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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1023-OA

H.H. AND T.H. PETITIONERS

v. AN ORIGINAL ACTION
ARISING FROM JEFFERSON FAMILY COURT
ACTION NO. 20-J-502526-001
AND
ARISING FROM BRECKINRIDGE CIRCUIT COURT
ACTION NOS. 22-CI-00100 AND 22-AD-00012

HONORABLE LORI GOODWIN, JUDGE,
JEFFERSON FAMILY COURT; AND
HONORABLE KENNETH HAROLD GOFF II,
JUDGE, BRECKINRIDGE CIRCUIT COURT RESPONDENTS

AND

CABINET FOR HEALTH AND FAMILY
SERVICES; V.H.; AND S.M.H., A MINOR REAL PARTIES IN INTEREST

OPINION AND ORDER
GRANTING IN PART AND DENYING IN PART
PETITION FOR A WRIT OF PROHIBITION

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Petitioners, H.H. and T.H., filed the above-styled original action pursuant to CR[1] 76.36 seeking a writ of prohibition. Petitioners seek a writ "directing the Jefferson Family Court to enter an order granting [them] temporary custody of S.M.H. in the Jefferson County action, estopping [Real Party in Interest, the Cabinet for Health and Family Services (the Cabinet)] from any activities inconsistent with the permanency goal of adoption, and to relinquish jurisdiction concerning the custody and adoption of S.M.H. in favor of the Breckinridge Circuit Court." Having reviewed the record and being otherwise sufficiently advised; IT IS HEREBY ORDERED that Petitioners' petition for a writ is hereby GRANTED IN PART and DENIED IN PART for the reasons set forth below.

I. BACKGROUND

S.M.H. was born prematurely on November 21, 2019, to Real Party in Interest, V.H. She was born positive for illicit drugs and tested positive for Hepatitis C. The first two months of her life were spent in the neo-natal intensive care unit (NICU) at the University of Louisville hospital. Upon release from the hospital, S.M.H. was placed with Petitioners, her cousins.[2] Petitioners were eventually approved as foster parents in November 2020. It appears from the limited record before the Court that V.H. was incarcerated during this time.

[1] Kentucky Rules of Civil Procedure.

[2] Petitioners adopted V.H.'s oldest child when her parental rights were involuntarily terminated.

The Cabinet filed a dependency, neglect, and abuse (DNA) petition in January 2020 in the Jefferson Family Court, No. 20-J-502526-001. V.H. stipulated to abuse or neglect on September 10, 2020. CourtNet indicates an "order of dependency disposition" was entered on December 7, 2020.[3] On January 15, 2021, the Cabinet filed its annual dispositional hearing report. The report notes that V.H. had five supervised visits with S.M.H. from September 2020 to October 2020, and that, as of the filing of the report, V.H.'s whereabouts were unknown. Further, while the goal was to reunify V.H. and S.M.H., the report notes "SSW[4] is going to audit the case to change the goal." The Jefferson Family Court's order entered on January 28, 2021, provides that the permanency goal was to return S.M.H. to V.H. and that S.M.H. was to remain in the custody of the Cabinet.

At some point between January 2021 and August 2021, V.H. had another child and entered a drug treatment program. The Cabinet acknowledges that during this time V.H. made significant efforts to comply with her case plan, and her visits with S.M.H. resumed in June 2021. Regardless, the Cabinet filed an involuntary termination of parental rights (TPR) action in the Jefferson Family Court, No. 21-AD-500359, in August 2021 because of "the length of time [S.M.H.]

[3] The Court acknowledges that CourtNet is an unofficial record of the circuit court proceedings. It has decided to utilize CourtNet in this case given the limited record made available by the parties, the parties' allegations of improper notice, and because there are discrepancies in the records proffered by the parties.

[4] Social worker.

had been in care, the relative newness of [V.H.'s] treatment compliance, and a lack of bonding between mother and child[.]" No significant litigation occurred in the TPR action until June 2022.

Meanwhile, the DNA action came before the Jefferson Family Court for a second annual permanency review hearing. On January 24, 2022, the Cabinet filed its second annual dispositional hearing report. The report documented V.H.'s progress in completing her case plan and remaining sober. Additionally, the Cabinet documented, "[t]he extent, quality and frequency of the communications with the child . . . by the mother has been 3 in-person visits, 13 zoom visits and 8 visits that did not occur." In total, V.H. was offered twenty-four visits and attended sixteen, six were canceled by V.H., and two were cancelled by Petitioners.

An order of permanency was entered on February 17, 2022. The Jefferson Family Court's permanency order found that V.H. "is compliant and sober; however, she has ∅ bond with this child." S.M.H. was to remain in the Cabinet's custody and be placed for adoption. Despite the new goal of adoption, V.H.'s visitation continued, and on April 1, 2022, the Jefferson Family Court ordered V.H. could have increased supervised visitation with S.M.H., and that "[t]he Cabinet . . . may expand to overnight visitation with the minor child." V.H. would not have her first overnight visit with S.M.H. until August 17, 2022.

