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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1059-OA

CABINET FOR HEALTH AND
FAMILY SERVICES — PETITIONERS

AN ORIGINAL ACTION
v. ARISING FROM BRECKINRIDGE CIRCUIT COURT
ACTION NOS. 22-CI-00100 AND 22-AD-00012

HONORABLE KENNETH HAROLD GOFF II,
JUDGE, BRECKINRIDGE CIRCUIT COURT — RESPONDENT

AND

T.H.; H.H.; V.H.; D.F.; S.M.H., A MINOR;
HONORABLE LORI GOODWIN, JUDGE,
JEFFERSON FAMILY COURT — REAL PARTIES IN INTEREST

OPINION AND ORDER
DENYING PETITION FOR A WRIT OF PROHIBITION

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Petitioner, the Cabinet for Health and Family Services (the Cabinet), filed the above-styled original action pursuant to CR[1] 76.36 seeking a writ of prohibition. Specifically, "the Cabinet requests that the Orders of the

[1] Kentucky Rule of Civil Procedure.

Breckinridge Circuit Court in the Civil Action Nos. 22-AD-00012 and 22-CI-00100 be set aside and that the actions be directed dismissed for want of both standing and particular case jurisdiction." Having reviewed the record and being otherwise sufficiently advised, IT IS HEREBY ORDERED that Petitioner's petition for a writ of prohibition is hereby DENIED.

I. BACKGROUND

The underlying cases are civil custody and adoption actions filed by Real Parties in Interest, T.H. and H.H. (collectively Relatives). They wish to adopt their three-year-old cousin, S.M.H. S.M.H. was born to Real Party in Interest V.H. on November 21, 2019. V.H. and T.H. are first cousins. When she was born, S.M.H. tested positive for illicit substances and Hepatitis C. S.M.H. has been in the custody of the Cabinet and the care of Relatives for nearly all of her short life.

In January 2020, the Cabinet filed a DNA petition in Jefferson Family Court. The Court will not delve into the history of this family's proceedings in the Jefferson Family Court because they are largely irrelevant to the Court's decision in this original action. Relatives filed a separate original action, Case No. 2022-CA-1023-OA, and the opinion and order disposing of that case contains a detailed summary of the Jefferson Family Court litigation. It is sufficient to say that the DNA action remains active and pending in the Jefferson Family Court.

On June 30, 2022, Relatives filed a petition for adoption in Breckinridge Circuit Court, the county where they reside. They also filed a petition for custody in Breckinridge Circuit Court on July 5, 2022. Soon thereafter, the Cabinet filed motions to dismiss both actions arguing Breckinridge Circuit Court lacked particular case jurisdiction and that Relatives lacked standing to bring the lawsuits. There have been litigation and orders pertaining to custody of S.M.H., but the motions to dismiss were scheduled for a hearing on November 28, 2022. The Breckinridge Circuit Court has not yet ruled upon the motions to dismiss.

The Cabinet filed this petition for a writ of prohibition and a motion for intermediate relief on September 6, 2022. Intermediate relief was denied that same day. In the order denying intermediate relief the Court determined:

> Any claim of harm to the Cabinet from the Breckinridge Circuit Court's conducting a hearing does not rise to the level of irreparable injury warranting extraordinary intermediate relief. [*Robertson*] *v. Burdette*, 397 S.W.3d 886, 890 (Ky. 2013). Furthermore, any party aggrieved by the final orders of the Breckinridge Circuit Court may file a notice of direct appeal. CR 73.02.

Relatives filed a response to the Cabinet's petition for a writ of prohibition. The matter was then assigned to this three-Judge panel of the Court for consideration 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). The Cabinet claims entitlement to a writ under the second class.

In order to qualify for a second-class writ, the Cabinet must show the circuit court is acting or about to act erroneously, there is no adequate remedy by appeal, and it will suffer irreparable harm. *Id*. "No adequate remedy by appeal or otherwise means that the injury to be suffered [] could not therefore be rectified in subsequent proceedings in the case." *Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635, 640 (Ky. 2013) (internal quotation marks and citation omitted). "Lack of an adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category." *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005) (citations omitted).

The Cabinet cannot prevail in its petition for a writ of prohibition because it has an adequate remedy by appeal. A hearing will be conducted in the

Breckinridge Circuit Court to determine the merits of the Cabinet's motion to dismiss the custody and adoption actions. The hearing is "itself an available remedy, a forum in which [the Cabinet] could prove to the trial court" that the underlying actions should be dismissed. *Goldstein v. Feeley*, 299 S.W.3d 549, 554 (Ky. 2009). Moreover, upon entry of a final order, any aggrieved party may file a direct appeal. CR 73.02.

III. CONCLUSION

Having reviewed the record and being otherwise sufficiently advised; IT IS ORDERED the petition for a writ of prohibition shall be, and hereby 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: While I agree with the majority in all respects, I write separately to address the validity of the Cabinet's underlying arguments in support of its petition for writ of prohibition, which is also a necessary prerequisite for issuance of a writ. As noted by the majority, grant of a

writ is an extraordinary remedy. The Cabinet has maintained that the Breckinridge Circuit Court has both proceeded outside of its "particular case" jurisdiction and, presumably, that it is about to act erroneously because Relatives are without standing to seek custody, and ultimately adoption of S.M.H. I believe the Cabinet is palpably wrong on both counts.

