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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000292-MR

FINAL
DATE 11/19/09 Kelly Klaber D.C.

TAMARA GORMLEY, JUDGE
WOODFORD CIRCUIT COURT
APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001964-OA
WOODFORD CIRCUIT COURT NO. 95-CI-00306

ROBERT DAMERON
APPELLEE

AND

VANESSA WADDLE, FORMERLY VANESSA DAMERON; MARY DAMERON; WILLIAM W. ROBERTS, ROWAN COUNTY ATTORNEY; AND ALAN J. GEORGE, WOODFORD COUNTY ATTORNEY
REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Honorable Tamara Gormley, Judge of the Woodford Circuit Court, Family Court Division, appeals as a matter of right the decision of the Court of Appeals, which granted Robert Dameron's writ of prohibition against Judge Gormley, prohibiting the Woodford Circuit Court, Family Court Division from enforcing orders temporarily changing primary residential custody of his daughter, Mary Dameron, to her mother, and from conducting further proceedings stemming from a motion for change of custody. The Court of Appeals also ordered that Mary Dameron be returned to her father's custody

immediately. Having reviewed the record, we opine that the Court of Appeals did not abuse its discretion in issuing the writ. Hence, we affirm.

BACKGROUND

Robert Dameron and Vanessa Dameron (now Waddle) were divorced on March 26, 1998, in Woodford County.[1] The parties were awarded joint custody of their two minor children, Mary, age four, and Mark, age two. Robert was designated primary custodian of both children. Shortly after the divorce, Robert moved to Rowan County with the children, and Vanessa moved to Franklin County. On July 15, 2008, Robert still lived in Rowan County and Vanessa still lived in Franklin County. On this date, Vanessa visited the Circuit Clerk in Woodford County seeking custody of the children. Vanessa received a blank motion form, on which she wrote the following request: "Emergency temporary custody order. Evaluation and Assessment for children for emotional, verbal and physical abuse. Medical and psychological assessments." Vanessa signed the form (not verified) and it was filed with the divorce case number. Vanessa visited Judge Gormley the same date and requested emergency *ex parte* relief, stating that her daughter, Mary (now fourteen) had recently called her to state that her father, Robert, had physically abused her by yanking her out of bed by her hair. Vanessa also stated that recently, when she picked up Mary from Robert's to attend a church event, Mary stated to Vanessa that she did not want to go back to Robert's house because she did not feel safe there. Based on these oral statements from

[1] Case no. 95-CI-00306

Vanessa, Judge Gormley converted the motion for a change of custody (in the divorce case) to a petition for an emergency protective order (EPO), with a new case number. [2] She issued an EPO and noticed Robert for a hearing on July 24, 2008, for a domestic violence order (DVO).

Robert appeared on July 24, 2008, with his attorney, who was a bit confused as to why Robert had been summoned, because there was no petition for an EPO on file. Counsel's motions to dismiss or to transfer to Rowan County (where the children lived) were denied by Judge Gormley. She did, however, continue the case until August 14, 2008, to give the attorney time to prepare for the DVO hearing.

On that date, Robert, through counsel, renewed his motions to dismiss or to transfer the case to Rowan County. The motions were summarily denied. At that point, Judge Gormley announced that she was ready to go forward on the DVO but would rather get an agreement from everybody for a modification of custody in the divorce case.[3] She explained that if there were an agreed order in the divorce case, she would convert the DVO to a restraining order, dismiss the DVO, and take it out of the court's electronic database. She would then give Vanessa primary custody of Mary with certain conditions for visitation with Robert, such as counseling for Robert and Mary. Counsel resisted an agreed order, informing the judge that if that were going to be the order, to enter it as the court's order. Judge Gormley didn't like that

---

[2] 08-D-0050-001

[3] 95-CI-000306

suggestion, insisting that it had to be an agreed order with no right to appeal, and that it had to be settled today, once and for all. When counsel again declined to agree, Judge Gormley addressed Robert directly, informing him there would be an agreed order (in the divorce case) changing custody to Vanessa with visitation under certain conditions, with no appeal, or she would enter a DVO with no contact between Robert and Mary. Robert quickly consented to an agreed order. Robert explained to Judge Gormley that "you're all talking a lot of things I don't understand," but that he would agree to whatever it took to get visitation with Mary. Judge Gormley then had Mary brought into the courtroom and worked out the conditions of visitation and related matters.

On September 2, 2008, the Woodford County Attorney made a motion to transfer the case to Rowan County for purposes of determining Vanessa's child support arrearages. Judge Gormley denied the motion and *sua sponte* suspended support payments for Mary.

Sometime after the September 2, 2008, hearing, Judge Gormley learned that Vanessa had been arrested on a flagrant nonsupport warrant and was still in jail. Judge Gormley *sua sponte* scheduled a hearing on custody for September 11, 2008. At that hearing, counsel for Robert inquired of Judge Gormley the purpose of the hearing. Judge Gormley explained that she was upset that Robert had started the nonsupport action because he lost the custody battle for Mary, and that she (Judge Gormley) was going to have the

Cabinet investigate Robert's relationship with his son, Mark, because she (Judge Gormley) was of the opinion that Robert should not have custody of Mark.

