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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000684-MR

GASSAN M. QUTIEFAN — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001196-OA
JEFFERSON CIRCUIT COURT NO. 10-CI-504274

HONORABLE ELEANORE M. GARBER, JUDGE,
JEFFERSON FAMILY COURT — APPELLEE

AND

RITA IQTAIFAN — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant asks this Court to reverse the Court of Appeals' decision not to grant a writ of prohibition stopping the Jefferson Family Court from proceeding with a divorce action where the marriage is alleged to be incestuous in this state but not in the country where it was solemnized. Because the Court of Appeals correctly concluded that the extraordinary writ was not available to disturb the lower court's proceedings, its order is affirmed.

I. Background

Gassan Qutiefan and Rita Iqtaifan were married in Amman, Jordan in 1990. They are first cousins, and their marriage was legal in Jordan. They have seven children, all born in the marriage and all still minors. On December 1, 2010, Mr. Qutiefan filed a petition in Jefferson Circuit Court seeking a

declaration that the marriage was void under Kentucky law, specifically KRS 402.010, and determinations about custody, parenting time, and child support. In her response, Ms. Iqtaifan admitted that she and her husband were first cousins and that that relationship made their marriage void. Based on this admission, Mr. Qutiefan moved for judgment on the pleadings as to his requested declaratory relief.

On May 11, 2011, the family court declared the marriage void as incestuous. Ms. Iqtaifan quickly filed a motion to amend, alter, or vacate the order because she had not received notice of the motion on the pleadings. The family court granted this motion and vacated its order declaring the marriage void, holding that the attempted attack on the marriage was time-barred under KRS 403.120, which was enacted after KRS 402.010. Specifically, the court's order stated that a "direct attack, by one party, on the validity of an incestuous marriage as set forth by KRS 402.010 is limited by the subsequently enacted statute, KRS 403.120(1)(c) and (2)(b)." Thus, the court held, "[t]he challenge to the validity of th[e] marriage is time barred."

Rather than appealing this ruling, Mr. Qutiefan petitioned for a writ of prohibition at the Court of Appeals, arguing that an ordinary appeal could not fully vindicate his interests and that the family court was instead required to declare his marriage void. As part of his claim, Mr. Qutiefan admitted that he had already married another woman outside the United States. The Court of Appeals denied the writ, holding that Mr. Qutiefan had failed to demonstrate that the family court's ruling would cause him irreparable harm and that he had no adequate remedy by appeal.

Mr. Qutiefan appealed to this Court as a matter of right. *See* CR 76.36(7)(a) ("An appeal may be taken to the Supreme Court as a matter of right from a judgment or final order in any proceeding originating in the Court of Appeals."); Ky. Const. § 115 ("In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court ... ."). He has not asked this Court for intermediate relief under Civil Rule 76.36(4).

II. Analysis

The first issue before this Court is whether Mr. Qutiefan has established that remedy by way of an extraordinary writ is even available to him. The test for determining whether a writ is available was most succinctly stated as follows:

> 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). This lays out what we have described as two classes of writs, one addressing claims that the lower court is proceeding without jurisdiction and one addressing claims of mere legal error. It is this lens through which we view Mr. Qutiefan's claims.

Mr. Qutiefan's brief does not expressly ask for this writ under the first class, i.e., where the lower court is alleged to be without jurisdiction, though it alleges in passing that a family court's subject-matter jurisdiction to entertain a divorce petition is conditioned on the existence of a valid marriage, which he

claims his is not. (Much of the brief focuses on this legal question, i.e., whether he had a legal marriage and whether it was void or voidable, though it is not couched there as a question of jurisdiction.) This is a misunderstanding of subject-matter jurisdiction, which is always the same (unless, of course, changed by statute), and is not contingent on how a court proceeds in a case. The family circuit court always has jurisdiction over divorce petitions and actions concerning the validity of marriages. *See* KRS 23A.100–.110. Mr. Qutiefan's argument is essentially that the family court did not have jurisdiction to treat his case as a divorce case. This is at best a claimed failure of jurisdiction over a particular case, which is different from subject-matter jurisdiction. *See Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007). Even then, his claim must fail as a particular-case jurisdiction claim, since even he does not claim that the family court cannot resolve his claim. Jurisdictional questions—personal, subject-matter, and particular-case—are only threshold issues, concerned as they are with whether a court has a case and a person properly before it, and do not go to how a court may resolve a case. Thus, complaints about whether the court can treat a proceeding in a certain way are not jurisdictional claims; instead, they are merely claims of legal error, that is, that the court is proceeding erroneously within its jurisdiction, which would fall under the second class of writs.