First, as noted above, the Cabinet contends only the Jefferson Family Court possesses particular case jurisdiction and, therefore, it alone must be the forum of any determination of custody. However, the Cabinet plainly misunderstands the nature of this subclass of jurisdiction:

> A court may be restrained by prohibition from interfering with the exclusive jurisdiction acquired by another court by reason of its being the first court to assume and exercise such jurisdiction in the particular case ***if both cases are predicated on the same cause of action, between the same parties***, and brought in courts of competent jurisdiction of the same state. However, there is also authority that the writ will not be granted if there is no sharp or intolerable conflict between the courts, or if the acquisition of jurisdiction by the first court was not necessarily exclusive, because it was not based on the seizure of property or the like.
>
> In general, the pendency of a prior action in a court of competent jurisdiction, predicated on the ***same cause of action*** and ***between the same parties***, constitutes good ground for abatement of a later action within the same jurisdiction either in the same court or in another court having jurisdiction, and the first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction, and prohibition lies to restrain

> another court from proceeding if it is threatening to do so.

63C Am.Jur.2d Prohibition § 41 (emphasis added) (footnotes omitted). Herein, as Relatives were unable to intervene in the Jefferson County action, there is ***no*** question of commonality of ***parties*** between the two actions. Moreover, both cases are ***not*** predicated on the ***same*** cause of action. The only matter now pending in the Jefferson Family Court is the DNA action under KRS[2] Chapter 620. The Breckinridge Circuit Court action rightly proceeds under KRS 199.470 – an entirely different cause of action and one that may only properly be brought in Breckinridge Circuit Court. The statute clearly requires any action brought pursuant to its provisions must be filed in the county of residence of the petitioners – Breckinridge in this case. Consequently, absolutely no legitimate issue of particular case jurisdiction exists.

The issue of standing is likewise evident for the same reasoning as that of jurisdiction. The Cabinet maintains that Relatives, as foster parents, lack standing to initiate an action for custody of S.M.H. because the Cabinet was granted custody by the Jefferson Family Court. I agree that much case law supports that position if custody is sought under either KRS Chapter 620 or KRS Chapter 625. Nevertheless herein, contrary to the Cabinet's argument, Relatives

[2] Kentucky Revised Statutes.

assuredly possess standing pursuant to KRS 199.470(4), a fact it has not disputed. Despite the Cabinet's repeated reference to Relatives as the "former foster parents" or "just the foster parents," Relatives are actually much more. They are blood relatives to S.M.H. and also her fictive kin, not only because of their deep emotional attachment,[3] but additionally by their adoption of S.M.H.'s older biological brother. These undeniable facts give Relatives standing pursuant to KRS 199.470(4)(a).[4]

I am further compelled to express my grave concerns regarding the Cabinet's motivation and objectivity in the decisions made in this case, as well as in the related Jefferson Family Court DNA and adoption proceedings. The majority has noted the Cabinet's dubious motion practice in this action. The

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[3] *See C.J. v. M.S.*, 572 S.W.3d 492, 498 (Ky. App. 2019) ("'"Fictive kin' means an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child.' KRS 199.011(9). The record shows that Child regards Adoptive Parents as her family; she is emotionally attached to Adoptive Parents. The record supports that Adoptive Parents qualify as Child's fictive kin. Therefore, we find no discernable error with respect to the family court's determination that Adoptive Parents properly petitioned to adopt Child.").

[4] (4) No petition for adoption shall be filed unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a child-placing institution or agency, or by the cabinet, or the child has been placed with written approval of the secretary; but no approval shall be necessary in the case of:

> (a) A child sought to be adopted by a blood relative, including a relative of half-blood, first cousin, aunt, uncle, nephew, niece, and a person of a preceding generation as denoted by prefixes of grand, great, or great-great; stepparent; stepsibling; or fictive kin; however, the court in its discretion may order a report in accordance with KRS 199.510 and a background check as provided in KRS 199.473(8)[.]

Cabinet's counsel, Rachel Caudel, e-filed its "NOTICE-MOTION-ORDER" at 1:14 p.m. on August 2, 2022, as a "MOTION NOT REQUIRING A HEARING," which shows it as "scheduled for 8/02/2022" – that same day.[5] To say that Relatives' counsel was notified of the motion is practically meaningless with so little time to intervene. How were Relatives to respond to a motion filed at 1:14 p.m. and set to be signed without a hearing that same day? It strains credulity to accept the Cabinet's claim that it filed its motion to dismiss Relatives' petitions in Breckinridge Circuit Court without scheduling a time for the motion to be heard simply because Ms. Caudel believed she would be notified by the court later of a specific hearing date. The Breckinridge Circuit Court local rules of practice – as well as almost all other such court rules[6] – require a date certain for a motion to be heard. Moreover, even in Jefferson Family Court, the Cabinet followed established procedural rules when it scheduled its motions to be heard on a particular day certain.[7] Judges are not administrative assistants paid to do the parties' scheduling. The obvious benefit to the Cabinet for its failure to schedule a date for its motion to be heard by the Breckinridge Circuit Court would be to accomplish dismissal without the necessity of actually arguing its position against

[5] *See* Exhibit 5C attached to the Cabinet's petition for writ of prohibition.

[6] I make this possible concession only because I have not reviewed each and every court's local rules of practice. However, I challenge the Cabinet to cite an exception.

[7] *See*, for example, Exhibit 3D attached to its Petition.

Relatives in court, something it appears loath to do. In fact, the Cabinet came close to realizing the *fait accompli* as the matter was placed on the judge's desk as a "motion not requiring a hearing." This appearance of impropriety – never fully explained in oral arguments before this Court – in conjunction with the Cabinet's conduct in the Jefferson Family Court matters and addressed at length in the concurring opinion to Relatives' petition for writ,[8] is deeply troubling. Rather than focus on the best interests of S.M.H., sadly, the Cabinet's actions effectively suggest that winning at all costs became, and remained, its primary priority. I would remind the Cabinet that its obligation is not only to S.M.H.'s birthmother; it is also the guardian of a defenseless child, seemingly omitted from the Cabinet's equation herein.

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[8] No. 2022-CA-1023-OA.