In June 2022, Petitioners hired an attorney. Petitioners allege their attorney contacted the Cabinet attorney on June 8, 2022, to discuss the TPR action. The attorneys had a phone conversation on June 10, 2022, wherein Petitioners' attorney claims to have informed the Cabinet of Petitioners' intention to intervene in the TPR action. Petitioners claim the Cabinet's attorney emailed their attorney on June 12, 2022, a Sunday, to inform her the TPR action had already been dismissed. The limited record reflects the Cabinet electronically filed (efiled) a notice of voluntary dismissal on Sunday. Petitioners then filed their motion to intervene. On June 29, 2022, the Jefferson Family Court entered an order dismissing the TPR action without having ruled on the motion to intervene. Petitioners assert the voluntary dismissal was an intentional maneuver by the Cabinet seeking to deprive them of their right to be heard. The Cabinet places the blame on Petitioners. Notably, when the TPR action was dismissed, V.H. had not had a single overnight visit with S.M.H.

Petitioners, who reside in Breckinridge County, then filed an adoption petition in Breckinridge Circuit Court, on June 30, 2022, No. 22-AD-00012. They also filed a petition for custody in Breckinridge Circuit Court on July 5, 2022, No. 22-CI-00100. The Cabinet moved to dismiss these petitions on August 1, 2022. Petitioners allege the Cabinet purposefully efiled the motions to dismiss as "motions not requiring a hearing," leading the circuit court to believe there were no

objections to the motions. This, they assert, was yet another attempt to deprive them of their right to be heard by the court. According to the Cabinet, when the motions to dismiss were originally efiled they were rejected by the circuit court clerk. The Cabinet asserts when the motions were refiled, the circuit court clerk erred and docketed them as "motions not requiring a hearing." During oral argument before this Court, the Cabinet conceded that it did not comply with the local practice rules for the Breckinridge Circuit Court. Despite the error, the Breckinridge Circuit Court set the matter for a hearing on August 17, 2022. All parties were present, either in person or via Zoom, at the hearing. During the hearing, the Breckinridge Circuit Court declined to change custody of S.M.H. and scheduled the matter for an evidentiary hearing on November 28, 2022. The motions to dismiss are still pending.

The events that occurred on the evening of August 17, 2022, appear to be pivotal in the decline of Petitioners' and the Cabinet's relationship. As far as the Court can discern, Petitioner H.H. contacted the Cabinet with concerns about S.M.H. going to the scheduled visit with V.H. that evening.[5] Unbeknownst to the Cabinet, Petitioners' attorney was also on the phone call. During the call, H.H. informed the Cabinet that V.H. seemed upset about the visit and suggested the Cabinet forced her into continuing the visit. H.H. also expressed concern that

[5] This was V.H.'s first overnight visit with S.M.H.

V.H.'s brother was residing with V.H. because he had been "released from prison for causing the death of a child and seriously injuring another child." The Cabinet does not appear to have been worried about S.M.H.'s safety.

At some point during this call, the Cabinet informed H.H. it was concerned about Petitioners' compliance with their foster care contract and that their adoption worker would be in contact. After this perceived "threat," Petitioners' attorney made her presence on the call known to the Cabinet. According to the Cabinet's response to the petition for a writ of prohibition:

> The [Petitioners'] home was subsequently closed by their adoption worker due to their having interfered with visits between the child and her biological family, and having filed for direct custody of the child, both of which are in violation of their contractual and statutory duties as foster parents.

Until August 2022, there is no indication from the record the Cabinet believed Petitioners were actively trying to interfere with the relationship between V.H. and S.M.H.

On August 19, 2022, Petitioners filed an *ex parte* motion for sole temporary custody of S.M.H. in the Breckinridge Circuit Court custody action. The Cabinet claims not to have received notice of the motion in time to respond or be heard. The motion was granted that same day and the matter was set for an evidentiary hearing. Having received the Breckinridge Circuit Court's order on August 22, 2022, the Cabinet proceeded to file an emergency *ex parte* motion to

return S.M.H. to the Cabinet's custody in the Jefferson Family Court DNA action. The certificate of service does not indicate Petitioners were notified of the motion despite their having temporary sole custody of S.M.H. pursuant to the Breckinridge Circuit Court's order. The motion was heard on the Jefferson Family Court's emergency docket by Judge Derwin Webb; however, Judge Lori Goodwin, who usually presided over actions pertaining to these parties, was called, and consulted on the motion. The Jefferson Family Court granted the Cabinet's motion that same day and ordered Petitioners to turn S.M.H. over to the Cabinet. Petitioners complied with the Jefferson Family Court's order. The Cabinet placed S.M.H. in a new foster home for some time before she was placed in V.H.'s care.

