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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 16, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9/6/18 Kim Redmon, DC

2017-SC-000403-MR

DORAN CLAY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2017-CA-000945-OA

HONORABLE HUGH SMITH HAYNIE,
JUDGE, JEFFERSON CIRCUIT COURT
FAMILY DIVISION TWO — APPELLEE

AND

JASON WHITING AND
D.W., A MINOR CHILD — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Doran Clay, mother of D.W., a minor child, appeals as a matter of right from the Court of Appeals' order denying her petition for a writ[1] wherein she requested that the Jefferson Family Court be ordered to set aside its April 19, 2017 order approving the temporary parenting schedule between Clay and Jason Whiting, D.W.'s father, as tendered by D.W.'s court-appointed guardian

[1] Although Clay styled her petition as one for mandamus and prohibition, she asks for only one remedy. Therefore, we will treat her request as a single petition, as did the Court of Appeals.

ad litem ("GAL"). Clay argues that the April 19 order should be set aside because it resulted from improper *ex parte* communication between the trial court and Whiting at a March 20, 2017 hearing which she did not attend because she was not properly served with notice of it. She points to Whiting's certification of service on his motion to set parenting schedule, to be heard on March 20, which listed an incorrect mailing address for her.[2] Clay further argues the April 19 order should be set aside due to the trial court's failure to make the requisite findings of fact regarding whether modification of the parenting schedule was in the child's best interests. Upon review of the record, we conclude that Clay has not made the necessary showing for issuance of a writ, and therefore affirm the Court of Appeals.

I. Background.

Clay and Whiting are joint custodians of D.W., who was born out of wedlock in 2006. At the hearing on March 20, the trial court heard Whiting's motion to set parenting schedule and primary residence, and his motion to hold Clay in contempt of court. Whiting's motion to set parenting schedule noted that the parties had been functioning without much direction from the court with respect to custody of D.W., and that Clay had unilaterally broken or manipulated every agreement that had been set. Whiting stated that the child's best interests would be served by having a set schedule that would

[2] Clay's correct mailing address is 2984 Wilson Avenue, Apt. 200, Louisville, KY 40211. The mailing address listed for her on Whiting's notice of March 20 hearing, and the trial court's March 23 orders, was 294 Wilson Avenue, Apt. 200, Louisville, KY 4021.

allow the child to enjoy parenting time with both parents on a predictable and consistent basis, and requested primary residency of D.W. for at least the school year. His motion for parenting schedule was accompanied by a supporting affidavit. Whiting's motion to hold Clay in contempt of court stated that Clay was in violation of the court's prior orders requiring the parties to mediate the parenting schedule and tax deductions.

On March 23, 2017, the trial court entered orders appointing a GAL; giving the GAL discretion to temporarily modify visitation if necessary; directing the parties, and the GAL, to attend mediation; holding Clay in contempt of court for failure to mediate as previously ordered; and reserving the primary residence issue while referring the issue to mediation. The March 23 orders were mailed to the same, incorrect mailing address for Clay. At that point, the parties next scheduled court date was June 26, 2017. Mediation for the parties was scheduled for May 9, 2017.

On April 18, 2017, Clay filed a motion to set aside the March 23 orders on grounds that she did not receive proper notice of the March 20 hearing upon which those orders were entered. On April 19, the trial court entered an order tendered by the GAL which set forth a temporary parenting schedule, to be effective immediately until further notice. That order granted Whiting primary residence status during the school year, and articulated how the parents were to timeshare on a weekly basis, as well as during holidays, summer months, and on the child's birthday. Nowhere in the April 19 order is it designated as final and appealable.

On April 24, 2017, Clay filed a supplement to her April 18 motion, asking the court to set aside its April 19 order, in addition to its March 23 orders. In her April 24 supplement, Clay stated that the April 19 order was never entered, but then went on to argue that the "unentered order" modified custody without giving her due process of law and should not be entered.[3] The trial court denied her motions to set aside its prior orders. Clay subsequently filed a motion to alter, amend or vacate the April 19 order. The record is unclear as to whether the trial court ever ruled on that motion. Thereafter, Clay filed a petition for a writ with the Court of Appeals asking that it direct the trial court to set aside its April 19 order. The Court of Appeals denied her petition, and this appeal followed.

II. **Analysis.**

The requirements for issuance of a writ are well established. Where, as here, the trial court's jurisdiction is unchallenged, a petitioner must show 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 it usually requires a showing that "great injustice and irreparable injury will result if the petition is not granted." *Id.* However, there are "special cases" within the second class that do not require a showing of great injustice and irreparable injury. In those special cases, a writ is 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." *Independent Order of Foresters v. Chauvin,* 175 S.W.3d 610, 616 (Ky. 2005) (quoting *Bender v. Eaton,* 343 S.W.2d 799, 801 (Ky. 1961)). Even in these special cases, the party asking for a writ must show that there is no adequate remedy on appeal. *Id.* at 617. Satisfying these tests, however, does not guarantee that a writ will

[3] The record reflects that the April 19 order was in fact entered.