Much of his argument is focused on the second class of writs, which requires showing that there can be no adequate remedy by appeal or otherwise and that he will suffer great injustice and irreparable injury. As he correctly notes, however, under this class of writs, while the inadequate-remedy

requirement is absolute, the requirement of great injustice and irreparable injury can be avoided in "certain special cases." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). In those special cases, a writ may be appropriate when "a substantial miscarriage of justice" will occur if the lower court proceeds erroneously, and correction of the error is necessary "in the interest of orderly judicial administration." *Id.*

Of course, in such cases, the petitioner still must show the first requirement of no adequate remedy by appeal. *Id.* ("[H]e *must* show he has no adequate remedy by appeal or otherwise." (emphasis added)). Thus, we need not examine whether the special-cases exception applies if the first requirement has not been established. *See id.* ("After passing test (a) the proper procedural method is to apply test (b) to determine whether or not the petitioner, even though lacking an alternate adequate remedy, will suffer great and irreparable injury.").

Instead of focusing on this test, Mr. Qutiefan's brief spends most of its time arguing the merits of the case, that is, his legal argument for why his marriage is void. But the writ process is no substitute of an ordinary appeal and thus the procedures surrounding it have been intentionally erected to avoid looking at the merits of disputes prematurely. The writ tests are thus "a practical and convenient formula for determining, *prior to deciding the issue of alleged error*, if petitioner may avail himself of this remedy." *Id.* The reasons for this have been discussed at length elsewhere. *See, e.g., Cox v. Braden*, 266 S.W.3d 792, 795 (Ky. 2008). No more need be said on that point except that the

writs of prohibition and mandamus are disfavored interferences with the lower courts, reserved for the most extraordinary circumstances. *Id.* at 796.

Applying the first prong of the practical-and-convenient formula to this case, the Court concludes that the requested writ is simply not available because Mr. Qutiefan has an adequate remedy by appeal. To the extent that he even discusses that requirement, Mr. Qutiefan's argument appears only to be that he has a fundamental right to be married and a reciprocal right to be unmarried, the exercise of which is being delayed. This, he claims, creates "irreparable damage" and "irretrievable loss," citing *Rhodes v. Pederson*, 229 S.W.3d 62, 66 (Ky. App. 2007). Though he does not so state in his initial brief, much of his alleged harm appears to stem from his having already married another woman, which may be bigamous under Kentucky law.[1] *Rhodes*, however, is an ordinary appeal concerning the revival of a divorce action after death. It is not a writ case, though it discusses a hypothetical writ action were the divorce action revived. Moreover, the potential "harm" that would arguably support the hypothetical writ discussed in that case would be caused by a departure from the status quo by an ordered sale of property. The family court's order in this case simply maintains the status quo by leaving the parties' marriage intact and unvoided until a further hearing can be held.

Ultimately, Mr. Qutiefan's theory for why an ordinary appeal is an inadequate remedy is that it is not fast enough. Thus, he will be subjected to

[1] Though Mr. Qutiefan discussed his second marriage in his petition to the Court of Appeals, he does not mention it in his initial brief to this Court. His reply brief, however, discusses it as the primary source of any harm he suffers. In making that argument, he seizes on his wife's argument that his second marriage is bigamous, a label he claims poses a threat of irreparable harm and cannot be adequately remedied by appeal.

the state of matrimony into which he voluntarily entered more than twenty years ago for some time longer than he would like. He admits that this Court has repeatedly noted, as did the Court of Appeals in this case, that having to incur the expense of litigation is not grounds for a writ. *See, e.g., Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 616 (Ky. 2005) ("[T]he delay incident to litigation and appeal by litigants who may be financially distressed cannot be considered as unjust, does not constitute irreparable injury, and is not a miscarriage of justice." (quoting *Ison v. Bradley*, 333 S.W.2d 784, 786 (Ky. 1960))). He attempts to distinguish these cases by claiming that he has more at stake than the mere cost of litigation; rather, his right to be unmarried and various related rights—e.g., to remarry, to use property that might otherwise be classified as marital—will also be encumbered, and any delay in removing that encumbrance renders other slower remedies inadequate. But those cases are not only about the expense of litigation. They are also about delay. And we have explicitly rejected the claim that "the delays involved in every lawsuit and appeal" render those procedures inadequate. *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005).