Petitioners filed this original action and a motion for intermediate relief on August 25, 2022. Intermediate relief was granted on September 2, 2022, and an amended order was entered the next day. Therein, the Court noted that "the allegation that [S.M.H.] will suffer irreparable injury in the absence of intermediate relief is amply supported by the record[,]" and ordered the Cabinet to "arrange for physical custody of [S.M.H.] to be returned to Petitioners[.]" Petitioners were also given temporary custody of S.M.H. pending disposition of the writ petition. On September 6, 2022, the Cabinet filed its own petition for a writ of prohibition, initiating Case No. 2022-CA-1059-OA. The Court denies the Cabinet's petition by separate opinion and order entered herewith.

On September 15, 2022, the Jefferson Family Court conducted a hearing on V.H.'s motion for return of custody in the DNA action. The Jefferson Family Court began the hearing by voicing its frustration with Petitioners and stating they had created a "big old mess." All those involved presented their legal arguments; however, no testimony or evidence was introduced and there was no consideration as to what was in the best interest of the child, other than a recitation by the Cabinet and S.M.H.'s Jefferson County guardian *ad litem* (GAL), Hon. Mark Gaston, that they believed it was in S.M.H.'s best interest to be returned to V.H. Petitioners attempted to bring up an alleged burn mark S.M.H. received while in the care of V.H. in August 2022; however, the Cabinet quickly asserted that no separate DNA petition had been filed and that the incident was irrelevant.[6]

The Jefferson Family Court then, believing it had superior jurisdiction, ordered custody be returned to V.H. in contravention of this Court's amended September 3, 2022, order. The September 15, 2022, orders entered by the Jefferson Family Court contained limited findings of fact and conclusions of law. In full the handwritten findings and conclusions state:

> Case on appeal, there was an emergency order entered out of Breckinridge County. [V.H.] moves for return. [Petitioners] object. Termination case was dismissed by [the Cabinet] in

[6] V.H. states in her response to the petition for a writ of prohibition that S.M.H. had the mark when she came to her from the new foster home. According to V.H., S.M.H. also had bug bites all over her when she came into V.H.'s care.

> [sic] June 29, 2022. [Petitioners] also filed an appeal. [Petitioners] don't have standing in DNA action.

There are no written findings of fact regarding the best interests of S.M.H.

Petitioners then filed a second motion for intermediate relief with this Court requesting a stay of the Jefferson Family Court's September 15, 2022, order. That same day, this Court entered an order requiring the parties to maintain the status quo as set forth in its amended September 3, 2022, order. The parties were then given the opportunity to file simultaneous responses to Petitioners' motion for a stay.

Three responses were filed. The Cabinet had no objection to maintaining the status quo. V.H. requested that the Court deny Petitioners' motion for a stay. Finally, S.M.H.'s Breckinridge County GAL, Hon. Shan Embry, filed a response supporting the motion to stay. Therein, GAL Embry reported that during the first visit with S.M.H. while she was in the care of Petitioners, she appeared healthy and well adjusted. GAL Embry was not able to observe S.M.H. while she was out of Petitioners' care because the social worker refused to provide S.M.H.'s information to GAL Embry.[7] GAL Embry stated:

[7] On September 2, 2022, GAL Embry filed a motion for contempt, in Breckinridge Case No. 22-AD-00012, against social worker Christy Hill. GAL Embry stated in the affidavit attached to the motion for contempt that Ms. Hill would not give her the phone number or address to reach S.M.H. without first speaking to a Cabinet attorney. GAL Embry did so, and then received a text from Ms. Hill stating GAL Gaston wanted to talk. GAL Gaston then texted GAL Embry asking to talk. When GAL Embry called GAL Gaston, GAL Gaston indicated he did not know the address or phone number for S.M.H. and that he believed Breckinridge Circuit Court did not

> I have learned that since the infant child has been returned to Petitioners' home, after the thirteen (13) day removal, she has exhibited numerous behaviors that are inconsistent with her prior demeanor. Specific examples of this include a notable fear of men, fitful sleep that includes whining and outcries, using language and words such as stupid, dummy, shut up, shut the (expletive) up, and most notably, a sore on her body the pediatrician will not rule out as a cigarette burn which [the Cabinet] is purportedly investigating.

The Court granted Petitioners' motion for a stay on September 20, 2022, reiterating that none of the parties were excused from complying with its interim orders.

The matter has now been fully briefed and the petition for a writ of prohibition is before the Court for a determination on the merits.

II. ANALYSIS

It is well established in Kentucky that a writ is an extraordinary remedy and may only be granted:

> upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

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have jurisdiction. The Court may take judicial notice of these filings. *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004).

