IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

J.A.I. and J.K.C.,
Petitioners,

vs. **Case No. XX DR XXX N**
B.R.,
Respondent,

ORDER ON THREE MOTIONS

This matter having come before the court today on:

(1) the petitioners' motion to determine confidentiality, filed 6/25/2012;
(2) the petitioners' motion for consolidation, filed 7/6/2012;
(3) the respondent's motion to dismiss, filed 6/21/2012; and
(4) the petitioners' notice of hearing filed 7/12/2012 that asks the court to enter a judgment granting the petition without further proceedings,

it is ordered:

1. Findings

The petition is sworn. It requests a declaratory judgment under Chapter 86. The respondent filed a motion to dismiss the petition. No rule of procedure is cited in the motion to dismiss as the basis for the motion. The motion recites additional facts that are not alleged in the petition. The motion is not sworn. The motion to dismiss also asks for "further relief that may be awarded."

These facts appear to be undisputed:

(A) the petitioner J.A.I. is the mother of a minor child, S.M.I., born 10/20/2005.
(B) the petitioners married on 4/11/2012.
(C) the petitioners made an acknowledgment of paternity pursuant to §742.10(1) on 4/20/2012.
(D) the petitioner J.K.C. was listed as the father of the child on her birth certificate after that acknowledgment form was filed with the bureau of vital statistics.
(E) the petitioner J.K.C. began supporting the child financially in 3/2012.
(F) B.R. claims that he is the biological father of the child.
(G) B.R. claims that the child has a "six year" relationship with him.
(H) B.R. claims that he has supported the child financially.
(I) B.R. wants the court to determine that he is the child's legal father and that J.K.C. is not the legal father.
(J) B.R. filed a paternity petition in Case No. XX DR XXX on 6/26/2012, in which he asks for a determination of the child's biological father, a parenting plan, a parental responsibility order, a time-sharing schedule and a child support order.

At the hearing on his motion to dismiss, the respondent asked to call four witnesses to testify, three from Atlanta and one, the respondent himself, from New York.

2. Ruling

2.1 Petitioners' motion to determine confidentiality

The parties agreed that this motion should be granted. **Therefore, the clerk of court is ordered to seal this court file from public view and also Case Number XX DR XXX.**

2.2 Petitioner's motion for consolidation

Pursuant to Rule 1.270, this motion is granted to the extent that Case Number XX DR XXX will be reassigned to the undersigned judge pursuant to this circuit's "Unified Family Court" administrative order and "one family, one judge" rule. This judge was assigned this case, which is the lower case number, so this judge must also be assigned the later case.

However, the clerk of court shall not combine these two court files in a single court file. These two cases are consolidated for hearings and trials because these two cases are concerned with the same child.

This motion is also granted to the extent that the respondent, B.R., is ordered to refile his petition in Case No. XX DR XXX in this case within 20 days as a counter petition. Leave is granted to amend the petition, if he wants to.

2.3 Respondent's motion to dismiss

A motion to dismiss a petition is permitted by Rule 1.140(b). There are seven grounds for a motion stated in the Rule. The only grounds that can be raised by a motion to dismiss are "(1) lack of subject matter jurisdiction" and "(6) failure to state a cause of action." *See* "Author's Comment - 1967" to Rule 1.140.

The respondent's motion does not state any grounds for the motion. It does not cite the Rule of Procedure under which it is filed. The court has subject matter jurisdiction over a declaratory action filed under Chapter 86, so that cannot be the basis for the motion. If that is the grounds for the motion, then it is denied.

The only other basis for a motion to dismiss allowed by Rule 1.140(b) is "(6) failure to state a cause of action."

The respondent's motion to dismiss states many facts that are not found in the petition. However, facts that are not stated in the petition may not be considered by the court on a motion to dismiss for failure to state a cause of action. *Nevitt v. Bonomo*, 53 So.3d 1078 (Fla. 1st DCA 2010). The question when this grounds is raised is whether "the four corners" of the petition state a cause of action. The court can decide such a motion only by reading the petition. No evidence may be considered on a motion to dismiss for "(6) failure to state a cause of action."

Today at the hearing on his motion, the respondent proffered the testimony of four witnesses, three flown in from Atlanta and the respondent's own testimony. The respondent flew in today from New York. However, the Rule does not permit taking any testimony on a civil motion to dismiss. *See, e.g., Crews v. Ellis*, 531 So.2d 1372, 1376 (Fla. 1st DCA 1988): A "motion to dismiss may not address factual matters not disclosed by the complaint."

Assuming the respondent's motion to dismiss is for "(6) failure to state a cause of action," the motion is denied. The petition states a cause of action for declaratory relief under Chapter 86.

