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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0434-MR

DATE 9-15-05 ENAGrayHPC.

WILLIAM JOSHUA HOWARD — APPELLANT

V.

APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2004-CA-446
HARLAN CIRCUIT COURT NO. 02-CI-85

HONORABLE JAMES L. BOWLING, JR.,
SPECIAL JUDGE, HARLAN CIRCUIT
COURT — APPELLEE

AND

PATRICIA KAY HOWARD
(REAL PARTY IN INTEREST) — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a denial by the Court of Appeals of a petition for a writ of prohibition. Appellant, William Joshua Howard, and Appellee, Patricia Kay Howard, are involved in litigation over the custody of two minor children, Dovie Cheyenne Howard, born August 14, 2000, and William Joshua Howard, Jr., born February 24, 2002.

Patricia and William were married on January 1, 2000, and divorced by a judgment and decree of the Harlan Circuit Court on March 6, 2003. The parties initially agreed to joint custody of their two minor children, with Patricia being the primary and residential custodian. However, William subsequently filed a motion for emergency

custody when he learned that Patricia had turned custody of William, Jr. over to another person, Lela Skidmore. Judge Ron Johnson granted the motion on December 23, 2003.

Patricia then accused Judge Johnson of participating in an ex parte communication with William's mother, Sheila Howard. Patricia stated that Sheila Howard and Judge Johnson were friends, that she believed Sheila Howard had consulted Judge Johnson regarding the process of obtaining emergency custody, and that Judge Johnson had made derogatory comments about Patricia and Skidmore. Judge Johnson denied that the alleged conversation took place and denied being prejudiced in favor of either Sheila or William Howard. Nevertheless, Judge Johnson recused himself, citing KRS 26A.015(2)(e), and Appellee, Hon. James L. Bowling, Jr., Judge of the Bell Circuit Court, was appointed to act as Special Judge.

After the appointment of Judge Bowling, Patricia stated in open court that her family could influence Judge Bowling because of their active involvement in Bell County politics. Shortly thereafter, William filed a motion for Judge Bowling to recuse himself, which was summarily denied. In the order, Judge Bowling stated that he did not know Patricia or her family, although he acknowledged that Patricia had admitted to making the statements. William then filed this original action in the Court of Appeals seeking a writ to prohibit Judge Bowling from presiding over the custody dispute. The Court of Appeals denied the writ, holding that neither of the required prerequisites for issuance of a writ were met: petitioner had an adequate remedy upon appeal and he would suffer no irreparable injury. This appeal followed.

There are two classes of cases in which writs of prohibition or mandamus can be granted: (1) those in which the lower court is acting without or beyond its jurisdiction;

and (2) those in which the court is acting erroneously within its jurisdiction. Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961). The case at bar alleges the second of the two categories.

To warrant the granting of a writ under the second category, the petitioner must show, "that he (a) had no adequate remedy by appeal or otherwise, and (b) would suffer great and irreparable injury (if error has been committed and relief denied)." Id. at 801. The first element requires us to determine "whether a favorable decision on appeal reversing this ruling would provide an adequate remedy for the harm or prejudice arising out of the alleged erroneous ruling." Roman Catholic Diocese of Lexington v. Noble, 92 S.W.3d 724, 729 (Ky. 2002). The second element is typically a showing of "great and irreparable injury." Bender, 343 S.W.2d at 801. However, in cases where a judge refuses to vacate the bench, it has been said that "a refusal to vacate the bench can never, in and of itself, create any injury or damage. The damage, if any, remains prospective, in that it must result from [the judge's] further and subsequent conduct of the proceedings." Middle States Coal Co., Inc. v. Cornett, 584 S.W.2d 593, 596 (Ky. App. 1978). Therefore, a different standard must be articulated. In Middle States Coal, the Court of Appeals expressed that "in determining whether the extraordinary remedy of prohibition is appropriate, it becomes necessary to consider the nature of the proceedings and the adequacy of the review procedures that are applicable to the further orders and judgments that may be entered by the judge who has refused to vacate." Id. In the case sub judice we note that the analysis with regard to the second element is similar to the first element.

Appellant argues that because the underlying case involves the custody of two minor children, an adverse decision could result in Appellant missing several years of

the lives of his children while the case is on appeal. As such, he argues that his remedy on appeal would be inadequate. We disagree and have held otherwise on numerous occasions. E.g., Petrey v. Cain, 987 S.W.2d 786, 788-89 (Ky. 1999) ("[T]here is an adequate remedy at law by way of appeal from any order entered which grants or denies a motion to modify a prior custody decree."); Pettit v. Raikes, 858 S.W.2d 171, 172 (Ky. 1993) (mother aggrieved by venue determination permitting father to pursue modification of child custody motion in county of his residence could not obtain writ of prohibition in intrastate custody dispute, but was required to proceed by appeal from final judgment); Pace v. Wolfinbarger, 420 S.W.2d 561, 563 (Ky. 1967) (mother had adequate remedy by way of appeal from order transferring custody from her to child's great aunt, and prohibition would not issue.)

We note in passing that it is not unknown for a party to a bitter legal dispute to claim to have influence over the presiding judge – if for no other reason than to intentionally inflict emotional distress upon the other party. Of course, it does not necessarily follow that the party actually has such influence.

Accordingly, because William Howard has an adequate remedy by appeal, we affirm the Court of Appeals.

All concur.

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