Our jurisprudence recognizes a subcategory of writs in certain special cases where "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). "It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury." *Id*. "[T]hese 'certain special cases' are exactly that – they are rare exceptions and tend to be limited to situations where the action for which the writ is sought would violate the law, e.g. by breaching a tightly guarded privilege or by contradicting the requirements of a civil rule." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004).

For the reasons that follow, the case *sub judice* qualifies for a writ under the certain special cases exception.

To begin, the Jefferson Family Court has acted erroneously. As early as January 2021, the Cabinet indicated the permanency goal for S.M.H. would be adoption, although, at the time, the goal had not been changed in the case permanency plan. In August 2021, the Cabinet filed a TPR petition to effectuate this goal. By February 2022, the Cabinet changed S.M.H.'s permanency goal in the DNA action to adoption and a court order reflected this. Then in June 2022, the Jefferson Family Court dismissed the TPR action without having ruled on

Petitioners' motion to intervene. The Cabinet maintains that the Petitioners knew early on that the trajectory of the TPR case was reunification and that they should have filed their motion sooner. Additionally, the Cabinet faults Petitioners further for not showing up to argue their motion to intervene, and for not filing a direct appeal from the TPR action. However, the Cabinet's argument is flawed given the facts of this case.

Petitioners had no reason to intervene until they did because the goal in the DNA action, according to the Jefferson Family Court record, was adoption as late as February 2022. The Cabinet did not actually seek dismissal of the TPR action until the Sunday after Petitioners' attorney called to inform the Cabinet they wished to intervene.[8] Although Petitioners have a statutory right to intervene, their motion to do so was never considered by the Jefferson Family Court and the TPR action was dismissed. KRS[9] 625.060. Without a ruling, Petitioners had no way in which they could appeal. *Erie Insurance Exchange v. Johnson*, 647 S.W.3d 198, 202 (Ky. 2022) (A reviewing court "cannot infer rulings not made explicit by the trial court").

[8] During oral argument before this Court, Petitioners' counsel, Hon. Richard Williams, stated he appeared to argue the motion, court was closed for reasons related to COVID-19, and he was informed the motion was not going to be heard that day. This allegation is not supported by the limited record or an affidavit by Mr. Williams; however, it is a matter the Breckinridge Circuit Court may consider if there is evidence in its record to support the allegation.

[9] Kentucky Revised Statutes.

Regardless, the Cabinet argues its voluntary dismissal of the TPR action meant the permanency goal automatically reverted back to reunification, and the Jefferson Family Court seemingly agreed given its subsequent actions. This finds no support in law. The Cabinet is vested with broad authority to make a permanency determination, but it must decide. The Court cannot find, nor has any party directed its attention to, language suggesting that a decision pertaining to the permanent placement of a child is automatic. There are more than two permanency goals for children, any of which the Cabinet could have chosen. KRS 620.140; 922 KAR[10] 1:140, Section 4.

This decision as to permanency must be documented. The Adoption and Family Safety Act of 1997 (ASFA) requires the Cabinet to file a TPR action if a child has been in foster care "15 of the most recent 22 months . . . unless"

> a State agency has **documented in the case plan** (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child[.]

42 U.S.C.[11] 675(5)(E)(ii) (emphasis added). The Cabinet's own administrative regulations reiterate this and further provide:

> (2) The cabinet **shall request an exception for proceeding with involuntary termination of parental**

[10] Kentucky Administrative Regulations.

[11] United States Code.

> **rights pursuant to subsection (1)(b) of this section,**[12] **if**:
>
> (a) A relative or fictive kin placement has been secured; [or]
>
> (b) Termination is not in the best interest of the child, for a compelling reason:
>
> 1. **Documented** in the case permanency plan; and
>
> 2. Monitored on a continual basis[.]

922 KAR 1:140, Section 6(2) (emphasis added).

S.M.H. has been in the Cabinet's custody for most of her young life. While the Cabinet filed a TPR petition in August 2021, it has since determined adoption is no longer in S.M.H.'s best interest and voluntarily dismissed the TPR action. Pursuant to its own rules, which are based on federal law, it must document why termination is no longer in S.M.H.'s best interest and request an exception. 922 KAR 1:140, Section 6(2). There is no indication from the limited record the Cabinet complied with these requirements. Further, the Jefferson Family Court has acted without requiring it to, causing unnecessary confusion.

Eventually, Petitioners felt their only choice was to move for *ex parte* emergency custody in the custody action stating they were afraid for S.M.H.'s mental health and safety. Upon learning of the Breckinridge Circuit Court's order,

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[12] Subsection (1)(b) provides the permanency goal shall be adoption if involuntary TPR is sought pursuant to KRS 620.180(2)(c)3., KRS 625.090, or 42 U.S.C. 675(5)(E).

the Cabinet immediately made an "emergency *ex parte* motion to return child to Cabinet custody" in the Jefferson Family Court. The stated grounds for the motion were:

> The actions taken by [Petitioners] and the custody order issued by the Breckinridge Circuit judge thwarts the proper process pending in this [DNA] action, create[] substantial interferences with the Cabinet's statutory duty to make reasonable efforts to reunify the family, undermines the authority of this court and creates a substantial risk to the minor child.

