RENDERED: December 12, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2247-MR

PETER C. MacDONALD APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JAMES E. HIGGINS, JR., JUDGE
CIVIL ACTION NO. 96-CI-000637

CLARK D. RENNISON APPELLEE

OPINION AND ORDER VACATING AND DISMISSING

* * * * *

BEFORE: WILHOIT[1], CHIEF JUDGE; GUIDUGLI and JOHNSON, Judges.

GUIDUGLI, JUDGE. This appeal is from an order entered by the Christian Circuit Court which granted a writ of prohibition against Christian District Court Judge, Peter C. MacDonald (MacDonald, J.), preventing him from proceeding in a domestic violence action (Paula Renee Gieske Rennison v. Clark D. Rennison, case number 96-D-00225-001) after the parties of interest filed a stipulation of dismissal pursuant to CR 41.01(1). Because the trial court erred in granting said writ, we vacate the order and dismiss the action.

On July 5, 1996, Paula Rennison (Mrs. Rennison) filed a domestic violence petition naming Clark Rennison (Mr. Rennison) as respondent. Judge MacDonald, presiding District Court Judge,

[1] Chief Judge Wilhoit concurred in this opinion prior to his retirement effective November 15, 1997. Release of the opinion was delayed by normal administrative handling.

issued an emergency protective order (EPO) pursuant to KRS 403.740.

At a hearing on July 11, 1996, Mrs. Rennison repeatedly requested that the action be dismissed. Mrs. Rennison's requests were denied. Judge MacDonald continued the EPO for an additional fourteen (14) days.

On July 12, 1996, the parties filed a stipulation of dismissal pursuant to CR 41.01(1), whereby the parties stipulated that the action be dismissed without prejudice. Later that day, Mrs. Rennison and Mr. Rennison appeared before Judge MacDonald in a criminal action involving the same underlying allegations as the domestic violence action. Therein, Mr. Rennison entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), which disposed of the criminal matter.

Following disposition of the criminal proceeding, the court raised the issue of the domestic violence proceeding. Notwithstanding the filing of the stipulation of dismissal, Judge MacDonald scheduled a hearing in the Christian District Court for July 25, 1996, concerning the domestic violence matter.

On July 17, 1996, Mr. Rennison filed a petition for writ of prohibition requesting that the Christian Circuit Court enter an order preventing Judge MacDonald from proceeding further in the domestic violence action. Judge MacDonald was served with a copy of the petition and summons on July 24, 1996. A hearing on the petition was conducted on the same day. Taking the matter

under advisement, the circuit judge entered an order granting the petition for writ of prohibition on July 31, 1996. This appeal followed.

Judge MacDonald contends that it was error for the circuit court to grant Mr. Rennison's petition for a writ of prohibition under these circumstances. Case law is replete with statements to the effect that a writ of prohibition is an extraordinary remedy and should never be issued except in exceptional, very extraordinary and unusual cases. Appalachian Regional Health Care, Inc. v. Johnson, Ky., 826 S.W.2d 868 (1993); Avery v. Knopf, Ky., 807 S.W.2d 55 (1991); Wareche v. Richardson, Ky., 468 S.W.2d 795 (1971); Brown v. Knuckles, Ky., 413 S.W.2d 899 (1967); Murphy v. Thomas, Ky., 296 S.W.2d 469 (1956).

The standard to be applied in a petition for writ of prohibition is set out in Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989):

> To obtain relief in the nature of a writ of prohibition, a petitioner must show that: (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no adequate remedy by appeal, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exits no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result.

Tipton v. Commonwealth, 770 S.W.2d at 241. Also see, Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981); Bender v. Eaton, Ky., 343 S.W.2d 799 (1961).

In the case sub judice, Mr. Rennison alleges that Judge MacDonald was acting or was about to act without jurisdiction. Consequently, the applicable standard to be applied in this case is did Judge MacDonald have jurisdiction in the underlying domestic violence proceeding and whether or not Mr. Rennison had an adequate remedy by appeal. It cannot be disputed that district courts possess subject matter jurisdiction over domestic violence cases pursuant to Chapter 403 of the Kentucky Revised Statutes (KRS). However, the trial court places great emphasis on the fact that the voluntary dismissal entered by the parties stripped the district court of any authority or jurisdiction to act with regard to the domestic violence matter filed on July 5, 1996. We do not agree. A voluntary dismissal by stipulation pursuant to CR 41.01(1) is effective upon filing and does not require judicial approval, as does CR 41.01(2), Louisville Label, Inc. v. Hildesheim, Ky., 843 S.W.2d 321 (1992), and it renders the proceedings a nullity and leaves the parties as if the action had never been brought. Smith v. Dowden, 8th Cir., 47 F.3d 940 (1995). See also, 7 Kentucky Practice Rules of Civil Procedure Ann., § 41, 36-38 (5th Ed. West (1995). However, this theory cannot defeat the basic fact that district courts have statutory jurisdiction over domestic violence cases. Although Judge MacDonald may have been acting erroneously by continuing to proceed with this particular case, he was still acting within his jurisdiction. See Duncan v. O'Nan, Ky., 451 S.W.2d 626 (1970).

Besides not being able to show that Judge MacDonald had acted outside his jurisdiction, Mr. Rennison has also failed to show that he had no adequate remedy of appeal. Although the circuit court held that "there is no adequate remedy by appeal as an appeal cannot be based on a [sic] action which is a nullity and further...before a decision on an appeal could be rendered", we decline to engage in this circular reasoning. The lower court seemed to be saying that since the case had been dismissed by operation of law then no appeal could follow had Judge MacDonald taken further action. This is simply not so. Instead, we believe that Mr. Rennison would have had a right to appeal any action or decision taken by Judge MacDonald in the underlying domestic violence proceeding, even if that proceeding had been properly deemed to have been a "nullity" because the court lacked subject matter jurisdiction. It is clear that Mr. Rennison could properly appeal any such action, including an appeal based upon lack of subject matter jurisdiction.

As stated previously, a writ of prohibition is an extraordinary remedy and is not to be issued unless circumstances exist that are so exceptional that no other remedy is adequate to prevent a miscarriage of justice. Brown v. Knuckles, 413 S.W.2d at 899. In this case, we do not believe that Mr. Rennison has met his burden for the issuance of a writ of prohibition. The trial court erred in its findings that the district court judge lacked jurisdiction and that Mr. Rennison had no adequate remedy of relief by appeal. Therefore, the Christian Circuit Court's

order granting a writ of prohibition is vacated and the action dismissed.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: December 12, 1997

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