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NOT TO BE PUBLISHED OPINION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NOT TO BE PUBLISHED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

2012-SC-000147-MR

MARCUS RIGNEY; RONNIE L. RIGNEY; AND
MARY BETH RIGNEY — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-002194-OA
BULLITT CIRCUIT FAMILY COURT NO. 09-J-00368-002

HONORABLE JUDITH BARTHOLOMEW, SPECIAL JUDGE
FOR BULLITT CIRCUIT COURT, FAMILY DIVISION; AND
CABINET FOR HEALTH AND FAMILY SERVICES,
DEPARTMENT OF COMMUNITY BASED SERVICES — APPELLEES

AND

MISTY D. FLINT — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellants ask this Court to reverse the Court of Appeals' decision not to grant a writ of mandamus. The Appellants seek the writ to require the trial court to vacate a temporary custody order and to require the Cabinet for Health and Family Services to strike all petitions, summonses, and investigations against two of the Appellants. Because the Court of Appeals correctly concluded that the extraordinary writ was not available, its order is affirmed.

I. Background

Appellant Marcus Rigney and Real-Party-in-Interest Misty Flint are the unmarried parents of two minor children.[1] In June 2009, allegations of drug use were made against Misty, which led to a dependency, neglect, or abuse (DNA) petition alleging neglect of the two children being filed with the Bullitt Family Court. At an emergency custody hearing later that month, the father, Marcus, was granted emergency custody of the children. A month later, the guardian ad litem for the children moved that the Cabinet be granted custody. The trial court granted the motion and awarded the Cabinet temporary custody of the children. A formal hearing on the neglect petition was held in November 2009. At that time, custody of the children was granted to the Cabinet, which then placed the children in foster care. Presumably, this custody award was based on a finding of neglect, though the record does not disclose such a finding.

This Court must also presume that the Cabinet undertook its usual duties of filing a case permanency plan and taking reasonable efforts to reunify the children with their parents, though neither the brief to this Court nor the writ petition filed with the Court of Appeals describes these procedures. In 2010, the mother was arrested for drug trafficking and jailed, so the Cabinet began working with the father, who was allowed visitation with the children on

[1] The majority of the facts recounted here are taken from the Appellants' brief to this Court and petition for a writ at the Court of Appeals. Many of these claims are not supported by documentation (e.g., copies of the trial court's orders concerning the 2009 proceedings). The Cabinet appears not to have responded to the Appellants either at the Court of Appeals or before this Court, so both courts have unfortunately been without its assistance in understanding what actually happened at the trial court.

a regular basis. The record is not clear whether this visitation was by court order or was part of the Cabinet's reunification process. The writ petition's description of it—"[The Cabinet] then had to start working with the father, and allowed visitation between the father and the children on a regular basis ... ."—suggests the latter.

In August 2011, the children's paternal grandparents, Appellants Ronnie and Mary Beth Rigney, were granted visitation with the children by agreed order entered by the trial court. The order appears to have been entered under the authority of KRS 405.021.[2]

On November 21, 2011, the foster parents reported that one of the children had a hand-shaped bruise on her buttocks after returning from an unsupervised visit with her father. The Cabinet investigated the matter and found that the child's father had hit her on the bottom and that her grandmother, who had given her a bath during the visitation, had seen the bruise but had not contacted the Cabinet or done anything else about it.

Based on this investigation, the Cabinet filled out an emergency custody order affidavit as to each child on AOC form AOC-DNA-2.1. A district judge signed each affidavit, noting that they had been subscribed and sworn before her. It seems likely that the same district judge also filled out an emergency custody order (like the model in AOC form AOC-DNA-2) as to each child. Though no such orders appear in the record, the Appellants refer obliquely to them and some of their arguments depend on such orders having been signed. The affidavits were filed in the record the next day (which was the day before

[2] The case number on this order was 10-CI-01811.

the Thanksgiving holiday), along with a dependency, neglect, and abuse petition concerning each child.[3] On November 29, the trial court heard the matter in what its docket sheets describe as a temporary removal hearing. At the end of the hearing, the court suspended the father's and grandparents' contact with the children while the Cabinet investigated the matter further. The court scheduled a follow-up hearing for January 4, 2012.