The Cabinet did not elaborate on what the substantial risk to S.M.H. was.

The Jefferson Family Court did not appropriately utilize KRS 620.060. The statute authorizes the use of emergency custody orders when the custodian is unwilling or unable to protect the child, it is in the child's best interest, and if:

> (a) The child is in danger of imminent death or serious physical injury or is being sexually abused;
>
> (b) The parent has repeatedly inflicted or allowed to be inflicted by other than accidental means physical injury or emotional injury. This condition shall not include reasonable and ordinary discipline recognized in the community where the child lives, as long as reasonable and ordinary discipline does not result in abuse or neglect as defined in KRS 600.020(1); or
>
> (c) The child is in immediate danger due to the parent's failure or refusal to provide for the safety or needs of the child.

KRS 620.060(1); *see also Robison v. Theele*, 461 S.W.3d 772, 775-76 (Ky. App. 2015). None of the grounds listed by the Cabinet in its "emergency ex parte motion to return child to Cabinet custody" warranted the relief it sought and obtained from the Jefferson Family Court on August 22, 2022.

The Jefferson Family Court's final error was in awarding full custody of S.M.H. to V.H. in the DNA action with no findings of fact or conclusions of law that to do so was in S.M.H.'s best interest. The Court recognizes V.H.'s progress in completing her case plan and maintaining her sobriety, as set forth by the Cabinet and in her response to the petition for a writ of prohibition. Nonetheless, it is, unfortunately, inescapable that V.H. has had a small role in S.M.H.'s short life. Of the visits between V.H. and S.M.H., most were supervised and only one was overnight before S.M.H. was removed by the Jefferson Family Court's August 22, 2022, order. The record indicates S.M.H. has a strong bond with Petitioners and has thrived in their care. None of this was discussed or considered by the Jefferson Family Court during the hearing on V.H.'s motion for custody or in its subsequent orders. The focus was on how well V.H. had done and the Court's frustration with Petitioners, not S.M.H.'s best interest. Furthermore, at the hearing no one other than Petitioners attempted to address the alleged burn mark S.M.H. received while she was in V.H.'s custody. Apparently, the court, the Cabinet, and GAL Gaston all believed this to be irrelevant to a custody determination.

To make matters worse, the Jefferson Family Court awarded custody of S.M.H. to V.H. with knowledge of this pending original action and in contravention of this Court's order temporarily awarding custody to Petitioners while the original action was pending. The Jefferson Family Court acknowledged that the ruling "would cause even, maybe, a bigger mess," but proceeded to award custody to V.H. because it believed it had "original jurisdiction and continuous jurisdiction in [the DNA] case to return [S.M.H.] to [V.H.]." This Court already corrected the mistaken belief that the Jefferson Family Court could issue an order in direct defiance of a controlling order from this Court. *See*, September 20, 2022, Order Granting Motion for Stay; *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

The erroneous actions of the parties, counsel, and the Jefferson Family Court illustrate why correction is necessary and appropriate for the orderly administration of justice. The Cabinet and the Jefferson Family Court believe the Jefferson Family Court is the only court with authority to determine custody matters pertaining to S.M.H. Petitioners and the Breckinridge Circuit Court clearly do not share that belief. This divide has, for some reason, extended to the Cabinet's social workers and S.M.H.'s GALs, with GAL Embry filing a motion for contempt against the Cabinet's social worker for not providing information regarding S.M.H. This could more easily be resolved, in a manner that would best

serve S.M.H., if the parties would work together. Regrettably, all those involved in this original action are at a stalemate.

To be clear, "our Constitution provides that there is only one circuit court, which leads to the logical conclusion that in the absence of express authority to the contrary, each geographic division of the one statewide circuit court has co-equal abilities and powers." *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 163 (Ky. 2009). Kentucky has also adopted a unified family court system with a "one-family one-judge" approach. *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014). The Kentucky Supreme Court's sentiment in *Morgan* in 2014 that "the family court experiment remains a work in progress[,]" still rings true today. *Id*. at 106.

The Cabinet heavily relies on *Martin v. Commonwealth*, 583 S.W.3d 12 (Ky. App. 2019), for its position that the Jefferson Family Court maintains "continuing, exclusive particular case jurisdiction" over all custody determinations pertaining to S.M.H. The underlying circuit court actions in *Martin* were both civil divorce and custody proceedings, the first having been filed in Hardin County and the second in Nelson County. As this Court explained:

> The Hardin Family Court's particular case jurisdiction attached when the parties pursued their dissolution issues there. "[A] court may retain jurisdiction over a particular case by operation of rule or statute and also by operation of its own judgment provided it is not precluded by any statute from doing

> so." The court that first exercises particular case jurisdiction **in a divorce, custody, and support case** "maintains a continuing jurisdiction over support provisions that pertain to wholly dependent persons" and, in this case, those wholly dependent persons are [the] minor children.

