

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000428-MR

DATE 10/29/09 Kelly Klaber D.C.
APPELLANT

TAMARA PURDIE MCVARISH

V.
ON APPEAL FROM COURT OF APPEALS
NO. 2008-CA-000501-OA
WHITLEY CIRCUIT COURT NO. 07-CI-00584

HON. PAUL E. BRADEN, JUDGE
WHITLEY CIRCUIT COURT; AND

APPELLEE

JAMES M. PURDIE,
REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Tamara Purdie McVarish appeals to this Court as a matter of right from the Court of Appeals' denial of her petition for a writ of mandamus. In that petition, McVarish alleged that the Whitley Circuit Court lacked jurisdiction to modify a custody decree entered by a Texas court.

McVarish and the real party in interest, James M. Purdie, were divorced by order of the Harris County District Court, Houston, Harris County, Texas on July 22, 2002. At that time, a custody determination was made as to the parties' four minor children and, pursuant to the order, McVarish assumed physical custody. While neither party disputes that the original custody

determination was made by the Texas court, this Court has not been furnished with a copy of that order or judgment.

Purdie subsequently moved to Louisiana. On May 23, 2003, McVarish voluntarily relinquished physical custody of the children to Purdie; her sister drove the children to Louisiana along with all of their belongings. The children lived with Purdie in Louisiana until 2005, at which time they moved to Whitley County, Kentucky. It appears that McVarish visited the children sporadically during this time, but made no attempt to assume physical custody of the children until 2007.

On January 5, 2007, Purdie petitioned the Texas court to “modify parent-child relationship.” An attempt at mediation in April of that year failed. The matter was heard over a three-day period in early August 2007, and the Harris County District Court entered its final order on August 21, 2007. In that order, the Texas court directed Purdie to surrender the children to McVarish at his Kentucky residence, and further ordered McVarish to immediately return with the children to Harris County, Texas. With respect to jurisdiction, the Texas court specifically found that it had “jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case.”

During this period, Purdie also pursued relief in Kentucky. On August 16, 2007 – after the three-day hearing in Texas, but before the Texas court’s final order – Purdie moved the Whitley Circuit Court to exercise emergency

temporary jurisdiction and temporary custody of the children. By order dated August 17, 2007, the Whitley Circuit Court granted Purdie emergency temporary residential custody and prohibited McVarish from removing the children from the county. With respect to jurisdiction, the order indicated that the Whitley Circuit Court was exercising jurisdiction “pursuant to KRS 403.420 et seq. and KRS 403.800 et seq.”

McVarish arrived in Kentucky on August 19, 2007 to assume custody of the children, which Purdie denied.¹ She then retained Kentucky counsel and on September 4, 2007, moved the Whitley Circuit Court to register the August 21, 2007 Texas order and to stay further proceedings in Whitley County. McVarish argued that the Whitley Circuit Court lacked jurisdiction because a proceeding concerning the custody of the children had been commenced in Texas.

On January 9, 2008, the Whitley Circuit Court entered its findings of fact, conclusions of law and judgment. At the outset, the Whitley Circuit Court noted that it had conferred with the court of original jurisdiction, the Harris County, Texas District Court. The court then concluded that Kentucky was the proper state of jurisdiction to modify custody pursuant to KRS 403.826, and assumed jurisdiction over matters of custody and modification of custody. Finally, the circuit court ordered that the children remain in Purdie’s custody, and enjoined McVarish and Purdie from commencing or continuing with

¹ McVarish asserts that she attempted to gain custody pursuant to the Texas court’s August 21, 2007 order, though acknowledging that she arrived in Kentucky for that purpose on August 19, 2007.

enforcement proceedings in any other state. A hearing on Purdie's petition to modify custody was scheduled for April 10, 2008.

Before that hearing could be held, McVarish petitioned the Court of Appeals for a writ of mandamus directing the Whitley Circuit Court to dismiss Purdie's petition for custody for lack of jurisdiction. McVarish argued that the Texas court had not relinquished its jurisdiction and had continuing, exclusive jurisdiction pursuant to KRS 403.824. The Court of Appeals denied the petition, determining that McVarish had failed to establish that she lacked an adequate remedy by appeal. Further, the Court of Appeals held that "the jurisdiction of the Whitley Circuit Court appears to be appropriate at this time, pursuant to the Uniform Child Custody and Jurisdiction and Enforcement Act (UCCJEA), KRS 403.800 to KRS 403.880." McVarish now appeals to this Court as a matter of right.

A writ may be granted upon a showing that the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through application to an intermediate court. Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). Writs are an extraordinary remedy granted sparingly, and the decision to grant or deny the petition lies within the sound discretion of the Court of Appeals. Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992). Where the lower court is alleged to be acting outside its jurisdiction, our review of the Court of Appeals' conclusions with respect to jurisdiction is de novo. Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

The Whitley Circuit Court determined that it had jurisdiction to modify the Texas custody order pursuant to KRS 403.826, which states:

Except as otherwise provided in KRS 403.828, a court of this state shall not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under KRS 403.822(1)(a) or (b) and:

(1) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under KRS 403.824 or that a court of this state would be a more convenient forum under KRS 403.834; or

(2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Having found that the children had lived in Kentucky for the nineteen months prior to the filing of Purdie's petition for custody modification, the Whitley Circuit Court concluded that it would have initial jurisdiction pursuant to KRS 403.822(1)(a)(1). ("[A] court of this state shall have jurisdiction to make an initial child custody determination . . . if this state is the home state of the child on the date of the commencement of the proceeding."). Further, the court noted that it had conferred with the Harris County District Court and concluded that the Texas court no longer had exclusive, continuing jurisdiction.

KRS 403.816(4) requires that a record shall be made of any communication between a Kentucky court and a court of another state concerning matters of jurisdiction. Aside from the circuit court's note that it

had communicated with the Harris County District Court, no record of that communication has been provided in the record before this Court. As the party seeking a writ of prohibition, McVarish bears the burden of establishing that the Whitley Circuit Court lacked jurisdiction. See Lexington Public Library v. Clark, 90 S.W.3d 53, 62 (Ky. 2002). By failing to make the circuit court's record of its communications with the Texas court part of the record in this writ action, we are unable to conclusively determine that such communications are inadequate or otherwise fail to satisfy the requirements of KRS 403.826. Accordingly, McVarish has failed to satisfy her burden of proof. "[A] writ will not issue unless it is shown that the standard for the issuance of a writ has been met." Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 757 (Ky. 2005).

For this reason, we find no abuse of discretion in the Court of Appeals' denial of McVarish's petition for a writ of mandamus.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Micah Edward Salsman
Catesby Woodford
Elizabeth C. Woodford
Miller, Griffin & Marks, P.S.C.
600 Security Trust Building
271 West Short Street, Suite 600
Lexington, KY 40507-1292

COUNSEL FOR APPELLEE:

Paul E. Braden
Whitley Circuit Court Judge
P. O. Box 535
Corbin, KY 40702

COUNSEL FOR REAL PARTY IN INTEREST:

Sandra Joyce Reeves
Reeves Law Office, P.L.L.C.
1015 Master Street
P. O. Box 1341
Corbin, KY 40702-1341