> issue. They are merely "a practical and convenient formula for determining, prior to deciding the issue of alleged error, if petitioner may avail himself of this remedy." *Bender v. Eaton,* 343 S.W.2d 799, 801 (Ky. 1961). And even upon examining the merits of a claim, issuance of the writ is still within the sound discretion of the appellate court. *Id.* at 800.

Lee v. George, 369 S.W.3d 29, 32 (Ky. 2012).

Clay asserts that the April 19 order was an improper, *ex parte* change in the child's custody without her knowledge, which violated her due process rights. However, nowhere in that order does it change custody; rather, the order approves the GAL's proposed parenting schedule, an authority the GAL was expressly granted by way of the court's March 23 orders. The April 19 order did not change the parties' status as joint custodians.

Further, Clay has failed to establish that she is not without an adequate remedy by appeal or otherwise. Even if the April 19 order was issued *ex parte*, Clay has since exercised her remedy by filing motions to set aside the April 19 order and is now properly present at court proceedings. We note that the parties have been instructed by the court to attend mediation to address outstanding issues, including the parenting schedule. Once they do so, and the trial court enters an order permanently changing the parenting schedule, custody, or primary residence, Clay has the right of appeal. Thus, Clay's due process rights are protected.

Furthermore, Clay has failed to show that she will suffer an immediate and irreparable injury if the petition for writ is not granted. "Irreparable injury" has been construed as "something of a ruinous nature[,]" *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961), causing "incalculable damage to the

applicant . . . either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences." *Litteral v. Woods*, 223 Ky. 582, 4 S.W.2d 395, 397 (1928). Any injury inflicted on Clay by the court's issuance of a temporary parenting schedule simply does not rise to this level of injury. Indeed, a disputed child custody determination does not amount to an irreparable injury, generally speaking:

> This injury is no different from the result in every custody case in which a parent does not get what he or she requested. While the Court recognizes Appellant's desire to spend more time with his children and to have more control over important decisions about their lives, his claimed injuries are simply not the kind of injuries that justify issuing an extraordinary writ. Indeed, if they were, the appellate courts would be awash with writ petitions in domestic cases. Yet, as we have noted time and again, the extraordinary writs are no substitute for the ordinary appellate process, and the interference with the lower courts required by such a remedy is to be avoided whenever possible.

Lee, 369 S.W.3d at 34. Accordingly, Clay's dissatisfaction with the parenting schedule does not provide a basis for issuance of an extraordinary writ.

Lastly, Clay argues that the trial court's failure to apply the best interests standard pursuant to KRS 403.320(3), as made applicable to modifications of timesharing between joint custodians by *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), places her petition for a writ squarely within the "certain special cases" exception carved out by this Court. Yet, Clay has failed to show she lacks an adequate remedy on appeal, as required for the "certain special cases" exception to apply. This Court has held:

> [I]n certain special cases this Court will entertain a petition for prohibition in the absence of a showing of specific great and irreparable injury to the petitioner, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration.

Indep. Order of Foresters v. Chauvin, 175 S.W.3d 610, 616 (Ky. 2005) (quoting *Bender*, 343 S.W.2d at 801). "Even in these special cases, the party asking for a writ must show that there is no adequate remedy on appeal." *Chauvin*, 175 S.W.3d at 617.

Here, the trial court signed off on the GAL's tendered parenting schedule, which contained no findings of fact as to whether the arrangement would serve the child's best interests. While under a different standard reversal may have been appropriate, under the standard for a writ, Clay still was obligated to show she lacked an adequate remedy on appeal. As we discussed above, Clay has an adequate remedy by appeal, thus she cannot claim the protection of the "certain special cases" exception.

III. Conclusion.

Clay has failed to show that the April 19 order should be set aside by way of the issuance of a writ, and therefore we affirm the Court of Appeals' order denying her petition.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Bethanni E. Forbush-Moss
Law Offices of Forbush-Moss, PSC

COUNSEL FOR APPELLEE:

Honorable Hugh Smith Haynie
Louisville, Kentucky

COUNSEL FOR REAL PARTY IN INTEREST
JASON WHITING:

Kanichole Compton
Louisville, Kentucky

COUNSEL FOR REAL PARTY IN INTEREST
D.W., A MINOR CHILD:

Vanessa Most Durham
Louisville, Kentucky