At that time, the father and grandparents filed a petition for a writ of mandamus with the Court of Appeals requesting that the order discontinuing the father's contact with the children be stricken, that all petitions, summonses, and information as to the grandparents be stricken, and that the Cabinet be required to turn over information to the proper authorities for further investigation.

The father argued only that the trial court misused legal procedure against him. Specifically, he claimed that the Cabinet had initiated an emergency custody proceeding under KRS 620.060, which applies only to removal of a child from a parent's custody. He argued this procedure was erroneous because he did not have custody of the children, who thus could not be "removed" from his care. He claimed that the Cabinet then used a temporary removal proceeding to address the new petition against the father as required by KRS 620.080 after an emergency custody order. He argued this was error because more than 72 hours had passed since the emergency custody order had been signed, making it void and requiring dismissal of the

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[3] The case numbers for these filings were 09-J-00367-002 and 09-J-00368-002. The trail numbers -002 and the fact that they are listed as 2009 cases indicate that they are related to the original DNA petitions.

temporary removal hearing, and because he had not been served the summons as required by KRS 620.070 and .080 for a dependency, abuse, and neglect petition.

The grandparents argued that the Cabinet had obtained the emergency custody order terminating their contact with the children with a new DNA petition alleging abuse, that this was an inappropriate use of the statute because they were not custodians of the children and the Cabinet was instead required to refer the matter to law enforcement under KRS 620.030. They also alleged that they had not been served with a summons or the petition. They claimed that the trial court lacked both subject-matter and personal jurisdiction as a result, and that they had no standing to appeal the order under KRS 620.155. The Appellants also filed a motion for emergency relief under Civil Rule 76.36(4).[4]

The Court of Appeals denied the petition in a short order. As to the father's requested writ, the court held that the extraordinary remedy was not available because the father alleged only that the trial court had acted erroneously by utilizing emergency custody procedures against him when the Cabinet already had custody, not that it had acted outside its jurisdiction or that he lacked an adequate remedy by appeal as required by *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). As to the grandparents, the court held that writs based on lack of jurisdiction were appropriate only for lack of

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[4] "If the petitioner requires any relief prior to the expiration of 20 days after the date of filing the petition he/she may move the court on notice for a temporary order on the ground that he/she will suffer immediate and irreparable injury before a hearing may be had on the petition." CR 76.36(4).

subject-matter jurisdiction, not lack of personal jurisdiction, that the trial court had subject-matter jurisdiction over temporary removal proceedings, and that the grandparents had standing to appeal under KRS 620.155 because they were "interested parties." The court also noted that any "injuries alleged can be fully remedied by the full hearing scheduled by the trial court and by appeal."

The Appellants then 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 ... ."). They have not asked this Court for intermediate relief under Civil Rule 76.36(4).

II. Analysis

The first, and ultimately only, issue before this Court is whether the Appellants have established that remedy by way of an extraordinary writ is even available based on their petition before the Court of Appeals. As this Court and its predecessor have noted repeatedly, the writ process requires a substantial showing of certain prerequisites before a court should even look at the merits of the petitioner's claim of legal error. *See, e.g.*, *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004) ("In other words, only after determining that the prerequisites exist will the court decide whether an error occurred for which a writ should issue."); *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961) ("This is a practical and convenient formula for determining, *prior to deciding the issue of alleged error*, if petitioner may avail himself of this remedy."). The rationale

behind this somewhat unusual process, which admittedly and intentionally avoids looking at the merits of a legal controversy whenever possible, is that the granting of an extraordinary writ "bypasses the regular appellate process and requires significant interference with the lower courts' administration of justice." *Cox v. Braden*, 266 S.W.3d 792, 795 (Ky. 2008). Thus, "we have always been cautious and conservative both in entertaining petitions for and in granting such relief." *Bender*, 343 S.W.2d at 801. To this end, we have adopted a "careful approach ... 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.*

That careful approach, which lays out the prerequisites noted above, 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, 150 S.W.3d at 10. 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 the Appellants' claims.

