

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
MCHENRY COUNTY

Case No. 19 OP 822

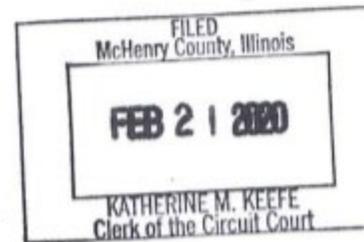
LISA M. SHAMHART,

Petitioner.

v.

MARY McCLELLAN,

Respondent.



**ORDER DENYING APPOINTMENT OF A SPECIAL
PROSECUTOR AND DISMISSING PETITION FOR
ADJUDICATION OF INDIRECT CRIMINAL CONTEMPT**

¶ 1 This matter is before the court for status of the petition for adjudication of indirect criminal contempt of court filed by Respondent Mary McClellan against Petitioner Lisa Shamhart and for the court's consideration of whether to appoint a special prosecutor for the charge of indirect criminal contempt as alleged. Mary McClellan is before the court representing herself. Lisa Shamhart is represented by private counsel. The court hereby declines to appoint a special prosecutor and dismisses the petition for adjudication of indirect criminal contempt.

¶ 2 To best understand this ruling, the setup of this stalking case must be told. On October 25, 2019, Shamhart filed a verified petition on behalf of herself and her adult daughter for a stalking no contact order against McClellan. An emergency order was entered that same day with a further plenary hearing set for November 15, 2019. On November 6, 2019, McClellan filed a motion to modify or vacate the emergency order and served a notice of motion for November 15, 2019. Both parties appeared in court representing themselves. Although McClellan's motion requested

a rehearing of the emergency order, she did not cite any legal authority to do so and, regardless, the emergency order was already set to expire that very day pending the outcome of the plenary hearing. The parties proceeded to an evidentiary hearing on Shamhart's petition.

¶ 3 During the hearing, Shamhart testified on her own behalf. McClellan did not cross-examine her. Shamhart did not call any other witnesses or admit any other relevant evidence in support of her petition. In the end, Shamhart's testimony fell short of facts that would justify a finding of stalking and instead she spoke mostly of coincidence, suspicion and conjecture of retaliation by McClellan. Put another way, speculation. The court granted a motion for directed finding at the close of Shamhart's case-in-chief because she failed to present sufficient evidence to make out a *prima facie* case of stalking as defined under the Stalking No Contact Order Act, 740 ILCS 21/1, *et seq.* Accordingly, the petition for a stalking no contact order was denied and the emergency order was vacated prior to its set expiration later that day.

¶ 4 On November 20, 2019, McClellan filed a petition for rule to show cause seeking a finding of direct contempt of court for perjury. However, McClellan's unverified petition did not adequately specify the particular type of contempt being sought, the order or rule of court alleged to have been violated, or the nature of the alleged violation. Rather, the petition loosely compared parts of Shamhart's in-court testimony with her allegations, e.g., the beheaded duck being found. The court cannot give out legal advice or read between the lines to make out a litigant's case, especially in cases of contempt where due process rights are implicated. Under those circumstances, it was unjust to require Shamhart to defend the defective petition. Thus, the court found McClellan's petition for rule to show cause was substantially insufficient in law and the court *sua sponte* ordered that it be stricken without prejudice. McClellan was granted leave to file an amended petition.

¶ 5 On November 27, 2019, McClellan filed the instant petition for adjudication of indirect criminal contempt. The petition itself is not organized or plead in a logical fashion. For example, McClellan mixes citations to both direct and indirect criminal contempt and perjury, but without clearly stating what legal standard is applicable here. Yet, that

is a critical distinction. Likewise, McClellan points to various testimony by Shamhart, but without clearly identifying which particular statement is alleged to have been contemptuous. Parsing through the petition, McClellan's focus seems to be on Shamhart's initial pleading in which she alleged "we found a beheaded duck on the front porch." Shamhart later explained that "*we*" was in reference to both herself and her daughter, whom she tried to include as an additional protected party. At hearing, Shamhart admitted she did not actually see the duck herself and instead relied on what her daughter told her about it. The out-of-court statements were inadmissible hearsay. Shamhart's daughter was not called to testify, nor was any other credible evidence admitted about what she may have seen, if anything. From this lack of evidence at the plenary hearing, McClellan concludes that Shamhart intentionally misled the court by attesting to a petition she knew to be false to obtain the emergency order.

¶ 6 The court takes judicial notice of the fact that the Office of the State's Attorney of McHenry County declined to prosecute the petition for adjudication of indirect criminal contempt. A copy of the declination letter dated December 10, 2019 was filed with the Clerk of the Circuit Court on December 26, 2019.

¶ 7 Section 3-9008 of the Counties Code, 55 ILCS 5/3-9008 (P.A. 99-352, effective January 1, 2016), provides that the circuit court may appoint a special prosecutor to perform the duties of the State's Attorney in certain circumstances. It provides, in relevant part:

(a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties. If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

(a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

(a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

¶ 8 Section (a-5) permits the court to exercise its discretion in reviewing the circumstances of the case to determine the need for a special prosecutor whenever the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties. In a recent case interpreting this statute, it was held that subsection (a-5) is limited to situations where the state's attorney is physically unable to perform due to sickness, absence, or similar circumstances beyond their control. *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 28. Here, McClellan has not filed a motion alleging the McHenry County State's Attorney is physically unable to perform his duties. That's obviously not the situation here.

¶ 9 Section (a-10) provides a similar remedy in situations where the State's Attorney has an actual conflict of interest in the cause or proceeding. McClellan has not filed a motion alleging the McHenry County State's Attorney has an actual conflict of interest in this specific case, and there are no facts or documents before the court to justify a hearing to determine that issue. McClellan was sued as a private individual and she is representing herself. What's more, the State's

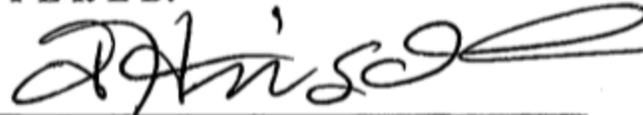
Attorney did not recuse himself from this proceeding as contemplated under Section (a-15). Without sufficient proof of an actual conflict of interest, the court cannot second-guess the state's attorney's exclusive discretion to decide whether to prosecute the criminal contempt petition. In re Appointment of Special Prosecutor, 2019 IL App (1st) 173173, ¶ 49.

¶ 10 The court finds there is not a sufficient basis under Sections (a-5), (a-10) or (a-15) of 55 ILCS 5/3-9008 to appoint some other competent attorney to prosecute the petition for adjudication of indirect criminal contempt of court. Lastly, the court has the inherent authority in a *sui generis* contempt proceeding such as this one to preliminarily determine whether there is probable cause of criminal contempt and a proper complaint. To this end, McClellan's petition fails again.

¶ 11 For these reasons, the court declines to appoint a special prosecutor and the petition for adjudication of indirect criminal contempt is dismissed.

It is so ORDERED this 21st day of February, 2020.

ENTERED:

A handwritten signature in black ink, appearing to read "J. Hirsch", written over a horizontal line.

Judge Jeffrey L. Hirsch