While some rights are so precious that any substantial delay in their vindication makes the normal appellate process inadequate, *see, e.g., Hoskins*, 150 S.W.3d at 19 (noting that an appeal is inadequate to vindicate double jeopardy rights), the rights argued by Mr. Qutiefan simply are not so fundamental, so fragile, as to require upsetting the normal process. Unlike double jeopardy rights, for example, the rights claimed by Mr. Qutiefan are not aimed specifically at allowing a citizen to avoid future disturbance by the

government by means of legal process, that is, to avoid *delay* in returning to normal life. Those rights, while important, are instead simply part of the ordering of civil society and securing justice; they must be asserted through the orderly processes of the law.

The courts of this Commonwealth are not charged with rendering immediate relief except in the most dire case. Even though the litigation may proceed more slowly than Mr. Qutiefan would prefer "it is worthwhile to reflect on the old adage that the wheels of justice grind slowly, but they grind exceedingly fine" and that the "alternative—precipitous spinning of the powerful wheels of justice merely to satisfy ... demand—runs the unacceptable risk of those wheels running over the rights" of the parties. *United States v. Tobin*, No. 04-CR-216-01-SM, slip op. at 4 (D.N.H. July 22, 2005), *quoted in* Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 Duke L.J. 237, 268 (2008). The administration of justice should be orderly and swift, but not necessarily instantaneous.

If Mr. Qutiefan's account of the importance of the right to be unmarried is correct, then every litigant dissatisfied with the pace at which a divorce petition or other case concerning marital status was moving would be entitled to a writ commanding the lower court to get on with it. But that cannot be the case. Such run-of-the-mill interference with the lower courts would threaten rather than assist the administration of justice.

That Mr. Qutiefan's marriage may be void, rather than voidable, does not change this. He and Ms. Iqtaifan have lived in the United States for most of their marriage—16 of 22 years—either in Ohio or Kentucky. Their marriage was

prohibited in both Ohio, Ohio Rev. Code Ann. § 3101.01 (barring marriages between "nearer of kin than second cousins"), and Kentucky during that time. The time to complete this litigation at the family court and then seek an appeal in the ordinary course will not add so much further to Mr. Qutiefan's burden as to render his appellate remedies inadequate.

That Mr. Qutiefan has chosen already to marry another woman, despite the ongoing litigation of his marital status at the family court, also does not change this. The exercise of that choice could have waited for the case to be processed in the ordinary course through the family court and then on appeal. This too does not add so substantially to Mr. Qutiefan's burden as to make his remedy by appeal inadequate.

Mr. Qutiefan also suggests that a writ is appropriate because this case presents an important threshold legal question, which is more appropriately decided by this Court than the family court. He cites language from *Hoskins* to suggest that this Court has held that writs are appropriate when the case presents a legal issue that would obviate a full trial. Specifically, he notes the language "it would be a most inept ruling 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." *Hoskins*, 150 S.W.3d at 11 (quoting *Chamblee v. Rose*, 249 S.W.2d 775, 777 (Ky. 1952)). But that part of *Hoskins* is about a no-jurisdiction writ, which does not have the requirement of no adequate remedy by appeal, *see Hoskins*, 150 S.W.3d at 10 ("We ... depart from those cases holding that the existence of an adequate remedy by appeal precludes the issuance of a writ to prohibit a trial court from acting outside its

jurisdiction."), and the Court's discretion to deny the writ even when the lower court has no jurisdiction. The reason why no-jurisdiction writs have a different test, of course, is because jurisdiction goes to the very power of a court to hear a case. The cited *Hoskins* language is thus inapplicable.

Moreover, this suggested approach to the second class of writs runs counter to the ordinary, *preferred* process of litigation followed by appeal. This is a court of appeal, a court of *last* resort. Legal questions and disputes should first be addressed by the trial courts, which are more than adequate to the task. That a novel or important question of law is involved does not render the normal appellate process inadequate. Indeed, the proper resolution of novel or important questions is best accomplished through the ordinary process in which a record is developed, factual questions are answered, and legal questions are fully explored first at the trial court.

Ultimately, "the burden in a writ case falls on the party seeking the writ." *Cox*, 266 S.W.3d at 799. This Court will not grant a writ where a petitioner has failed to show one of the prerequisites.

III. Conclusion

Because Mr. Qutiefan has not shown availability of a writ of prohibition, the Court of Appeals' order denying his petition is affirmed.

All sitting. All concur.

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