Martin, 583 S.W.3d at 17 (citations omitted) (emphasis added). This original action is distinguishable because it consists of DNA, adoption, and custody actions where the Jefferson Family Court first exercised its jurisdiction in a DNA action, not a civil custody action. Moreover, *Martin*'s holding regarding jurisdiction relied on KRS 403.824(1) which does not apply to adoption proceedings. KRS 403.802.

Furthermore, custody is clearly an underlying issue in all of the pending actions. Ideally, all actions pertaining to S.M.H. would have been filed in a single court. However, adoption petitions must be filed in the county where the petitioner resides. KRS 199.470(1). Petitioners reside in Breckinridge County; therefore, they could not file the adoption petition in the Jefferson Family Court.[13] While the DNA action could be transferred to Breckinridge, the Court sees no benefit to this because Breckinridge County has no family court. Jurisdiction over DNA cases is vested in either the district court or the family court. KRS 24A.130;

[13] The Court would also point out that, although V.H. appears to reside in Jefferson County, Breckinridge County is the only home S.M.H. has known. S.M.H.'s only connection to Jefferson County, and the likely reason the DNA action was filed in Jefferson County, was S.M.H.'s two-month stay in the NICU at University of Louisville Hospital when she was born.

KRS 23A.100. In counties that do not have a family court, matters outside of the juvenile code are assigned to the circuit court. KRS 23A.010. As a result, even if the DNA action were transferred to the Breckinridge Circuit Court, the parties would still be litigating in two courts. For these and the immediately preceding reasons, the Court cannot say the Jefferson Family Court is the only court with authority to determine custody of S.M.H.

Thus, the Court is left with two co-equal circuit courts issuing competing orders regarding custody of S.M.H. As the parties have already demonstrated, any time they do not like an order of one court they will seek relief from the other. The actions of the parties, counsel, and the court have disrupted the orderly administration of justice. More importantly, the competing custody orders are not in S.M.H.'s best interest. These orders have uprooted S.M.H.'s life and torn her between two homes, further delaying permanency for a child who deserves stability.

Finally, a writ is appropriate in this case because Petitioners have no adequate remedy by appeal. The Cabinet and V.H. argue Petitioners should have filed a direct appeal from the TPR action; however, as the Court has already stated, this remedy was unavailable because the Jefferson Family Court never ruled on their motion to intervene. *Erie Insurance*, 647 S.W.3d at 202. Additionally, Petitioners are not parties to the DNA action and cannot appeal from orders of the

Jefferson Family Court entered therein. KRS 620.155. Thus, be it intentional or inadvertent, the Cabinet has cut off Petitioners' right to have their arguments pertaining to custody of S.M.H. heard by the Jefferson Family Court. The Petitioners may, also, only appeal from an order by which they are aggrieved. *See Brown v. Barkley*, 628 S.W.2d 616, 618 (Ky. 1982). They were not aggrieved by the Breckinridge Circuit Court's orders. Moreover, the orders of the Breckinridge Circuit Court are interlocutory because they are temporary custody orders, and as such are unappealable. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

As a final note, at the heart of this case is a three-year-old child, who has a fundamental right to "a secure, stable family." KRS 620.010. Given how the underlying cases have proceeded, this Court fears if it does not intervene at this juncture the custody battle will rage on depriving S.M.H. of this fundamental right, all while wasting an excessive amount of judicial resources and undermining the orderly administration of justice.

III. CONCLUSION

Having reviewed the limited record, petition for a writ of prohibition, responses thereto, and having heard oral argument, and being otherwise sufficiently advised; the Court hereby ORDERS as follows:

Petitioners' request for an order requiring the Jefferson Family Court to "relinquish jurisdiction concerning the custody and adoption of S.M.H. in favor

of the Breckinridge Circuit Court" is GRANTED IN PART AND DENIED IN PART. Petitioners' request as to the adoption issue is DENIED as MOOT; the Jefferson Family Court cannot be made to relinquish jurisdiction over the adoption issue because it never had jurisdiction therein. It is GRANTED to the extent that the Breckinridge Circuit Court shall make all further determinations regarding custody of S.M.H. in the civil custody action, unless it determines Petitioners lacked standing to bring the civil custody action, and the custody case is dismissed. If so, all custody determinations shall be made by the Breckinridge Circuit Court in the adoption action. If the adoption action also results in dismissal, the Jefferson Family Court may resume making custody determinations.

