

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2007-SC-000390-MR

DATE 11-26-07 EIA Gow + P.C.

MICHAEL LOVE HOWELL

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NUMBER 2007-CA-000520-MR
BARREN CIRCUIT COURT NO. 95-CI-00360

HONORABLE WILLIAM MITCHELL NANCE, JUDGE
BARREN FAMILY COURT

AND

JENNIE ELIZABETH HOWELL (REAL PARTY IN INTEREST)

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Michael Love Howell petitioned the Court of Appeals for a writ prohibiting Honorable Mitchell Nance, Judge of the Barren Family Court, from requiring Howell to purchase a new automobile for his ex-wife and from requiring him to disclose post-dissolution financial information. The Court of Appeals denied the writ and Michael Howell now appeals to this Court as a matter of right. Ky. Const. § 115; CR¹ 76.36 (7)(a). We affirm.

¹Kentucky Rules of Civil Procedure

Relevant Facts and Procedural Background

The litigation surrounding Michael and Jennie Howell's divorce has spanned twelve years. During this time, the trial court has yet to distribute the marital estate, which is valued at over \$8,000,000.² The parties were married in Barren County, Kentucky, in February 1976. During the marriage, Michael apparently acquired interests in certain corporations which he still held when he filed for divorce in July, 1995. On December 23, 1996, the Barren Circuit Court entered a dissolution decree, reserving maintenance and property division for later determination. At that time, the parties began participating in discovery so that the value of their marital estate, including the corporate holdings, could be determined. Despite the grant of a motion to compel discovery from Michael in January 1998, and to show cause why he had not complied with discovery in December 2002, Michael continues to resist disclosure regarding the corporate assets.

The current original action involves two orders entered by the trial court. On January 19, 2007, Barren Family Court ordered that Michael provide certain financial information to the court-appointed expert, including business property depreciation schedules from 1996 to 2005, current financial statements, and asset sales regarding five corporations in which Michael has had an ownership interest since before 1996. Arguing that a writ should be granted with respect to this order, Michael contends that the trial court erred by ordering him to disclose information about his post-divorce financial dealings; that he has no adequate remedy from this error by appeal; and even though he will not face irreparable injury by having to disclose this information, the

²The value of the marital estate is derived from a Prenuptial Agreement, which Michael entered into with his current wife days after his dissolution decree with Jennie was finalized in December, 1996.

special case exception should apply. Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961); Wal-Mart Stores v. Dickinson, 29 S.W.3d 796, 801 (Ky. 2000). Jennie responds that these holdings are part of their marital estate, noting that Michael acquired these corporate assets during their marriage and he has had sole control over them since the 1996 dissolution decree. We affirm the Court of Appeals' denial of the writ on this issue, finding that the special case exception does not apply.

In the second order, entered on February 2, 2007, the trial court granted Jennie's motion requiring Michael to purchase a 2007 Lexus automobile for her.³ Michael argues that the trial court lacks jurisdiction to enter this order because it involves a transfer of non-marital property to his ex-wife not authorized by the statutes. Jennie characterizes this order as a partial distribution of marital property, clearly within the trial court's jurisdiction, which will be accounted for by the court when it makes a final distribution of marital property. The Court of Appeals correctly held that the trial court acted within its jurisdiction when it made a partial distribution of the marital estate and thus we affirm on this issue as well.

Standard of Review

Whether to grant or deny a writ of prohibition is within the sound discretion of the court with which the petition is filed. Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992). Thus, this decision is ultimately reviewed by an appellate court for abuse of discretion. However, if the basis for the grant or denial involves a question of law, the appellate court reviews this conclusion de novo. Rehm v. Clayton, 132 S.W.3d 864,

³This is the second Lexus the court has ordered Michael to purchase for his ex-wife since 1996. In January 2000, the trial court entered an amended order agreed to by the parties requiring Michael to pay Jennie \$60,000 for the purchase of a 2000 Lexus. The amended order stated that Jennie would have this amount charged against her share of the marital property at the conclusion of this case.

866 (Ky. 2004). If the court with which the petition is filed bases its ruling on a factual determination, this finding of fact is reviewed for clear error. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). Typically, which standard of review to apply will depend on which type of writ the petitioner seeks.

This Court has consistently divided cases seeking writs of prohibition into two classes: cases alleging the trial court lacks jurisdiction to carry out the challenged action and cases alleging the trial court is within its jurisdiction but acting erroneously. Bender, 343 S.W.2d at 800; Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004); Grange Mutual Insurance Co., 151 S.W.3d at 808. Michael's allegations invoke both classes, contending that the trial court lacked jurisdiction to enter one order and erred in entering the other. Being a question of law, the Court of Appeals' finding that the trial court acted within its jurisdiction when entering the vehicle order is reviewed de novo. Grange Mutual Insurance Co., 151 S.W.3d at 810. Similarly, whether Michael's case falls into the special case exception and whether he has an adequate remedy by appeal are questions of law and are also reviewed de novo. Id.; Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 755 (Ky. 2005).

Lack of Entitlement to a Writ of Prohibition

As this Court stated in Hoskins, 150 S.W.3d at 10,

"A writ of prohibition *may* 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."

