2001 stipulation and order. Judge Rosborough denied the motion on January 14, 2002.

Thereafter, plaintiff Adam sought permission from the Wisconsin Court of Appeals to appeal Judge Rosborough's order denying reconsideration of the prior orders. Plaintiff contended that the judge had erred by issuing *ex parte* orders and denying and then limiting Montana's placement with plaintiff without the proof necessary for a child abuse injunction under Wis. Stat. § 813.122. In an order entered February 11, 2002, the court of appeals denied the petition and ordered plaintiff Adam to pay costs and attorney fees to Jill Marino, finding that he had misstated the issues and mischaracterized the trial court's orders. The court found that the trial court's orders were not issued *ex parte* but were issued pursuant to its authority under Chapter 767 of the Wisconsin Statutes. It also noted that the provisions of § 813.122 were irrelevant because Jill Marino had not pursued a child abuse injunction.

From the time the initial restraining order was issued until January 28, 2002, the date he filed his complaint in this court, plaintiff Adam had had three, two-hour supervised visits with Montana. He asked defendant Frantz on numerous occasions to inform him "as to the legal reason(s) for the issuance and the continuance of the ex parte restraining orders, and the legal basis for the requirement of 'supervised' visits." Plaintiff Adam alleges that on each

occasion, defendant Frantz refused to provide him "with any satisfactory answers to these inquiries."

A scheduling order was issued in the paternity action on January 14, 2001. Among other provisions, it included the appointment of a psychologist to conduct examinations of the parties. The order stated that pending the psychological exams, "Mr. Adam shall have such placement as the Guardian ad Litem recommends as appropriate under terms and conditions the Guardian ad Litem believes are appropriate. In the event either party objects, the matter may be brought before the Court." Defendant Frantz has informed plaintiff Adam that he may have only supervised physical placement with Montana and has limited the times, dates and places of these supervised visits.

OPINION

I. PLAINTIFFS' CLAIMS AGAINST DEFENDANT FRANTZ

Plaintiffs allege that defendant Frantz's actions in the pending custody case have deprived them of their constitutional right to enjoy a parent-child relationship with each other free from governmental interference and of their right to due process as guaranteed by the Fourteenth Amendment. This court lacks subject matter jurisdiction over these claims. Domestic relations, including custody disputes, are the primary responsibility of state courts. Ex Parte Burrus, 136 U.S. 586, 593-94 (1890) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to

the laws of the United States."). Recognizing this, the Supreme Court has held that federal courts lack jurisdiction over domestic relations cases where the relief sought would "involv[e] the issuance of a divorce, alimony, or child custody decree." Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992). This "domestic relations" exception to subject matter jurisdiction applies to such cases even when constitutional claims are involved. Allen v. Allen, 48 F.3d 259, 261-62 (7th Cir. 1995). Plaintiffs' claim that defendant Frantz has imposed unconstitutional restrictions on their right to enjoy a relationship with each other is essentially a challenge to the temporary custody and visitation order in place in the Vernon County circuit court. Because granting plaintiffs the relief they request would amount to issuing a custody decree, this court lacks jurisdiction to entertain plaintiffs' complaint. See Ankenbrandt, 504 U.S. at 703; T.W. by Enk, 124 F.3d at 897 (plaintiff cannot remove state domestic relations case to federal court).

Furthermore, custody proceedings are still ongoing in state court. In Younger v. Harris, 401 U.S. 37(1971), and its progeny, the Supreme Court has made clear that lower federal courts must decline to hear challenges to pending state actions involving important state interests. See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (dismissal appropriate in light of pending attorney disciplinary proceeding); Moore v. Sims, 442 U.S. 415 (1979) (dismissal appropriate in light of pending child custody proceedings). The Younger abstention doctrine requires federal courts to abstain from enjoining ongoing state proceedings that are (1) judicial in nature; (2) implicate

important state interests; and (3) offer an adequate opportunity for review of constitutional claims, so long as no extraordinary circumstances exist that would make abstention inappropriate. Middlesex County, 457 U.S. at 432; Green v. Benden, 281 F.3d 661, 666 (7th Cir. 2002). Although defendant Frantz has not raised the issue of abstention, the issue may be properly raised by the court on its own initiative. Barichello v. McDonald, 98 F.3d 948, 955 (7th Cir. 1996) (federal court may raise abstention issue *sua sponte* so long as defendant has not waived issue by expressly urging court to address merits of case).