When the Woodford County Attorney explained that the flagrant nonsupport case started long before the start of the change of custody hearing, Judge Gormley put Robert under oath and demanded to know what actions he took concerning the non-support before and after the August 14, 2008 custody hearing. Judge Gormley did order a "[h]ome evaluation of Mr. Dameron's home re: safety and well being of son, Mark," and because Vanessa was in jail, Judge Gormley transferred custody of Mary to friends of Vanessa[4] with a provision of no contact with Robert until further order of the court.

Robert's attorney received an emergency stay and eventually a writ of prohibition from the Court of Appeals, prohibiting the Woodford County Family Court from enforcing its orders in this case and from any further action stemming from the motion for a change of custody. Mary was ordered returned to her father's custody immediately. Judge Gormley appeals as a matter of right.[5]

ANALYSIS

Judge Gormley argues that the Court of Appeals had no authority to grant Robert's petition for a writ of prohibition or mandamus.

> A writ of prohibition is an extraordinary remedy, available only in two instances: 1) when a "lower court

[4] James W. & Lisa Feck

[5] CR 76.36(7).

> is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; or 2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice or irreparable injury will result."

Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 456-57 (Ky. 2009) (quoting Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004)). The standard of review to be applied when reviewing a writ of prohibition depends on the class or category of writ. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). When the lower court is alleged to be acting outside its jurisdiction, the proper standard is *de novo* review, because jurisdiction is generally only a question of law. Id. When an appellant alleges that the court with which the writ was filed is acting within its jurisdiction but in error, the standard is abuse of discretion. Id. In the case before us, no one questions that a circuit court family court division is the proper court to determine custody matters in both divorce actions and in domestic violence actions. Therefore, a family court has subject matter jurisdiction. The rulings by the trial court are alleged to have been made erroneously within its jurisdiction, which requires review under an abuse of discretion standard.

The erroneous ruling allegation relates to the proper venue for deciding custody, and not jurisdiction. See Pettit v. Raikes, 858 S.W.2d 171 (Ky. 1993). In Fritsch v. Caudill, this Court held "[e]xtraordinary relief is not available to interrupt pending litigation unless the petitioner can show a lack of an

adequate remedy by appeal and great and irreparable injury." 146 S.W.3d 926, 930 (Ky. 2004). We agree with the Court of Appeals that great and irreparable injury would occur in this case had the Court of Appeals not issued the writ. Judge Gormley took away Robert's child with an *ex parte* order, denied contact with another order, and attempted to take away Robert's right to appeal. She even started the process to remove the second child, Mark, because the father was trying to collect lawfully ordered child support. This is clearly a case of irreparable injury and extraordinary circumstances.

The court in which the petition is filed may, in its discretion, address the merits of the issue within the context of the petition for the writ. St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 1999). The question in this case before the Court of Appeals was, which county would be the proper venue/forum for a change of custody when the parties no longer have any connection with the dissolution forum? The Court of Appeals decided that the proper forum would be Rowan County and we cannot say the Court of Appeals abused its discretion, given that both parents/parties had moved out of Woodford County ten years ago and neither had had contact with the county until Vanessa filed the motion for a change of custody. Both children have lived in Rowan County since shortly after the 1998 divorce and that county would be the proper venue for custody modification orders.

Accordingly, we cannot say that the Court of Appeals abused its discretion in granting Appellee's writ of prohibition, and hence, we affirm.

Minton, C.J.; Cunningham, Schroder, Scott, and Venters, J.J., concur.

Abramson, J., concurs in result only. Noble, J., not sitting.

COUNSEL FOR APPELLANT:

David W. Anderson
Charles Everett English
English, Lucas, Priest & Owsley, LLP
1101 College St.
P.O. Box 770
Bowling Green, KY 42101-0770

COUNSEL FOR APPELLEE:

David Allen Barber
252 E. Court Street
P.O. Box 1205
Prestonsburg, KY 41653

REAL PARTIES IN INTEREST:

Vanessa Waddle, Formerly Vanessa Dameron, *pro se*

Mary Dameron, *pro se*
9278 Owenton Road
Frankfort, KY 40601

COUNSEL FOR REAL PARTY IN INTEREST
WILLIAM W. ROBERTS, ROWAN COUNTY ATTORNEY:

William Warner Roberts
Roberts & Watkins
546 E. Main St., Suite one
Morehead, KY 40351

COUNSEL FOR REAL PARTY IN INTEREST
ALAN J. GEORGE, WOODFORD COUNTY ATTORNEY:

Alan Jerome George
Woodford County Attorney
Courthouse, Room 300
Versailles, KY 40383