Michael argues that the trial court acted outside of its jurisdiction by requiring him to transfer non-marital funds to his ex-wife. However, it is apparent that when the court

ordered him to purchase a Lexus for Jennie in 2007, it was not transferring non-marital property, but rather, making a partial distribution of the marital estate. Michael has had almost total control of the substantial marital estate for the past twelve years,⁴ and the court's inability to distribute fully this marital property has been due in large part to Michael's refusal to cooperate with discovery. Under the circumstances, it is understandable that the court made an interim award of a relatively small part of Jennie's marital share. This conclusion is furthered by the trial court's January 14, 2000 order which also required Michael to purchase an automobile for his ex-wife. In the January 14, 2000 Order, the court stated that the \$60,000 payment to Jennie from Michael for a 2000 Lexus would be charged against her share of marital property at the conclusion of the case. Since the January 2000 Order spells out the trial court's intention that the \$60,000 be an advance on Jennie's eventual award of marital property, it follows that the February 2007 payment was intended to be the same.

Michael next argues that even if the trial court made a partial distribution of marital property, this act nonetheless exceeds the court's jurisdiction because it is not specifically authorized by Kentucky statutes. "Subject-matter jurisdiction refers to a court's authority to determine 'this kind of case' as opposed to 'this case.'" Privett v. Clendenin, S.W.3d 530, 532 (Ky. 2001), quoting Duncan v. O'Nan, 451 S.W.2d 626, 631 (Ky. 1970). It is well-recognized that the trial court has wide discretion to make an equitable division of the marital estate. Davis v. Davis, 777 S.W.2d 230, 233 (Ky. 1989); KRS 403.190(1). Since claims regarding marital property are the "kind of cases" the trial court has the authority to hear, actions taken to divide such marital property are clearly within the court's jurisdiction. As noted above, by ordering Michael to purchase

⁴Jennie resides in the marital residence.

a new automobile for his ex-wife, the court was deciding a matter regarding the Howells' marital estate, over which it clearly has jurisdiction.

Michael correctly notes there is no statutory authority for a court ordering partial distributions of marital property prior to a final adjudication. However, neither do the statutes expressly prohibit a court from making partial property distributions. In this case, the trial court need not have ordered a partial distribution of Jennie's likely marital share if Michael had complied promptly with the requests for disclosure of his financial assets so the estate could be divided. Regardless, if subsequent to the final distribution of marital property, Michael believes the court erred in making this partial award or in not equitably dividing the marital property, he has an adequate remedy by appeal. Thus, we affirm the Court of Appeals' decision on this issue.

Michael next contends that a writ should be granted because the trial court, though within its jurisdiction, acted erroneously when it ordered him to make certain disclosures regarding his post-dissolution corporate holdings. When the petitioner alleges mere trial court error, he will normally be required to show that he has no adequate remedy by appeal and will suffer irreparable injury before the merits of the petition will be considered. Bender, 343 S.W.2d at 801. However, this Court recognizes an exception for certain special cases where "a substantial miscarriage of justice will result . . . and correction of the error is necessary and appropriate in the interest of orderly judicial administration." Id. If the writ falls into this special case category, the petitioner is excused from showing great and irreparable injury. Id.

Arguing that he has no remedy by appeal, Michael stresses that erroneous grants of discovery automatically extinguish one's appellate remedy because "once the information is furnished it cannot be recalled." Id. at 802. While this statement is

facially accurate, it is not dispositive in this case because Michael's petition for a writ does not fall under the special case exception. Michael argues that two unique circumstances in this case make the exception applicable: his petition addresses the broad scope of a trial court's authority in divorce matters, and the discoverability of post-dissolution financial information is a matter of first impression for Kentucky appellate courts. Neither circumstance warrants the application of the special case exception. As this Court has noted, special cases "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 Mutual Insurance Co., 151 S.W.3d 808. Unlike work product or attorney-client communications, Michael's financial records are not the type of privileged information "tightly guarded" by the courts.

Furthermore, the forced disclosure of post-dissolution financial information, which is necessary and relevant to determining the value of the Howells' marital estate, will neither result in a "substantial miscarriage of justice" nor threaten the existence of "orderly judicial administration." Bender, 343 S.W.2d at 801. The financial information was ordered disclosed so that the court can fairly and equitably divide the marital estate, thus ending a twelve-year divorce proceeding. If after disclosing such information Michael disputes the court's distribution, he has an adequate remedy by direct appeal. Moreover, the trial judge ordered that Michael's sensitive financial information be sealed and thus has assured its confidentiality beyond the confines of the parties' dispute. In sum, Michael's petition is not of the special case category and his admitted inability to show irreparable injury warrants denial of his writ.

Lastly, we note that Jennie is correct in stating that Michael's Notice of Appeal incorrectly identified the court to which the matter was appealed. This Court agrees with Michael, however, that this clerical error in his Notice of Appeal does not warrant a dismissal. CR 73.02(2).

For the above stated reasons, we affirm the Court of Appeals' Order and deny Michael's Petition for a Writ of Prohibition.

All sitting. All concur.

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