The Middlesex County factors all favor abstention. First, the state court paternity and custody action is judicial in nature. Second, the action implicates important state interests in domestic relations and child custody. See Moore, 442 U.S. at 435 (recognizing that family relations are traditional area of state concern); T.W. by Enk, 124 F.3d at 897 ("Domestic relations in general, and child custody in particular, are . . . the primary responsibility of the states."). Third, because "state courts are just as able to enforce federal constitutional rights as federal courts," Brunken v. Lance, 807 F. 2d 1325, 1331 (7th Cir. 1986), plaintiffs can present their constitutional claims adequately by raising them in the ongoing state court proceedings. Finally, there are no extraordinary circumstances in this case that would make abstention inappropriate. Such extraordinary circumstances include those in which the state proceeding is motivated by a desire to harass or is conducted in bad faith or involves such extraordinary circumstances that the plaintiff will be irreparably injured. See id. Plaintiffs' complaint does not indicate that any of these recognized

exceptions to Younger is present. See Moore, 442 U.S. at 434-35 (child custody order does not per se create great, immediate, and irreparable harm warranting federal court intervention, particularly where state is capable of "accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation.") Accordingly, even if this court could properly exercise subject matter jurisdiction over plaintiffs' claim, abstention would be required under Younger.

Alternatively, to the extent that granting plaintiffs the relief they seek would require this court to overrule the state trial court's temporary order regarding custody and placement, their claims are barred by the Rooker-Feldman doctrine. Under the Rooker-Feldman doctrine, lower federal courts lack subject matter jurisdiction over claims seeking review of state court judgments as well as claims that are inextricably intertwined with matters previously determined in a state court ruling. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). A party may not relitigate matters raised in prior state court proceedings even if the federal court is convinced that the state court's decision was unreasonable, in error or contrary to law. See Rizzo v. Sheahan, 266 F.3d 705, 713 (7th Cir. 2001); Maple Lanes, Inc. v. Messer, 186 F.3d 823, 825-26 (7th Cir. 1999). It is well-settled that Rooker-Feldman deprives federal courts of jurisdiction in cases in which the plaintiff's "federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("Where

federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment."). The pivotal question is "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." Rizzo, 266 F.3d at 713 (quotation marks and citation omitted).

I disagree with plaintiffs' conclusory assertion that deciding their claim will not impair or affect in any way the validity of any state court judgment. The state circuit court issued a temporary order allowing plaintiff to have placement with Montana under the terms and conditions recommended by the guardian ad litem. The order also provided that objections to those terms and conditions should be brought before the circuit court. Despite plaintiffs' suggestion to the contrary, the injuries of which they complain arise from that order. A conclusion by this court that the terms and conditions imposed by the guardian ad litem are unconstitutional and that plaintiff should have unfettered access to his daughter would have the effect of a decree regarding physical placement and would effectively invalidate the circuit court's orders. Instead of presenting his claims to this court, plaintiffs must pursue their claims through the state appellate system and, if still aggrieved, seek certiorari from the United States Supreme Court.

II. PLAINTIFFS' CLAIM AGAINST DEFENDANT ROSBOROUGH

In plaintiffs' cause of action against defendant Rosborough, they seek only declaratory relief in the form of an order declaring that Chapter 767 of the Wisconsin Statutes is unconstitutional on its face and as applied to them because it does not provide for an evidentiary hearing prior to the entry of an order restraining contact between a natural parent and child.

Like plaintiffs' claim against defendant Frantz, plaintiffs' claim against defendant Rosborough has no reason to be in federal court. First, it is questionable whether a state judge acting in a purely adjudicatory capacity is a proper party in a § 1983 action challenging the constitutionality of a state statute. See In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982). But even if Judge Rosborough is a proper defendant, plaintiffs may raise their constitutional challenges to Wis. Stat. § 767 in the ongoing state court proceedings, with the option to seek review in the Supreme Court if they are ultimately unsuccessful. Federal courts are to refrain from deciding the constitutionality of state statutes when the plaintiff may obtain adequate relief in the state courts. See generally, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). Although plaintiffs may point to the Wisconsin Court of Appeals' decision denying plaintiff Adam's request for permission to file an interlocutory appeal as evidence that the state courts are unwilling to hear their claims, plaintiff Adams did not challenge the constitutionality of Chapter 767 in the court of appeals; rather, he contended that the trial court had erred by issuing *ex parte* orders and by

misapplying the standards for a child abuse injunction under § 813.122. (The court of appeals found neither of these assertions supported by the facts.) Because plaintiffs did not present their constitutional claim to the court of appeals, thereby depriving the court of the opportunity to construe or explain the relevant statutes, it is impossible to be certain whether the governing Wisconsin statutes and procedural rules actually give rise to the due process claims plaintiffs assert. In such a case, Younger abstention is particularly appropriate. See Pennzoil, 481 U.S. at 12; Moore, 442 U.S. at 429 ("State courts are the principal expositors of state law"). It makes no difference that plaintiffs are seeking only declaratory and not injunctive relief. See Samuels v. Mackell, 401 U.S. 37, 73 (1971) (because practical effect of declaratory and injunctive relief is "virtually identical," policy against federal policy against interference with pending state court proceedings "will be frustrated as much by a declaratory judgment as it would be by an injunction.").

In sum, federal court is not the proper forum for plaintiffs' complaints about the ongoing custody suit in state court. The complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint of Gaylord Forbes Adam and Montana Lea Marino is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

Entered this _____ day of May, 2002.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge