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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000048-MR

STEPHEN P. GILMORE — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000740-OA
KENTON CIRCUIT COURT NO. 03-CI-01348

HON. LISA OSBORNE-BUSHELMAN
(JUDGE, KENTON CIRCUIT COURT), ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Petitioner, Stephen Gilmore, petitioned the Court of Appeals for a writ prohibiting Judge Bushelman, of Kenton Family Court, from: (1) forbidding Petitioner's state-funded expert from testifying at the support and maintenance modification hearing without Petitioner repaying the Commonwealth for the expert's services and placing the amount owed under the lump sum judgment for past-due child support into escrow and (2) ordering Petitioner's counsel, an attorney with the Department of Public Advocacy (DPA), to cease representation in counsel's official capacity, and if counsel chose to undertake the matter *pro bono*, counsel must keep his time separately from his duties as an assistant public advocate. The Court of Appeals denied the petition and Appellant now appeals to this Court as a matter of right. Ky. Const. § 115; CR 76.36(7)(a).

I. Background

In 2005, after several decades of marriage, Petitioner and his wife divorced and entered into a maintenance and child support agreement. By the terms of the agreement, Petitioner was to pay a total of $3,500 per month.[1] In June 2008, Petitioner was indicted for flagrant nonsupport. With DPA representation, Petitioner successfully obtained an order granting funding for Dr. Roebker's expert evaluation of his ability to sustain gainful employment. Dr. Roebker concluded that Petitioner was totally occupationally disabled. The Commonwealth, perhaps influenced by Roebker's evaluation, negotiated a plea agreement under which Petitioner was sentenced to five years of non-reporting supervision.

After reaching the plea agreement, Petitioner's DPA counsel filed a motion to modify his child support obligation. In connection with this motion, Judge Bushelman initially granted an order for funding for Dr. Roebker's expert testimony at the hearing.[2] Subsequently, Petitioner's ex-wife objected to Petitioner's use of both a public advocate and public funds for Dr. Roebker's testimony in a civil support modification case. Judge Bushelman agreed and ordered that no public monies be expended on this case; that Dr. Roebker shall not testify unless Petitioner reimburses the Commonwealth for the fees expended to procure Dr. Roebker's testimony and deposit the amount owed for

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[1] At this time, Petitioner was a practicing attorney.

[2] Judge Bushelman's later order vacating the funding order expressed chagrin with the public advocate's decision not to advise her that the case was against a private party since the funding motion was styled similar to those utilized by child support cases prosecuted by the county.

past-due child support into escrow—unless he can pay Roebker himself "without using money deficient in child support;" and, that Petitioner's counsel discontinue representation in his official capacity or if he chose to undertake the matter *pro bono*, keep his *pro bono* time separately from his DPA time.

For reasons that follow, we affirm the order of the Court of Appeals.

II. Analysis

As we have consistently reiterated, "the writs of prohibition and mandamus are extraordinary in nature, and the courts of this Commonwealth 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 12 (Ky. 2007) (*quoting Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961)). Issuance of a writ effectively prevents full examination of the underlying merits, thus we are conservatively judicious with its application. We have further stated that "[t]his careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts." *Id.* (*quoting Bender*, 343 S.W.2d at 800).

The decision of whether to issue a writ always resides within the sound discretion of the court; however, to qualify for this extraordinary remedy, a petitioner must still satisfy the relevant standard:

> 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.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). We further instructed that when determining whether to issue a writ preventing the trial court from acting *outside* its jurisdiction, the existence of a remedy by appeal is a relevant, but not controlling, factor. *Id.* at 9. In certain cases, however, the precise issue is presented by the writ, thus rendering the right of appeal an inadequate remedy. In this regard, we have stated that it would be inept and inefficient "to deny the writ, require a trial on the merits, and then on an appeal be forced to reverse the case on the very question which is now before us." *Chamblee v. Rose*, 249 S.W.2d 775, 776-777 (Ky. 1952); *see also Maricle*, 150 S.W.3d at 11.

Alternatively, "if the petition alleged only that the trial court was acting erroneously within its jurisdiction, a writ would issue *only if* it was shown that there was no adequate remedy by appeal *and* great injustice and irreparable harm would otherwise occur." *Maricle*, 150 S.W.3d at 9. Thus, this portion of the standard is the more demanding, as it mandates the prerequisite showing of an inadequate appellate remedy and, usually, demonstration of specific great and irreparable injury.

We now turn to the present case to determine which portion of the writ standard is applicable and if Petitioner's allegations merit extraordinary relief.

A. Family Court's Proscription of Dr. Roebker's Testimony.

Due to the disparate burdens attached to each jurisdictional standard, Petitioner unsurprisingly argues that Judge Bushelman proceeded outside her jurisdiction when she prohibited Dr. Roebker's testimony pending the escrow of the past-due support balances. Petitioner claims that this prohibition trampled his constitutional right to "call witnesses in his favor"—guaranteed by *Chambers v. Mississippi*, 410 U.S. 284 (1973)—and violated the evidentiary rule providing for admission of relevant evidence. KRE 401. We find Petitioner's arguments unpersuasive.

Given the extraordinary nature of a writ of prohibition and that its issuance is entirely discretionary, it follows that a petition must precisely identify the jurisdictional issue (outside or erroneously within) and why this type relief is mandated. However, instead of citing pertinent case law supporting his argument—that a court cannot prohibit a competent witness' testimony—Petitioner quotes from a single, inapposite case and cites the evidentiary rule defining relevance. This general citation to an evidentiary rule—KRE 401—is unhelpful, since the very next rule contains the limitation that some relevant evidence is inadmissible. KRE 402.

Furthermore, *Chambers* stands for the right to present a defense in the context of a *criminal* trial. In fact, the *Chambers* Court prefaced the language Petitioner utilizes—the right to confront, cross-examine, and call witnesses on one's behalf—with: "[t]he right of an *accused* in a *criminal trial* to due process

is, in essence, the right to a fair opportunity to defend against the *State's* accusations." *Chambers*, 410 U.S. at 294 (emphasis added). Petitioner's case involves a *civil* motion to modify support and maintenance, thus his citation to *Chambers* is out of context and, therefore, unpersuasive.

Consequently, Petitioner fails to cite any relevant law supporting his extraordinary request. As with our briefing standards, it is incumbent upon the advocate to present legal arguments substantiating his position; this Court will not bear the burden of searching our common law for cases supporting a litigant's positions. *See generally* CR 76.12 (4)(c)(v) (mandating that a brief shall contain arguments with "citations of authority pertinent to each issue of law . . . ."). Arguments failing to conform to our rules will not receive consideration.

Even if we were to assume—without deciding—that the family court proceeded outside its jurisdiction, Petitioner cannot satisfy the lesser showing. Initially, Petitioner has a clear remedy on appeal: the Court of Appeals, hopefully with the benefit of a properly briefed position, can evaluate the merits of whether Judge Bushelman may prohibit the expert's testimony. If the Court of Appeals finds reversible error, it may simply reverse and remand for a new modification hearing. In addition to this relevant factor, denying the writ is not inept or inefficient judicial administration, akin to the factual situations in *Chamblee* and *Maricle*.[3] *Chamblee* involved a child custody decision from an

[3] In both cases, the trial court was allegedly proceeding outside its jurisdiction. The petition in *Maricle* also alleged that the trial court was proceeding erroneously within its jurisdiction.

Alabama court, which was later challenged in a Kentucky court by the non-custodial parent in essence seeking reversal. *Chamblee*, 249 S.W.2d at 776. The petitioner filed a writ to prohibit the Whitley Circuit Court from proceeding because it allegedly lacked jurisdiction. *Id.* Our predecessor court held that, although there is a remedy on appeal, it would be inept to deny the writ and mandate a trial on the merits, when the writ squarely presented the dispositive jurisdictional issue. *Id.* at 777.

In *Maricle*, the defendants petitioned for a writ to prohibit the court from proceeding outside its jurisdiction after it unilaterally denied their guilty pleas, believing the plea deal too lenient when compared to the indictment charges.[4] *Maricle*, 150 S.W.3d at 5. We concluded that the existence of an appeal was an inadequate remedy, since it would be inept to deny the writ and require a full trial, when we could simply address the dispositive question—whether the court has jurisdiction to unilaterally reject the plea agreements—presented by the writ. *Id.* at 11.

Here, a denial of the writ would not result in a full trial on the merits, but rather, as Petitioner's describes it, "a simple child support modification" hearing in connection with *his* motion to modify. Moreover, partially due to the briefing issues discussed above, we cannot conclude that this ground presents a dispositive issue, which if we ineptly denied, would later force an appellate

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[4] The defendants were indicted for murder and mutilating a corpse, but after a mistrial the Commonwealth moved to amend the indictment to second degree manslaughter—which defendants intended to plead to—and dismiss the other two counts.

court to reverse on that precise issue. Therefore, we hold that, unlike *Chamblee* and *Maricle*, Petitioner's right to appeal is an adequate remedy.

B. The Family Court's Prohibition of DPA Representation and Command that Petitioner's Counsel Keep His Time Separately.

Petitioner next contends that Judge Bushelman lacked jurisdiction to forbid DPA representation for the modification hearing and command his counsel to keep his time spent on the modification motion separate from that for which the Commonwealth pays him a wage. He argues that Judge Bushelman's ruling regarding his DPA representation is "clearly erroneous." Petitioner asserts that United States Supreme Court precedent clearly holds that any time an indigent person faces legal challenge which could result in incarceration, he is entitled to appointed counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002). Furthermore, the "spirit" of *Shelton* is apparently reflected by KRS 31.110(2)(c),[5] which Petitioner interprets as providing a needy person with counsel in any post-conviction proceeding counsel considers appropriate. However, we decline to exercise our discretion and grant the writ based on this ground.

Initially, we note that Petitioner failed to provide citations to *any* relevant case law substantiating his claim that Judge Bushelman proceeded outside her jurisdiction. Instead, he utilizes the "clearly erroneous" standard—more apt for

[5] KRS 31.110(2)(c) states: "To be represented in any other post-conviction, or . . . proceeding that the attorney and the needy person considers appropriate. However, if the counsel appointed in such post-conviction . . . determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter."

a traditional appeal—in conjunction with an inapposite Supreme Court case and an inapplicable statute. While it is true that an indigent person has a constitutional right to representation when facing potential incarnation, here, there is no potential for Petitioner's incarceration as result of the modification hearing.[6] Furthermore, KRS 31.110, by its very terms, is limited to needy persons detained by law enforcement on suspicion of, formally charged with, or following conviction for committing a *serious crime*, or who is accused of committing a public or status offense. KRS 31.110(1).[7] Thus, this statute has no applicability in the context of a civil support modification motion.

Notwithstanding the inadequacies in the petition, this ground can be adequately resolved on appeal.[8] At the outset, we fail to see Petitioner's need for extraordinary relief, since his counsel acknowledged that he would represent him *pro bono* (arguably mooting this issue). Moreover, Petitioner's counsel's argument regarding the impropriety of Judge Bushelman ordering him to keep his time separate is irrelevant to this action as he is not the party seeking relief. Therefore, rather than straining to examine the merits based on partially developed points, the more apt route is a traditional appeal from a final order. At that point, our intermediate court, presumably with the assistance of complete briefing, can appropriately address the issue. Our

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[6] We held in *Lewis v. Lewis* that an indigent defendant has a right to counsel for civil contempt proceedings prior to the execution of an order of incarceration; a concept Judge Bushelman recognized in the order. 875 S.W.2d 862, 864 (1993).

[7] Although we need not reach the issue, we fail to see how a motion to modify child support and maintenance qualifies as a post-conviction proceeding under KRS 31.110(2)(c).

[8] As such, it is not necessary that we resolve the jurisdictional issue.

decision furthers the policy of sparing the judicial system from being overwhelmed because, as we stated decades ago, "[i]f this avenue of relief were open to all who considered themselves aggrieved by an interlocutory court order, we would face an impossible burden of nonappellate matters." *Bender,* 343 S.W.2d at 800.

C. Miscellaneous Contentions

Finally, Petitioner informs this Court that Judge Bushelman's implication that his counsel misled the court when styling his motion for expert funds for the modification hearing is unfounded. He also notifies us that Judge Bushelman's contention that his counsel desired to represent him *pro bono* is erroneous; counsel rather claimed he would represent Petitioner *pro bono* if the court forbade him from representing Petitioner in his DPA capacity. Neither of these informational grounds requests relief and thus we decline to further address them.

III. Conclusion

For the foregoing reasons, we affirm the Court of Appeals' order denying the petition for a writ of prohibition.

All sitting. Minton, C.J.; Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only.

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