Therefore, the respondent's motion to dismiss is denied and the respondent is granted 20 days leave to serve an answer to the petition. **Any counter petition, compulsory or permissive, must be served with the answer, pursuant to Rule 1.170(a).**

While Rule 1.110(d) permits the court to designate a "counterclaim" that is actually an "affirmative defense" as a defense and not a claim for relief, there is no rule that allows a party to be granted relief or judgment without pleading ultimate facts showing the entitlement to that relief in a petition or complaint. *See* Rule 1.110(b). In other words, a "motion to dismiss" cannot be designated

a "claim for relief." A "claim for relief" must be stated in "an original claim, [or] counterclaim ..."

Pursuant to Rule 1.110(b), a claim for relief must be stated in a petition that alleges ultimate facts showing the pleader is entitled to the relief sought. Claims for relief stated in a motion to dismiss cannot be granted as the ultimate relief in the case. A motion is not a pleading. A petition and an answer are pleadings. It is improper to raise claims for relief in a motion to dismiss. Due process requires that the court can grant a party only what is asked for in a petition. *See, e.g., Todaro v. Todaro,*704 So.2d 138 (Fla. 4th DCA 1997); *Furman v. Furman*, 707 So.2d 1183 (Fla. 2d DCA 1998); *McDonald v. McDonald*, 732 So.2d 505 (Fla. 4th DCA 1999); and *McKeever v. McKeever*, 792 So.2d 1234 (Fla. 4th DCA 2001); *Paulk v. Paulk*, 25 So.3d 672 (Fla. 2d DCA 2010).

Because this case has been consolidated with Case No. XX DR XXX , **pursuant to Rule 1.270 the court now orders the respondent to refile his petition in that case in this case as a counter petition in this case, along with any other claims for relief he may have, when he files his answer to the petition**. The respondent may amend his petition when refiled in this case, if he wants to.

2.4 Petitioners' request for judgment on petition

In their "Second Amended Notice of Hearing" filed 7/12/2012, the petitioners ask the court to enter a judgment granting their petition, without further proceedings.

No authority is cited for the proposition that the court has the authority to grant a final judgment without the entry of a trial order pursuant to Rule 12.440 or 1.440. However, there is considerable authority that the court cannot enter a judgment without a trial being conducted pursuant to a trial order entered under Rule 12.440 or 1.440, except that the court can dispose of a case without a trial under: (A) Rule 1.140(b) by granting a motion to dismiss with prejudice if the petition fails to state a cause of action; (B) Rule 1.140(h)(2) by granting a motion for judgment on the pleadings; or (C) Rule 1.510 by granting a motion for summary judgment.

In *Merrigan v. Merrigan*, 947 So.2d 668 (Fla. 2d DCA 2007), a final judgment was entered after "a hearing" held before the magistrate pursuant to an order entered by the court that referred the wife's petition for dissolution to the magistrate and scheduled "a hearing" before the magistrate. Both parties appeared at that "hearing" on the wife's petition but it turned out to be "an abbreviated trial" on the merits of her petition. No trial order was entered pursuant to Rule 12.440(a) by either the judge or the magistrate. The appellate court ruled that the court's order of referral that noticed a hearing "did not fairly apprise the Husband that the hearing would result in a final judgment. ... This notice also failed to comply with the procedures required by Florida Rule of Family Law Procedure 12.440(a) for setting a trial or final hearing. This alone merits reversal. ... the procedures in this case were clearly insufficient to provide appropriate notice and an opportunity to be heard on the significant contested issues..."

See also Bennett v. Ward, 667 So.2d 378 (Fla. 1st DCA 1995). Despite this authority, the petitioners say that because this is a Chapter 86 case, it is somehow exceptional and that Chapter 86 cases are not subject to the usual due process of law required by the rules of procedure. However, the petitioners do not cite the court to any law that supports this extraordinary argument.

The court must follow the due process required by law, that is, the rules of procedure. This case is not at issue, as required by Rule 1.440 and 12.440. The respondent filed a motion to dismiss. The court has now denied that motion. The respondent has 20 days leave to file an answer and any counterclaim he may have. The court has ordered the respondent to refile his petition in the consolidated case as a counter petition in this case.

"An action is at issue after any motions directed to the last pleading served have been disposed or, if no such motions are served, 20 days after service of the last pleading." Rule 1.440(a). Only after a case is at issue can the court issue a trial order or consider a motion for judgment on the pleadings.

Therefore, the petitioners' request for a judgment on the petition without further

proceedings and without a trial order, motion for summary judgment, or motion for judgment on the pleadings, is unsupported by any legal authority. Therefore, the court has no authority to grant it. Since this request is not a motion that is permitted by any rule of procedure, the court does not otherwise rule on it.

Done and ordered in Fort Myers, Lee County, Florida, this _____

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R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.