A. Marcus Rigney's Claim.

As the Court of Appeals correctly noted, the father alleged only legal errors in his petition and did not even assert the showings required for

availability of a writ. Though the petition noted in passing that the trial court had "acted erroneously, albeit with [sic] its jurisdiction, against the natural father," which echoes the language in *Hoskins*, nowhere did he actually allege the prerequisites laid out in that case. On appeal, he continues to pursue only the merits of his claim and does not discuss whether a writ is even available in his circumstances. For example, the first argument in the brief is essentially that the procedure used by the Cabinet—a temporary removal hearing—was inappropriate because the Cabinet already had custody and the hearing was not held within 72 hours of the emergency custody orders as required by KRS 620.060(3). This, he claims, amounts to a denial of due process. But this is not a claim that the trial court acted without jurisdiction, nor does it explain how great injustice and irreparable injury will result if the petition is not granted or how the father has no adequate remedy by appeal or otherwise. Yet, "the burden in a writ case falls on the party seeking the writ." *Cox*, 266 S.W.3d at 799. This Court will not conjure up a showing of the prerequisites where a petitioner has failed to do so.

And the simple fact is that, even assuming the father had made such arguments, his claim does not satisfy either class of writ. Under the first class, the fundamental requirement is an allegation and, ultimately, a showing that the trial court is acting without jurisdiction, which the Court has stated means a lack of subject-matter jurisdiction. *See Watson v. Humphrey*, 293 Ky. 839, 170 S.W.2d 865, 866–67 (1943) ("Jurisdiction in this connection means jurisdiction of the subject matter."). While the trial court may have been proceeding erroneously, it certainly has subject-matter jurisdiction over all

matters related to child custody and KRS Chapter 620, including this one. *See* KRS 23A.100.

Similarly, under the second class of writs, it is not clear that suspending the father's visitation while the Cabinet investigated the matter is a great injustice and irreparable injury of the sort contemplated by the writ standard. The children had already been taken out of the father's temporary custody and placed in the Cabinet's custody in 2009, leaving the father with only a claim to visitation (and even that was likely granted only by the grace of the Cabinet into whose custody the children had been placed rather than a court order). This scenario is different than one in which no finding of abuse, neglect, or dependency has yet to be found and the parent's custodial rights should thus be completely unencumbered. And, as the father admits in his brief, the Cabinet could have accomplished the same goal—temporary suspension of visitation during the investigation—without resorting to the courts.[5]

More importantly, the father has, or at least had before he filed his writ petition, an adequate remedy by appeal or otherwise, the lack of which is an "*absolute* prerequisite," *Bender*, 343 S.W.2d at 801 (emphasis added), to availability of the writ. When the trial court suspended the father's visitation, it simultaneously set the matter for a hearing barely more than a month away. At a full hearing on the matter at that time, the father could have sought a remedy and asked to have his visitation reinstated. If that hearing had ended

[5] The brief states: "Since the [Cabinet] had the custody of the children, [it] only had to tell the father that [it was] suspending visitation until the investigation was completed and then set it for review." This further suggests that the father's visitation was given by the Cabinet in the course of reunification efforts and not by court order.

badly for him, then he could have sought a normal appeal at that time. Just as "[w]e have consistently found the right of appeal to be an adequate remedy when the petition of a criminal defendant seeks only to correct procedural or trial errors," *Hoskins*, 150 S.W.3d at 19, so too is that remedy adequate when a father claims procedural improprieties in the denial of visitation with his children.

Because the father has not shown and cannot show the prerequisites for a writ of mandamus, he may not obtain such a remedy. Moreover, this Court need not look at the merits of his claim about the trial court's procedures.

B. The Grandparents' Claim.

The children's paternal grandparents have claimed entitlement to a writ only under the first class of writs, namely, where the petitioner claims the trial court has or is about to exceed its jurisdiction. This Court concludes that the grandparents have failed to show a lack of jurisdiction as contemplated by this state's writ jurisprudence.

Despite claiming in their writ petition to the Court of Appeals that the trial court lacked subject matter jurisdiction,[6] the Appellants' brief now states that "the Petitioners admitted that the Court had subject matter jurisdiction to hear this case." The Court takes this as an admission that the grandparents do not seek a writ based on a lack of subject-matter jurisdiction at this time. Though appellate courts are obliged to always confirm the existence of subject-matter jurisdiction and thus are required to raise the issue sua sponte if

[6] The writ petition stated, "The Court acting under KRS 620 *et seq*, [sic] lacked *subject matter jurisdiction* and personal jurisdiction over the grandparents to deny their visitation." (Second italics added.)