It is FURTHER ORDERED that the Jefferson Family Court DNA action is STAYED pending a ruling by the Breckinridge Circuit Court on whether Petitioners have standing to bring the custody and adoption actions. The Court takes this unusual step to ensure the orderly administration of justice because all parties are before the Breckinridge Circuit Court and can be heard. In the Breckinridge Circuit Court, the parties may present their arguments, a record can be developed, and once a final order is entered any aggrieved party may appeal. The same is not so in the Jefferson Family Court for reasons already stated herein. This, the Court believes, will prevent the parties from continuing their practice of obtaining competing orders from the lower courts.

Petitioners' request for an order granting them temporary custody of S.M.H. is GRANTED. Petitioners shall retain temporary custody of S.M.H. until further order of the Breckinridge Circuit Court.

Petitioners' request to estop "the Cabinet from any activities inconsistent with the permanency goal of adoption" is DENIED.

LAMBERT, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

ENTERED: December 2, 2022

JUDGE, COURT OF APPEALS

DIXON, CONCURRING IN RESULT: I agree with the majority determination herein yet write separately to express my deep concern at the Cabinet's actions in these two separate, yet related cases.[14] Rather than seek a child's best interest, it appears to me that the Cabinet has placed pettiness and vindictiveness at the forefront of its actions. I believe the Cabinet has played fast and loose with the system, sadly with the judiciary as its accomplice.

The Cabinet would stress repeatedly that Petitioners are merely "the foster parents," effectively making itself the judge, jury, and executioner of the

[14] *See Cabinet v. Goff, et. al.*, No. 2022-CA-1059-OA (concurring opinion).

determination of S.M.H.'s fate. However, what the Cabinet seeks to bury is that Petitioners are more than *merely* foster parents. They are, in fact, both blood relatives and the fictive kin of S.M.H., which makes their case for custody much different than that of "just a foster parent."[15]

The Jefferson Family Court action began in November 2019, when S.M.H. was born prematurely with Hepatitis C and tested positive for codeine and morphine. Birthmother later admitted to heroin use. In fact, S.M.H. was hospitalized in the NICU for two months as a result of Birthmother's use of illegal drugs during pregnancy. Birthmother herself suggested Petitioners as possible caregivers for her daughter. Petitioners had already adopted S.M.H.'s older biological brother. Petitioners welcomed S.M.H. into their home and have provided a safe and loving environment for her. By all accounts – including the Cabinet's own reports – S.M.H. has thrived in Petitioners' home.

On January 15, 2020, the Cabinet noted Birthmother was unwilling to work with it to make decisions for S.M.H. Eventually, on September 10, 2020, Birthmother stipulated to neglect or abuse. On January 14, 2021, the Cabinet, in its annual review in the DNA action, noted that on July 17, 2020, Birthmother tested positive for cocaine, methadone, and opiates. While on October 29, 2020,

[15] I would also observe that the Cabinet must have approved Petitioners' home at one time as Petitioners previously adopted S.M.H.'s older brother, apparently with the Cabinet's blessing.

Birthmother stated she would enter treatment for drug addiction, she instead disappeared. At this time, Birthmother had an outstanding bench warrant for her arrest for failure to report to her probation officer. Birthmother's whereabouts were apparently unknown until she was incarcerated on April 7, 2021. She subsequently gave birth to another child who tested positive for methadone. The Cabinet was notified and opened another case concerning the infant. Thereafter, Birthmother entered and completed substance abuse treatment, parenting classes, and otherwise stayed in compliance with her case plan.

While Birthmother made progress after this child's birth, the Cabinet – seeing a total lack of bonding between S.M.H. and Birthmother – in August 2021, changed the goal to adoption of S.M.H., rather than reunification. Birthmother continued to have Zoom and in-person visits with S.M.H. pending the TPR hearing; however, the court noted as late as February 17, 2022, that Birthmother "has ∅ bond" with S.M.H. Moreover, adoption remained the goal even though by this date the court noted Birthmother was "compliant and sober." It also observed, however, "[c]hild is bonded w/[the Petitioners] as parents as well as her older sibling (mother's rights terminated in involuntary adoption)."

While adoption remained the goal, the Cabinet nevertheless inexplicably agreed with Birthmother's motion for increased visitation in mid-April 2022. The only evidence in the record reveals no change in circumstances as

only a few, relatively unsuccessful visits had occurred in the preceding two months. Nonetheless, the family court granted this motion, over the objection of S.M.H.'s GAL.[16] S.M.H. was now almost two-and-a-half years old.

