

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2004-SC-0418-MR

DATE 10-14-04 ELLAG:cm:tdp.c.

TIM WARD

APPELLANT

V. ORIGINAL ACTION FROM COURT OF APPEALS  
2004-CA-677-OA  
HARDIN CIRCUIT COURT NO. 2004-CI-16

HON. JANET P. COLEMAN, JUDGE,  
HARDIN CIRCUIT COURT;  
CARRIE WARD; AND  
HON. PAUL MUSSELWHITE,  
COMMISSIONER, HARDIN CIRCUIT  
COURT

APPELLEES

REAL PARTIES IN INTEREST

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This is an appeal from a Court of Appeals decision denying a writ of mandamus filed pro se by Ward to reverse the Hardin Circuit Court grant of temporary custody of his daughter to his wife during their marriage dissolution proceedings.

Ward is in the middle of a marital dissolution with his wife. The wife filed for dissolution in January 2004, having separated on December 23, 2003. Since then she filed for temporary custody of their minor 2-year-old daughter. At a hearing scheduled on March 4, the Hardin Domestic Relations Commissioner found that Ward's attorney had been notified of the date, time, and place of the hearing and that the Sheriff called Ward several times without avail, and therefore, Ward knew of the hearing but did not

appear. Ward's attorney had already withdrawn from representing him in this matter. On March 5, the Hardin Circuit Court ordered sole, temporary custody of the infant daughter to the wife along with temporary support payments of \$246.42 per month and allowed the daughter to move to Georgia to be with the mother. Visitation rights were suspended until Ward would appear before the court.

From this order, Ward filed a writ of mandamus pro se to have the order reversed. Additionally, Ward had filed several other pro se motions to the Court of Appeals. Essentially, the other motions involve evidentiary matters pertinent to the circuit court and not the Court of Appeals. Two motions were styled "Motion to Submit Evidence of More Perjury" and attached were various documents that may or may not be pertinent to findings below. Several other motions each attempted to introduce evidence as well. Another motion prayed for judgment relief under CR 55.01, a matter improperly placed before the Court of Appeals while the dissolution action is pending in Hardin County. Finally, another motion moved the Court of Appeals to dismiss the response to the petition filed by the real party in interest. The Court of Appeals denied all these motions. The Court of Appeals noted review of the hearing video record where Ward attempted to obtain an injunction from the trial court against the commissioner and the volume of ineffective pro se motions filed. It advised that due to Ward's deep emotional involvement, he should seriously consider whether he should continue pro se in this matter. This pro se appeal followed.

The writ of mandamus is an order for relief from an action below. It is filed in the appellate court as an original action. It is an extraordinary remedy and is reluctantly granted. In order to prevail and obtain a writ, a petitioner must show that the lower court is acting outside its jurisdiction or acting erroneously within its jurisdiction, and

when the court is acting within its jurisdiction, the petitioner must show that it has no adequate remedy by appeal and it will suffer an irreparable injury if relief is not granted. Bender v. Eaton, Ky., 343 S.W.2d 799, 800 (1961). Ward does not contest jurisdiction, and the record supports that Hardin Circuit Court has jurisdiction of the dissolution proceedings. Ward must therefore show that he has no adequate remedy on appeal or an irreparable injury if we do not grant the writ. Being that the custody order was temporary, and that the underlying dispute is pending, Ward has remedies available in Hardin Circuit Court, as well as on appeal from them.

Ward has not shown irreparable harm or great injustice to result from this order. Ward pleads to us for permanent custody because temporary custody to his wife was given by means of her “perjury and falsification of records” and because he has the “clear convincing evidence”. Additionally, he charges that he was not informed of the hearing because a certificate of service cannot be produced. Proving perjury or falsification of records is an evidentiary matter of fact-finding. Neither the Court of Appeals or this court is properly the fact-finder, but the trial court is the place to make evidentiary findings. Commonwealth Transportation Cabinet Department of Highways v. Taub, Ky., 766 S.W.2d 49 (1989), and CR 52.01. These charges do not amount to irreparable harm that has no adequate remedy on appeal. Therefore, there are no grounds on which we may grant the writ.

Ward asked this Court for review in order to plead his motions by claiming that the Hardin Commissioner and the Court of Appeals will not hear the evidence. There is no evidence that the court with appropriate jurisdiction for his motions has refused to hear his pleadings.

Therefore, the decision of the Court of Appeals denying the Petition for the Writ of Mandamus is affirmed.

All concur.

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