necessary, *see, e.g., Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005), it is not clear that this obligation extends outside the normal process of trial followed by appeal. As noted above, the writ process steps outside the normal procedures for prosecuting a matter, and it is possible that the obligation to examine sua sponte subject-matter jurisdiction does not extend to that process. Indeed, this Court has hinted on occasion that it is unnecessary to take up the jurisdictional category of writs where a petitioner has not raised the issue. *See, e.g., Russell County, Kentucky Hosp. Dist. Health Facilities Corp. v. Ephraim McDowell Health, Inc.*, 152 S.W.3d 230, 236 (Ky. 2004) ("Petitioner never claims that the Court of Appeals acted outside its jurisdiction; thus we conclude that it is not invoking the first class of writ cases."). We need not reach this intriguing procedural question, however, as it is clear that the trial court in this case, the Bullitt Family Court, had subject-matter jurisdiction to hear this case, as it has subject-matter jurisdiction over all actions related to child custody and KRS Chapter 620. *See* KRS 23A.100.

As to the alleged lack of personal jurisdiction, which depends on having not received the summons, it suffices to say that the grandparents have failed to create an adequate record to even begin considering whether to entertain their writ request. The only "proof" of lack of service on them is their claim of lack of service in the body of their petition to the Court of Appeals and the brief to this Court. They do not appear to have gone to the trial court to allege a lack of personal jurisdiction, a ruling on which could have resolved such a claim. (And if they did raise this issue with the trial court, they have included no record of it in the writ proceeding.) Had they done so, like with a default

judgment, the court no doubt would have given them an opportunity to be heard.

In fact, this claim actually sounds more like a due process complaint based on lack of notice and opportunity to be heard. If anything, the writ petition was premature without their having first asked the trial court to address the question of personal jurisdiction and their lack of an opportunity to be heard.

This case illustrates exactly the concern raised by the Court in *Cox v. Braden* when it noted that even under the best of circumstances "[t]he expedited nature of writ proceedings necessitates an abbreviated record," which "magnifies the chance of incorrect rulings that would prematurely and improperly cut off the rights of litigants." 266 S.W.3d at 795. This danger "explains why courts of this Commonwealth are—and should be—loath to grant the extraordinary writs unless absolutely necessary." *Id.* It is also why "the burden in a writ case falls on the party seeking the writ." *Id.* at 799.

But this case, with its incomplete record, is worse than even the average writ case. For this Court to decide questions of personal jurisdiction when the trial court has not even had an opportunity to address the issue would require blind speculation. A writ cannot be granted in the dark. For this reason, the Court of Appeals ruled correctly that the grandparents had not shown availability of the writ.

Finally, though it is not necessary to this decision, this Court finds it prudent to address one last point. In denying the petition, the Court of Appeals held that the grandparents had an adequate remedy by appeal because they

were "interested parties" under KRS 620.155 and thus could appeal the trial court's decision temporarily suspending their visitation. Of course, the grandparents argue they do not fall under the statute. We need not answer that question because it is irrelevant when a party seeks a no-jurisdiction writ. The lack of an adequate remedy by appeal is simply not a prerequisite to such a writ. *See Hoskins*, 150 S.W.3d 1, 10 (Ky. 2004) ("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."). In fact, there was no need to address the issue.

III. Conclusion

Because neither the father nor the grandparents have shown availability of a writ of mandamus, the Court of Appeals' order denying their petition is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANTS:

Jean Kelley Cunningham
927 Main Street, Suite 201
Shelbyville, Kentucky 40065

APPELLEE:

Hon. Judith Bartholomew
Special Judge for Bullitt Circuit Court
Family Division
Hall of Justice
600 West Jefferson Street
Louisville, Kentucky 40202-2740

COUNSEL FOR APPELLEE, CABINET FOR HEALTH AND FAMILY SERVICES, DEPARTMENT OF COMMUNITY BASED SERVICES:

Jack Conway
Attorney General

David Wayne Carby
193 S. Buckman Street
PO Box 460
Shepherdsville, Kentucky 40165

COUNSEL FOR REAL PARTY IN INTEREST:

Angelena M.E. Etherton
Schmidt & Etherton Law Ofc PSC
148 E. Joe B. Hall Avenue
PO Box 218
Shepherdsville, Kentucky 40165