According to Petitioners' affidavit, the increased visitation did not go well. Visits were cancelled by the Cabinet, Birthmother, and Petitioners for various reasons.[17] Further, many visits were apparently cut short as a result of S.M.H.'s emotional state caused by these visits. S.M.H., who by January 2022 had lived with Petitioners for two full years – most of her life – would cling to Petitioners at visits, beg for her mommy and daddy (Petitioners), and cry so hard she would vomit.[18]

On June 8, 2022, Petitioners' attorney reached out to the Cabinet's attorney, Erika Saylor, to discuss Petitioners' desire to intervene in S.M.H.'s

[16] This was the initial guardian *ad litem,* Abigail Green, who was later replaced by Mark Gaston. Mr. Gaston evidently agreed with Birthmother's reunification as he argued at the hearing on August 22 that the Jefferson Family Court had "original jurisdiction" to return custody to the Cabinet in what he called a "triad" of involved courts (along with Breckinridge Circuit Court and the Court of Appeals). He apparently believed this "original jurisdiction" somehow trumped this Court's prior "Order Returning Custody" to Petitioners.

[17] The Cabinet has attempted to paint Petitioners as causing the cancelled visitations. However, from the only specific evidence in the record from July 2021 through August 2022, Birthmother cancelled or was late for approximately 10 visits, the Cabinet cancelled four visits, and Petitioners cancelled three visits (due to lack of cell service, the death of a grandmother, and being on a Cabinet approved vacation).

[18] According to her affidavit, Geneva White, the Cabinet supervisor, responded to Petitioners' concerns about S.M.H.'s emotional behavior by stating: "I explained such behavior is normal and expected for children in and out of home care situation."

pending adoption action and their concern with the Cabinet's increased visitation between Birthmother and S.M.H. The two discussed the matter by phone on Friday, June 10, wherein Ms. Saylor was informed of Petitioners' intent to move to intervene the next week. Despite knowledge of Petitioners' plans, on Sunday, June 12, Ms. Saylor e-filed a "Notice of Voluntary Dismissal" of the TPR action. Thus, armed with information of Petitioners' disagreement with the Cabinet's new view toward reunification, rather than allow Petitioners the opportunity to present their motion to the court and be heard, the Cabinet covertly fast-tracked dismissal of its notice of dismissal on a Sunday, leading to the inevitable appearance of an effort to circumvent Petitioners' involvement. Petitioners nevertheless proceeded in their attempt to intervene in the TPR action, but the court entered an order of dismissal before their motion could be heard.[19]

These actions, along with the Cabinet's surreptitious attempt to obtain dismissal of Petitioners' suit for adoption pursuant to KRS 199.470, in Breckinridge Circuit Court, lead to the inevitable conclusion that the Cabinet has systemically schemed to thwart Petitioners' efforts in both the Jefferson Family Court and the Breckinridge Circuit Court, merely to be heard. In the Breckinridge

[19] The Cabinet's counsel seeks to lay blame at Petitioners' feet for filing their motion to intervene to be heard on the wrong day. What the Cabinet fails to acknowledge is that its counsel, Ms. Saylor, was well aware of Petitioners' intent to intervene yet failed to alert the court of this knowledge. This inaction could be considered contravention of ethical obligations which require candor to the tribunal.

actions the Cabinet filed its motion to dismiss as one needing no hearing all the while knowing the motion would be contested. Hence, the Cabinet attempted to obtain dismissal of that action without Petitioners' involvement, thereby again precluding Petitioners' right to be heard.[20]

Moreover, the Cabinet's lack of respect for the order of the Breckinridge Circuit Court is more than troubling. When Cabinet supervisor Geneva White learned of the Breckinridge Circuit Court's order maintaining placement of S.M.H. with Petitioners, White made it clear she had no intention of honoring the court's order. Instead, White declared an "emergency," requiring immediate physical custody of S.M.H., in the Jefferson Family Court action. What remains unclear, however, is exactly what "emergency" occurred – other than White not getting her way. Apparently, this was a sufficient "emergency" for the Jefferson Family Court to agree and to demand S.M.H. be returned to the Cabinet immediately.[21] And what was the result of this 13-day return of S.M.H. to the Cabinet? According to the affidavit filed by the GAL appointed by the Breckinridge Circuit Court, S.M.H., who had been a happy, adjusted toddler in

[20] These facts are more fully developed in the concurring opinion on the Cabinet's petition for writ of prohibition, No. 2022-CA-1059-OA.

[21] I question the objectivity of Judge Goodwin given her comments made in court at the hearing on September 15, 2022, as noted on page 9 of the majority Opinion. Judge Goodwin further entered an order directly violative of a decision of this Court concerning S.M.H.'s custody on that same date. Consequently, I feel recusal is appropriate as it appears Judge Goodwin's impartiality is clearly questionable.

Petitioners' custody, returned 13 days later a frightened, foul-mouthed child with a possible cigarette burn. Nonetheless, the Cabinet continues to fight tooth and nail to prevent Petitioners' custody of S.M.H. I have no doubt had this occurred in Petitioners' custody, the Cabinet would have notified law enforcement immediately, knocking down the courthouse doors to file an emergency petition for removal. Yet, it is unclear whether it has even opened an investigation into this incident. With whose best interest is the Cabinet really concerned? It certainly does not appear to be that of S.M.H.

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