

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

A.K.T., Juvenile, et al.,)	CASE NO. 5:12CV00043
)	
Plaintiffs,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
CLARK COUNTY DSS, et al.,)	
)	
Defendants.)	By: B. WAUGH CRIGLER
)	U.S. MAGISTRATE JUDGE

This *pro se* action was brought by various plaintiffs on behalf of A.K.T., a juvenile who was allegedly taken from her home by authorities and whose whereabouts in state of West Virginia are unknown to the plaintiffs. Plaintiff Shelly Sue Ott allegedly is A.K.T.'s mother; plaintiff Kenneth E. Bennett allegedly is her step-father; and plaintiff Joshua David Phillips is allegedly her uncle. Before the court is the April 23, 2012 motion to proceed *in forma pauperis* filed by plaintiff Ott. The case was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) to address non-dispositive pretrial motions and under 28 U.S.C. § 636(b)(1)(B) to conduct proceedings and render a report and recommended disposition on dispositive motions.¹ For the following reasons, the undersigned RECOMMENDS that the presiding District Judge DISMISS plaintiffs' Complaint with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B) as frivolous and for failing to state a claim upon which relief may be granted. In the alternative, the undersigned RECOMMENDS that the presiding District Judge abstain and DISMISS the action.

¹The proposed action on the motion to proceed *in forma pauperis* will dispose of the case. Thus, the undersigned exercises authority under 28 U.S.C. § 636(b)(1)(B) and hereby files a recommendation to the presiding District Judge on the disposition of the motion.

Plaintiffs' Complaint, entitled "Civil Action," relates events crossing the jurisdictional boundaries between Virginia and West Virginia and relates the saga of a transient family's experiences with the juvenile and domestic relations and criminal courts, probation departments, departments of social services, and the public schools in either or both of the states. The named defendants range from personnel in those departments or agencies, to the departments and agencies themselves, to one of the judges of the Preston County, West Virginia juvenile court.

The best the undersigned can determine, the core gravamen of the complaint is A.K.T.'s removal from her mother's custody and her eventual placement in her father's custody by the West Virginia courts. This was done despite plaintiffs' allegations that investigations of plaintiff Ott for child abuse conducted by the Departments of Social Services for Frederick County, Clark County, Warren County, or all three, eventually led to findings that the charges of child abuse were unfounded.

In their prayer for relief, plaintiffs ask the court to do the following: (1) criminalize child abuse so certain process rights apply; (2) narrow the definition to disregard the allegations of "Mental Abuse" or 'Mental Injury', 'Neglect', and 'Threat of Harm'" as "Snake Oil" frauds;" (3) strike mandatory reporting laws "from the books," or limit the requirement of professionals to report child abuse; (4) mandate that child abuse allegations be "PROFESSIONALLY investigated by POLICE;" (5) strip social agencies of their power; (6) remove psychologists, psychiatrists and "so-called 'mental health clinicians'" from child abuse investigations; and (7) award compensatory and punitive damages, compel a "PUBLIC APOLOGY," and restore the plaintiffs' "honor." Finally, plaintiffs seek an order by this court returning A.K.T. to her mother, plaintiff Ott, notwithstanding the decision by the West Virginia court granting custody to her father.

The statute governing requests to proceed *in forma pauperis*, 28 U.S.C. § 1915, provides that the court shall dismiss the case at any time if it determines that the action is frivolous or malicious or fails to

state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2). A complaint is frivolous “where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A plaintiff fails to state a claim upon which relief can be granted when the complaint fails to plead enough facts to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

According to the Complaint, Shelly Sue Ott, A.K.T.’s mother, and Kenneth E. Bennett, her step-father, appear to be asserting claims for themselves, as well as in a representative capacity on behalf of A.K.T. Joshua David Phillips, allegedly A.K.T.’s uncle, asserts no claims personal claims; thus, his claims appear to be raised only in a representative capacity for A.K.T.

It is clear in the Fourth Circuit that *pro se* plaintiffs do not have the authority to bring representative claims on behalf of other persons. *See Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005) (“An individual unquestionably has the right to litigate his *own* claims in federal court, before both the district and appellate courts The right to litigate for *oneself*, however, does not create a coordinate right to litigate for *others*.”). While a minor may initiate proceedings by and through a qualified representative, a parent or next friend, the Complaint here sets forth allegations demonstrating that custody of A.K.T. has been removed from plaintiff Ott by the courts of West Virginia. Therefore, to the extent plaintiffs’ claims are construed as representative, they should be dismissed as frivolous for lack of authority to litigate A.K.T.’s claims in this court.

To the extent the Complaint is construed as an effort to assert claims personal to each plaintiff, the Complaint fails to state claims upon which relief can be granted. Plaintiffs have merely set forth conclusory allegations of violations of various constitutional and statutory provisions, without providing facts upon which the undersigned can discern plausible claims. Thus, the Complaint fails to meet the threshold requirements of *Iqbal* and *Twombly*.

Finally, plaintiffs essentially are asking this court to step into the midst of at least one ongoing case in the West Virginia courts and order relief that essentially reverses a decision there. Specifically, plaintiffs seek the entry of an order by this court returning A.K.T. to her mother, plaintiff Ott. Moreover, the other allegations set forth in the Complaint show displeasure either with the administrative processes or the decisions in various Virginia Departments of Social Services, while failing to reflect that any action was taken to appeal these matters either administratively or to the Virginia courts.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that federal courts should not interfere with ongoing state criminal proceedings. *Id.* at 40-41; *Nelson v. Green*, No. 3:06cv00070, 2007 WL 2363615, at *2 (W.D.Va. August 16, 2007). Under *Younger* and its progeny, a federal court is to abstain “if (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges.” *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). The *Younger* doctrine has been extended to noncriminal judicial proceedings involving important state interests. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Thus, in this case, the court should abstain from what appears on the face of the Complaint to be ongoing proceedings in the courts or administrative processes of Virginia or West Virginia, or both.

For all these reasons, the undersigned RECOMMENDS that the presiding District Judge enter an Order DISMISSING plaintiffs’ complaint with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B) as being frivolous and for failing to state a claim upon which relief may be granted. In the alternative, the undersigned RECOMMENDS that the presiding District Judge abstain and DISMISS the action.

The Clerk is directed to immediately transmit the record in this case to the presiding District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to transmit a certified copy of this Report and Recommendation to all counsel of record and mail a copy to the plaintiffs.

ENTERED: s/ B. Waugh Crigler
U. S. Magistrate Judge

May 22, 2012
Date